

# WHAT HAVE YOU DONE TO ME LATELY?: NAVIGATING THE NEW FEDERAL RULES

Presented by  
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# What's The Fuss About?

- Significant amendments to the Federal Rules of civil Procedure became effective December 1, 2015
  - some commentators call this the most extensive suite of amendments in more than two decades
- Result of 2010 meeting of Advisory Committee at Duke University
  - nearly five years of drafting, commenting, compromising, revising and general bickering
- Adopted by the U.S. Supreme Court on April 29, 2015

# Why the Amendments?

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Per U.S. Courts website:

Any change to the federal rules must be designed to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.

# Why the Changes, continued

Three main goals of 2015 Amendments:

1. Improve efficiency of case administration
  - emphasis on cooperation
2. Redefine scope of permissible discovery
  - emphasis on proportionality
3. Address the preservation and production of electronic discovery materials
  - emphasis on prejudice and intent

# So What Has Changed?

Eleven Rules Have Been Changed:

- Rule 1 – amended to make the “Parties”, as well as the Court, responsible for employing the rules to achieve inexpensive determination of every case
- Rule 4 – shortened time limits for service of process
- Rule 16 – regarding scheduling conferences and scheduling orders

# So What Has Changed, continued

- Rule 26 – scope of discovery amended
- Rules 30, 31 and 33 – Rules governing oral depositions, depositions on written questions, and written interrogatories amended to incorporate new scope of discovery
- Rule 34 – changes to procedure for objecting to requests for production
- Rule 37 – amended to address preservation of e-discovery and sanctions for failure to preserve
- Rule 55 – clarifying that a default judgment that does not dispose of all parties and claims is interlocutory and may be revised by court until final
- Rule 84 – appendix of forms abrogated

# Amended Rule 1

## Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, ~~and~~ administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

# Amended Rule 1

- Per Advisory Committee Note to Amended Rule 1:

“Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way.”
- Parties now expressly responsible
- Emphasis on cooperation



# Amended Rule 4

## Rule 4. Summons

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**(m) Time Limit for Service.** If a defendant is not served within ~~120~~90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

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# Practice Under Amended Rule 4

- Shortens time limit for service on a defendant from 120 to 90 days
- Part of goal of speeding up the beginning of suits and improving case administration
- Advisory Committee acknowledged this may result in increased number of requests for more time based on “good cause”
- Also shortens time for relation back of amendments under Rule 15(c)(1)(c)

# Amended Rule 16

## Rule 16. Pretrial Conferences; Scheduling; Management

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### (b) Scheduling.

- (1) **Scheduling Order.** Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:
  - (A) after receiving the parties' report under Rule 26(f); or
  - (B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means.~~
- (2) **Time to Issue.** The judge must issue the scheduling order as soon as practicable, but in ~~any event~~ unless the judge finds good cause for delay, the judge must issue it within the earlier of 120~~90~~ days after any defendant has been served with the complaint or 90~~60~~ days after any defendant has appeared.

# Amended Rule 16 continued

## (3) *Contents of the Order.*

\* \* \* \* \*

(B) *Permitted Contents.* The scheduling order may:

\* \* \* \* \*

- (iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;
- (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;
- (v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;
- (~~v~~vi) set dates for pretrial conferences and for trial; and
- (~~vii~~viii) include other appropriate matters.

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# Practice Under Amended Rule 16

- Scheduling conferences must now be conducted by “direct simultaneous communication” (per Advisory Committee Note). Conference may be held “in person, by telephone or by more sophisticated electronic means.”
- Scheduling order must be issued within 90 days (not 120) after any defendant has been served, or within 60 days (not 90) after any defendant has appeared.
- Three new items added to list of permitted contents of scheduling orders:
  - 1) preservation of electronically stored information;
  - 2) agreements reached between the parties concerning assertions of privilege;
  - 3) court may direct that before filing a discovery motion, the movant must request a conference with the court.

# Amended Rule 26(b)

## Rule 26. Duty to Disclose; General Provisions; Governing Discovery

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### (b) Discovery Scope and Limits.

