2015 Revisions to the Federal Rules of Civil Procedure

Background for the New Rules

- May 2010 Civil Rules Advisory Committee Conference.
- Over 200 judges, lawyers, and academics evaluated the state of civil discovery.
- Preceded by many studies, surveys of lawyers, papers which aided the discussion.
- Concluded that federal civil litigation works reasonably well as a whole, but that improvements in four areas were needed:
  - Greater cooperation among litigants during discovery practice.
  - Discovery needs to be tailored to be proportional to what is at issue in each case.
  - Earlier and more active case management by judges is needed.
  - A new rule is needed to address preservation and loss of electronically stored information (ESI).

Action by the Civil Rules Advisory Committee

- The Committee took the recommendations from the 2010 Conference and drafted proposed rules to address each of the four areas of concern that had been identified.
- Between 2010 and 2013 the Committee sponsored mini-conferences with judges, lawyers, and academics to discuss possible rule amendments.
- Drafts of proposed rule changes were circulated and discussed during Committee meetings and conference calls held by two subcommittees tasked with drafting proposed rule changes.
- Following approval by the Committee, proposed rule amendments were published for public comment in August 2013. Public hearings were held in Washington, D.C., Phoenix, and Dallas, where more than 120 witnesses appeared, and more than 2300 written comments were received and reviewed, and revisions were made to the proposed rules.
- A package of rule amendments was unanimously approved by the Civil Rules Advisory Committee, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, and the Supreme Court.
- The new rules took effect on December 1, 2015, and address the four areas of change identified during the 2010 Conference.

Cooperation

- Participants at the 2010 Conference agreed that cooperation among the litigants and counsel during discovery can reduce time and expense.
- Cooperation can be achieved if it is encouraged by the Rules and judges.
- Rule 1 encourages cooperation by stating that the Rules of Procedure "should be construed, administered, **and employed by the court and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding." The intent is to make it clear that the parties themselves have a responsibility to achieve the goals of Rule 1.
- Rule 1 now gives judges an opportunity to inform the parties of their obligation to cooperate during discovery to reduce delay, expense, and burden.

Proportionality and Changes to Certain Discovery Rules

- The lawyer surveys that preceded the 2010 Conference nearly unanimously agreed that district and magistrate judges must be involved at the outset of the discovery process, and remain involved throughout it to tailor discovery to what is reasonably needed to resolve the claims and defenses raised. This is what is meant by discovery that is "proportional."
- The lawyer surveys revealed widespread belief that civil cases take too long and cost too much, resulting in some meritorious cases not being filed, and for some cases that are filed, settlement on the basis of the cost of litigation rather than the merits of the case.
- The proportionality requirement has been part of the Rules since 1983, but surveys reveal that lawyers believe that judges do not adequately enforce it.
- The new Rules now restore the proportionality requirement to Rule 26(b)(1), where it first appeared, as part of the definition of the scope of discovery.

Proportionality, con't

- Rule 26(b)(1) provides that parties "may obtain discovery regarding any nonprivileged matter that is **relevant to any party's claim or defense**, and **proportional to the needs of the case**, considering the **importance of the issues at stake in the action**, the **amount in controversy**, the **parties relative access to relevant information**, the **parties' resources**, the **importance of the discovery in resolving the issues**, and whether the **burden or expense of the proposed discovery outweighs its likely benefit**."
- This change is intended to make proportionality mandatory, by including it in the definition of the scope of discovery. It is not intended to deprive any party of the evidence reasonably needed to prove its case or defenses.
- The judge is responsible for insuring that discovery in each case is proportional, by actively managing the case, intervening early to help identify what is needed to prepare the case for trial, to resolve disputes promptly that threaten to delay its resolution, and to limit discovery to prevent undue expense.

