Arkansas Association of Defense Counsel

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The Rules, They Are A Changin':

Part 1

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The Supreme Court of the United States has approved and sent to Congress several proposed amendments to the Federal Rules of Civil Procedure. Absent congressional action, those amendments will become law on December 1, 2015. Some of the changes are major, such as the amendments to the rules regulating discovery of electronically stored information. Others are minor. But they all attempt to foster quick and cost-efficient litigation. This two-part series will report on some of these proposed amendments. The first part will focus on changes to the rules on summonses, scheduling conferences, and requests for production. The second part will report on changes in discovery of ESI.

Rule 4. The new Rule 4(m) reduces the time for serving a defendant with process from 120 days to 90 days. This change will also shorten the time for amending a pleading that "changes the party or the naming of the party" under Rule 15(c)(1)(c).

Although the substantive changes to Rule 4 don't occupy much space on a page, the amended Rule will be much, much longer. There's a simple explanation for the longer rule. The Supreme Court has abrogated Rule 84, which advises that the "forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." The scrapping of Rule 84 means the scrapping of the Appendix. So now the text of Forms 5 and 6 (which deal with requests to waive service of a summons) will appear in the body of Rule 4.

Rule 16. Under current Rule 16(b)(1)(B), the court must issue a scheduling order after, among other options, "consulting with the parties' attorneys . . . at a scheduling conference or by telephone, mail, or other means." The proposed amendment to this rule strikes "or by telephone, mail, or other means." The Advisory Committee commented that scheduling conferences are "more

effective if the court and parties engage in direct simultaneous communication." Fed. R. Civ. P. 16 (2015 Addition to Advisory Committee Notes). Basically, any means that facilitate a live conversation between the court and parties should suffice under the amended rule.

Consistent with the changes to Rule 4(m), the new text of Rule 16 shortens the court's deadlines for issuing the scheduling order. The court now "must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared." Fed. R. Civ. P. 16(b)(2).

Rules 26 & 34. The current Rules generally do not permit parties to conduct discovery until after the first Rule 26(f) conference. The proposed amendment to Rule 26(d) will allow parties to serve requests for production (but not interrogatories) on the opposing party before the Rule 26(f) conference but no earlier than 21 days after service of the complaint and summons. The requests are not considered served, however, until the court holds the first Rule 26(f) conference. This amendment "is designed to facilitate focused discussion during the Rule 26(f) conference." Fed. R. Civ. P. 26(d) (2015 Addition to Advisory Committee Notes). Under an amendment to Rule 34, the time for responding to the early requests for production will begin running on the date of the first Rule 26(f) conference, protecting parties from having to respond to discovery at the very beginning of a case.

These are just a few of the many imminent changes to the Federal Rules. Some of the major amendments will give district courts more options for tailoring (or curtailing) discovery to the needs of each case. More on that to come in the second part of our series.

The thanks of the AADC go out to Lee Lowther of Wright Lindsey & Jennings for writing this article.

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