

## NUTS AND BOLTS

# Staying Ahead of the Curve: Upcoming Amendments to Federal Pretrial Rules

By Craig M. Sandberg

Change is inevitable. In the legal profession, attorneys who stay abreast of change are ahead in the game. To that end, this article discusses the most important changes to the Federal Rules of Civil Procedure (FRCP) and Federal Rules of Evidence (FRE) as they relate to pretrial practice and discovery.<sup>1</sup>

## Be an Expert

Amendments to the rules are always in the works, and suggested changes are opened for public comment. You can stay considerably ahead of the curve by following amendments and proposed amendments at the website maintained by the Administrative Office of the U.S. Courts, [www.uscourts.gov](http://www.uscourts.gov). You also may participate in the discussion of proposed amendments.

Under the "Federal Rulemaking" heading, you will find all you need to know about changes to the federal rules. In the case of the subject amendments, the best guidance is found in a 332-page PDF version of a document that includes the following: (1) the Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure; (2) the Report of the Judicial Conference Committee on Rules of Practice and Procedure; and (3) the reports from each of the respective rules advisory committees, which include substantial committee comments.

## Evolution of the Amendments

The current changes to the rules have been in the works over the last five years. Proposals were published for comments in August 2001, followed by three public hearings, testimony from 74 witnesses, and review of 180 written submissions. Following its June 2006 meeting, and after having accepted all public comments, the Committee on Rules of Practice and Procedure approved the recommendations of the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules regarding certain proposed amendments and new rules. In September 2006, the Committee transmitted proposed new rules and amendments to the Judicial Conference with a recommendation that they be approved and transmitted to the Supreme Court of the United States. On April 12, 2006, the Supreme Court approved the proposed amendments to the federal rules without comment

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or dissent. Therefore, a host of amended rules will become effective on December 1, 2006, unless Congress countermands the amendments before that date.

Briefly, the changes to the FRCP and FRE, as described on the U.S. courts' web page, include the following:

### Federal Rules of Civil Procedure

- Civil Rule 5 (Service and Filing of Pleadings and Other Papers) (authorizes courts to adopt local rules *requiring* electronic filing and allowing reasonable exceptions)
- Civil Rule 9 (Pleading Special Matters) (conforming amendment pertaining to Supplemental Rule G (dealing with forfeiture actions *in rem*))
- Civil Rule 14 (Third-Party Practice) (conforming amendment pertaining to Supplemental Rule G (dealing with forfeiture actions *in rem*))
- Civil Rule 16 (Pretrial Conferences; Scheduling; Management) (establishes process for the parties and court to address early issues pertaining to the disclosure and discovery of electronic information)
- Civil Rule 26 (General Provisions Governing Discovery; Duty of Disclosure) (requires parties to discuss during the discovery-planning conference issues relating to the disclosure and discovery of electronically stored information)
- Civil Rule 33 (Interrogatories to Parties) (expressly provides that an answer to an interrogatory involving review of business records should involve a search of electronically stored information)
- Civil Rule 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes) (distinguishes between electronically stored information and "documents")
- Civil Rule 37 (Failure to Make Disclosure or Cooperate in Discovery; Sanctions) (creates a "safe harbor" that protects a party from sanctions for failing to provide electronically stored information lost because of the routine operation of the party's computer system)
- Civil Rule 45 (Subpoena) (technical amendments that conform to other proposed amendments regarding discovery of electronically stored information)
- Civil Rule 50 (Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings) (permits renewal after trial of any Rule 50(a) motion, deleting the requirement that a motion made before the close of all the evidence be renewed at the close of all the evidence)

- Civil Rule 65.1 (Security: Proceeding Against Sureties) (conforming amendment pertaining to Supplemental Rule G (dealing with forfeiture actions *in rem*))
- Form 35 (Report of Parties' Planning Meeting) (technical revision reflecting the proposed amendment to Civil Rule 26)
- Supplemental Rule G (Forfeiture Actions *in Rem*) (establishes comprehensive procedures governing *in rem* forfeiture actions)
- Supplemental Rule A (Scope of Rules), Supplemental Rule C (*In Rem* Actions; Special Provisions), Supplemental Rule E (Actions *in Rem* and Quasi *in Rem*: General Provisions), and Rule 26 (General Provisions Governing Discovery; Duty of Disclosure) (conforming amendments pertaining to proposed Supplemental Rule G)

### Federal Rules of Evidence

- Evidence Rule 404 (Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes) (clarifies that evidence of a person's character is never admissible to prove conduct in a civil case)
- Evidence Rule 408 (Compromise and Offers to Compromise) (resolves conflicts in case law about statements and offers made during settlement negotiations admitted as evidence of fault or used for impeachment purposes)
- Evidence Rule 606 (Competency of Juror as Witness) (clarifies that juror testimony may be received only for very limited purposes, including to prove that the verdict reported was the result of a clerical mistake)
- Evidence Rule 609 (Impeachment by Evidence of Conviction of Crime) (permits automatic impeachment only when an element of the crime requires proof of deceit or if the underlying act of deceit readily can be determined from information such as the charging instrument)

### Reviewing the Proposed Amendments

#### Federal Rules of Civil Procedure

The upcoming rule amendments to the Federal Rules of Civil Procedure generally fall into two broad categories: (1) electronic discovery and (2) privilege claw-backs. Also, amendments to Rule 50 are worth note.

