A SUMMARY OF THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

by

KATHRYN CARNEY COLE, ESQ.

Farrell Fritz, P.C.
New York City

A Summary of the Proposed Amendments to the Federal Rules of Civil Procedure

By:
Kathryn C. Cole[1]

Amendments to certain of the Federal Rules of Civil Procedure (the "Rules") have been proposed by the body charged with overseeing the development of the Federal Rules -- The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Committee").[2] The proposed amendments originated during a 2010 conference at Duke University Law School that was intended to facilitate changes that would further the goals of the Rules: "to secure the just, speedy, and inexpensive determination of every action."[3] At its June meeting, the Committee unanimously approved for publication and public comment the proposed amendments to the Rules. Subject to Supreme Court approval and inaction by Congress, the proposed amendments will become effective on December 1, 2015.

Generally speaking, the proposed amendments reflect efforts to: (1) encourage early and effective judicial case management in civil litigations; (2) enhance the means of keeping the discovery proportional to the underlying action; and (3) advance cooperation among counsel to a given litigation. Draft versions of the proposed amended rules are available for public comment through February 15, 2014.[4] This article will not address each proposed amendment but instead summarizes below some of the more noteworthy proposals for individuals practicing in the Federal courts.

Amendments to Effectuate Early and Effective Case Management

The proposed amendments to Rules 4, 16, 26 and 34 seem to reflect a growing perception that the early stages of a civil litigation often take too long. This, in turn, can result in unnecessary costs associated with the litigation. As a result, a number of amendments designed to accelerate the litigation process have been proposed. Included in these proposals is the Committee's recommendation to revise Rule 4(m) such that the time to serve the summons and complaint would be shortened from 120 days to 60 days. Irrespective of

---

[1] Kathryn Carney Cole is Counsel at the law firm of Farrell Fritz, P.C. in New York, where she concentrates on complex commercial litigation. She can be reached at kcole@farrellfritz.com From 2004-2006, Ms. Cole was a law clerk to the Honorable Richard C. Wesley, who is at Judge at the United States Court of Appeals for the Second Circuit.

[2] Specifically, amendments to each of Civil Rule 1, 4, 16, 26, 30, 31, 33, 34, 36 and 37 have been proposed.

[3] See more at: http://law.duke.edu/news/duke-lends-name-amendment-proposals-federal-rules-civil-procedure/#sthash.z4evD8Il.dpuf

[4] A copy of the draft amendments are available at: http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf

the amendment, the Court would retain the right to extend the amount of time in which the Plaintiff must effectuate service if the Plaintiff shows good cause.[5]

Another Rule 16(b) is subject to proposed amendments. Currently, Rule 16(b)(2) provides that a judge must issue the scheduling order within the earlier of 120 days after any defendant has been served or 90 days after any defendant has appeared.[6] The Committee is recommending, however, that a judge issue the scheduling order within the earlier of "90 days after any defendant is served or 60 days after any defendant appears" although the judge may extend the time on finding good cause for delay.[7] Additionally, current Rule 16(b)(1)(B) authorizes the issuance of a scheduling order after receipt of the parties' Rule 26(f) report or after consulting "at a scheduling conference by telephone, mail, or other means."[8] A proposed amendment, however, strikes "mail, or other means" and instead proposes the conference occur by a direct communication including face-to-face, by telephone or by other means of simultaneous communication.[9] Finally, there is also pending a proposal to add a new Rule 16(b)(3)(v), permitting a scheduling order to "direct that before moving for an order relating to discovery the movant must request a conference with the court."[10] While similar provisions can often be found in a Judge's local rules – especially here in the Eastern and Southern Districts of New York – this amendment would harmonize the authority of the federal bench to require such a conference which, it is believed, could prevent unnecessary, costly and time-consuming discovery motion practice.

Rule 26 is also subject to a number of proposed amendments including providing for a party to request certain limited disclosure before the Rule 26(f) conference. Specifically, the proposal at Rule 26(d)(1) allows for Rule 34 Requests to Produce to be made in advance of the Rule 26(f) conference in order to facilitate a meaningful 26(f) conference by allowing for consideration of actual – as compared to hypothetical – discovery demands. Notwithstanding the early request for disclosure, under the proposal the requests would be deemed served at the first Rule 26(f) conference,[11]with the time to respond 30 days thereafter.[12]

---

[5] Additionally, the proposed amendment is not intended to apply to service in a foreign country under current Rule 4(f) or 4(j)(1), or to service of a notice in a condemnation action pursuant to Rule 71.1(d)(3)(A).

