Thursday, January 7, 2016 / Volume 108 / Number 4

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials & TRIBULATIONS

A review of the recent amendments to the Federal Rules of Civil Procedure

On April 29, 2015, the United States Supreme Court adopted amendments to the Federal Rules of Civil Procedure (the "Rules") and submitted the amendments to Congress for approval [H.R. Doc. No. 114-33, at 1-2 (2015)]. As of December 1, 2015, the amendments were effective, having not been acted upon by Congress; but, pursuant to 28 U.S.C. § 2074(a), the Supreme Court ordered that the amendments "shall govern in all proceedings and civil cases … commenced [after December 1, 2015] and, insofar as just and practicable, all proceedings then pending" [id.] Accordingly, the new Rules may apply to cases filed prior to December 1, 2015, and attorneys should be aware that the Court may require that the parties operate under the new Rules, if it is practicable. This article will briefly review the key amendments, but attorneys should consult the Rules as well as the Notes of the House Committee on the Judiciary accompanying the Rules (the "Committee Notes"), which explain, in detail, the rationale behind the amendments to the Rules as well as how Congress intends the amendments to apply.

The amendments to the Rules are clearly guided by the need to curb the ever-expanding scope of discovery and the associated rising costs of civil litigation in federal courts. For example, the Scope and Purpose of the Rules, contained in Rule 1, was amended to emphasize that an important consideration in the construction of the Rules by the courts and parties is to contain costs and ensure efficient results [Committee Note to Rule 1]. The remaining amendments reflect this overall goal; which, if adhered to in practice, should lessen the burden of litigation and allow for the quick and cost-effective resolution of cases in federal courts.

By MARY E. SHEPARD
Daily Record Columnist

New deadlines

First, it is important to note that several of the amendments have changed long-standing deadlines, and must be reviewed and adhered to by counsel (particularly plaintiff's counsel) to avoid inadvertently jeopardizing your client's rights. The Committee Notes explain that the purpose of these amendments is to streamline the initial stages of litigation [see Committee Note to Rule 16]. So, for example, Rule 4 has been amended to reduce the time a plaintiff has to serve a defendant from 120 days to 90 days. If not cautious, plaintiff's attorneys could find themselves in the precarious position of seeking an extension of time to serve based on their failure to review the amendments to the Rules. It remains to be seen whether courts will be lenient for a period of time with this new requirement, or whether they will take a hardline approach.

Rule 16 was also amended, and the period within which the court must issue a scheduling order was reduced from 120 days to 90 days from when a defendant is served, or 60 days from when a defendant first appears. This change will also likely shorten the time within which the court will hold any pre-trial conference and the time for the parties to confer prior to any such conference pursuant to Rule 26(f). In connection with these timing changes, Rule 26(d) was also amended to permit early Rule 34 discovery requests. The latter amendment is intended to permit parties to explore the potential scope of the case prior to a scheduling or discovery conference, so that the parties will be better prepared to discuss with the court their positions with respect to the scope of the case and any potential discovery disputes [see Committee Notes to Rules 16, 34]. The amendments also encourage direct meetings between the parties and the court, by removing the provision permitting a Rule 16 conference to be conducted by "telephone, mail or other means". This amendment reflects the Committee's belief that a Rule 16 conference is more effective if conducted in a manner that allows for the parties to "engage in direct simultaneous communication" [see Committee Note to Rule 16]. Accordingly, the parties should make an effort to confer as soon as possible after service of process to discuss the scope of the case and the extent of discovery, including the discovery of electronically stored information ("ESI"), so that a scheduling or discovery conference will be productive.

Proportional to the case

Rule 26 (b) now places a greater emphasis on the need for courts and litigants to tailor discovery to the size of the case. For example, the rule states that discovery must be:

> 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

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> information, the parties' resources, the importance of discovery in resolving issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Parties should use this mechanism to narrowly tailor the scope of discovery from the outset, or to reevaluate the scope of currently pending discovery, eliminating the risk of large-scale fishing expeditions though potentially enormous electronic databases. The Committee Note to Rule 26 clarifies that this proportionality requirement is not new, but "the revision is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse."

Rule 34, dealing with the manner in which parties can request documents and respond to document demands, was also amended. Attorneys should review the amendment before responding to any outstanding or new document demands, and also review recent discovery responses to the extent that a party may seek to challenge any response under the new Rule 34. For example, it may be common practice to respond to document demands with the run of the mill objections that the request is "overbroad" or "unduly burdensome", however, although such objections are still permitted, Rule 34(b)(2)(B) and (C) now require that objections be made "with specificity" and that "[a]n objection must state whether any responsive materials are being withheld on the basis of that objection." The Committee Note to Rule 34 explains:

> This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection.

Preservation of ESI

Of great interest to many, the amendments also specifically tackle the preservation of ESI, a topic that has been the subject of many recent federal court decisions. The Committee Note to Rule 37(e) explains that "[f]ederal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information." For this reason, Rule 37(e) was amended to establish a nationwide standard for the imposition of sanctions for the loss of ESI.

Previously, Rule 37(e) stated that courts were not permitted to impose sanctions where ESI was "lost as a result of the routine, good-faith operation of an electronic information system." However, as the scope of ESI discovery has begun to overwhelm courts and parties, the Committee Note to Rule 37(e) highlights that:

> This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

Accordingly, the new Rule 37(e) now establishes a standard by which courts may impose sanctions on parties who fail to preserve ESI when they reasonably anticipate litigation. Although the new Rule does not change any particular jurisprudence regarding when a party has a duty to preserve ESI (see Committee Note to Rule 37(e)), the Rule provides specific guidance to courts regarding the appropriate sanction where ESI has been lost. As the Committee Notes highlight:

> Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

From the earliest point

As always, attorneys should counsel their clients regarding the need to preserve information, including ESI, from the earliest point that they may expect a claim or a lawsuit may be filed.

Rule 55(c) was amended to clarify when the standards for vacating a default judgment versus the standards for vacating a final judgment apply. The Committee Note to Rule 55 clarifies that the amendment is intended to "to make plain the interplay between Rules 54(b), 55(c), and 60(b)."

Finally, the forms contained in Rule 84 have been removed as an official appendix to the Rules, as they are now publicly available in many alternate places; for example, court websites [see Committee Note to Rule 84]. However, the forms a party must include when seeking a waiver of service under Rule 4(d) are now specifically appended to Rule 4.

In sum, the new Rules offer parties and courts new opportunities to reign in the costs and expansiveness of federal litigation, but they should be reviewed carefully by attorneys to avoid running afoul of any new timing Rules and so that attorneys are prepared for what maybe now be required of them when attending court conferences and responding to discovery requests.

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