12/1/2015 Civil Rules Amendments

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RULEMAKING PROCESS

- Amendments adopted April 10-11, 2014 by the Advisory Committee on Civil Rules and approved by the Standing Committee on Rules on May 29-30, 2014.
- In September 2014, the proposed amendments were approved by the Judicial Conference of the United States, and in April 2015, by the the Supreme Court.
- Congress took no action on the amendments.
- Hence, on December 1, 2015, they went into effect.

ABROGATION OF FEDERAL RULE OF CIVIL PROCEDURE 84

Rule 84 (Official Forms)

- Rule 84 will be abrogated.
- Present Forms 5 (Notice of a Lawsuit and Request to Waiver Service of a Summons) and 6 (Waiver of the Service of Summons) will become incorporated into Rule 4(d).
- Forms are available at the website of the Administrative Office of the United States Courts:

http://www.uscourts.gov/FormsAndFees/Forms/CourtForms.aspx

DUKE CONFERENCE PROPOSALS

CASE MANAGEMENT

Rule 4(m) Service of Summons

(m) TIME LIMIT FOR SERVICE. If a defendant is not served within ~~120~~ 90 days after the complaint is filed, the court *** must dismiss the action without prejudice against that defendant or order that service be made within a specified time. *** This subdivision does not apply *** to service of a notice under Rule 71.1(d)(3)(A).

Rule 16(b)(2) Scheduling Order

(1) *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.

Rule 16(b)(1) Scheduling Order

(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~~.

Rule 16(b)(3) Contents of 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 claim 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;

[*Present (v) and (vi) to be renumbered*]

Rule 26(f)(3) Discovery Conference

(f) *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; ***

Rule 26(c)(1)(B) Protective Orders

(1) *In General*. *** The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or example, including one or more of the following: ***

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

Advisory Committee Note: "Recognizing the authority (to allocate expenses) does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding."

Rule 26(d)(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.

Rule 34(b)(2)(A) Time to Respond to Early Rule 34 Requests

(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.

Rule 26(d)(3) Sequence of Discovery

(3) *Sequence*. Unless~~, on motion,~~ the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

PROPORTIONALITY

Rule 26(b)(1) Scope of Discovery

(1) Unless otherwise limited by court order...: 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.

Rule 26(b)(1) Scope of Discovery

Deleted from Rule 26(b)(1):

— ~~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).~~

Rule 26(b)(2)(C) Limitations

(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 matter~~.

Rule 30(a)(2)(A)(i) Depositions

(a) WHEN A DEPOSITION MAY BE TAKEN. ***

(2) *With Leave*. A party must obtain leave of court, and the court must grant leave to the extent consistent, with Rule 26 (b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants

No change made to number of depositions

Rule 30(d)(1) Duration

(d) DURATION***

(1) *Duration*. Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

No change made to duration of a deposition

Rule 31(a)(2)(A)(i) Depositions by Written Questions

(a) WHEN A DEPOSITION MAY BE TAKEN. ***

(2) *With Leave*. A party must obtain leave of court, and the court must grant leave to the extent consistent, with Rule 26 (b)(1) and (2): ***

Rule 33(a)(1) Interrogatories

(a) IN GENERAL.

(1) *Number.* Unless stipulated or ordered by the court, a party may serve on another party no more than 25 interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

(2) *No change made to number of interrogatories*

Rule 36 (Requests for Admission)

No limitation imposed on numbers of requests for admission

Rule 34(b)(2)(C) Requests for Documents, ESI

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. ***

Rule 34(b)(2)(B) Requests for Documents, ESI

(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.

Rule 37(a)(3)(B)(iv) Motions to Compel

(B) *** The motion may be made if: ***

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

COOPERATION

Rule 1 Scope and Purpose

[These rules] 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.

REPLACEMENT OF FEDERAL RULE OF CIVIL PROCEDURE 37(e)

Rule 37(e) Failure to Preserve

(e) *Failure to 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 any 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:

Rule 37(e) Failure to Preserve

(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.