#### Electronic Discovery

Rule 1 of the Federal Rules of Civil Procedure contains the command that the civil rules should foster the "just, speedy, and inexpensive determination of every action." "It is this command that gives all the other rules life and meaning and timbre in the realist world of the trial court."<sup>2</sup> In seemingly direct contravention of this noble goal, the discovery rules resulted in time-consuming, burdensome, and costly discovery of electronically stored information. For this reason, "[t]he proposed amendments to Rules 16, 26, 33, 34, 37, 45, and revisions to Form 35 are aimed at discovery of electronically stored information."<sup>3</sup>

The discovery of electronically stored information raises markedly different issues from conventional discovery of paper records in several ways. First, electronically stored information is characterized by exponentially greater volume than hard-copy documents. Commonly cited current examples of such volume include the capacity of large

organizations' computer networks to store information in terabytes, each of which represents the equivalent of 500 million typewritten pages of plain text, and to receive 250 to 300 million e-mail messages monthly.

Second, computer information, unlike paper, is also dynamic; merely turning a computer on or off can change the information it stores. Computers operate by overwriting and deleting information, often without the operator's specific direction or knowledge. A third important difference is that electronically stored information, unlike words on paper, may be incomprehensible when separated from the system that created it. These and other differences cause problems in discovery that rule amendments can helpfully address.<sup>4</sup>

**Zubulake V, probably one of the most oft-cited cases on electronic discovery, provides tremendous insight into the duties of lawyers as they relate to electronic discovery.**

The amendments to Rule 16, Rule 26(a) and (f), and Form 35 address the importance of early attention to electronic discovery issues. The amendments should provide an agenda for the parties and the court to give early attention to issues relating to electronic discovery, including the frequently recurring problems of the preservation of evidence and the assertion of privilege and work-product protection.<sup>5</sup> Inherent in the concept of that agenda is the fact that counsel must already have an intimate understanding of their clients' information systems and how electronic information is created, stored, deleted, and backed up. Also, this same understanding will permit counsel, working in conjunction with the client, to ensure that *all* the necessary information is retained through a litigation hold and not accidentally lost, for example, because someone forgot to secure the contents of a personal digital assistant, or PDA. *Zubulake V*,<sup>6</sup> probably one of the most oft-cited cases on electronic discovery, provides tremendous insight into the duties of lawyers as they relate to electronic discovery.

Rules 33 and 34 are being changed to clarify how they apply to electronically stored information. Rule 33 will now reflect that a party may answer an interrogatory involving review of

business records by providing access to the information if the party serving the interrogatory can find the answer as readily as the responding party can.<sup>7</sup> “Under the proposed amendment to Rule 34, electronically stored information is explicitly recognized as a category subject to discovery that is distinct from ‘documents’ and ‘things.’”<sup>8</sup>

Rule 45 now conforms the provisions for subpoenas to changes in other discovery rules related to discovery of electronically stored information.<sup>9</sup>

The amendment to Rule 26(b)(2) aims to clarify the obligations of a responding party to provide discovery of electronically stored information that is not reasonably accessible. This has become an increasingly disputed aspect of such discovery.<sup>10</sup> This is contrary to the normal convention, which is that the producing party pays for the cost of production. The cost-shifting portion of the rule incorporates the “accessibility” concept from *Zubulake I* and other recent cases.<sup>11</sup>

Rule 37(f), referred to as the “safe harbor” provision, precludes a court from imposing sanctions caused by routine operation of information systems. The safe harbor, however, is limited. The amendment precludes a court from imposing sanctions, absent exceptional circumstances, for the loss of electronically stored data occurring as a result of routine, good-faith operation of the information system. Therefore, intentional destruction of information related to the litigation or the exploitation of the routine operation of the information system would not be shielded by the amendment. This amendment “responds to a distinctive and necessary feature of computer systems—the recycling, overwriting, and alteration of electronically stored information that attends normal use.”<sup>12</sup>

### Privilege “Claw-backs”

Rule 26(b)(5) provides a procedure for asserting a privilege after production, which is parallel to the similar proposals for Rules 16 and 26(f).<sup>13</sup> Due to the sheer potential volume of electronic discovery, review for privilege and work-product protection is more difficult; inadvertent production of privileged or protected material is a substantial risk. The amendment to this rule clarifies the procedure when a responding party asserts a claim of privilege or of work-product protection after production.<sup>14</sup> Claw-back agreements were previously utilized as reciprocal agreements incorporated into case management or scheduling orders with the court.<sup>15</sup> “[Claw-back] agreements provide that the parties will timely return materials inadvertently produced, and that they will not later claim that their inadvertent production factors into any subsequent privilege analysis.”<sup>16</sup>

