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Rules Of Civil Procedure Updates Affect E-Discovery

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On Dec. 1, 2016, the annual updates to the Federal Rules of Civil Procedure went into effect. The rules were first adopted by the United States Supreme Court on April 28, 2016. Congress had an opportunity to revise the rules but took no action. As such, the amendments adopted by the Supreme Court in April took full effect last week.


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The changes are relatively minor this year compared to last year. The amendments adopted in 2015 narrowed the scope of discovery with the addition of the "and proportional to the needs of the case" limitation to the definition of the scope of discovery. Fed. R. Civ. P. 26(b)(1). While the long-term practical significance this change is still working its way through case law, there was an immediate need for practitioners to make changes to the handling of written responses and objections to discovery.


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There were no such big changes this time around. Nonetheless, there is a timing change this year regarding electronically served discovery that all litigators will need to keep in mind: the three-day "mail rule" extension no longer applies to electronically served discovery.

The two other amendments this year regarding service of internationally based corporate defendants and venue in maritime law actions have narrower practice area application. Additionally, there were no amendments to the Federal Rules of Evidence this year, so civil litigators need not worry about that until next year.

There were multiple changes to the Federal Appellate Rules and the Federal Rules of Criminal Procedure that practitioners in those areas will want to consider, but we leave that discussion to others.

The amending language for the three changes to the Federal Civil Rules is below. Deleted language is ~~stricken~~, while new language is in **bold**.

Rule 4. Summons

(m) Time Limit for Service. If a defendant is not served within 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)**, 4(h)(2),** or 4(j)(1).

This change removes a possible ambiguity regarding international service on a corporation, partnership, or other unincorporated association. As with service on an individual in a foreign country (Rule 4(f)) and a foreign government (Rule 4(j)(1)), the rule now makes clear that international service on a foreign entity (Rule 4(h)) is also exempt from the typical 120-day window for effectuating service under Rule 4.

120 days is generally plenty of time to serve a party domestically in most circumstances, but the comments recognize that there are "delays that often occur in effectuating service in a foreign country." While unlikely to affect most lawyers' day-to-day practice, the clarification will likely be appreciated by litigators who find themselves having to serve foreign corporations.

Rule 6. Computing and Extending Time; Time for Motion Papers

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~**being served** and service is made under Rule 5(b)(2)(C) **(mail)**, (D) **(leaving with the clerk)**, ~~(E),~~ or (F) **(other means consented to)**, 3 days are added after the period would otherwise expire under Rule 6(a).

This change removes electronic service (Rule 5(b)(2)(E)) from the means of service that get the benefit of the 3-day "mail rule" extension. The drafters made the change because electronic service is instantaneous, increasingly commonplace, and concerns over its reliability have dissipated over the years as technology has advanced.

The big concerns in 2006 were expected problems with sending and receiving large attachments, which are much easier to handle today.

Consent is still required to make electronic service valid, so litigators should keep in mind that responses will be due in 30, not 33, days when deciding whether to consent to service by electronic means. Moreover, it is important to bear in mind that party must have "consented in writing" before it can be served with discovery by electronic means. Fed. R. Civ. P. 5(b)(2)(E).

Importantly, registration for electronic filing through the ECF/CM system is a requirement for filing and serving pleadings in federal court for parties represented by counsel. It does not grant consent for electronic service of discovery among parties. See, e.g., Rocky Mountain Holdings v. Johnson, 2013 WL 5928550, at *2 (N.D. Fl. Oct. 31, 2013) ("Plaintiff is correct that service of the discovery requests was technically improper because Plaintiff did not consent in writing to such service. Defendants' argument that Plaintiff's consent to electronic filing with the Court was consent to electronic service of discovery requests is unavailing" because the court's form included explicit language to the contrary.)

Interestingly, the comments for this rule change note that "[e]lectronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond." The comments recognize that in such situations "[e]xtensions of time may be warranted to prevent prejudice." A party faced with accusations of serving discovery late by a day or two could possibly find some solace in this language from the comments when asking for relief from the court.

While many discovery issues can be resolved through the meet-and-confer process, responding to discovery in a timely manner is crucial for minimizing the extent of inefficient discovery fights and preserving objections and arguments — for example, requests for admission are admitted and objections to interrogatories are waived under the Federal Rules if responses are untimely, so it is crucial to determine accurately whether discovery is technically due today or three days from now.

> Rule 82. Jurisdiction and Venue Unaffected
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> These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) **is governed by 28 U.S.C. § 1390** ~~not a civil action for purposes of 28 U.S.C. §§ 1391-1392~~.

This is a technical change reflecting the enactment of 28 U.S.C. § 1390 and the repeal of 28 U.S.C. § 1392 (local actions). The statute exempts maritime law actions from the typical venue rules under the Federal Rules. The exemption is a practical necessity because traditional venue rules — based on judicial districts — do not work well in the maritime context, as coastal waters, for example, are not part of territory of nearby federal districts.

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