Applicability to Pending Cases

In transmitting the proposed rules amendments to Congress on April 29, 2015, the Chief Justice included an order providing in part that "the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2015, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." 2015 U.S. Order 0017.

Applicability to Pending Cases

"The Supreme Court may fix the extent to which such rule [of procedure or evidence] shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies." 28 U.S.C. § 2074(a).

EARLY CASE LAW TRENDS: RELEVANT TO SUBJECT MATTER AND REASONABLY CALCULATED ARE GONE, BUT ARE THEY?

Rule 26(b)(1) Scope of Discovery

(1) Unless otherwise limited by court order...: 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.

Steel Erectors, Inc. v. AIM Steel Int'l, Inc., 2016 U.S. Dist. LEXIS 271 (S.D. Ga. Jan. 4, 2016)

Discovery propounded to defendant to find out if the defendant's parent company underfunded defendant or caused it to breach its contract with plaintiff rejected as not proportional where defendant's interrogatory answer said parent was not involved in construction projects in issue:

"**Allowing discovery** – particularly 'complicated and complex' discovery that 'may involve treaties or agreements with foreign governments' (doc. 18 at 2) **-- based solely on plaintiff's pure speculation and in the face of existing discovery responses indicating no involvement by AIM's parent in the contracts at issue would needlessly increase the expense of this litigation and, in doing so, subvert Rule 26(b)(1)'s goal of 'guard[ing] against redundant or disproportionate discovery.'** Fed. R. Civ. P. advisory committee note (2015)."

Robertson v. People Magazine, 2015 U.S. Dist. LEXIS 168525 (S.D.N.Y. Dec. 16, 2015)

Race discrimination and harassment claims under Title VII, Section 1981 where plaintiff claimed that defendant hindered her ability to succeed as a writer. Plaintiff propounded 135 document requests, 36 of which focused on editorial decisions made by defendant. "**[T]he 2015 amendment does not create a new standard; rather it serves to exhort judges to exercise their preexisting control over discovery more exactingly.**" Lack of proportionality and relevance was then found:

"Unlike most discrimination cases where discovery is addressed to allegedly discriminatory conduct and/or comments, Plaintiff here seeks nearly unlimited access to People's editorial files, including all documents covering the mental process of People staff concerning what would or would not be published in the magazine."

Robertson v. People Magazine, 2015 U.S. Dist. LEXIS 168525 (S.D.N.Y. Dec. 16, 2015)

"To provide a few examples, Plaintiff requests all documents 'concerning any of People Magazine's regular meetings,' all documents 'concerning any meeting at which discussions concerning which content would appear in People Magazine occurred,' all documents 'concerning the decision-making process with regard to choosing who would be put on the cover of People Magazine,' and copies of all of People's covers and published stories dating back to 2005. Those requests (and others) extend far beyond the scope of Plaintiff's claims and would significantly burden Defendants. In addition, what Defendants decided to publish (or not publish) and its editorial decisions (as opposed to its business decisions in personnel hiring, firing, promoting, or demoting) are not relevant to Plaintiff's claims.

La. Crawfish Producers Ass'n – West v. Mallard Basin, Inc. 2015 U.S. Dist. LEXIS 163230 (W.D. La. Dec. 4, 2015)

"The plaintiffs seek an order allowing them to enter the private defendants' land to obtain discovery pursuant to Fed.R.Civ.P. 34. More specifically, they seek authorization for a site visit for the purpose of inspection, measuring, surveying, photographing and examining Fisher Lake (a.k.a. Fisher Bottom) and Bayou Cane. The plaintiffs assert that the primary purpose of the intended site visit is to obtain information discoverable and relevant to their NEPA claim, challenging the adequacy of the U.S. Army Corps of Engineers' analysis of the alternatives or impacts associated with the permits at issue in this case. The plaintiffs contemplate a group of approximately ten persons, consisting of four attorneys or legal representatives, two members of the plaintiff organizations, a surveyor, one or two assistants and a hydrologist. The experts will bring surveying and hydrologic equipment and the plaintiffs will bring a camera. They allege that the inspection will take no longer than one day, and will not harm, alter or adversely affect the environmental integrity of the inspected areas."

