PRESENTATION FOR THE ODBA WINTER CONFERENCE

JANUARY 30, 2016

Federal Practice

Prepared and Presented by

Barbara Johnson, Esq.

I. OVERVIEW OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Rules of Civil Procedure for the United States District Courts (FRCP) were enacted in 1938. They were amended most recently in 2015. These newest amendments went into effect on December 1, 2015. The FRCP follow a logical sequence from the commencement of action through discovery and the trial of a matter.

TITLE I. SCOPE OF RULES; FORM OF ACTION

Rule 1. Scope and Purpose

Rule 2. One Form of Action

TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencing an Action

Rule 4. Summons

Rule 4.1. Serving Other Process

Rule 5. Serving and Filing Pleadings and Other Papers

Rule 5.1. Constitutional Challenge to a Statute—Notice, Certification, and Intervention

Rule 5.2. Privacy Protection For Filings Made with the Court

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

TITLE III. PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

Rule 7.1. Disclosure Statement

Rule 8. General Rules of Pleading

Rule 9. Pleading Special Matters

Rule 10. Form of Pleadings

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

TITLE VII. JUDGMENT

Rule 54. Judgment; Costs

Rule 55. Default; Default Judgment

Rule 56. Summary Judgment

Rule 57. Declaratory Judgment

Rule 58. Entering Judgment

Rule 59. New Trial; Altering or Amending a Judgment

Rule 60. Relief from a Judgment or Order

Rule 61. Harmless Error

Rule 62. Stay of Proceedings to Enforce a Judgment

Rule 62.1. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

Rule 63. Judge's Inability to Proceed

TITLE VIII. PROVISIONAL AND FINAL REMEDIES

Rule 64. Seizing a Person or Property

Rule 65. Injunctions and Restraining Orders

Rule 65.1. Proceedings Against a Surety

Rule 66. Receivers

Rule 67. Deposit into Court

Rule 68. Offer of Judgment

Rule 69. Execution

Rule 70. Enforcing a Judgment for a Specific Act

Rule 71. Enforcing Relief For or Against a Nonparty

TITLE IX. SPECIAL PROCEEDINGS

Rule 71.1. Condemning Real or Personal Property

Rule 72. Magistrate Judges: Pretrial Order

II. RECENT CHANGES TO THE FRCP

On December 1, 2015, the newest amendments to the FRCP went into effect. The amended rules implement the so-called "Dukes Rules Package". These amendments were developed at a 2010 Federal Rules Advisory Committee meeting held at Duke University. The changes focus on three main areas: (1) early judicial case management; (2) the scope of discovery; and (3) litigants' failure to preserve electronically stored information.

A. Speeding Things Up.

Many of the proposed changes are intended to reduce delays at the beginning of litigation.

1. Rule 4(m) shortens the time period for serving a defendant from 120 days to 90 days. If service is not effected by that point, the court may dismiss the suit for failure to prosecute.

2. Rule 16(b)(1) encourage courts to hold a scheduling conference that involves "direct simultaneous communication" between parties and that "may be held in person, by telephone or more sophisticated electronic means."

3. Rule 16(b)(2) reduces the time to issue a scheduling order to the earlier of 90 days (down from 120 days) after any defendant has been served, or 60 days (down from 90 days) after any defendant has appeared, unless the judge finds good cause for the delay.

4. Under old 26(d), a party could not serve any discovery requests of any sort prior to the parties Rule 26(f) conference, which may not have occurred until months after the complaint was filed. Under the amended rule, RFPs may be served much earlier—as soon as 22 days after service of the complaint and summons—even if the parties have not yet had a Rule 26(f) conference. The time for responding to those early RFPs, however, only begins counting down at the 26(f) conference. The idea behind allowing early RFPs is to make the Rule 26(f) conference more productive and to encourage agreements to facilitate document searches and production.

