Summary of Proposals of the Civil Rules Advisory Committee's "Duke Subcommittee" And Approved for Public Comment by the Standing Committee on Rules in June 2013

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Early and active case management

- Proposed Rule 4(m) will reduce the time to serve a complaint to 60 days from 120 days.
- Rule 16(b) currently provides that a judge must issue a scheduling order as soon as practicable, but in any event within 120 days after any defendant has been served or 90 days after any defendant has appeared. These two time periods have been reduced to 90 days after any defendant has been served or 60 days after any defendant has appeared. In another change, there is a "good cause" escape hatch: the court has authority to delay issuance of the scheduling order.
- Present Rule 16(b)(1) provides that a court issues a scheduling order after receiving the parties' Rule 26(f) report or after consulting "at a scheduling conference by telephone, mail, or other means." The proposed amendment will delete "by telephone, mail, or other means." The proposed advisory note will make it clear that a conference can be held face-to-face, by telephone, or other means of simultaneous communication.
- Additional subjects will be added to the list of topics to be covered at the Rule 16(b)(3) list of permitted contents of a scheduling order. Two of these are also proposed for addition to the list of subjects in a Rule 26(f) discovery plan. These two topics are:
    - Preservation of electronically stored information
    - Agreements on implementing Rule 502(d) of the Federal Rules of Evidence to protect the privileged or protected status of inadvertently disclosed information.
- Rule 16(b)(3) would have added to it a new subparagraph (v) which permits a scheduling order to direct that before moving for an order relating to discovery that the movant must request a conference with the court. Consideration was given to making this a mandatory requirement but in the end the decision was to encourage, not prescribe, the practice.
- Allocation of expenses is made specific in Rule 26(c)(1). Courts have always had the authority to grant a protective order that allows for cost-shifting for any discovery request. The change is now explicit. Rule 26(c)(1)(B) would now provide that a court for good cause may issue an order to protect a party 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 of discovery: ***."
- Rule 26(d)(1) would be amended to address the moratorium on discovery that now exists (i.e., no discovery until after the Rule 26(f) conference has occurred). There would now be a waiting period of 21 days after service of summons and a complaint. Then a Rule 34 request can be delivered but it is not considered to be "served" until the Rule 26(f) conference occurs. In other words the clock to respond does not start to tick until that conference. It allows the parties to discuss the requests at the Rule 26(f)

conference and if there are significant issues that arise from that discussion, they can be taken up with the district court at the Rule 16(b) scheduling conference.

Proportionality

- Rule 26(b)(1) would be changed in three ways.
    - Discovery would be limited to matters relevant to a party's "claim or defense" instead of "relevant to subject matter involved in the action."
    - The word "proportionality" is now included in the scope of discovery. And the proportionality factors that were in Rule 26(b)(2)(C) are now included specifically in the scope of discovery in Rule 26(b)(1). With the proposed change, discovery must be "proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, 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."
    - The language regarding "calculated to lead to the discovery of admissible evidence" has been deleted. The goal of this text originally was to make it clear that information like hearsay could be discovered since it might lead to discoverable admissible evidence. But this language has been used by many courts to expand the scope of discovery beyond its original purpose. In its place, the proposed rule will read: "Information within this scope of discovery need not be admissible in evidence to be discoverable."
- Rules 30 and 31 will be amended so that the presumptive limit of 10 depositions per side or for third parties and a duration limit of 7 hours for each deposition, is reduced to 5 depositions per side with a maximum duration of 6 hours. Rules 30 and 31 still would require the district court to grant leave to take more depositions as long as that outcome is consistent with Rules 26(b)(1) and (2) (currently the reference is just to Rule 26(b)(2)). Parties can stipulate to have more depositions; there is no change there. And parties can still stipulate to longer depositions and the court "must" still allow additional time "consistent with Rules 26(b)(1) and (b)(2)" (again Rule 26(b)(1) has now been added to this phrase) if needed to fairly examine the deponent, or if the deponent, another person, or any other circumstance impedes or delays the examination.
- Interrogatories would be limited to 15 instead of 25 under a change to Rule 33.
- With respect to requests for admissions in Rule 36, there would be a limit of 25 requests except as to the genuineness of documents.
- With respect to responses to Rule 34 requests for production, Rule 34(b)(2)(B) would require that the grounds for objecting to a request be stated with specificity. Rule 34(b)(2)(C) would then require that an objection state whether any responsive materials are being withheld on the basis of that objection. But an objection can state that documents are not being searched if that is the case (e.g., that a search was limited to documents created after a specific date). Where a party states that it will produce documents or electronically stored information instead of permitting inspection, the production must be completed no later than the time for inspection in the request or a later reasonable time stated in the response. A corresponding change will be made to Rule 37(a)(3)(B)(iv) to provide that a party seeking discovery may move for an order compelling production if a party "fails to produce documents."

Cooperation

Rule 1 would be amended to say 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."