

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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This summary explains revisions to seven federal procedural rules effective December 1, 2015.

Rule 1 Scope

The rules are to be “construed, administered, and employed by the court *and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding.” Parties, in addition to the court, now have the obligation to ensure cases proceed as affordably and speedily as possible.

Rule 4 Service of Complaint

The deadline for serving the defendant is reduced from 120 to 90 days to reduce delays at the beginning of a lawsuit, and the revised rule includes forms permitting waiver of service of the summons to further reduce delays.

Rule 16 Pretrial Conferences

The deadline for issuing the scheduling order under Rule 26(b)(2) is reduced from 120 to 90 days after a defendant is served or from 90 to 60 days after a defendant appears “unless the judge finds good cause for delay.” This change requires an earlier Rule 26(f) discovery conference and prompts initial disclosures while reducing delays.

A scheduling order may provide for electronically stored information (ESI) preservation, agreements regarding privilege and work product information, and a requirement that a court conference must occur before a discovery motion may be brought. These revisions codify preferred current practice.

Rule 26 Scope of Discovery

Revised Rule 26(b)(1) now reads: “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....” and includes six factors that determine proportionality. The amendment adds proportionality and gives it greater prominence and deletes two former provisions that were mistakenly relied on in the past as expansive discovery definitions. Discovery may not have been narrowed but courts are encouraged to place reasonable limits on it.

The requirement of proportionality is placed at the beginning of Rule 26 to reinforce its importance in determining permissible discovery. The two provisions

deleted were “any matter relevant to the subject matter” and “reasonably calculated to lead to the discovery of admissible evidence.” The standard of relevant to a claim or defense remains.

Protective Order

A protective order under Rule 26(c)(1)(B) may now be based on the “allocation of expenses,” permitting a court to shift discovery costs from one party to another. This revision is not intended to make cost-shifting a routine practice, and parties will generally continue to bear their own costs.

Timing of Discovery

Parties may agree to specific discovery sequences under Rule 26(d)(3), and requests including document production may occur earlier in the case.

Discovery Plan

The discovery plan must include proposals by the parties regarding ESI preservation, protections afforded by privileges, and related Fed.R.Evid. 502 issues, such as quick-peek and claw-back provisions.

Rule 34 Document Production

Pursuant to Rule 34(b)(2)(B), the responding party must timely respond to early requests, may produce copies of documents rather than permit inspection, and must specify grounds for objections and whether any responsive materials have been withheld. These changes reflect preferred practice and mandate that a responding party provide prompt and full disclosures. This is an anti-game-playing provision that will likely have a significant impact on practice.

Rule 37 Sanctions

Revised Rule 37(e) permits sanctions if a party should have preserved ESI, lost ESI while failing to take reasonable preservation steps, and cannot restore the ESI through other discovery. This revision requires these three elements to be met before sanctions may be imposed. Further, the efforts to replace or restore ESI are to be proportional to the importance of the information and the costs to be incurred.

Revised Rule 37(e)(1) provides that an evaluation of prejudice suffered by a party includes a determination of the proportional importance of the lost information. The revisions further allow a court to order sanctions “no greater than necessary to cure the prejudice” unless a party is found to have intentionally deprived another party of discoverable information and then severe sanctions including adverse-inference instructions may be ordered.

Rule 84 Forms

This rule was abrogated as forms are readily available from other sources. The amendment also removed the conflict between the heightened pleading requirements of *Twombly* and *Iqbal* and the bare-bones pleading examples in the former forms.