Amendments to the Federal Rules of Practice and Procedure: Civil Rules 2015—Overview (Video Transcript)[1]

Federal Judicial Center

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Hello, I am Judge Dave Campbell, of the United States District Court for the District of Arizona, and the former chair of the Advisory Committee on the Federal Rules of Civil Procedure.

On December 1, 2015, several important amendments to the Federal Rules of Civil Procedure became effective. The purpose of this video is to provide you with a general overview of those amendments. Other, more detailed videos have been prepared by the Federal Judicial Center. Those videos, as well as other materials explaining the new amendments, are available on the FJC website.

The amendments grew out of a conference convened by the Civil Rules Advisory Committee in May of 2010. The conference was convened for the purpose of evaluating the state of civil litigation in federal court. Some 200 judges, lawyers, and academics, from all parts of the country and representing a wide range of views, were invited to discuss their experiences with civil litigation in federal courts. Several surveys were completed before the conference, including members of the Section of Litigation of the American Bar Association, fellows of the American College of Trial Lawyers, and members of the National Employment Lawyers Association.

The Conference found that federal civil litigation works reasonably well—that a complete overhaul of the system is not warranted. The conference also concluded, however, that the system can be improved, particularly in four areas: increased cooperation among litigants during the pretrial process; greater proportionality in discovery; earlier and more active management of cases by judges; and improved guidance on the preservation and loss of electronically stored information, sometimes referred to as "ESI."

Over the next four years, the Advisory Committee developed amendments in these four areas and a few others. The committee worked through numerous drafts, additional conferences, and a public comment period that produced more than 2,300 written comments and testimony from 120 witnesses at three public hearings. The proposed amendments ultimately were approved unanimously by the Advisory

1. This is a transcript of a video available at http://fjconline.fjc.dcn/content/309286/rules-amendments-2015-civil-overview.

Committee, the standing committee that oversees the work of all the rules committees, the Judicial Conference of the United States, and the United States Supreme Court.

Collectively, these rule changes provide a unique opportunity to improve the delivery of civil justice in federal court by making pretrial litigation more efficient and less expensive, without sacrificing any party's need to obtain the evidence necessary to prove or defend its case.

I will now describe some of the amendments, using the four areas of focus from this 2010 conference.

First, cooperation.

Participants in the 2010 conference agreed that cooperation among parties and counsel can do much to reduce the time and expense of civil litigation without compromising effective and competent advocacy. As you know, Rule 1 addresses the scope and purpose of the Federal Rules of Civil Procedure. Before the amendments, the second sentence of Rule 1 said that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." As amended, this sentence states that the civil rules "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."

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Amended Rule 1

Civil rules "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."

This amendment makes clear that the obligation to secure these fundamental objectives of the civil rules is not limited to judges. Parties and their lawyers also have a responsibility to achieve the objectives of fair, timely, and inexpensive litigation.

The Advisory Committee note to this rule change observes that "effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure." The note also makes clear that the change does not create some new, independent source for litigants to seek sanctions against each other. That, of course, would defeat the purpose of the amendment.

We recognize, of course, that cooperative behavior cannot be legislated. But this change to Rule 1, which declares the very purpose of the civil rules, can be used by judges, lawyers, and academics to promote the highest standards of law practice.

The second major change concerns early and active judicial case management.

Virtually all of the participants in the 2010 conference, and large majorities of the lawyers surveyed before the conference, agreed that cases are resolved more quickly, less expensively, and with more satisfactory results when judges actively manage cases from beginning to end. The Advisory Committee believes that effective case management includes a thoughtful and well-designed scheduling order, firm deadlines, and a judge who is available for prompt resolution of pretrial disputes.

The idea of active case management is already found in Rule 16, but the 2010 conference suggested that it is not used as widely as the rules intend or as litigants prefer. The rule amendments therefore include four changes aimed at encouraging earlier and more active case management by judges.

