Update on Proposed Amendments to Federal Rules of Civil Procedure

In September, the Judicial Conference Committee on Rules of Practice and Procedure approved the most recent version of proposed amendments to the Federal Rules of Civil Procedure. These amendments are subject to review and approval by the United States Supreme Court and Congress in 2015. Assuming approval by the Court and Congress, the proposed amendments will become effective December 1, 2015. The proposed amendments modify Rules 1, 4, 16, 26, 30, 31, 33, 34, 37 and 55 and abrogate Rule 84 and the Appendix of Forms.

The primary goal of the amendments is to streamline civil litigation by reducing costs and delays, increasing access to the courts and promoting the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding." The amendments seek to improve early and active judicial case management, enhance the means of keeping discovery proportional to the action and encourage increased cooperation among the parties. The proposed amendments also seek to deal with the current disparate treatment among the federal courts concerning the rule on preservation and loss of electronically stored information.

Of particular note: Proportionality Gets Front Billing – Under the broad scope of discovery under Rule 26, particularly the "reasonably calculated to lead" language, unreasonable e-discovery demands have often received sanctuary in

civil matters. The proposed amendments to Rule 26, however, remove this broad language and move up to Rule 26(b)(1) the proportionality analysis now contained in Rule 26(b)(C)(iii). Under amended Rule 26(b)(1), discovery would be limited to "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." Interestingly, the "reasonably calculated to lead" language in the current Rule 26(b)(1) was never intended to define the scope of discovery, even though, in practice, it was used precisely for that purpose and often to unreasonably expand that scope.

In the notes accompanying the proposed Rule 26, the Committee explains that these changes are not intended to place a burden of proving proportionality on the requesting party and do not authorize boilerplate objections to provide discovery on the grounds of proportionality. Rather, the amended language is intended to initiate a dialogue among the parties (meet and confer), and where necessary, with the court concerning the amount of discovery reasonably needed to resolve the case.

Also notable: Allocation of Discovery Costs is Expressly Authorized in Rule re Protective Orders – Amended Rule 26(c), involving protective orders, would expressly permit the court to allocate expenses in such an order. Under common law, federal courts have that authority now, but the Committee thought it was advisable and useful to make the authority explicit in the rule to ensure that the courts and parties would be more likely to consider cost shifting as an alternative to denying a discovery request or imposing an undue burden on the responding party. The assumption remains, however, that the responding party ordinarily bears the costs of its own discovery productions.

Finally: No More Boilerplate Discovery Objections? – The proposed Amendments to Rule 34 are designed to reduce discovery disputes and adhere to

Rule 1's tenet of a speedy and inexpensive litigation. Two notable amendments require objections to be stated "with specificity" and to state whether any responsive information is being withheld on the basis of an objection. As to the former, for instance, where an objection is made stating that the request is overbroad in part, the comments to the proposed new rule instruct that the responding party should identify the portion of the request that it not overbroad. These amendments are designed to eliminate the use of broad boilerplate discovery objections that provide little understanding about the real reason for the objections and responses that state a litany of objections or do not indicate whether any information has been or will be withheld from production on the basis of a stated objection.