

CORE CHANGES TO THE FRCP: THE 2015 AMENDMENTS

*February 4, 2016
United States District Court of Guam
Annual District Conference*

HISTORY AND PURPOSE OF 2015 CHANGES

➤ Amendments redress three key themes:

- (1) the need for better case management;
- (2) employment of the principle of “proportionality”;
- (3) emphasis on cooperation by parties in discovery.

➤ Amendments Promote:

- Reduction of cost and delay in civil litigation in federal court (due to revolution in information technology)
- Repositioning of the FRCP to facilitate just, speedy and inexpensive resolutions of civil actions.

THE CORE CHANGES

RULE NO.	SUMMARY OF AMENDMENTS
1	The rule now makes clear that the Federal Rules of Civil Procedure should be construed, administered, and employed by both the court and the parties to secure a just, speedy, and inexpensive determination of every action.
4	The time to serve a defendant is reduced from 120 days to 90 days.
16	The rule no longer provides for scheduling conferences by “telephone, mail, or other means” and the time for a court to issue a scheduling order is now the earlier of 90 days after any defendant has been served, or 60 days after any defendant has appeared. The rule was also amended to permit scheduling orders to address the preservation of electronically stored information (“ESI”) and incorporate the parties’ agreements for asserting claims of privilege and work-product protection.
26	This rule now mandates that discovery be relevant to any party’s claim or defense and proportional to the needs of the case. The rule also has been amended to permit requests for production to be sent before the Rule 26(f) conference.
30-33	These rules are amended to take into account the proportionality requirement of Rule 26.
34	The rule has been amended to require objections “with specificity,” require responses to state whether documents are being withheld, and provide a reasonable time for production.
37	The amendment to this rule is directed to the preservation and loss of ESI by outlining considerations of whether information should have been preserved, and specifying measures a court may employ if information that should have been preserved is lost and cannot be restored or replaced.
55	The change to Rule 55 is meant to clarify that a default judgment that does not dispose of all of the claims among all parties is not a final judgment, unless so directed by the court, and thus may be revised by the court until final judgment is entered.
84	This rule and forms were adopted to illustrate the simplicity and brevity that the Rules contemplate. According to the Advisory Committee, this purpose has been fulfilled and therefore, the rule and forms no longer are required, but their abrogation does not alter existing pleading standards.

RULE 4: TIME LIMIT FOR SERVICE.

Redline of Changes to Rule 4(m):

If a defendant is not served within ~~120~~ **90 days** after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

RULE 16: SCHEDULING.

Redline of Changes to Rule 16(b)(1)-(3):

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge – or a magistrate judge when authorized by local rule – must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means.~~

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but **in any event unless the judge finds good cause for delay, the judge must issue it** within the earlier of ~~120~~ **90** days after any defendant has been served with the complaint or ~~90~~ **60** days after any defendant has appeared.

(3) Contents of the Order.

(B) Permitted Contents. The scheduling order may:

(iii) provide for disclosure, ~~or~~ discovery or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi) set dates for pretrial conferences and for trial; and

(vii) include other appropriate matters.

RULE 16. CORE CHANGES

- Timing: Court to issue a scheduling order –
 - 90 days (after defendant served);
 - 60 days (after defendant has appeared).
- ESI: Permits scheduling orders to address the preservation of electronically stored information (“ESI”)
- Privilege Agreements: Incorporates the parties’ agreements for asserting claims of privilege and work-product protection.

RULE 26: CORE CHANGE

Mandates that discovery be relevant to any party's claim or defense *and* proportional to the needs of the case

RULE 26:

PROPORTIONAL DISCOVERY, ALLOCATION OF COSTS, AND EARLY REQUESTS.

Redline of Changes to Rule 26(b)(1):

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged 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. —including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. **Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.** All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) Limitations on Frequency and Extent.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(iii) the burden or expense of proposed discovery **is outside the scope permitted by Rule 26(b)(1)** outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issue

RULE 26:

PROPORTIONAL DISCOVERY, ALLOCATION OF COSTS, AND EARLY REQUESTS.

FRCPP 26(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

RULE 34.

SPECIFIC OBJECTIONS AND TIME TO RESPOND

Redline of Changes to Rule 34 (b)(2):

(b) Procedure.

(2) Responses and Objections.

(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state **an objection with specificity the grounds for objecting** to the request, including the reasons. **The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.**

(C) Objections. **An objection must state whether any responsive materials are being withheld on the basis of that objection.** An objection to part of a request must specify the part and permit inspection of the rest.

RULE 34. CORE CHANGE

- Amendment requires:
 - Objections “with specificity,”
 - Require responses to state whether documents are being withheld,
 - Provide a reasonable time for production.

RULE 37: FAILURE TO PRODUCE AND ESI.

Redline of Amended Text - Rule 37(a), (e):

(a) Motion for an Order Compelling Disclosure or Discovery.

(3) Specific Motions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(e) Failure to Provide Preserve Electronically Stored Information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~ 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 another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon 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.

RULE 37. MAJOR CHANGE

- Requires preservation of ESI
- Specifies measures a court may employ if information that should have been preserved is lost and cannot be restored or replaced.

THANK YOU!