Nassau Lawyer

OCTOBER 2015 | VOL. 65 | NO. 2 | WWW.NASSAUBAR.ORG

Significant Amendments to the FRCP Coming in December

If you practice in federal court, pay attention, because the Federal Rules are (likely) changing. In April of this year, the United States Supreme Court adopted various amendments to the Federal Rules of Civil Procedure (the "Rules") and submitted them to Congress for its consideration. Absent contrary Congressional action, those amendments will take effect on December 1, 2015.

As is detailed below, the most significant of these new amendments are to Rules 4(m), 16(b), 26(b), 26(d) and 34(b)(2). The changes to Rules 4(m), 16(b) and 26(d) will expedite federal cases and require earlier case management, and the changes to Rules 26(b) and 34(b)(2) should curtail the ever-expanding scope and expense of the federal discovery process. The discussion below outlines in further detail the amendments to these Rules and the steps federal practitioners should take to ensure compliance with them.

Amendments to Rules 4(m), 16(b) and 26(d)

The amendments to Rules 4(m) and 16(b)(2) shorten the time periods set forth in each Rule by 30 days. The amended Rule 4(m) requires a plaintiff to serve process within 90 days after filing the complaint (reduced from 120 days), and the amended Rule 16(b)(2) requires a court to issue a scheduling order at the earlier of 90 days after any defendant has been served or 60 days after any defendant has appeared (reduced from 120 and 90 days, respectively).

The amendments to Rule 26(d) permit parties to get a jump-start on discovery by serving Rule 34 requests earlier than under the current version of the Rule, which prohibits parties from seeking any discovery prior to the Rule 26(f) conference. The amended Rule 26(d) states: "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." The amended Rule also provides that responses to any such early Rule 34 requests are due within 30 days after the parties' first Rule 26(f) conference.

The amended Rules 4(m) and 16(b)(2) will require parties to address case management earlier than ever before and should cause federal cases to proceed more expeditiously across the board. Similarly, the service of Rule 34 requests prior to the initial Rule 26(f) conference should make the Rule 26(f) conference more productive, or at least permit the parties to flag discovery issues at an earlier date.

Amendments to Rules 26(b) and 34(b)(2)

Under the amended Rule 26(b), discovery must be both relevant to any party's claim or defense and "proportional to the needs of the case." This new proportionality requirement requires parties to perform a cost-benefit analysis to determine the scope and expense that is appropriate for discovery in each particular case. Pursuant to the Rule, that cost-benefit analysis should include the following considerations: "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."

Under the amended Rule 34(b)(2), a party responding to a Rule 34 request can no longer respond by asserting an array of boilerplate objections. Instead, under the new Rule, an objecting party must state with specificity the grounds for objecting to the request, including the reasons for such objection. The objecting party also must state whether any responsive materials are being withheld on the basis of its objection. Additionally, with respect to documents that are to be produced, a responding party must either produce them by the time for inspection specified in the request or specify in the response another reasonable time by which it will in fact produce the documents.

If these new Rules are followed, they have the potential to remove many of the pitfalls currently associated with the discovery process. Indeed, with the burgeoning use of electronic discovery, the discovery process has turned into an extremely burdensome and expensive process often involving hundreds of thousands of pages of documents and metadata most attorneys would not even know how to access. The process as it currently stands is particularly troubling when representing a "David" versus a "Goliath," and Goliath unleashes an avalanche of documents and discovery demands upon David. Unable to afford the expense of discovery, David has no choice but to agree to an unfavorable settlement.

Further complicating the current discovery process is that attorneys often attempt to dodge requests for production by responding, in the first instance, with the "kitchen sink" of boilerplate objections. That initial response is then followed with numerous meet and confers between counsel trying to truly understand the objections being asserted, as well as what will be produced and what will be withheld. This process takes months, or sometimes years, and completely undermines the purpose of the discovery process in federal courts, which under the new Rule 1 is to "secure the just, speedy, and inexpensive determination of every action pending."

The new amendments to Rules 26(b) and 34(b)(2) presumably will help move the discovery process along by limiting the scope of discovery and requiring counsel to be more specific and forthright in their discovery objections. The proportionality requirement should curtail the exorbitant and unnecessary burden and expense associated with discovery, particularly in cases that do not require it or in which certain of the parties cannot afford it. Likewise, the specificity requirement should make the discovery process more efficient, curbing expense and burden.

What should federal practitioners do to comply with these new Rules?

As an initial matter, gone are the days when counsel can relax in the early stages of a federal case. Counsel must ensure that all parties are promptly served, and be prepared to begin discovery much sooner than in the past. Given the new ability to serve early Rule 34 requests, counsel should be prepared to respond to such discovery requests within a month after the first Rule 26(f) conference. That means that counsel must learn the case early, conducting both factual and legal research right away to ascertain their theory of the case. Those crucial steps cannot be put off for a few months under these new Rules.

With regard to discovery, the new amendments are sure to be the subject of significant motion practice over the coming months and years, as the plain language of these new Rules flips the discovery process on its head. For example, it now appears that there is no place for many of the general objections so often recited in discovery responses. Nor is there any way to dodge discovery in the first instance.

Jennifer L. Hartmann

In the meantime, counsel must be cognizant of the new proportionality requirement in both discovery demands and discovery responses. Counsel also must ensure that they specifically assert any objections, including the grounds for such objections, as well as an affirmative statement as to whether any documents are being withheld on the basis of such objections. Furthermore, counsel must also produce documents by the time requested in the demands or specify in the response another reasonable date certain by which documents will be produced. Clearly, these new Rules will impose a greater burden on counsel in the beginning of the discovery response process, which should curtail the burden and expense incurred by lengthy meet and confers and discovery disputes.

Further information on these proposed amendments can be found at: http://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf

Jennifer L. Hartmann is an associate at Ruskin Moscou Faltischek, where she is a member of the Litigation Department.