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Amending the rules and nature of discovery

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On June 3, the Federal Judiciary's Committee on Rules of Practice and Procedure approved the publication of proposed amendments to the Federal Rules of Civil Procedure ("Rules"). The proposed amendments to the Rules would narrow the scope of discovery, impose or reduce the numerical limits on depositions and written discovery, and narrow the circumstances under which parties who fail to preserve relevant information may be sanctioned.

While historically the Rules have permitted "broad and liberal" discovery with a goal of truth-seeking, the proposed amendments would limit the scope of discovery and place new emphasis on cost and proportionality.

Proposed rule amendments

The familiar "just, speedy, and inexpensive" language of Rule 1, which historically has been more of an aspirational goal than a hard requirement, is amended to make securing a "just, speedy, and inexpensive" resolution of cases a specific responsibility of the parties and the court. The advisory committee notes explain that the intention of amended Rule 1 is to encourage increased cooperation between parties.

The proposed amendments to Rule 26(b) may be the most significant and most contentious. Amended Rule 26(b)(1) would explicitly require parties to ensure that discovery adheres to the principle of proportionality, as well as be relevant to a party's claim or defense. In determining whether a discovery request comports with the principle of proportionality, the court may consider: (1) the amount in controversy; (2) the importance of the issues at stake in the action; (3) the parties' resources; (4) the importance of discovery in resolving the issue; and (5) a cost-benefit analysis.

The proposed changes to Rule 26(b) also confine the scope of discovery by eliminating the "for good cause" provision entirely. Consequently, discovery would be restricted to information that is relevant to the claims or defenses of the parties without any right or ability to seek potentially relevant information for good cause where a party cannot establish (without yet having the information) that it is relevant to its claims or defenses, as opposed to the subject matter of the action.

Two other changes to Rule 26 are noteworthy. Amended Rule 26(c) clarifies a court's authority to issue a protective order shifting discovery costs. Amended Rule 26(d) permits presentment of Rule 34 requests prior to the Rule 26(f) conference, though service would not be effective until the Rule 26(f) conference is held, so the amendment merely encourages early presentment of requests for production of documents for discussion at the Rule 26(f) conference.

Similarly, significant amendments are proposed for Rules 30, 31, 33, 34, and 36. Amended Rule 30 reduces the default number of depositions allowed per party from 10 to 5 and changes the default time limit for a deposition from 7 hours to 6 hours. Amended Rule 31 also reduces the number of written depositions permitted from 10 to 5. Amended Rule 33 decreases the permitted number of written interrogatories from 25 to 15. Amended Rule 34 would require that objections to document requests be stated "with specificity," suggesting that boilerplate objections will no longer suffice. Additionally, amended Rule 34 would require a responding party disclose whether any documents are being withheld on the basis of an objection and state specifically when documents will be produced if they are not provided along with discovery responses. Finally, amended Rule 36 would provide a default limit of 25 requests for admission (there is no limit currently), with the exception of requests regarding the genuineness of documents, which would remain exempt from a numerical limit.

The proposed amendments to Rules 4 and 16 attempt to strengthen judicial case management. Amended Rule 4(m) shortens the time for service of the complaint after filing from 120 to 60 days. Amended Rule 16(b) also requires scheduling orders to be issued no

later than 90 days (instead of 120) after the Rule 26(f) report is filed and permits scheduling orders to provide for the preservation of electronically stored information ("ESI").

Amended Rule 37(e) offers litigants a certain level of refuge from immediate and harsh sanctions caused by failure to preserve ESI because it only permits sanctions for failures to preserve ESI if the court finds the failure was "willful or in bad faith" and caused "substantial prejudice," or if a negligent failure to preserve "irreparably deprived a party of any meaningful opportunity" to litigate their claims or defenses. Further, amended Rule 37(e) provides courts with the discretion to employ curative measures to ameliorate a failure to preserve ESI, rather than immediately impose harsh sanctions. Current Rule 37(e), which has been criticized for being vague and inconsistently enforced, provides only that courts may not impose sanctions if a loss of ESI from "routine, good faith" operations of ESI systems.

Moving away from "broad and liberal" discovery?

