

## ELECTRONIC DISCOVERY &amp; INFORMATION GOVERNANCE

## Tip of the Month



## Retroactivity of the Proposed Amendments to the Federal Rules of Civil Procedure

### Scenario

A manufacturing company is a defendant in a case that is currently in discovery. The general counsel knows that the proposed amendments to the Federal Rules of Civil Procedure ("FRCP") are set to become effective on December 1, 2015, and wonders whether the revised rules will apply to the pending case.

### Overview of the 2015 FRCP Amendments

The proposed FRCP amendments change several rules that govern case management and discovery, most importantly:

- *Rule 1*: This seldom-invoked provision urges use of the Rules "to secure the just, speedy, and inexpensive determination" of court proceedings. The new Rule 1 specifies that the court and the parties should interpret the rules to secure just, speedy and inexpensive outcomes.
- *Rule 4*: Under new Rule 4(m), plaintiffs now have 90 days, not 120 days, to serve a defendant after filing the complaint. The revision retains the rule that a court may extend the time for service upon a showing of good cause.
- *Rule 16*: To encourage direct communication, new Rule 16(b)(1)(B) omits the option of holding scheduling conferences "by telephone, mail, or other means." Also, new Rule 16(b)(2) reduces the time for a judge to issue such an order setting a Rule 16 conference, from 90 days after service (down from 120) or 60 days after an appearance by a defendant (down from 90), whichever is earlier.
- *Rule 26*: Rule 26(b)(1), which defines the scope of discovery, sees substantial changes that, in general, narrow permissible discovery. New Rule 26(b)(1) now requires that discovery requests be "**proportional** to the needs of the case" (emphasis added) and drops the broad statement that a discovery request may be "reasonably calculated to lead to the discovery of admissible evidence." (New amendments to Rules 30, 31, and 33 all refer back to these changes.) New Rule 26(c)(1)(B) also empowers courts to order the allocation of discovery costs. Further, parties should now discuss preservation of evidence in their discovery plan under new Rule 26(f)(3)(C). Finally, new Rule 26(d)(2) allows parties to serve document requests before the scheduling conference that are to be "considered to have been served at the first Rule 26(f) conference."

- *Rule 34*: Under new Rule 34(b)(2)(B), responses to production requests now must state “with specificity the grounds for objecting,” and state “whether any responsive materials are being withheld on the basis of that objection.”
- *Rule 37*: Under new Rule 37(e)(1), which relates to parties’ preservation obligations, a court’s power to impose sanctions for failure to preservation information are substantially reduced. Courts may only order “curative measures” based a finding that another party was prejudiced from losing the information. More severe sanctions, such as an adverse inference or the entry of default judgment, are permitted under proposed Rule 37(e)(2), but only when the court finds that a party “acted with the intent to deprive another party of the information’s use in the litigation.”

## **Retroactivity**

A key question is whether the new and revised rules apply in cases that have already been filed. The plain language of the Supreme Court’s April 2015 order that accompanied their transmittal to Congress suggests that, in some cases, they may not be retroactive. The order states that the new rules “shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.” The Supreme Court has included this language when submitting previous amendments to the FRCP to Congress.

However, in the past, courts have generally found that it is “just or practicable” to apply the new rules in all cases as soon as they are promulgated. Courts typically apply the new rules unless doing so would “work a manifest injustice” or prejudice one or both parties. For example, when assessing whether to apply the amendment to Rule 56 in 2011, the First Circuit cited the Supreme Court’s “just and practicable” language in deciding to apply the rule as amended, rather than the version of the rule in place when the case was originally filed.

Similarly, in 2004, a district court for the District of Northern Illinois had to decide whether the revised version of Rule 58 applied to a case initiated before adoption of the new rule in 2002. Relying on the same “just and practicable” statement issued with the amended rules, the court considered whether application of the revised rule would be “prejudicial or unjust.” Finding that “injustice would result” if the amended rule did not govern, the court applied the amended rule.

## **Conclusion**

The 2015 amendments to the Federal Rules of Civil Procedure bring about significant changes to the ways parties conduct discovery and cooperate on case management. Parties with cases pending in the federal courts should study the proposed changes, which may become operative in litigation that predates December 1, 2015, when the amendments will likely take effect. If the court presiding in a specific case finds that application of the rule changes will not bring about injustice or prejudice, it will likely enforce the rules as amended in a pending matter.

For inquiries related to this Tip of the Month, please contact Kim Leffert at [kleffert@mayerbrown.com](mailto:kleffert@mayerbrown.com) or Jeff VanDam at [jvandam@mayerbrown.com](mailto:jvandam@mayerbrown.com).

To learn more about Mayer Brown's [Electronic Discovery & Information Governance](#) practice, contact Michael E. Lackey at [mlackey@mayerbrown.com](mailto:mlackey@mayerbrown.com), Eric Evans at [eevans@mayerbrown.com](mailto:eevans@mayerbrown.com), Ethan Hastert at [ehastert@mayerbrown.com](mailto:ehastert@mayerbrown.com), or Edmund Sautter at [esautter@mayerbrown.com](mailto:esautter@mayerbrown.com).

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