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### Ch-Ch-Ch-Ch Changes: Turn and Face the Strange...2015 Amendments to the FRCP

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### **FEDERAL PRACTICE NEWS**

#### **Rules Changes**

On Dec. 1, 2015, the first changes to the Federal Rules of Civil Procedure since 2010 went into effect. Professor Steven Baicker-McKee describes and discusses those changes.

### **Ch-Ch-Ch-Ch Changes: Turn and Face the Strange...2015 Amendments to the FRCP**

*By Steven Baicker-McKee*

On Dec. 1, 2015, a set of amendments to the Federal Rules of Civil Procedure took effect. These amendments were extremely controversial, drawing over 2,000 comments during the public comment periods.<sup>1</sup> Plaintiffs' lawyers believe the amendments are just the latest move by the Supreme Court to protect big corporate defendants and limit plaintiffs' access to the courts.<sup>2</sup> Defendants' lawyers believe the amendments do not go far enough in curbing disproportionate and abusive discovery.<sup>3</sup> As is so often the case, the truth probably lies somewhere in the middle. Only time will tell, however, as we wait to see how the courts interpret these new provisions.

This article will provide a summary of the most controversial of the amendments, as well as some of the provisions that did not draw as much attention, but yet have the potential for significant change in federal court practice. It is not intended to be an exhaustive catalog of each amended provision—but you can find the text of each amended rule together with detailed commentary in the [2016 Edition of the Federal Civil Rules Handbook](#), published by Thomson Reuters. Additionally, I and a co-author of that treatise have written some blog posts on the amendments, which you can find [here](#).

#### **Rule 1**

Let's start at the very beginning, with the amendment to Rule 1.<sup>4</sup> Rule 1 contains the iconic, and largely aspirational, language requiring that the rules be construed to secure the "just, speedy, and inexpensive determination of every action and proceeding."<sup>5</sup> The amendment expressly imposes that duty on the parties, whereas the prior language could be read to apply only to the courts.

This change may turn out to be minor, and readers may wonder why it is on this list of important changes. Sanctions, or at least the potential for sanctions, is the reason. Although the Advisory Committee Notes—not binding, but persuasive authority for construing the amendments<sup>6</sup>—suggest that the committee did not intend to create a new source of sanctions, such as a Motion for Sanctions for Violations of Rule 1,<sup>7</sup> it would not be surprising to see motions for sanctions under other rules reference violations of Rule 1. For example, a party might move for involuntary dismissal under Rule 41(b)<sup>8</sup>—which lists failure to follow the rules as one basis for involuntary dismissal—asserting that the opposing party had repeatedly violated Rule 1 by acting in a way that frustrated the speedy or inexpensive determination of the case.

#### **Let's Get this Party Started**

The 2015 amendments contain a couple of changes designed to get the litigation process moving more quickly at the outset. The first is an acceleration in the time for service of the complaint and summons. **Rule 4** used to allow up to 120 days from the date of filing to effectuate service, and that period is now reduced to 90 days.<sup>9</sup> While 90 days is typically more than enough time to serve the defendants, it might become a challenge if the plaintiff attempts the

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waiver of service process and the defendant declines. That process could consume a meaningful portion of the 90-day period, leaving the plaintiff squeezed for time. Anticipating this, the amendment also adds language allowing the court to expand the time for service for “good cause.”<sup>10</sup>

The second is in **Rule 16**, and it decreases the time for the court to hold the initial status conference from 120 days to 90 days after a defendant has been served.<sup>11</sup> This amendment not only advances the time for the initial status conference, it has the collateral effect of accelerating discovery as well. Parties may not serve discovery until they have conducted their Rule 26(f) discovery conference, which typically occurs approximately 14 days before the court’s initial Rule 16 conference.<sup>12</sup> Thus, discovery is likely to commence earlier under the amended rules.