- (1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: 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. Information within this scope of discovery need not be admissible in evidence to be discoverable. ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

# Amended Rule 26(b), continued

## 2) *Limitations on Frequency and Extent.*

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(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

\* \* \* \* \*

(iii) ~~the burden or expense of the proposed discovery~~ is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

\* \* \* \* \*

# Amended Rule 26(c)

## (c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

. \* \* \* \*

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

\* \* \* \* \*



# Amended Rule 26(d)

## (d) Timing and Sequence of Discovery.

\* \* \* \* \*

### (2) Early Rule 34 Requests.

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

# Amended Rule 26(f)

## (f) Conference of the Parties; Planning for Discovery.

\* \* \* \* \*

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

\* \* \* \* \*

(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

\* \* \* \* \*

# Practice Under Amended Rule 26

- Biggest change in 2015 amendments
- Scope of discovery:
  - Standard is no longer relevant information reasonably calculated to lead to discovery of evidence
  - Now, discovery must be relevant and proportional to the needs of the case
  - Amendment also deletes provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter of the case
    - Advisory Committee Note ties this change back to new emphasis on proportionality

# Factors in Proportionality

- 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;
- Whether the burden or expense of the proposed discovery outweighs its likely benefit.

# Practice Under Amended Rule 26

- Powerful new tool for opposing excessive discovery
- Advisory Committee note attempts to minimize the change, claiming it does not alter the responsibility of the court (and the parties) to consider proportionality
- Not intended to permit automatic boiler plate objections based on proportionality
- Expect automatic boiler plate objections...

# E-discovery Practice Under Amended Rule 26

Advisory Committee Note regarding e-discovery:

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

# Practice Under Amended Rule 26

- Provision on protective orders amended to authorize court to allocate expenses of disclosure or discovery
  - Though Advisory Committee says this does not imply cost-shifting should become a common practice
  - Responding party will still normally bear cost of responding
- E-discovery can be expensive
- If you are trying to resist discovery, the cost can impact the proportionality of your opponent's requests
- If you lose on proportionality, try seeking cost-shifting

# Practice Under Amended Rule 26, continued

- 26(d)(2) Amended to permit requests for production before the parties' Rule 26 conference
- May serve requests “more than” 21 days after the summons and complaint are served
- Either party may serve such requests
- Early Requests for Production are considered served at the Rule 26(f) conference



# Amended Rule 34(b)

## Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

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### (b) Procedure.

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#### (2) Responses and Objections.

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties’ first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection~~ with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

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# Practice Under Amended Rule 34(b)

- Responses to “early” requests due 30 days after Rule 26(f) conference
- Rule now expressly permits production of copies of documents or electronically stored information
  - conforms to common practice
  - response must state copies will be produced
- Production of copies must be completed no later than the time specified in the request, or another “reasonable time” specified in the response
  - “mutually agreeable time and place” not good enough
  - If production will be in stages, must specify a beginning and end date

# Practice Under Amended Rule 34(b), continued

- If you object to a request, your response must now specify the grounds for objection
- Objections must state whether any responsive materials are being withheld based on the objection
  - Similar to withholding statement for privileged materials under Texas practice?
  - Advisory Committee Note indicates don't have to specify what documents have been withheld
  - An objection that states the limits that controlled the search for responsive materials is enough. It is sufficient, for example, to state search for documents was limited to a specific relevant time period
- Intended to eliminate “defensive” motions to compel

# Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(e) ~~Failure to Provide~~**Preserve Electronically Stored Information.** ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system. If electronically stored information 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, the court:~~

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

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# Practice Under Amended Rule 37(e)

- Widespread belief former Rule 37(e) did not adequately guide judges in dealing with failures to preserve or produce electronically stored information
- New rule incorporates common law spoliation concepts to remedy loss of electronic information
- Applies only:
  - (1) to electronically stored information
  - (2) if it should have been preserved in the anticipation or conduct of litigation, but
  - (3) was lost due to failure to take reasonable steps to preserve it
- Only applies if the lost data cannot be restored or replaced through additional discovery
  - If information can be replaced, no further action should be taken

# Practice Under Amended Rule 37(e)

- Duty to preserve
  - Generally common law obligations
  - Can arise from other sources, including statutes, administrative regulations, a court order (even in another case), or even a party's own policies
- Reasonable steps to preserve
  - Advisory Committee: “reasonable ≠ perfect”
  - Court should consider proportionality

# Practice Under Amended Rule 37(e)

- Court may impose sanctions if it finds prejudice to another party
  - Rule does not specify who has burden of proof
- Court may order measures “no greater than necessary to cure the prejudice”
- Broad discretion
- In appropriate cases, remedy may include (examples):
  - Forbidding party from presenting certain evidence
  - Permitting parties to present evidence and argument to jury on loss of information
  - Giving jury instructions to assist in evaluation of such evidence or argument

# Practice Under Amended Rule 37(e)

- If court finds intent to deprive another party of information, the court may:
  - (1) Presume lost information was unfavorable to the party;
  - (2) Instruct the jury that it may or must presume the information was unfavorable to the party, or
  - (3) dismiss the case or enter a default judgment
  
- Court may, but is not required, to order these sanctions. Again, Court has broad discretion



# CONCLUSION

## ➤ Q & A Session

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