### Slaying the “Motion for Directed Verdict” Trap

While not tied directly to either pretrial practice or discovery, an amendment to Rule 50 is significant because it should eliminate a trap for the unwary. The Judicial Council succinctly explained the amendment: “Present Rule 50(b) allows a party to renew after a trial a motion for judgment as a matter of law under Rule 50(a) made *only* at the close of all the evidence. The proposed amendment deletes the requirement that the Rule 50(a) motion be made again at the close of all the evidence, allowing renewal of a Rule 50(a) motion made at any time.”<sup>17</sup>

In its current state, present Rule 50(b) has been described as one of the most dangerous traps for trial counsel.<sup>18</sup> Yet, the reasons for the trap do not justify its existence. The amendment rectifies this situation.

### Federal Rules of Evidence

While the vast majority of changes to the federal rules are related to civil procedure, four changes to the rules of evidence also will affect civil practice. The first change is to Rule 404(a) and resolves conflict in the courts about the admissibility of character evidence offered as circumstantial proof of conduct in a civil case.<sup>19</sup> Under the amendment, evidence of a person’s character will never be admissible in a civil case to provide that the person acted in conformity with the character trait.

“The proposed amendment to Rule 408 resolves three long-standing conflicts in the courts about the admissibility of statements and offers made in settlement negotiations when offered to provide the validity or amount of the claim. The amendment does not alter the current rule that such information can be used for such purposes.”<sup>20</sup> The three conflicts and their resolutions are as follows: (1) a statement or conduct regarding a claim made in the course of settlement negotiations in a civil dispute is barred in a subsequent criminal case, unless the statement was made in an action brought by a governmental regulatory, investigative, or enforcement agency; (2) the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction is barred; and (3) a party may not introduce its own statements and offers made during settlement negotiations when offered to prove the validity, invalidity, or amount of the claim.

The third change to rules of evidence amends Rule 606(b) and clarifies whether statements from jurors can be admitted to prove disparity between the verdict rendered and the verdict intended by the juror.<sup>21</sup> The amendment generally prohibits parties from introducing testimony or affidavits from jurors in an attempt to impeach the jury verdict.

Finally, “[t]he proposed amendment to Rule 609 resolves the conflict among the courts about whether a prior conviction must involve dishonesty or false statement, to automatically be used to impeach the witness . . . Under the amendment, the crime must be a crime of dishonesty or false statement.”<sup>22</sup>

### Conclusion

A good litigator must know the rules. Staying ahead of the curve, by knowing the upcoming changes to the federal rules, provides a valuable advantage in representing clients (and, possibly, avoiding some pitfalls). Staying current also will permit you to become the expert on the practice’s future. Perhaps you may even have some insights to share in the next round of amendments. ♦

### Endnotes

1. Note that the Federal Rules of Appellate Procedure (FRAP 25, 32.1), Federal Rules of Bankruptcy Procedure (FRBP 1009, 5005, 7004), and Federal Rules of Criminal Procedure (FRCrP 5, 6, 32.1, 40, 41, 58) also are changing. If your practice intersects with any of the aforementioned areas, check out the changes.
2. *In re Paris Air Crash*, 69 F.R.D. 310, 318 (C.D. Cal. 1975).

3. *Report of the Judicial Conference Committee on Rules of Practice and Procedure*, September 2006, <http://www.uscourts.gov/rules/Reports/ST09-2006.pdf> [hereinafter *Report*], at 22.
4. *Id.* at 22–23.
5. *Id.* at 26.
6. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*); see also *Phoenix Four v. Strategic Resources Corp.*, 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. May 30, 2006) (duty of lawyer to locate electronic data); *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005) (duty to produce metadata).
7. *Report*, *supra* note 3, at 27.
8. *Id.* at 28.
9. *Id.*
10. *Id.* at 30.
11. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) (*Zubulake I*).
12. *Report*, *supra* note 3, at 32.

13. *Id.* at 29.
14. *Id.*
15. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (*Zubulake III*) (“Indeed, many parties to document-intensive litigation enter into so-called ‘claw-back’ agreements that allow the parties to forgo privilege review altogether in favor of an agreement to return inadvertently produced privileged documents.”).
16. Douglas R. Richmond, *Key Issues in the Inadvertent Release and Receipt of Confidential Information: How to Protect Yourself and Your Client from Embarrassing Exposure*, 72 DEF. COUNS. J. 110 (Apr. 2005).
17. *Report*, *supra* note 3, at 35 (emphasis added).
18. Evan M. Tager, *Tips on Preserving Arguments for Appeal*, 1:37 MEALEY’S INS. L. WKLY. (Dec. 1, 1997).
19. *Report*, *supra* note 3, at 43.
20. *Id.* at 44.
21. *Id.* at 45.
22. *Id.* at 46.