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Changes Aimed at Early, Active Case Management

Time for service of complaint reduced from 120 to 90 days.
Time for holding initial case management conference is reduced by 30 days.

The first case management change concerns the time for service of a complaint. It is reduced from 120 days to 90 days, and the time for holding the initial case-management conference is also reduced by 30 days. The intent of both changes is to provide for earlier involvement by judges in the management of cases. The committee note recognizes that more time may be required in some cases.

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Rule 16 is amended to encourage judges and parties to engage in live, interactive communication at initial case management conference.

The second case management change alters Rule 16 to encourage judges and parties to engage in live, interactive communication at the initial case management conference.

Although the rules still permit judges to enter case management orders without a live conference in cases where a conference truly is not necessary, the committee note emphasizes that such conferences are almost always the most effective way for a judge to identify the needs of a case and enter an order tailored to provide for its most efficient resolution. Live conferences may be held under the amended rule in person, by telephone, or by video or Internet link.

The third case management change encourages judges and parties to consider adopting a requirement that discovery disputes be discussed with the judge, in a hearing or telephone conference, before discovery motions are filed.

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Amendments encourage judges and parties to discuss discovery disputes before motions are filed.

The many federal judges who follow this procedure now find that most discovery disagreements can be resolved in the motion conference—that is, the conference before any motion is filed—thus avoiding the costly and time-consuming process of briefing discovery disputes. Prompt resolution of discovery disputes also keeps cases on track and avoids disruptions in the discovery schedule.

The fourth case-management change adds two important topics to the list of items to be discussed at the Rule 16 conference: the preservation of electronically stored information, or ESI, and the entry of orders under Federal Rule of Evidence 502.

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Two New Items at Rule 16 Conference

Preservation of electronically stored information, or ESI.
Entry of orders under Federal Rule of Evidence 502.

Ensuring that the parties are preserving ESI at the beginning of a case can avoid costly and time consuming problems later, and Rule 502 is specifically designed to help streamline the review and production of large volumes of information.

Going back to the major changes in the rules, the third major change concerns proportionality.

Survey results before the 2010 conference reflected widespread belief that discovery in civil cases is too expensive and time consuming. Respondents to these surveys and participants in the conference agreed that discovery should be proportional to the needs of the litigation, and often is not.

What is proportional discovery? It is discovery tailored by the parties and the judge to meet the reasonable needs of the case. Proportional discovery provides the information needed by litigants to prove their cases, but it avoids excess and waste.

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Proportional discovery is discovery tailored by the parties and the judge to meet the reasonable needs of the case. Proportional discovery provides information needed by the litigants to prove their cases, but avoids excess and waste.

The idea of proportionality is not new to the Federal Rules of Civil Procedure. It has been there since 1983. Before the recent amendments, Rule 26(b)(2)(C) provided that a court on a motion, or on its own, "must" limit the frequency or extent of discovery if the burden or expense of the proposed discovery outweighs its likely benefit, considering a number of factors specifically listed in the rule. And Rule 26(b)(1), which established the scope of discovery, stated that all discovery was subject to those limitations found in Rule 26(b)(2)(C).

The new amendments have moved the proportionality factors in Rule 26(b)(2)(C) to Rule 26(b)(1). They are now part of the scope of discovery. Thus, discovery in civil litigation will now be defined as follows: "Parties may obtain discovery regarding any non-privileged 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."

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Scope of Discovery in Civil Litigation

"Parties may obtain discovery regarding any non-privileged 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."

These factors come from Rule 26(b)(2)(C), with some modifications that are explained in the Advisory Committee notes. The purpose of this change is to make proportionality an integral part of the scope of discovery. It is intended to prompt a discussion among the parties and the court, early in the litigation, about the discovery that is truly needed to resolve the case.