The final acceleration occurs in amendments to **Rules 26** and **34** allowing for early service of document requests.<sup>13</sup> In order to make the Rule 26(f) discovery conference and the initial Rule 16 conference more productive, parties may now serve Rule 34 document requests before the Rule 26(f) conference, as long as more than 21 days have elapsed since service of the summons and complaint on the defendant.<sup>14</sup> The purpose of this early discovery is to allow parties to identify potential problems with document production (and particularly production of Electronically Stored Information, or ESI) and address those problems earlier in the process.<sup>15</sup> Note, however, that the response is not accelerated—it is still due 30 days after the Rule 26(f) conference.<sup>16</sup>

### **What’s All this Fuss About Proportionality?**

One of the amendments that drew the most fire from those submitting comments was the revision addressing proportionality—the balancing of the benefits and burdens of discovery. The concept of proportionality has been in the rules since 1983, but the amendment changes proportionality from a limitation on discovery to part of the core definition of the scope of discovery.<sup>17</sup>

Prior to the amendments, the scope of discovery, found in **Rule 26(b)(1)** was “nonprivileged matter relevant to any party’s claim or defense.”<sup>18</sup> A separate provision required the court to limit discovery if the burden or expense of the proposed discovery outweighs its likely benefit.<sup>19</sup> Worried that courts were not giving sufficient consideration to proportionality, the 2015 amendment changed the definition of the scope of discovery to be “nonprivileged matter that is relevant to any party’s claim or defense *and is proportional to the needs of the case ...*”<sup>20</sup>

Besides moving the proportionality language, the amendment also flips the order of two of the listed factors for evaluating proportionality. Prior to the amendment, the “amount in controversy” was the first listed factor. The amendment puts “the importance of the issues at stake in the action” first, to underscore that the amount in controversy is not the only or driving consideration.<sup>21</sup>

Again, readers might be tempted to ask why all the angst about this amendment—it merely moves a concept already found in Rule 26(b) to a different subsection of Rule 26(b), retaining the same factors in a slightly different order. The difference, one might argue, is that before the amendments, the core definition of the scope of discovery was very broad, and parties then had to work to limit it. After the amendment, the core definition has become more narrow.

Plaintiffs’ lawyers worry that proportionality will become a new tool that defendants increasingly use to avoid discovery. The fear is that parties responding to discovery will routinely object to requests based on proportionality considerations, and the burden will then shift to the requesting party to file a motion to compel (and perhaps the burden of proving proportionality will shift from the responding party to the requesting party as well). This will lead to more motion practice, which translates to more cost and delay—the exact opposite of the articulated aim of the amendments.

Further narrowing of the scope of discovery occurred when the amendments eliminated another provision of Rule 26(b)(1). The old rule allowed the court to expand the scope of discovery from matter relevant to “a party’s claim or defense” to matter relevant to “the subject matter involved in the action;” in other words, relevant to a claim or

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defense that a party is seeking to develop but that is not yet pleaded. The Advisory Committee Notes suggest that this provision was seldom invoked, so they decided to eliminate it.<sup>22</sup>

### **Ask and Ye Shall Pay**

Those seeing an alarming restriction on discovery were also concerned about an amendment to **Rule 26(c)** covering protective orders. Since the Supreme Court's *Oppenheimer Fund* case in 1979,<sup>23</sup> it has been settled that a court may shift the costs of discovery from the responding party to the requesting party. The 2015 amendment to Rule 26(c) simply codified this case law, making that authority explicit (and explicitly authorizing parties to seek protective orders shifting those costs).<sup>24</sup> A contingent of the bar—primarily plaintiffs' lawyers—believe that this express authority will spur more motions to shift costs and make courts more likely to grant those motions.<sup>25</sup> However, the Advisory Committee Notes emphasize that the amendment “does not imply that cost-shifting should become a common practice.”<sup>26</sup>