Proportionality, con't

- The proportionality factors in Rule 26(b)(1) include some changes:
  - The first factor now is "**the importance of the issues at stake**," and the second is "**the amount in controversy**." This was done to emphasize that the amount in controversy is not the most important factor to be considered. Some cases involve important issues and require significant discovery even if they do not seek recovery of large monetary damages.
  - A new factor was added: "**the parties relative access to relevant information**" to recognize the fact that in some cases the discoverable information the parties have is asymmetrical. In these cases, the party with more information will have to bear greater burden and cost in responding to discovery than the party with less information. This does not mean that the discovery in such cases is disproportionate.
- The Advisory Note makes it clear that the changes to Rule 26(b)(1) do not place the burden of showing that requested discovery is proportional on the party requesting discovery. It also makes clear that boilerplate objections to producing discovery on the basis of proportionality is improper. Rather, the goal is to prompt a dialogue between the parties and court about the amount of discovery reasonably needed to resolve the case.

Other Changes to Rule 26(b)(1) Intended to Promote More Efficient, Less Expensive Discovery

- "**Reasonably Calculated to Lead**." Revised Rule 26(b)(1) no longer contains the language that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This language is replaced with "**[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable**."
  - The deleted language never was intended to define the scope of discovery, but some lawyers had argued, and courts had held, that the "reasonably calculated to lead" language defined the scope of discovery, which, in effect, broadened the scope of discovery beyond what the rules allowed.
  - The amendment will eliminate the incorrect reading of the scope of discovery in 26(b)(1), while continuing to make it clear that inadmissibility is not grounds for objecting to relevant discovery.

Other Changes to 26(b)(1), con't

- Rule 26(b)(1) no longer permits discovery relating to the "**subject matter**" of the litigation in addition to discovery relevant to the claims or defenses.
  - "Subject matter" discovery rarely was sought, or allowed, and the line between the two was very hard to draw.
  - The proper focus of discovery is the actual claims and defenses asserted.
- Rule 26(b)(1) no longer mentions discovery of "**the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and locations of persons who know of any discoverable matter**."
  - This language was deleted because the Committee determined that discovery into the existence and location of discoverable information is so widely accepted that rule language is not needed to ensure that it is available.

Other Discovery Rule Changes that Promote Efficiency and Reduce Expense/Burden

- Allocation of Expenses. Rule 26(c)(1)(B) allows the court to order "**allocation of expenses**" when issuing a protective order during discovery.
  - This authority is not new, it merely makes explicit the authority to allocate discovery expenses as part of a protective order as recognized in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).
  - This change is not intended to make cost shifting more frequent or to imply that cost shifting is part of the proportionality analysis. It only codifies existing authority.
  - The Advisory Note explains that the change does not alter the fact that the responding party ordinarily bears the costs of responding to proper discovery requests.

Three Changes to Rule 34

- First Change: Rule 34 now requires that objections to document production requests be stated "**with particularity**, " as already is required for objections to interrogatories.
  - This change is intended to prevent non-specific "boilerplate" objections that impose delay and burden.
- Second Change: Rule 34 now allows a responding party to state that it will produce copies of documents/ESI instead of permitting inspection, but requires the party to **specify a reasonable time for production**.
  - This change eliminates the objectionable practice of stating that documents will be produced "in due course" but without saying when, leading to delay and wrangling about when production actually will occur.
- Third Change: Rule 34 now requires that an objection to production of documents **state whether any responsive documents are being withheld based on the objection**.
  - This prevents delay and wrangling when a party states objections, produces certain documents anyway, but does not say whether any responsive documents have been withheld based on the objection.

Change to Rule 26(d)

- Rule 26(d) now allows parties to deliver Rule 34 document production requests before they meet and confer as required by Rule 26(f).
  - The purpose is to facilitate discussion of specific discovery proposals at the discovery conference and with the court at the case management conference.
  - The 30 days to respond to the document production request begins to run from the date of the first Rule 26(f) meeting.