A few points are worth emphasizing. This change is not intended to deprive any party of the evidence needed to prove its claim or defense. The intent is to eliminate excessive and unnecessary discovery. The Advisory Committee note also recognizes that in some cases, one party has much more relevant information than the other party. The fact that discovery flows mostly one way in these cases does not mean that it is disproportional. The note also explains that the change does not place the burden of proving proportionality on the party seeking discovery. As I already mentioned, the intent is to prompt a discussion among all the parties and the court. The

note further makes clear that it does not authorize boilerplate refusals to provide discovery on the ground that it is not proportional.

There is one other change to Rule 26(b)(1) I will mention. The sentence which provides that "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence" has been eliminated.

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Amendment to Rule 26(b)(1) deletes the sentence which provides "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

That sentence was never meant to define the scope of discovery. It was added to the rules in 1940s to stop lawyers from objecting in depositions to relevant questions on the ground that the answers would be inadmissible hearsay. The sentence has been replaced with a new sentence that retains this original intent. The new sentence reads, "Information within this scope of discovery need not be admissible in evidence to be discoverable."

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"Information within this scope of discovery need not be admissible in evidence to be discoverable."

Several other changes have been made to the discovery rules, particularly Rules 26 and 34, that are intended to make discovery more efficient and less expensive.

The fourth major area of change concerns the preservation and loss of ESI.

The explosion of electronically stored information as you well know has created a variety of problems in civil litigation. These include challenges surrounding the pre-trial and post-trial preservation of ESI, expensive and time-consuming litigation over the loss of ESI, and a lack of uniformity in federal court cases on the consequences of losing ESI.

New Rule 37(e) is designed to address some of these ESI challenges. The new rule does not create a duty to preserve ESI, but instead recognizes the existing common law duty to preserve information when litigation is reasonably anticipated. The rule applies when ESI that was subject to a duty to preserve "is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." The rule thus calls upon parties to take reasonable steps to preserve ESI. If reasonable efforts were not taken, ESI is lost as a

result, and the ESI cannot be restored or replaced through additional discovery, then a party may seek relief under subdivisions (e)(1) or (e)(2) of the new rule.

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- New Rule 37(e)(1) does not create a new duty to preserve ESI. It recognizes the existing common law duty to preserve information when litigation is reasonably anticipated.
- The amended rule applies when ESI subject to a duty to preserve "is lost because a party failed to take reasonable steps to preserve it and it cannot be restored or replaced through additional discovery."
- If ESI is lost as a result of not taking reasonable efforts to preserve it and cannot be restored or replaced through additional discovery, then a party may seek relief under amended Rule 37(e)(1) or (e)(2).

Subdivision (e)(1) applies if the loss of ESI results in prejudice to a party. It provides that the court may take measures to cure the prejudice caused by the loss, but no greater than necessary to cure the prejudice. This subdivision is intended to preserve broad trial court discretion to remedy prejudice caused by the loss of ESI that should have been preserved through reasonable efforts.

Subdivision (e)(2) addresses more severe sanctions and applies only if the party that lost the ESI acted with the intent to deprive the other party of the ESI's use in litigation. If that finding is made, a court may draw an adverse inference with respect to the lost ESI, instruct the jury that it may or must draw an adverse inference, dismiss the case, or enter a default judgment. Thus, the most severe sanctions are reserved for cases where the loss of ESI is intentional. This provision resolves a split among the circuits. Some circuits now hold that serious sanctions such as an adverse inference instruction may be imposed on a finding of mere negligence. Other circuits require a showing of bad faith. New Rule 37(e)(2) will establish a uniform standard for imposing the most serious sanctions in federal court.

In conclusion, the new rule amendments are intended to promote needed improvements in federal civil litigation—more cooperation among parties, earlier and more active case management by judges, greater proportionality in discovery, and clearer guidelines for the preservation and loss of ESI. As members of the Advisory Committee, we believe these changes present an opportunity for all participants in the civil litigation arena—judges, lawyers, and parties—to make the system more effective, less costly, and more accessible to the many it is designed to serve.

These amendments will make a difference, however, only if all of us change our behavior and help accomplish these goals. We respectfully invite your participation in this effort to improve the delivery of civil justice in our federal courts. Thank you.