

# Changing Rules

MODL Judicial Luncheon

November 5, 2015

# 2015 FRCP Amendments

- Amendments to Rules

- (as approved by Supreme Court on April 29, 2015; will be effective December 1, 2015):

- 1
- 4
- 16
- 26
- 30
- 31
- 33
- 34
- 37
- 55
- 84

# 2015 FRCP Amendments

- **Rule 1: Scope and Purpose**

- *Adds* that the rules should be “employed by the court and the parties” to secure the just, speedy, and inexpensive determination of every action and proceeding.
  - Needs to be a cultural change so that we have great advocacy but in accordance with Rule 1

- **Rule 4: Summons**

- *Changes* service of the summons and complaint to 90 days from 120.
- *Adds* appended forms for notice of a lawsuit and request to waive service of summons to account for abrogation of Rule 84 and appendix of forms.

# 2015 FRCP Amendments

- **Rule 16: Pretrial Conferences; Scheduling; Management**
  - 16(b)(1)(B) scheduling conference:
    - ***Removes*** “by telephone, mail, or other means.”
      - Comm. Note: More effective if parties engage in direct, simultaneous communication. Conference can be held in person, by phone or by more sophisticated electronic means.

# 2015 FRCP Amendments

## ▪ Rule 16:

- 16(b)(2): reduced time to scheduling conference
  - **Removes** “in any event” and **adds** “unless the judge finds good cause for delay, the judge must issue it” within the earlier of “**90**” (**changed from 120**) days after any defendant has been served with the complaint or “**60**” (**changed from 90**) days after any defendant has appeared.
    - Comm. Note: In a complex case, it may be that the parties cannot prepare for a Rule 26(f) conference in this time, so because Rule 26(f) is tied to the scheduling order, if the court extends the time for cause on the scheduling order, time will be extended for the Rule 26(f) conference.

# 2015 FRCP Amendments

- **Rule 16:**

- 16(b)(3)(B)(iii): **Adds:** that the scheduling order may provide for **preservation** of ESI in addition to discovery of ESI.
- 16(b)(3)(B)(iv): **Adds:** that scheduling order may include any agreement of the parties regarding claims of privilege, including agreements reached under FRE 502.
- 16(b)(3)(b)(v): A new section that **adds:** that a scheduling order may “direct that before moving for an order relating to discovery, the movant must request a conference with the court.”
  - Note: Many judges find that such conference is an efficient way to resolve most discovery disputes without the delay and burdens of a formal motion. Whether to require such conferences is left to the discretion of the judge in each case.

# 2015 FRCP Amendments

- **Rule 26: Duty to Disclose; General Provisions Governing Discovery**
- **Rule 26(b): 4 changes:**
  - The proportionality factors currently in 26(b)(2)(C)(iii) will **move** to 26(b)(1).
    - Change focus of rules to relevant and proportionate discovery. Proportionality needs to be practical & reasonable.
  - Language regarding the discovery of sources is **removed** as unnecessary.
  - The distinction between discovery of information relevant to the parties' claims or defenses and discovery of information relevant to the subject matter of the action on a showing of good cause is **removed**.
  - The sentence allowing discovery of information "reasonably calculated to lead to the discovery of admissible evidence" is **replaced**.

# 2015 FRCP Amendments

- **Rule 26(b):**

- Rule 26(b)(1) *revised*: will permit a party to “obtain discovery regarding any **non-privileged matter** that is **relevant** to any party’s claim or defense and **proportional to the needs of the case, considering 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.**”
- The last sentence *replaces* the current language of “[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”



# 2015 FRCP Amendments

- **Rule 26(b):**

- The balance of current Rule 26(b)(1) will be *removed*, in part to delete “excess” language. This would include examples of types of discoverable information such as the location of discoverable matter and identity of parties who know about it. Concerns about possible negative inferences from that deletion led to addition of a comment in the Committee Note that discovery of that nature should be permitted as required.