Early, Active Judicial Case Management

- The 2010 Conference revealed widespread agreement among lawyers that litigation results are more satisfactory when a judge promptly manages a case and remains involved throughout the process.
- But lawyer surveys showed that many federal judges do not actively manage their cases. The new rules include **four changes** designed to encourage more active case management by judges:
  - Rule 16(b) has been revised to **encourage judges to communicate directly with the parties** before issuing a scheduling order.
  - The time for holding the scheduling conference has been shortened to the earlier of **90 days** (instead of 120) after a defendant has been **served** or **60 days** (instead of 90) after any defendant **has appeared**. The time for **serving a complaint** under Rule 4(m) is reduced from 120 to **90 days**.
  - Two topics have been added to the list of subjects to discuss during a Rule 16 conference: **Preservation of ESI** and **Evidence Rule 502**.
  - Finally, the new rules encourage judges and parties to adopt a requirement that **discovery disputes be discussed with the judge before a motion may be filed**.

Direct Communication between Judge and Parties at Scheduling Conferences

- A key to effective case management is for the judge to hold a Rule 16 conference with the parties to set an appropriate litigation schedule.
- The new rules encourage case management conferences where judges and lawyers actually speak to each other by eliminating language in Rule 16(b) that allowed scheduling conferences by "telephone, mail, or other means." Although the Committee Note explains that Rule 16 conferences still may be held by telephone, the new rule is intended to eliminate the express suggestion in the old rules that setting litigation schedules by "mail" or "other means" not involving direct communication between the judge and parties is adequate.
- The amendment to Rule 16 is intended to encourage judges to communicate directly with the parties at the start of the case before a scheduling order is issued.

Reduced Deadlines for Serving Defendants and Holding Scheduling Conferences

- The new rules shorten the time for holding the **scheduling conference** to the **earlier** of **90 days** after **any defendant** has been **served** (down from 120 days) or **60 days** after **any defendant** has **appeared** (down from 90 days).
- The new rules also **reduce** the time for **serving a complaint** under Rule 4(m) from 120 days to **90 days**.
- The purpose of these changes is to start the case management process earlier. The Committee Note explains that judges may set later time deadlines for good cause.

Additional Issues to Address at Rule 16 Conference

- The list of subjects to discuss at a Rule 16 or 26(f) conference adds **Preservation of ESI** and **Evidence Rule 502**.
- Addressing **preservaton of ESI** early in the case can avoid costly and burdensome disputes later on about whether a party acted reasonably to preserve ESI that should have been preserved when litigation reasonably is anticipated.
- Addressing **Evidence Rule 502** at the start of a case can reduce the expense of producing voluminous ESI and "hard copy" documents by the parties entering into "non-waiver" agreements, or the court issuing a "non-waiver" order.

Pre-Motion Discovery Conferences with the Court

- Briefing and deciding discovery disputes can be very expensive and significantly delay litigation. But many discovery disputes can be resolved quickly and inexpensively if the judge holds an in-person or telephone conference with the parties as soon as the dispute arises.
- Experience has shown that a pre-motion discovery conference with the judge is a very effective means of resolving disputes quickly and inexpensively. The new rules encourage the judge and parties to consider at the initial case management conference whether to adopt a pre-motion conference requirement before discovery motions may be filed.

Preservation of ESI: New Rule 37(e)

- Preservation of ESI is a major issue confronting parties and courts, and the resolution of disputes about the consequences of loss of ESI has produced a significant split in the circuits about the level of culpability required before serious sanctions can be imposed. Some circuits held that serious sanctions such as an adverse inference instruction could be imposed for the negligent loss of ESI, others required a showing of bad faith.
- The Advisory Committee was informed that the lack of a uniform approach throughout the federal courts led some persons and entities to over-preserve ESI out of concern that their actions might, in hindsight, be viewed as negligent, and they might be sued in a circuit that allowed an advserse inference instruction based on negligence alone. This over-preservation was burdensome, and costly.
- The participants in the 2010 Conference strongly encouraged the Committee to draft a uniform rule to deal with this issue. New Rule 37(e) was in response to this request.

Rule 37(e) con't.

