

Amendments to Federal Rules of Civil Procedure Effective December 1, 2015

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Unless Congress intervenes before December 1, 2015—which is considered unlikely—amendments to nine of the Federal Rules of Civil Procedure will become effective on that date. The most significant amendments are in the discovery rules, with major revisions particularly to Rules 26, 34, and 37. This article addresses these revisions.

Amendments to discovery rules

Rule 26

The most important change to Rule 26—and to some, the most controversial—relates to the general scope of discovery set forth in Rule 26(b)(1). The amendment to Rule 26(b)(1) adds proportionality factors similar to those currently included as part of Rule 26(b)(2)(C). In explaining the rationale for the amendment, the Advisory Committee on Civil Rules observed that courts were not using the proportionality limitations as originally intended, and the amendment restores the proportionality factors to their original place in defining the scope of discovery. Thus, Rule 26(b)(1) will now direct the parties and the court to consider whether the discovery is proportional to the issues at stake, the amount in controversy, the parties' relative access to the information, the parties' resources, and the importance of the discovery in resolving the issue.

The committee note to the Rule 26(b)(1) amendment goes on to state that the change is not intended to place upon the party requesting discovery the burden of showing proportionality, nor is it intended to allow the opposing party to resist discovery on the basis of boilerplate objections that the requested discovery is not proportional. Rather, the amendment is intended to impose upon the parties and the court a col-

lective responsibility to consider the proportionality factors in making discovery requests, responses, and objections.

The amendment to Rule 26(b)(1) also removes the language stating that relevant information does not have to be admissible “if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” In its place is the direct statement, “Information within this scope of discovery need not be admissible in evidence to be discoverable.” The committee explains the change is necessary to make clear that the limitation on discovery is not expanded by discovery claimed to be “reasonably calculated” to lead to the discovery of admissible evidence.

Rule 26(c)(1)(B) is amended to include an express provision allowing a court to shift the cost of providing discovery in the context of protective orders. A court's authority to order cost-shifting has been recognized by the Supreme Court for many years,¹ and the committee observes that an explicit recognition of a court's ability to shift costs will remove the temptation for parties to argue otherwise. The committee cautioned, however, that the amendment does not mean cost-shifting should become the norm, and the courts should continue to assume that a responding party ordinarily bears the cost of responding to discovery requests.

Last, an amendment to Rule 26(d)(2) allows a party to serve Rule 34 document requests before the parties hold a Rule 26(f) discovery meeting. The date of service of such requests will be deemed as of the date of the first Rule 26(f) meeting.

Rules 30, 31, and 33

Rules 30, 31, and 33 are amended in parallel fashion to reflect the recognition of proportionality in Rule 26(b)(1). For example, a party wishing to extend the time of a deposition beyond seven hours (Rule 30) or serve more than 25 interrogatories (Rule 33) may do so by seeking leave of court so long as the request is consistent with the proportionality factors of Rule 26(b)(1).

Rule 34

Significant changes are made to Rule 34, governing requests for production of documents, electronically stored information (ESI), and tangible things. The rule is changed in three ways. The first is the least consequential, clarifying that a response to a request for production served before the first Rule 26(f) conference is not due until 30 days after the first Rule 26(f) conference.

Second, amended Rule 34(b)(2)(B) requires that objections to requests to produce

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be stated with specificity, thus suggesting that broad boilerplate objections will not suffice. It also formally authorizes a practice that has been widespread—production of copies of documents or ESI instead of permitting inspection. If that option is chosen, the documents must be produced “no later than the time for inspection specified in the request or another reasonable time specified in the response.”

Third, under current Rule 34(b)(2)(C), the responding party is obligated to specify which part of a request is the subject of any objection and produce other documents to which no objection is made. The amendment seeks to strengthen that obligation, requiring the objecting party to expressly tie each objection to a refusal to produce; the party must “state whether any responsive materials are being withheld on the basis of that objection.” This requirement is designed to eliminate the uncertainty that results when the responding party states one or more objections and then produces documents, making it unclear which, if any, documents are being withheld because of the objection(s).

Rule 37

One of the most significant current rules amendments is contained in Rule 37(e), addressing the failure to provide ESI. The advisory committee notes indicate that current Rule 37(e), enacted in 2006, has come to be regarded as inadequate to address the continued exponential growth in ESI and the resulting problems. The committee also noted that federal circuits have established differing standards for imposing sanctions or other measures on parties that fail to produce ESI. As a result, litigants have turned ultraconservative, spending excessive time and money on preservation to avoid the severe sanctions they may face if a court decides not enough effort to preserve information has been made.

The committee reminds us that the duty to preserve ESI is not created by the federal rules, but instead is a product of common law (or certain specific statutes or rules). The amendments to Rule 37(e) do not change that common-law basis for the duty, focusing rather on the consequences of a breach of that duty.