### **I Object. But I Might Not Really Mean It.**

One amendment that has not drawn as much attention as some of the more controversial amendments, but which has the potential to be extremely disruptive, is an amendment to **Rule 34**.<sup>27</sup> Rule 34 received a number of amendments, some not particularly significant. For example, prior to December 1, 2015, there was a curious lack of parallel language between the provisions governing objections to interrogatories and objections to document requests. Objections to interrogatories were required to be stated with specificity under Rule 33, but Rule 34 did not impose that requirement expressly for objections to document requests.<sup>28</sup> Courts had long construed both rules similarly in terms of the manner of stating objections, however.<sup>29</sup> That disparity has been remedied, and Rule 34 now also requires that objections to document requests be stated with specificity.<sup>30</sup> Likewise, Rule 34 technically requires the responding party to make responsive documents available for inspection, but in practice parties often simply provide copies of the responsive documents.<sup>31</sup> That practice is now officially sanctioned.<sup>32</sup>

The more significant change is found in a new sentence added to **Rule 34(b)(2)(C)**, which reads, “An objection must state whether any responsive materials are being withheld on the basis of that objection.”<sup>33</sup> The purpose of the rule amendment is laudable—to let the requesting party know whether it is worth the cost of contesting the objection.<sup>34</sup> If the responding party did not withhold any documents on the basis of an objection, it may not make sense to challenge the objection. Unnecessary motion practice can thus be avoided, reducing cost and delay.

Note that the rule does not require a listing of the documents that a party is withholding—the equivalent of a privilege log.<sup>35</sup> Rather, a simple statement or description of the documents withheld will suffice.<sup>36</sup> For example, a responding party might object to a request that has no time parameters as overly broad and burdensome, then advise the requesting party that the responding party is withholding documents more than ten years old. In that circumstance, the rule is straightforward, fair, and easy to apply.

In other circumstances, however, the rule might prove thorny. For example, if a request is vague or ambiguous, and susceptible to multiple meanings, the responding party may have to attempt to discern the various potential meanings of the request and conduct a document review or analysis to determine if it has documents responsive to one of the alternative meanings that it is withholding on the basis of the objection. This could be a difficult, time-consuming, and expensive.

### **Oops! I Just Deleted All the Emails**

One of the more dramatic changes occurred in **Rule 37(e)**.<sup>37</sup> Prior to Dec. 1, 2015, Rule 37(e) contained a narrow safe harbor for the destruction of ESI through the routine operation of a computer system. Courts addressed general questions of spoliation either through their general powers over cases on their dockets or, if they had entered a

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preservation order, through their contempt powers.<sup>38</sup> None of the Federal Rules of Civil Procedure expressly addressed spoliation sanctions. As a consequence, the cases were not consistent on the standards for spoliation sanctions, with some courts imposing them for mere negligence and others requiring a heightened degree of misconduct.

With respect to ESI, “that was then, and this is now.” New Rule 37(e) creates a national, uniform standard for imposition of spoliation sanctions for failure to preserve ESI.<sup>39</sup> As a starting point, the rule establishes three prerequisites for any sanctions. A judge may not impose any sanctions at all related to spoliation of ESI unless: 1) there was a duty to preserve the evidence (which can arise before litigation is filed so long as it was reasonably anticipated); 2) the party failed to take reasonable steps to preserve the evidence (the comments indicate that perfection is not the expected standard, and that loss through an accident might not be sanctionable); and 3) the information cannot be restored or replaced through additional discovery.<sup>40</sup>

If those three prerequisites are satisfied, there are two levels of sanctions available to the judge. If the judge finds prejudice to the other party, the judge may impose measures “no greater than necessary to cure the prejudice.”<sup>41</sup> Such measures might include precluding the guilty party from using certain of its evidence or making certain arguments.<sup>42</sup> It might also include certain instructions to the jury, but explicitly may not include the very harsh sanction of an adverse inference instruction to the jury—telling the jury that they may, or must, conclude that the lost evidence would have been harmful to the party failing to preserve it.<sup>43</sup>