Federal discovery rules have enjoyed "broad and liberal" interpretation since the Supreme Court's decision in Hickman v. Taylor, 329 U.S. 495 (1947). In Hickman, the Court recognized that mutual knowledge of "all the relevant facts" is essential to litigation. Recognizing the utility of discovery as a truth-seeking tool, the Court instructed federal litigants to "disgorge" any relevant facts they may have. Federal courts have followed this mantra ever since.

Despite the technological changes in the volume and nature of information relevant to many cases in the past decade, federal courts' tradition of broad and liberal interpretation of discovery rules has remained constant. But the proposed amendments may represent a departure from this trend by proposing that the scope of discovery be limited by relevance and proportionality.

Efforts to curtail discovery costs

In many respects, contemporary federal civil litigation has already evolved to limit tenuous or expansive discovery. The current pleading requirements and discovery rules have developed in the face of increased litigation and expensive discovery, so the rules already incorporate a number of means to combat abuse.

After Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), plaintiffs face a heightened pleading obstacle, wherein a complaint must plead sufficient facts, that if assumed to be true, would make the claim "plausible." In Twombly, the Supreme Court further directed district courts to consider complaints with the task of weeding-out tenuous claims in mind. The venerable Judge Richard Posner has observed that Twombly "is designed to spare defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand." In re Text Messaging Antitrust Litig., 630 F.3d 622, 625 (7th Cir. 2010). Therefore, in effect, the heightened pleading standard is a proportionality filter for the legal system.

The Federal Rules of Civil Procedure already embrace the need for proportionality in discovery. Rule 26 provides that judges may limit overly broad discovery by motion or sua sponte, including by consideration of the somewhat infrequently considered proportionality factors in current Rule 26(b)(2)(C)(iii). Furthermore, Rule 26(g)(1)(B) clearly demands that an attorney make only proportional discovery requests by making it the duty of lawyers to request discovery that is proportionate to the "needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." Consequently, the current Rules already value proportionality.

There is no doubt that proportionality can be a valuable tool in limiting litigation expenses. But the current Rules already incorporate proportionality principles as one of many tools in the discovery "toolbox," suggesting that the problem is not a lack of available tools but a failure to use the tools already available in discovery. Courts and attorneys have readily established means by which they can administer proportionality—they need only pick them off the shelf, dust them off, and put them to use. Whether including proportionality more prominently in Rule 26 will make a difference in decreasing discovery costs is far from certain in light of the steps that have already been taken in this direction.

Room for interpretation?

Even with the guidance of five proportionality factors included in amended Rule 26(b)(1), determinations of proportionality are inherently subjective and will undoubtedly result in

varied interpretations. Many proponents of proportionality view it as the solution to the large increase in discovery costs in the age of electronic discovery and seem to assume including proportionality more prominently in Rule 26 will inevitably lead to less money being spent on discovery. However, the proposed package of rule changes provides no indication whether the factors are to be weighed equally or if one factor is more valuable than the others, so it is anybody's guess how the rules will be interpreted. For instance, it is certainly possible courts may determine that the "amount in controversy" and "parties' resources" factors mean that in class actions against large corporations with millions or billions of dollars at stake, proportionality warrants spending more money on discovery than is the practice currently in light of the high stakes in such cases.

More trials?

One of the motivating factors behind the Advisory Committee's proposals is the argument that abusive discovery has become a weapon used to intimidate parties into settlement rather than face the high costs of conducting discovery and proceeding to trial. Proponents of limiting discovery argue that American jury trials are nearly extinct and "trial by paper" is the new norm, so the proposed amendments that limit discovery will lead to more federal trials. It is certainly true that the number of trials in federal court has decreased, but it is far from clear that the proposed amendments will reverse that trend. Federal district courts are already burdened with high caseloads and taking a case to trial is very expensive, so it seems just as plausible that after the rule amendments the great majority of cases will continue to settle or be dismissed prior to trial. The difference may be that the restrictions placed on discovery by the amendments could limit the facts available to parties to value a case for settlement or present it for summary judgment.

Proposals moving forward

A public comment period on the proposed package of rule changes will open August 15, after notice is published in the Federal Register, and extend for six months. Interested individuals and organizations may comment on the proposed amendments and offer alternative proposals. After Supreme Court approval, Congress has seven months to enact legislation to reject, modify, or defer the rules. Absent such Congressional action, it is expected that the proposed amendments would take effect no earlier than Dec.1, 2015.

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