# 2015 FRCP Amendments

- **Rule 26(b) and (c):**

- Rule 26(b)(2)(C)(iii) **Revised:** to require a court to limit the frequency or extent of discovery when a court determines that the “proposed discovery is outside the scope permitted by Rule 26(b)(1).”
- Rule 26(c)(1)(B): **Adds:** “the allocation of expenses” as part of what the court may include in an order to protect a party or person from annoyance, embarrassment, oppression or under burden or expense.

# 2015 FRCP Amendments

- **Rule 26(d):**

- 26(d)(2) **adds** a new section for Early Rule 34 Requests. Rule provides for delivering your Rule 34 requests before the 26(f) conference and at least 21 days after the summons and complaint are served. Requests can be delivered to the party that was served and by the served party to any plaintiff or any other served party.
  - Rule 34 requests **will not be** considered served until the first Rule 26(f) conference.
- 26(d)(3) **removes** “on motion” and **adds** unless “the parties stipulate” regarding the sequencing of discovery (in addition to the court’s ability to otherwise order).

# 2015 FRCP Amendments

- **Rule 26(f):**

- 26(f)(3)(C): **Adds:** that the discovery plan must state the parties' views and proposals on **preservation** of ESI in addition to disclosure and discovery of ESI.
- 26(f)(3)(D): **Adds:** that the discovery plan must state the parties' views and proposals related to claims of privilege and whether to ask the court to include their agreement in an order “*under Federal Rule of Evidence to 502*”.

# 2015 FRCP Amendments

- **Rules 30, 31 and 33: Deposition by Oral Examination, Depositions by Written Questions, Interrogatories to Parties**
  - **Adds:** 26(b)(1) (consistent with the change in moving proportionality factors) in addition to 26(b)(2) to when the court may grant leave consistent with those rules to take a deposition under 30(a)(2) or deposition on written questions under 31(a)(2), must allow additional deposition time under 30(d)(1), or may grant leave to serve additional interrogatories under 33(a)(1).

# 2015 FRCP Amendments

- **Rule 34: Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes**
  - 34(b)(2)(A): **Adds:** “or if the request was delivered under 26(d)(2) within 30 days after the parties’ first Rule 26(f) conference.”
  - 34(b)(2)(B): **Adds:**
    - Grounds for objections must be stated with specificity.
    - The responding party may state that it will produce copies of documents or ESI instead of permitting inspection. The production must be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.
      - When a production is to be made in stages the response should identify the beginning and end dates for production.

# 2015 FRCP Amendments

- **Rule 34:**

- 34(b)(2)(C): **Adds:** that “[a]n objection must state whether any responsive materials are being withheld on the basis of that objection.”
  - For example: A responding party might state that it will limit the search of documents or ESI to a given time period or to specified sources. With such an objection, the statement of what has been withheld can be identified as anything beyond the search and/or time limits specified in the objection.

# 2015 FRCP Amendments

## • Rule 37:

- 37(a)(3)(B)(iv): **Adds:** when a party “fails to produce documents or” (for grounds when to compel a discovery response).
- 37(e): **Title change to:** “Failure to Preserve Electronically Stored Information.” **Rule changed in its entirety** to read:
  - If **electronically stored information** that **should have been preserved** in the **anticipation or conduct of litigation** is **lost** because a party failed to take **reasonable steps** to preserve it, and it **cannot be restored or replaced** through additional discovery, the court:
    - (1) upon finding **prejudice** to the other party from loss of the information, **may order measures no greater than necessary to cure the prejudice**; or
    - (2) **only upon a finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:**
      - (A) **presume that the lost information was unfavorable** to the party;
      - (B) **Instruct the jury that it may or must presume the information was unfavorable** to the party; or
      - (C) **dismiss the action or enter a default judgment.**



# 2015 FRCP Amendments

- **Rule 55:**
  - *Adds*: “final” to the type of default judgment that may be set aside under Rule 60(b).
- **Rule 84:**
  - *Abrogated*, along with Appendix of Forms as no longer necessary.