Rule 37(e) is entirely rewritten to provide specific standards that apply to litigation in the federal courts, to the exclusion of state law or rulings based on courts’ inherent authority (although, the committee cautions, an independent tort claim for spoliation under state law, if available, is not precluded). The new rule applies only when ESI is lost—i.e., when it cannot be restored or replaced and is gone permanently—and only when the lost information “should have been preserved in the anticipation or conduct of litigation....” As the committee observes, “an evaluation of prejudice from the loss of information necessarily includes an evaluation of the information’s importance to the litigation.”² If the court finds the loss of that information creates prejudice to the opposing party, it “may order measures no greater than necessary to cure the prejudice.”³

Courts’ discretion in fashioning an appropriate remedy is quite broad, subject to specific limitations on the most serious sanctions, discussed below. The rule does not designate which party has the burden of proving or disproving prejudice, leaving that issue to courts’ discretion. In some circumstances, of course, placing the burden of proving prejudice on the party that did not lose—and may never have seen—the lost information would be unfair. In other cases, placing the burden on the party claiming prejudice would be completely reasonable.

With respect to the most serious of sanctions, courts’ discretion is specifically limited: “only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation” may a court presume or instruct the jury to presume that the information was unfavorable to the party, dismiss the action, or enter a default judgment.⁴ In other words, merely inadvertent, negligent, or even grossly negligent failure to preserve ESI will not support these most serious sanctions; absent an intentional failure, the focus is on measures to cure any prejudice.

Amendments to other rules

Rule 1

The amendment to Rule 1 is more symbolic than substantial. It is intended to em-

phasize the responsibilities of the parties (and their counsel) in the just, speedy, and inexpensive determination of actions. The current second sentence of Rule 1 indicates the Federal Rules of Civil Procedure “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” As amended, Rule 1 will state that the rules “should be construed, administered *and employed by the courts and the parties* to secure the just, speedy and inexpensive determination of every action and proceeding.” (Emphasis added.)

Rule 4

Rule 4 is amended in two ways. Of most concern to practitioners, under amended Rule 4(m) the time for expiration of the summons is reduced from 120 to 90 days after filing the complaint. This deadline continues to be inapplicable when the plaintiff demonstrates to a court good cause for the failure to serve within the prescribed time, to service in a foreign country under Rules 4(f) or 4(j)(1), or to the special proceeding for condemnation under Rule 71.1. Second, two forms are added to Rule 4. Since 1938, Rule 84 has provided an appendix of forms. That rule is being abolished as no longer necessary, with two exceptions. Current forms 5 and 6 deal with waivers of service permitted under Rule 4(d) and are now included at the end of Rule 4. Under amendments to Rules 4(d)(1)(C) and 4(d)(1)(D), use of the specified forms is mandatory.

Rule 16

The amendments to Rule 16 begin by deleting the reference to scheduling conferences taking place “by telephone, mail, or other means.”⁵ According to the committee note, this does not foreclose Rule 16 conferences taking place by telephone or electronic means, but is intended to encourage more effective scheduling conferences when the court and the parties engage in direct simultaneous communication.

Additional amendments to Rule 16 seek to expedite issuance of a case management order and expand the topics to be addressed at a scheduling conference. Pursuant to amended Rule 16(b)(2), the time

for issuing a case management order is reduced from 120 to 90 days. Preservation of ESI and agreements on the disclosure of privileged information under Evidence Rule 502, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(D), may be included in a case management order. Amended Rule 16 also permits a case management order to require a conference with the court before the filing of any discovery-related motion.

Rule 55

A minor revision to Rule 55(c) clarifies that the demanding standards of Rule 60(b) must be satisfied only in seeking to set aside a *final* default judgment. A default judgment that is not final may be set aside at any time by the court under Rule 54(b).

Rule 84

As discussed above, Rule 84, providing an appendix of forms, is repealed, although former forms 5 and 6 are newly incorporated into Rule 4. ■



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ENDNOTES

1. See *Oppenheimer Funds, Inc v Sanders*, 437 US 340, 358; 98 S Ct 2380; 57 L Ed 2d 253 (1978).
2. FR Civ P 37, Advisory Committee Notes, 2015 Amendment: Subdivision (e)(1).
3. FR Civ P 37(e)(1).
4. FR Civ P 37(e)(2)(A), (B), and (C).
5. FR Civ P 16(b)(1)(B).



MONEY JUDGMENT INTEREST RATE

MCL 600.6013 governs how to calculate the interest on a money judgment in a Michigan state court. Interest is calculated at six-month intervals on January and July of each year, from when the complaint was filed, and is compounded annually.

For a complaint filed after December 31, 1986, the rate as of July 1, 2015 is 2.468 percent. This rate includes the statutory 1 percent.

But a different rule applies for a complaint filed after June 30, 2002 that is based on a written instrument with its own specified interest rate. The rate is the lesser of:

- (1) 13 percent a year, compounded annually; or
- (2) the specified rate, if it is fixed—or if it is variable, the variable rate when the complaint was filed if that rate was legal.

For past rates, see <http://courts.mi.gov/Administration/SCAO/Resources/Documents/other/interest.pdf>.

As the application of MCL 600.6013 varies depending on the circumstances, you should review the statute carefully.

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