B. Proportionality is the Key to the Scope of Discovery

1. To reduce the ever-increasing costs associated with discovery, the new rules make dramatic changes to Rule 26(b)(1), which defines the scope of discovery. Former Rule 26 allowed a party to pursue discovery requests that were "reasonably calculated to lead to the discovery of admissible evidence." That broad language has led to broad language has lead to unnecessarily wide scope of permissible discovery. The new Rule 26(b)(1) limits discovery to that which is "proportional to the needs of the case" and provides five factors for courts to consider:

a) Amount in controversy

b) Importance of the issues at stake in the action

c) The parties' resources

d) The importance of the discovery in resolving the issues

e) Whether the burden or expense of the proposed discovery outweighs its benefit

2. Rule 26 (c)(1)(B) was also amended to recognize more explicitly that cost allocation is among the subjects that may be included in a protective order:

> (c) Protective Orders.
>
> (1) In General. * * * The court may, for good cause, issue an order to protect a party or person 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 or discovery; * **

C. Clearly Defined Consequences for Failure to Maintain ESI

1. New Rule 37(e) **Failure to Preserve Electronically Stored Information**:

> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> a) presume that the lost information was unfavorable to the party;
>
> b) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> c) dismiss the action or enter a default judgment.

2. In applying Rule 37(e), the court should consider all relevant factors, including:

    a) The extent to which the party was on notice that litigation was likely and that the information would be relevant;

    b) The reasonableness of the party's efforts to preserve the information;

    c) The proportionality of the preservation efforts to any anticipated or ongoing litigation; and

    d) Whether, after commencement of the action, the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

III. TRIAL PROCEDURE IN FEDERAL COURT

A. Pretrial

1. After discovery and any dispositive motion practice, a case enters the final pretrial stage. Pretrial consists of filing the pretrial order, the proposed charge to the jury ad the pretrial disclosures, and the pretrial conference itself.

2. Proposed Charge. Typically, the court requires the parties to submit proposed jury instructions, either separately or jointly.

3. Pretrial Disclosures must be served and filed at least 30 days before trial, unless the court directs; otherwise FED R. CIV. P. 26(a)(3)

    a) Name and, if not previously provided, the address and phone number of each witness, divide into a "will call" and "may call" list

    b) Designation of those witnesses whose testimony the party expect to present by deposition and, a transcript of the relevant parts of the depositions

    c) Identify each document or other exhibit the party expects to offer into evidence

    FED R. CIV. P. 26(a)(3)(A)(i)(ii)(iii)

4. Courts general require the parties to file a joint pretrial order before the joint pretrial conference. Local rules usually contain the details of the requirements for the joint pretrial order. Once signed, the pretrial order becomes the controlling document in the case in many respects.

5. The pretrial conference is designed to improve the quality of the trial through more thorough preparation. FED. R. CIV. P. 16(a)(4). The conference should be held as close to the start of trial as is reasonable and at least one attorney who will conduct the trial for each party. FED. R. CIV. P. 16(E).

    a) Defining and narrowing the issues

    b) Previewing the evidence

    c) Determining the length of trial

    d) Establishing ground rules for trial

6. Before appearing in court, attorneys should consult the local rules and experienced local practitioners familiar with the particular court to understand the court's expectations for courtroom etiquette

B. Jury Selection

1. Whether a juror is qualified for jury service is determined by statute.

2. A federal jury must be composed of no less than six and no more than twelve persons. FED. R. CIV. P. 48

3. The selection process involve the "de-selection" of prospective jurors—through "challenges"—not the selection of acceptable ones.

4. During the voir dire process, members of the venire panel are given information about the case, the parties, the witnesses and counsel, and asked questions as to whether anything in their backgrounds or experience would make it difficult for them to decide the case fairly

5. Method for conducting voir dire varies jurisdiction to jurisdiction and judge to judge.

   a) Some courts permit lawyers to do the voir dire by themselves.

   b) More common for the court to conduct voir dire entirely on its own or at least conduct most of the examination while allowing the lawyers to ask follow up questions.

   c) Some judges require parties to submit written proposed questions.

6. Types of challenges

   a) "For cause" if the prospective juror's answers show that he or she cannot be fair and impartial

   b) "Peremptory" to remove individuals for any reason as long as the challenges are not used to remove jurors on the basis or race or another federally protected status. *Batson v. Kentucky*, 476 U.S. 79 (1986).