The most draconian sanctions, such as the adverse inference instruction sanction or dispositive sanctions like dismissal or judgment, are reserved for the most culpable conduct. If the court finds that the party failed to preserve ESI for the specific purpose of depriving another party of the use of that information in the litigation, then the court may impose those severe sanctions.<sup>44</sup>

### Goodbye Forms

Lastly, the 2015 amendments abrogated **Rule 84**, which was the rule that established and blessed the federal forms. Rule 84 previously stated, in its entirety, “The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”<sup>45</sup>

Thus, the forms in the Appendix were deemed sufficient under the rules—anyone using the forms could rest assured that they were unassailable in terms of the sufficiency of the form itself (leaving aside the content, of course).<sup>46</sup> Now, while the forms are still available online as a resource, and while many district and appellate courts sponsor their own websites with additional exemplar forms, these forms no longer have any assurance of sufficiency.

The Advisory Committee Notes state that the forms are unnecessary, that their original purpose—namely, illustrating the type of simplicity and brevity the Rules envisioned for federal practice—has long since been fulfilled.<sup>47</sup> Others attribute a different explanation for the forms’ impending departure: frustration with the perceived dissonance between the austerity of the official pleading forms and the U.S. Supreme Court’s opinions in *Twombly* and *Iqbal*.<sup>48</sup>

Following abrogation, only two official forms survived, both repositioned to Rule 4 (namely, a form that requests, and a form that consents to, a waiver of service of a summons).<sup>49</sup>

### Only Time Will Tell

Will the amendment moving proportionality from Rule 26(b)(2) into Rule 26(b)(1) effect a substantial change on the frequency and vigor with which the parties and the courts apply proportionality? Will the codification of the authorization to shift fees to the requesting party increase the number of applications for fee shifting or the frequency with which the courts grant such applications? Will the change to Rule 1 spur motions for sanctions invoking the new language?

Only time will tell. As of January 21—approximately 52 days after the effective date of the amendments, a quick Westlaw search suggests that there are already 24 opinions addressing the amendments. Remember that the



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amendments affect not only newly filed cases, but pending cases as well, unless the court “determines that applying them in a particular action would be infeasible or work an injustice.”<sup>50</sup>

A cursory survey of those cases suggests that proportionality and the amendments to Rule 26(b)(1) are drawing the most motion practice. Of the 24 cases, 20 focused on the amendments to Rule 26(b)(1), 3 focused on the amendments to Rule 1, 1 addressed the amendments to Rule 37(e), and 1 addressed the amendments to Rule 4(m).<sup>51</sup> Interestingly, a search of the same date range, but one year earlier, turned up 20 cases citing to the proportionality provision then located in Rule 26(b)(2)—precisely the same number citing to the proportionality provision in the amended rule. Thus, based on this non-scientific survey lacking any statistical significance, the volume of cases does not appear to have increased as a result of the amendments. Now, whether the courts are granting these motions with any greater frequency is a different question, but that will have to wait for another article.

Mr. Baicker-McKee is an Assistant Professor of Law, Duquesne University School of Law, following a complex litigation practice of almost 25 years at Babst Calland, where he remains of counsel. Professor Baicker-McKee is co-author of the *Federal Civil Rules Handbook*, a leading work for lawyers in federal court, and *A Student's Guide to the Federal Rules of Civil Procedure*, used in US law schools across the country. He is also co-author of *Learning Civil Procedure*, a law school text book, and *Mastering Multiple Choice—Federal Civil Procedure*, a study aid for the bar examination and for law students, and is a co-author/editor of the *Federal Litigator*, a monthly publication summarizing developments in federal practice. Professor Baicker-McKee is “AV”-rated by Martindale-Hubbell, named a “Key Author” by West Publishing Company, regularly selected as a Pennsylvania “Super Lawyer,” elected to the Academy of Trial Lawyers, and recognized in *The Best Lawyers of America*, and was voted Professor of the Year by the students at Duquesne.