[6] Rule 16(b).

[7] See http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf at pgs. 261, 285.

[8] Fed. R. Civ. P. 16(b)(1)(B).

[9] http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf at pgs. 262, 284.

[10] *Id.* at 286.

[11] See proposed 26(d)(2)(B) available at: http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf, pg. 294.

[12] See Fed. R. Civ. P. 34(b)(2)(A).

Amendments to Ensure Proportionality in the Use of Discovery:

There are a number of proposed amendments that seek to promote the responsible use of discovery in a way that is proportional to the needs of a specific case. Specifically, the Committee has recommended revising the scope of discovery defined in Rule 26(b)(1) "by transferring the analysis required by present Rule 26(b)(2)(C)(iii) to become a limit on the scope of discovery, so that discovery must be

> proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its benefit.[13]

Current Rule 26 allows a party to pursue discovery requests that are "reasonably calculated to lead to the discovery of admissible evidence."[14] That broad language, which can lead to an unnecessarily wide scope of permissible discovery, is a significant factor in the rise of discovery costs. Another proposed change to Rule 26(c)(1)(B) is to include an explicit recognition of the Court's present authority to enter a protective order allocating the expenses of discovery.

Additional proposed amendments directed at proportionality in discovery include:

> reducing the presumptive number of depositions from 10 to five (Rules 30 and 31);
> limiting the presumptive duration of each deposition from one day consisting of seven hours to one day consisting of six hours (Rule 30(d)(1));
> reducing the number of interrogatories from "no more than 25 written interrogatories, including all discrete subparts" to "no more than 15…" (Rule 33(a)(1));
> adding a presumptive limit of 25 to requests to admit – which currently have no presumptive limitation;[15]
> requiring that the grounds for objecting to a request for production be stated with specificity (Rule 34(b)(2)(B));
> requiring that an objection to a request for production state whether any responsive materials are being withheld on the basis of that objection (Rule 34(b)(2)(C)); and
> adding that if a party elects to produce materials rather than permit inspection in response to a request for production, directing that party to state that copies will be produced, and production will be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response. The current rule does not indicate when production must occur.

---

[13] http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf at pg. 265.

[14] Fed. R. Civ. P. Rule 26(b)(1).

[15] Expressly exempted from the proposed limitation, however, are requests to admit the genuineness of documents. *Id.* at 269. This presumptive limitation may be increased by stipulation of the parties or court order. *Id.*

Proposed Amendments Aimed at Increasing Cooperation Between Attorneys

The Committee has also proposed a number of amendments intended to increase cooperation among attorneys. Indeed, the Committee indicated that hyper-adversarial behavior often increases litigation costs quickly and exponentially.[16] An initial proposal is a modest addition to Rule 1 that would state the rules "are employed by the court and the parties" to demonstrate that the parties are to share in the responsibility for achieving the aspirations espoused in Rule 1.[17]

Additional amendments are suggested for Rule 37(e). Specifically, one proposal focuses upon the failure to preserve information and aims to cloak the court with specific curative measures and sanctions. As proposed, Rule 37(e) would provide conformity throughout the federal courts by allowing certain specific sanctions, certain specific curative measures or an adverse inference jury instruction only where the party's actions caused substantial prejudice and were willful or in bad faith, or where they "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation."[18] The proposed revisions to Rule 37 also enunciate factors for the court to consider in determining if a party failed to fulfill its preservation obligations, if that failure was willful or in bad faith. These factors include:

> The extent to which the party was on notice that litigation was likely and that the information would be discoverable;
> The reasonableness of the party's efforts to preserve the information;
> Whether the party received a request to preserve information, whether the request was clear and reasonable and whether the person who made it and the party consulted in good faith about the scope of preservation;
> The proportionality of the preservation efforts to any anticipated or ongoing litigation; and
> Whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.[19]

As the foregoing summary illustrates, many of the proposed amendments are quite far reaching and could have a substantial impact on federal practitioners, particularly insofar as discovery practices are concerned.

---

[16] *Id.*

[17] *Id.* at pgs. 270, 281.

[18] *Id.* at pgs. 272-73, 315.

[19] *Id.* at pgs. 316-17.