C. Opening Statements

1. The court determines the time and scope of opening statements.

2. May be the first opportunity an attorney has to talk to jurors about the case.

3. Especially important to set out a party's case and outline what the evidence will show to support its theories.

4. The party with the burden of proof generally opens first.

5. Consider use of demonstratives (federal courts are usually equipped with technological systems

D. Direct Examination

1. General considerations

    a) Order of witnesses

    b) How are you going to tell the story

    c) Chronological –Use of an overview witness

2. Keep it simple

3. Organize logically

4. Use introductory and transition questions

5. Introduce witness and develop background

6. Elicit scene, then description

7. Elicit general, flowing descriptions

8. Use pace in describing action

9. Use simple language

10. Use non-leading open questions

11. Have the witness explain

12. Volunteer weaknesses

13. Use exhibits to highlight and summarize facts

14. Listen carefully to the witness' answers

    a) To determine if the question is answered adequately

    b) To appear interested to the trier of fact.

    c) When answers are inadequate or deviate from expectation, ask the witness to elaborate or explain, ask the question in a different way, or simply repeat the question.

15. Generally, it is not permissible to ask leading questions of witnesses on direct.

    a) A leading question is one that suggests an answer.

    b) Leading questions are permissible in limited circumstances

        (1) When questioning a very young or very old witness

        (2) On preliminary matters that are not reasonably in dispute

        (3) In examining a hostile witness

        (4) Possibly with a forgetful witness

E. Trial Exhibits

1. All exhibits should be numbered, keyed to, and offered through witnesses qualified to testify about them.

2. The witness need not have created the exhibit. The witness need only testify as to authenticity or accuracy.

3. To establish a foundation for authenticity or accuracy, the witness should first testify as to the witness' capacity or relationship to the exhibit—for example, custodian of business records or caseworker on a particular case.

4. Exhibits should also be reviewed with opposing counsel before the hearing to identify objections and their grounds.

5. In most courts, the rules will provide for the pretrial exchange of trial exhibits.

F. Cross Examination

1. Three goals

a) Obtain helpful information

b) Discredit the witness or her testimony

c) Bolster the credibility of a third person who will then discredit the witness.

2. Use leading questions

3. Make a statement of fact and have witness agree

4. Use short questions

5. Project a confident, take charge attitude

6. Be a good actor

7. Use a natural style

G. Jury Instructions

1. Before trial begins, counsel should draft proposed jury instructions that include citations to supporting authority. The instructions must be an accurate, clear, and plain statement of the legal and factual issues in the case. Instructions should cover all tried material issues supported by competent evidence.

2. The court may submit special or general instructions to the jury. FED. R. CIV. P. 49(a), (b). *See O'Connor's Federal Rules * Civil Trials,* ch. 8-I, p. 720.

3. Proposed instructions must be submitted "at the close of the evidence or at any earlier reasonable time that the court orders. Fed. R. Civ. P. 51(a)(1). Some judges include in their trial order a requirement that the parties submit joint jury instructions to the extent possible, and then a list of disputed instructions.

4. Sources of pattern jury instructions in the federal system include *Federal Jury Practice and Instructions* by Edward J. Devitt, Charles B. Blackmar, Michael A. Wolff, and Kevin F. O'Malley.

5. The court is required to inform the parties of the instructions before instructing the jury and before closing arguments. Fed. R. Civ. P. 51(b)(1). Once the judge has done so, the judge must give the parties an opportunity to object to the instructions. Fed. R. Civ. P.

51(b)(2). Objections made at this point are regarded as timely. Fed. R. Civ. P. 51(c)(1). Often, these objections and subsequent rulings are made at a "charge conference" outside the view of the jury. Objections to an instruction or failure to make a requested instruction must be made distinctly and on the record. Counsel should therefore ensure that the charge conference is conducted in the presence of a reporter or is otherwise recorded. To preserve the objection for appeal, the objection should be phrased as an objection rather than a preference that another instruction be given. The objection should also clearly articulate how the instruction should be rephrased or should proffer an alternative instruction. *Estate of Keatinge v. Biddle*, 316 F.3d 7, 15 (1st Cir. 2002).