- 1 See, e.g., Report of the Advisory Committee on Rules of Civil Procedure, April 2014, available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2014>.
- 2 See, e.g., Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083 (2015).
- 3 See, e.g., John J. Jablonski & Alexander R. Dahl, *The 2015 Amendments To The Federal Rules Of Civil Procedure: Guide To Proportionality In Discovery And Implementing A Safe Harbor For Preservation*, 82 DEF. COUNS. J. 411 (2015).
- 4 FED. R. CIV. P. 1.
- 5 *Id.*
- 6 See, e.g., *Tome v. United States*, 513 U.S. 150, 159, 115 S.Ct. 696, 702, (1995).
- 7 FED. R. CIV. P. 1 advisory comm. notes to 2015 amendments.
- 8 FED. R. CIV. P. 41(b).
- 9 FED. R. CIV. P. 4(m).
- 10 *Id.*
- 11 FED. R. CIV. P. 16(b)(2).
- 12 FED. R. CIV. P. 26(f)(1).
- 13 FED. R. CIV. P. 26(d)(2); 34(b)(2)(A).
- 14 FED. R. CIV. P. 26(d)(2).
- 15 FED. R. CIV. P. 26(d)(d) and 34(b)(2)(A) advisory comm. notes to 2015 amendments.
- 16 FED. R. CIV. P. 34(b)(2)(A).
- 17 FED. R. CIV. P. 26(b)(1) advisory comm. notes to 2015 amendments.
- 18 FED. R. CIV. P. 26(b)(1).
- 19 FED. R. CIV. P. 26(b)(2).
- 20 FED. R. CIV. P. 26(b)(1) advisory comm. notes to 2015 amendments.
- 21 *Id.*
- 22 *Id.*
- 23 *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, 98 S. Ct. 2380, 2393 (1978).
- 24 FED. R. CIV. P. 26(c) advisory comm. notes to 2015 amendments.
- 25 See, e.g., Moore, *supra* note 2, at 1121-22.
- 26 FED. R. CIV. P. 26(c) advisory comm. notes to 2015 amendments.
- 27 FED. R. CIV. P. 34.
- 28 Compare FED. R. CIV. P. 33(b) to FED. R. CIV. P. 34(b)(2)(B).
- 29 FED. R. CIV. P. 34(b)(2)(B) advisory comm. notes to 2015 amendments.
- 30 *Id.*
- 31 *Id.*
- 32 FED. R. CIV. P. 34(b)(2)(B).
- 33 FED. R. CIV. P. 34(b)(2)(C).
- 34 FED. R. CIV. P. 34(b)(2)(C) advisory comm. notes to 2015 amendments.
- 35 *Id.*
- 36 *Id.*
- 37 FED. R. CIV. P. 37(e).
- 38 See, e.g., Baicker-McKee, Janssen, and Corr, *Federal Civil Rules Handbook*, Pt. III, Rule 37 (2015 ed.).
- 39 FED. R. CIV. P. 37(e) advisory comm. notes to 2015 amendments. Note that the original proposed amendment applied to spoliation of all forms of information, ESI, paper, or otherwise. Based on public comments, the Advisory Committee narrowed the scope to ESI, observing that public comments suggested that the existing approach was working adequately for paper documents.
- 40 FED. R. CIV. P. 37(e).
- 41 FED. R. CIV. P. 37(e)(1).
- 42 FED. R. CIV. P. 37(e)(1) advisory comm. notes to 2015 amendments.
- 43 *Id.*
- 44 FED. R. CIV. P. 37(e)(2).
- 45 FED. R. CIV. P. 84.
- 46 See, e.g., Baicker-McKee, Janssen, and Corr, *Federal Civil Rules Handbook*, Pt. III, Rule 84 (2015 ed.).
- 47 FED. R. CIV. P. 84 advisory comm. notes to 2015 amendments.
- 48 See, e.g., Sara Fevurly, *Down Go the Forms: The Abrogation of Rule 84 and the Official Forms of the Federal Rules of Civil Procedure*, 64 U. KAN. L. REV. 325 (2015).
- 49 FED. R. CIV. P. 4(d).
- 50 FED. R. CIV. P. 86(a)(2)(B).
- 51 Note that these add up to 25 because one case spent considerable time on the amendments to both Rule 26(b)(1) and Rule 1.