- New Rule 37(e) **eliminates the circuit splits** by adopting a **national standard** and provides guidance to parties faced with making preservation decisions.
- The **focus** of New Rule 37(e) is **preservation of ESI**. Issues about the duty to preserve evidence that is not ESI are still governed by the law that existed prior to December 1, 2015.
- New Rule 37(e) **does not create a duty to preserve ESI**, it recognizes the existing common law duty to preserve information when litigation is reasonably anticipated. It applies when ESI "**that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery**."
- Rule 37(e) requires **reasonable steps, not perfection**, in efforts to preserve ESI.

Rule 37(e), con't.

- If reasonable steps are not taken and ESI is lost as a result, Rule 37(e) directs the court to focus first on whether the lost ESI can be **restored** or **replaced** through **additional discovery**.
- If the lost ESI cannot be restored or replaced, Rule 37(e)(1) provides that the court, "upon finding **prejudice** to another party from loss of the information, may order measures **no greater than necessary** to **cure the prejudice**." This provision deliberately preserves broad trial court discretion to order measures to cure the prejudice under (e)(1), but it is limited in three important ways:
  - First, there must be a **finding of prejudice** to the party that is deprived of the use of the ESI;
  - Second, the measures imposed by the court must be **no greater than necessary to cure the prejudice**; and
  - Third, the court may **not impose** the **severe measures** provided in **subdivision (e)(2)**.

Rule 37(e), con't.

- Rule 37(e)(2) limits the application of several specific, serious sanctions to cases where the party that failed to take reasonable actions to preserve ESI once a duty to preserve it had arisen "**acted with the intent to deprive another party of the information's use in the litigation**."
- The sanctions subject to the restrictions of subdivision (e)(2) are:
  - The **court presuming that the lost information was unfavorable to the party that lost it** (such as during summary judgment or a bench trial);
  - **Instructing the jury** that it **may or must presume the information lost was unfavorable** to the party that failed to preserve it; and
  - **Dismissing** the action or entering a default judgment.

Rule 37(e), con't.

- Subdivison (e)(2) eliminates the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI to situations where the historical justification for such instructions exist: if a party destroys evidence for the purpose of preventing another party from using it in litigation, it is reasonable to infer that the evidence was unfavorable to the party that destroyed it. This standard is met if, as (e)(2) requires, the ESI was lost or destroyed "with the intent to deprive another party of the information's use in the litigation." It is not met if the loss was due to mere negligence.
- Subdivision (e)(2) applies the same intent requirement to the imposition of sanctions of equivalent severity as an adverse inference instruction, namely the court presuming that the lost ESI was unfavorable to the party that lost it, and dismissing the action or entering a default judgment.

Rule 37(e), con't.

- Unlike subdivision (e)(1), there is no requirement in (e)(2) that the court find prejudice to the party deprived of the use of the lost ESI by the conduct of the party that lost or destroyed it with the intent to deprive the other party of its use in the litigation. This is because the circumstances under which the ESI was lost or destroyed will permit the inference of prejudice.
- The Committee Note to Rule 37(e) advises that the comprehensiveness of the rule is intended to eliminate the need for the court to rely on its inherent authority when determining how to deal with the loss of ESI that falls within the scope of the rule.

One Final Change: Abrogation of Rule 84

- Prior to the adoption of the new rules, the substantive Rules of Civil Procedure were followed by an appendix of forms, and Rule 84 provided that the forms "suffice under these rules."
- Many of the forms were out of date, the process of amending them was cumbersome, and the Advisory Committee found that they rarely are used. Because there are helpful alternative sources for civil forms easily available from commercial publishers as well as forms created by the Administrative Office of the United States Courts, available on its website, the new rules abrogate Rule 84. The Committee Note makes clear that the abrogation of Rule 84 is not intended to signal a change in the pleading standards of Rule 8.

Conclusion

- The new rules of Civil Procedure underscore the importance of cooperation during the pretrial process, active judicial management of civil cases, the need to insure that discovery is proportional to the needs of each individual case, and the importance of having a nation-wide standard applicable to the preservation of ESI. The overarching goal of the new rules is that they be applied by the courts and the parties themselves to achieve the goals of Rule 1 – the just, speedy, and inexpensive determination of every action. Their success depends on the willingness of judges and lawyers to use them for this purpose.