6. If a party failed to preserve an objection to an instruction or failed to provide one, Rule 51(d)(2) permits appellate reversal only in cases of plain error. Such plain error review is not permitted if the objection has been affirmatively waived. *Goulet v. New Penn Motor Express, Inc.*, 512 F.3d 34, 44 (1st Cir. 2008) (counsel waived objection to instruction by stating "I'm satisfied" when asked for response to instruction).The Supreme Court has described such review as containing four elements: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Johnson v. United States*, 520 U.S. 461, 469-70 (1997). The burden of showing plain error is extremely high and effectively requires a showing of a miscarriage of justice.

H. Closing Arguments

1. Use themes and labels
2. Argue the theory of the case
3. Use exhibits
4. Use the instructions
5. Use rhetorical questions
6. Argue strengths
7. Deal candidly with weaknesses

APPENDIX I: AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE	
Rule	**Amendment**
1	Adds that courts and parties should employ the Rules to secure the just, speedy, and inexpensive determination of every action
4(m)	**Reduces time limit for serving a defendant from 120 days to 90 days**
16(b)(1)(B)	Removes the provision for consulting at a scheduling conference by "telephone, mail, or other means"
16(b)(2)	**Reduces time to issue scheduling order to earlier of 90 days (not 120) after any defendant has been served, or 60 days (not 90) after any defendant has appeared**
16(b)(3)(B)(iii)	Permits scheduling order to provide for preservation of ESI
16(b)(3)(B)(iv)	**Permits scheduling order to include agreements reached under FRE 502**
16(b)(3)(B)(v)	Permits scheduling order to require conference before discovery motion
26(b)(1)	**Requires discovery to be proportional to the needs of the case**
26(b)(2)(C)(iii)	Requires the court to limit discovery if the proposed discovery is outside the scope permitted by Rule 26(b)(1)
26(c)(1)(B)	**Adds that protective orders can allocate expenses for discovery**
26(d)(2)	Adds the party can deliver Rule 34 requests prior to Rule 26(f) conference
26(d)(3)	**Permits parties to stipulate on sequence of discovery**
26(f)(3)(C)	Requires discovery plan to include parties' views on preservation of ESI
26(f)(3)(D)	**Requires discovery plan to include parties' views on whether to ask court to include agreement in FRE 502 order**
30(a)(2)	Amends the provision regarding leave for oral depositions to reflect the recognition of proportionality in 26(b)(1)
30(d)(1)	**Amends the provision regarding duration of oral depositions to reflect the recognition of proportionality in 26(b)(1)**
31(a)(2)	Amends the provision regarding leave of the court to request deposition by written questions to reflect the recognition of proportionality in 26(b)(1)
33(a)(1)	**Amends the provision regarding number of interrogatories to reflect the recognition of proportionality in 26(b)(1)**
34(b)(2)(A)	Adds that response time to Rule 34 request served prior to Rule 26(f) conference per Rule 26(d)(2) is 30 days after the first Rule 26(f) conference
34(b)(2)(B)	**Adds that objections to Rule 34 requests must be stated with specificity; permits responding party to produce copies of ESI**

	instead of permitting inspection; requires parties to produce no later than time specified in request or another reasonable time
34(b)(2)(C)	Requires objections to Rule 34 requests to state whether responsive materials are being withheld on the basis of that objection
37(a)(3)(B)(iv)	**Permits motion to compel if party fails to produce documents under 34(b)(2)(B)**
37(e)(1)	Replaces prior rule and permits court to order curative measures no greater than necessary upon finding of prejudice as result of loss of ESI
37(e)(2)	**Replaces prior rule and specifies measures court may take if it finds a party intentionally attempted to hide/destroy ESI**
55(c)	Adds that court may set aside a "final" default judgment under Rule 60(b)
84	**Removes provision and appendix relating to forms**

APPENDIX II: TABLE OF CONTENTS FOR THE LOCAL RULES OF THE EASTERN DISTRICT OF VIRGINIA

CONTENTS:

LOCAL CIVIL RULES

APPENDIX III---TABLE OF CONTENTS FOR THE LOCAL RULES OF THE WESTERN DISTRICT OF VIRGINIA