La. Crawfish Producers Ass'n – West v. Mallard Basin, Inc. 2015 U.S. Dist. LEXIS 163230 (W.D. La. Dec. 4, 2015)

Proportionality analysis:

"[T]he issues at stake with respect to the plaintiffs' NEPA claim are extremely important not only to the plaintiffs but to all citizens who visit and enjoy the Atchafalaya Basin area and the discovery appears essential for the resolution of the plaintiffs' NEPA claim. While the defendants have, or have had, access to the area sought to be inspected, the plaintiffs do not enjoy that same access. Moreover, there has been no showing that the parties' (or more specifically the defendants') resources are insufficient to accommodate the plaintiffs' request or that the requested discovery will cause the defendants any expense, much less any undue expense. There has been no showing by the private defendants, who ultimately may bear the burden of any "logistical difficulties in transporting the proposed group" cited by the federal defendants, that the burden of the plaintiffs' requested discovery outweighs its likely benefit."

Rule 26(b)(1) Scope of Discovery

Deleted from Rule 26(b)(1):

— ~~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).~~

Wertz v. GEA Heat Exchangers, Inc., 2015 U.S. Dist. LEXIS 167947 (M.D. Pa. Dec. 16, 2015)

The court allowed 1 additional deposition beyond the presumptive limit of 10. But it also said the following with respect to the liberal scope of discovery under Rule 26(b)(1):

"Moreover, **discovery need not be confined to items of admissible evidence but may encompass that which appears reasonably calculated to lead to the discovery of admissible evidence**."

Elliott v. Superior Pool Prods., LLC, 2016 U.S. Dist. LEXIS 293 (C.D. Ill. Jan. 4, 2016)

A pro se plaintiff brought this suit. Its requests for production were denied but so were the defendant's requests. Yet the court wrote:

"In this opinion, the word 'relevance' is used as it pertains to discovery and not admissibility in evidence. Hence, **when the terms "relevant" or "relevancy" are used in this order and opinion, they refer to the requirement that the request must be reasonably calculated to lead to discovery of admissible evidence**."

Green v. Cosby, 2015 U.S. Dist. LEXIS 173475 (D. Mass. Dec. 31, 2015)

A pro se plaintiff served as subpoena that was quashed. Nonetheless, the court quoted from *In re New England Compounding Pharmacy, Inc. Products Liab. Litig.*, 2013 WL 6058483, at *4 (D. Mass. Nov. 13, 2013):

"**Rule 26(b) permits** discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . or **discovery of any information that appears reasonably calculated to lead to the discovery of admissible evidence**."

Reasonably Calculated?

All of these courts cited to new Rule 26(b)(1) but did not note that the "reasonably calculated" text was removed from Rule 26(b)(1).

It never had anything to do with document production or the scope of discovery. It was added in 1946 to address hearsay objections in depositions.

La. Crawfish Producers Ass'n – West v. Mallard Basin, Inc. 2015 U.S. Dist. LEXIS 163230 (W.D. La. Dec. 4, 2015)

Motion to compel entry onto land for an inspection in connection with plaintiffs' claim under the National Environmental Policy Act granted:

"As amended, effective December 1, 2015, Rule 26(b)(1) permits broad discovery of 'any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. . . .' Rule 26(b)(1).1 **The term 'relevant' in Rule 26 is 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'** *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

Green v. Cosby, 2015 U.S. Dist. LEXIS 173475 (D. Mass. Dec. 31, 2015)

A pro se plaintiff served as subpoena that was quashed. But to get there, the court quoted from *In re New England Compounding Pharmacy, Inc. Products Liab. Litig.*, 2013 WL 6058483, at *4 (D. Mass. Nov. 13, 2013) which quoted also from *Oppeheimer Fund*:

"As the Supreme Court has instructed, because discovery itself is designed to help define and clarify the issues, the limits set forth in **Rule 26 must be construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case**."

