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Perspectives on Procedure: A Civil Rules Roundtable

Early and Often

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Having worked in this industry for as long as I have, the amended Federal Rules of Civil Procedure introduced in 2006 made complete sense to me. The spirit of the changes back then echoed a movement of acting early and often. The latest changes continue to reflect this idea. Rules 4 and 16 in particular speak volumes.

Rule 4 introduces a shortened time period for a party to serve a defendant with a summons and complaint. The proposed amendment reduces the 120-day time period to 90 days. This change is intended to reduce delays at the beginning of litigation. The Committee originally proposed a 60-day period; however, after considering public comment on the issue, the Committee recommended the 90-day limit.

As a result of the change to Rule 4, three types of changes were proposed for Rule 16:

In the first, the Committee recommends that Rule 16(b)(1)(B) be amended. Currently, Rule 16 says "after consulting with the parties, attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means." The recommendation removes the phrase "or by telephone, mail, or other means." The Committee Note adds that the conference may be held by any "direct simultaneous communication," and Rule 16(b)(1)(A) still allows a scheduling order to be based on the parties Rule 26(f) report without holding a conference. That said, the change to the text of the rule is intended to encourage judges to participate directly with the parties early on in the litigation process.

The second change shortens the time frame for holding the scheduling conference. The Rule 16(b)(2) currently allows for the conference to be held at the earlier of 120 days after any defendant is served or 90 days after any defendant has appeared. The proposed amendment reduces the number of days to 90 days after any defendant is served or 60 days after any defendant has appeared. Judges are allowed to set a later date with a finding of good cause. The purpose of this change is to encourage judges to engage in early case management.

In the third change, the proposed amendment adds three new elements to the list of permitted contents in a scheduling order:

- The first element pertains to the preservation of Electronically Stored Information (ESI). ESI has become a prevalent challenge in litigation, and the issues of preservation of ESI must be considered.
- The second element speaks to agreements reached under Federal Rule of Evidence 502. Rule 502 deals with the reduction of expense in producing ESI and other documents. By adding these two elements, the Committee is encouraging parties to consider the application of these issues early in the litigation process.
- The third element addresses the parties' requirement to request a conference with the court before filing discovery requests. Many federal judges currently require such a premotion conference because it can facilitate the resolution of discovery disputes.

The amended Rules 4 and 16 seek to increase awareness of ESI issues, invite parties to get involved in the discussion of these ESI issues sooner rather than later and empower the bench to play a more active role in the resolution of the matter at hand. Most importantly, it is the expectation of the court that parties carry out the responsibility to meet and confer early and often.

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