



The Duke Conference Amendments to the Federal Rules of Civil Procedure

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On April 29, 2015, the United States Supreme Court approved amendments to the following Federal Rules of Civil Procedure: 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, 84, and the Appendix of Forms. In accordance with the Rules Enabling Act, the amendments are scheduled to take effect on December 1, 2015, absent congressional action to the contrary.

The amendments represent the most important changes to the Federal discovery rules in years. For example:

- The iconic definition of scope of discovery in Rule 26(b) has been rewritten. It now expressly includes proportionality factors. It no longer includes language authorizing the court to order discovery of any matter relevant to the subject matter involved in the action ; nor does it contain the reasonably calculated language;
- The provision for protective orders in Rule 26(c) has been revised to allow for allocation of expenses;
- Rule 26(d) is amended to provide for early Rule 34 requests;
- The discovery plan required under Rule 26(f) must now address any issue of preservation of electronically stored information (ESI);
- The exceptional circumstances standard for imposing sanctions for loss of ESI in Rule 37(e) has been deleted. It has been replaced with a rule that authorizes and specifies measures a court may employ if information that should have been preserved is lost;
- New Rule 37(e)(1) authorizes the court to order measures to remedy the loss of ESI but only if the information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, the information could not be restored or replaced by additional discovery, and the court finds prejudice to another party resulting from the loss of the information;
- New Rule 37(e)(2) authorizes the court to take severe measures for the loss of ESI such as adverse-inference instructions, dismissal, or entry of default judgment, but only upon a finding of intent to deprive. Thus, court rulings that have allowed such measures upon a finding of mere negligence or gross-negligence are no longer permitted.
- The time limit for service of process in Rule 4(m) has been reduced;
- The time to issue the scheduling order under Rule 16(b) has been reduced;
- Scheduling orders under Rule 16(b) may provide for preservation of ESI and may direct that before filing a discovery motion, the movant must request a conference with the court;
- Rule 34(b) is amended to require that objections to Rule 34 requests be stated with specificity and must state whether any responsive materials are being withheld on the basis of that objection;

Most of the amendments can trace their origin to the conference held at the Duke University School of Law on May 10-11, 2010, sponsored by the Advisory Committee on the Federal Rules of Civil Procedure. The Duke Conference examined problems in federal civil litigation particularly excessive costs and delay and the adequacy of the Federal Rules of Civil Procedure to address them.

To aid the reader in understanding these important rule changes, including their evolution and significance, this publication includes the Duke Conference Report, excerpts from the September 2014 Report of the Standing Committee on Rules of Practice and Procedure, and the June 2014 Report of the Advisory Committee on the Federal Rules of Civil Procedure. These excerpts include a historical analysis, a statement

of each rule change in "black line" format, and explanatory "Committee Notes" for each rule change.

This book is an invaluable tool for understanding the new rule changes. It is an essential guide for every litigation attorney, litigation support team and law student.

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