Lightsquared Inc. v. Deere & Co., Cosby, 2015 U.S. Dist. LEXIS 166403 (S.D.N.Y. Dec. 10, 2015)

Where negligent misrepresentation and constructive fraud claims survived a motion to dismiss, the court overruled defendants' objection to producing documents from 2010-2012 because defendants were still discussing the material fact in issue in this time frame. On relevance, the court cited *Oppenheimer*:

While discovery no longer extends to anything related to the "subject matter" of the litigation, **relevance is still to be "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on" any party's claim or defense.** *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, (1978).

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978)

This case involved an order requiring defendants to pay $16,000 to identify members of a certified class who had bought shares in an investment fund and had been deceived by allegedly misleading prospectuses and annual reports.

At the time Rule 26(b)(1) provided: "**Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,** whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party…it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears a reasonably calculated to lead to the discovery of admissible evidence."

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978)

In relation to this standard, the Court wrote: "The key phrase in this definition – **'relevant to the subject matter involved in the pending action' -- has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.** See *Hickman* v. *Taylor*, 329 U.S. 495, 501 (1947)."

The Court then reversed saying plaintiffs' attempt to obtain class members' names and addresses was not relevant as defined above.

But what was the "See" reference to *Hickman v. Taylor*?

Hickman v. Taylor, 329 U.S. 495 (1947)

What *Hickman v. Taylor* says at page 501:

"The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."

What was Justice Powell in *Oppenheimer* referring to?

Relevant to Subject Matter?

Oppenheimer relied on "relevant to subject matter" but:

In 2000, Rule 26(b)(1) was amended to limit discovery to information relevant to a claim or defense. Information relevant to the subject matter required a showing of good cause.

In 2015, Rule 26(b)(1) eliminated "relevant to subject matter" from the scope of discovery.

Rule 37(e) Failure to Preserve

(e) *Failure to Preserve Electronically Stored Information*. 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

Rule 37(e) Failure to Preserve

(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.

CAT3, LLC v. Black Lineage, Inc. 2016 U.S. Dist. LEXIS 3618 (S.D.N.Y. Jan. 12, 2016)

- Intentional alteration of emails to change the domain name in email addresses (done to support plaintiffs' argument that defendant was aware of plaintiffs' trademark as of the date of the altered emails).
- Discovered when defendants' copies of the same emails showed different domains in the addresses of recipients.
- Rule 37(e) was applicable, but if not applicable (because the original emails were found), then inherent authority is available.

CAT3, LLC v. Black Lineage, Inc. 2016 U.S. Dist. LEXIS 3618 (S.D.N.Y. Jan. 12, 2016)

- M.J. Francis decided that clear and convincing evidence was the standard of proof.
- He found that defendants met that standard through a forensic expert's testimony that he found the originals of the altered emails, which had been deleted but left a digital footprint, and that the alteration had to be intentional.
- Intentional deletion of emails to deprive defendants of the information satisfied Rule 37(e)(2).

CAT3, LLC v. Black Lineage, Inc. 2016 U.S. Dist. LEXIS 3618 (S.D.N.Y. Jan. 12, 2016)

- But dismissal or issuance of an adverse inference instruction is not a mandatory sanction under Rule 37(e) or inherent authority.
- "The sanction should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore 'the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'"

CAT3, LLC v. Black Lineage, Inc. 2016 U.S. Dist. LEXIS 3618 (S.D.N.Y. Jan. 12, 2016)

- Court precluded plaintiffs from relying upon their versions of the emails to demonstrate notice to the defendants of the use of the SLAMXHYPE mark.
- Court ordered plaintiffs to bear the costs, including reasonable attorneys' fees, incurred by defendants to establish plaintiffs' misconduct and in securing relief.

CAT3, LLC v. Black Lineage, Inc. 2016 U.S. Dist. LEXIS 3618 (S.D.N.Y. Jan. 12, 2016)

- "The relief outlined here satisfies the dictates of Rule 37(e)(2) and of principles of inherent authority not to impose unnecessarily drastic sanctions. Furthermore, it is also consistent with Rule 37(e)(1), as it is no more severe than is necessary to cure the prejudice to the defendants."

Questions?

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