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### Rules Changes *(continued)*

The U.S. District Court for the Western District – updated its Patent Jury Instructions on Dec. 5, 2015. See [Model Patent Jury Instructions](#).

### Hon. L. Felipe Restrepo, U.S. Court of Appeals

By a vote of 82-6 the U.S. Senate on Jan. 11, 2016 confirmed Judge Restrepo's appointment. The roll call vote results are posted here: [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=114&session=2&vote=00001](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=2&vote=00001). He received his commission on Jan. 13, 2016.

### Status of Judicial Vacancies

#### U.S. Court of Appeals, Third Circuit

- There is one vacancy.

#### U.S. District Court, Western District of PA

- On July 30, 2015, President Obama nominated Judge Susan P. Baxter, Judge Robert J. Colville and Judge Marilyn J. Horan to fill the three vacancies in the United States District Court for the Western District of Pennsylvania. A Senate Judiciary Committee hearing on these nominees was held Dec. 9, 2015. Although the Judiciary Committee on January 28 approved Judge Baxter and Judge Horan for a full Senate vote, the Committee did not place Judge Colville on that week's agenda.

#### U.S. District Court, Eastern District of PA

- On July 30, 2015, President Obama nominated Judge John M. Young to fill the vacancy in the United States District Court for the Eastern District of Pennsylvania. A Senate Judiciary Committee hearing was held Dec. 9, 2015.
- There is one vacancy (due to Judge Restrepo's elevation to the Court of Appeals).

### CASE SUMMARIES

Summaries of notable Third Circuit and Pennsylvania district court decisions issued between October and December 2015 that involved issues of federal practice or provided a particularly thorough discussion of applicable law. All cases are linked to Casemaker.

#### Third Circuit Precedential Opinions

*Witasick v. Minnesota Mutual Life Ins. Co.*, 803 F.3d 184 (3d Cir. 2015) (Insurance/Jurisdiction) – After discussing whether certain types of docket entries made via the CM/ECF system can satisfy Rule 58's "separate document" requirement (text entries-usually; others-no) and whether the "contingent" notice of appeal filed by the pro se appellant conferred appellate jurisdiction (yes), the Court of Appeals affirmed the district court's Rule 12(b)(6) dismissal of Witasick's claims against his insurer because a prior settlement agreement between the parties unambiguously released all claims and contained a covenant not to sue.

*U.S. v. Foy*, 803 F.3d 128 (3d Cir. 2015) (Criminal Law & Procedure) – The Eastern District of Pennsylvania denied Foy's Rule 60(d)(3) motion seeking to vacate an order of civil commitment issued by the U.S. District Court for the Western District of Missouri. The Court of Appeals evaluated whether the district court had jurisdiction under (1) 18 U.S.C. § 4247(h); (2) Fed. R. Civ. P. 60(b); (3) Fed. R. Civ. P. 60(d); (4) 28 U.S.C. § 2255; or (5) 28 U.S.C. § 2241. Because none of these bases gave the district court jurisdiction to determine if it should grant the motion (because the district court did not issue the original commitment order and because petitioner was not serving a sentence), the Court of Appeals vacated the district court's denial and remanded for a determination of whether the district court should transfer the case to Western District of Missouri pursuant to 28 U.S.C. § 1631.

*Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015) (Constitution) – Plaintiffs sued the City of New York, asserting that through the NYPD, the City conducted since January 2002 a wide-ranging surveillance program that singled out, on the basis of religion, those in the Muslim community "to monitor the lives of Muslims, their