



Perspectives on Procedure: A Civil Rules Roundtable

Gear Up for Acceleration and Collaboration

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The amendments to FRCP 4, 16, 26 and 34 accelerate case deadlines and are intended to require a party to address discovery at a very early juncture in the action, encourage collaboration between the parties and result in more interaction with the court. A party that fails to attempt to act proactively and collaborate with its adversary is more likely to be on its heels in the action and may not be able to capitalize on other amendments to the rules, such as the proportionality requirements.

In most cases, the amendments require parties to actively work with their counsel to locate documents, Electronically Stored Information and witnesses in a more expedient manner. The accelerated deadlines begin with the change in Rule 4(m) that establishes a 90-day presumptive limit to serve the summons and complaint on U.S.-based defendants. This change was made in conjunction with the changes to Rules 16 and 26 to increase the speed at which the parties commence discovery. Rule 16(b)(2) requires that the court issue a scheduling order within the earlier of 90 days after any defendant has been served or 60 days after any defendant appears, unless the judge finds “good cause” for a delay. While the rules do not define “good cause,” the Advisory Committee Notes suggest that “good cause” includes actions that are complex, have many parties or involve large organizations that may need additional time in order to have meaningful discussions relating to scheduling and discovery. While the deadline to hold a Rule 26(f) conference has not changed, the changes to Rules 4 and 16 mean that the parties will be required to begin the Rule 26(f) conference no later than 69 days after a party has been served or 39 days after a defendant appears.

As a result of these changes, there are potentially 60 fewer days after an action has commenced for a party to identify witnesses and potentially relevant information. Thus, a party and its counsel has to be proactive to determine what people or entities are in possession of potentially relevant information in order to be prepared for the Rule 26(f) conference or, alternatively, to apply for an extension of time relating to the Rule 16 conference. If a party is not proactive, it may face difficulty meeting the “good cause” standard to delay the Rule 16 conference because that party likely will not have sufficient facts to demonstrate “good cause.” Given that a party would want to seek the extension prior to the deadline, a party will have to act expeditiously in order to make the application and obtain a ruling prior to the expiration of the 39-day period. If a party elects not to make such an application, the requirements for Rule 26(f) conferences and the Rule 16 conference mandate that a party be prepared to discuss many of the issues that would form

the basis of making the “good cause” application. Therefore, the need to work quickly likely applies in all cases.

The amended rules seek to encourage collaboration and cooperation among the parties. Rule 26(d)(2) allows a party to “deliver” document requests to the plaintiff or any party that has been served with the summons and complaint if more than 21 days have elapsed since the papers were served on a party. The requests are not deemed “served” until the first Rule 26(f) conference therefore, responses are due 30 days after that conference, unless the parties stipulate to another deadline. By delivering document requests before the Rule 26(f) conference, the parties should be in a better position to address preservation, proportionality and the scope of discovery at the conference. The reason is that a party will be able to discuss the requests internally and be able to identify any potential issues with the requests prior to the entry into a discovery plan or the entry of the scheduling order. A party that fails to deliver documents requests before the Rule 26(f) conference may be at a disadvantage because it may not be aware of its adversary’s position. The changes to Rule 34 also seek to increase collaboration because they require objections to document requests to be stated with specificity and identify any materials withheld. These changes also will likely lead to agreements to further extend the time to respond to discovery requests, especially in light of the potential requirement that a court conference be held prior to making a motion to compel or for a protective order.

The amended rules also seek to encourage interaction with the court because the Advisory Committee believes that interaction leads to more effective results. The amendment to Rule 16(b)(3)(B)(v) permits a court to include a provision mandating that a party request a conference before moving for an order relating to discovery. This may eliminate the need for formal motion practice, which might result in a reduction in the amount of time and money spent relating to discovery. If a court elects to hold a scheduling conference (as opposed to accepting the proposed order submitted by the parties), Rule 16(b)(1) requires that the conference be held either in person or by telephone or videoconference.

The 2015 amendments to the rules are likely to lead to increased costs and expenses for parties at the outset of an action. A party and its counsel that are proactive may be able to offset the increased costs (or even save money) through active case management and technology.

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