



WILL PROPOSED CHANGES TO THE FEDERAL RULES DECREASE THE COSTS OF CIVIL DISCOVERY?

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INTRODUCTION

As anyone who has been involved in civil litigation knows, or quickly learns, one of the most costly and time-consuming aspects of a civil suit is discovery. This is particularly true in today's increasingly paperless office environment, where the bulk of business and communications are conducted through electronic means, creating a vast and, in some instances, difficult to manage electronic footprint. The result of these developments is that the costs of discovery in civil litigation, including management and financing of the preservation of electronically stored information ("ESI"), sometimes dwarfs the potential value of the claims asserted, leading plaintiffs to forgo claims and defendants to reach early settlements. Some proposed changes to the Federal Rules of Civil Procedure that attempt to address this problem by changing the scope of discovery and the role of attorneys and judges in active discovery management are working their way through the rule adoption process. As the drafters of the proposed changes note, however, the poten-

tial success will ultimately depend on the actions of the legal community.

THE DUKE CONFERENCE AND THE PROPOSED AMENDMENTS

The centerpiece of the proposed discovery amendments is focused on what is known as a proportionality standard. The proportionality standard and accompanying rule changes are based on a set of proposals developed during the 2010 Conference on Civil Litigation held at Duke University ("Duke Conference"). At the Duke Conference, some 200 practitioners met to discuss ways to deal with the expense of discovery and its impact on civil litigation. The key change proposed by the Duke Conference and the later-established conference Subcommittee ("Subcommittee") is a new version of Rule 26(b), along with revisions to associated rules concerning discovery and litigation management. These proposed revisions place a greater focus on assessing the stakes of the litigation in question to determine the necessary scope of discovery in a given case.

Under revised Rule 26(b)(1), the basic

scope of discovery remains unchanged, allowing the parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."¹ The key change comes in language concerning the breadth of discovery requests. The language of the current rule provides that the discovery sought need not be admissible at trial so long as the request is "reasonably calculated to lead to the discovery of admissible evidence."² Based on a general consensus at the Duke Conference that the parties had placed too much emphasis on this provision, the proposed amendment replaces it with a proportionality standard. Although proportionality language currently appears in Rule 26(b)(2)(iii), the Subcommittee found it was little used or relied upon and, thus, moved the proportionality standard to the scope provision of Rule 26.³ The Subcommittee determined, after comment, that it would change the order of the factors to be considered in applying the proportionality standard to demonstrate that the issue of primary importance in determining whether discovery was warranted

should be the importance of issues at stake in the litigation. Proposed Rule 26(b)(1) requires that discovery be proportional to the needs of the case by considering a number of factors:

[P]roportional 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.⁴

This proposed scope change is accompanied by several associated rule changes that according to their drafters, were designed to advance cooperation among the parties, proportionality in the use of available procedures, and promote early and active judicial case management.⁵ The accompanying changes include modifications to Rule 1 (adding language encouraging increased cooperation among the parties), Rule 16 (imposing stricter time limits for holding the scheduling conference at the outset of litigation and increasing the number of topics discussed therein and adding an increased focus to the need for greater judicial intervention and management of pre-trial matters including discovery), Rule 34 (allowing early requests for production and requiring certification of whether a responsive document exists upon objection), and Rule 37 (changing the method of determining sanctions for failure to preserve ESI).⁶

In an effort to address feedback received during the comment period, the proposed rule changes are accompanied by extensive commentary explaining the drafter's intent. The ultimate takeaway from the commentary is that the Subcommittee's vision is not to impose a new standard, but to simply redirect the legal community and the judiciary back to the original focus of Rule 26, which was to ensure that the burdens imposed by discovery were proportionate to the stakes of the litigation at issue. The commentary notes that this focus was derailed by improper emphasis on the phrase "reasonably calculated to lead to the discovery of admissible evidence," which the

Subcommittee indicates has been the driving force behind many of the judicial decisions and litigants' positions concerning discovery that gave rise to the need for discovery reform.⁷

The other takeaway from the proposed commentary is that one of the key factors necessary for real discovery reform to occur is for the judiciary to take a more active role in prelitigation planning and discovery management (as indicated by the proposed amendments to Rule 16). This emphasis is shown in commentary noting that "[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes" and emphasizing that the "court's responsibility, using all the information provided by the parties, is to consider [proportionality] factors in reaching a case-specific determination of the appropriate scope of discovery."⁸

ANTICIPATED IMPACT OF THE RULE

While the proposal put forward by the Duke Conference and Subcommittee is certainly a step in the right direction in an effort to reign in the ever increasing costs of discovery, its ultimate efficacy is dependent on the legal community; a fact which is made prominent in the most recent version of the Subcommittee's proposed commentary. Specifically, the commentary notes that previous overhauls of the discovery rules in 1983 and 1993 did not work because, among other things, the judiciary did not exercise the level of discovery oversight intended by the architects of the proposed rule changes.⁹ Given the current realities of the caseload of the federal judiciary and substantial roadblocks imposed on filling judicial vacancies by congressional gridlock, increased judicial oversight seems unlikely.¹⁰ The plain fact is that many federal judges are simply faced with such a heavy case load that increased judicial oversight of civil discovery is not feasible. As such, unless there is a drastic change in political will concerning judicial confirmations, which seems unlikely, any measure that involves reliance on increased judicial involvement and oversight has little chance of producing meaningful change on a nationwide scale.

That said, however, the Subcommittee's current proposal is a step in the right direction. Increased emphasis on the proportionality standard and the guidance provided in the commentary will help to generate precedent in those discovery disputes in which judicial intervention is available, interpreting, and hopefully providing guidance for practice under a proportionality standard. The language will also hopefully begin to affect some change in the behavior of the bar, providing pause before sending out boilerplate discovery requests and engaging in costly discovery disputes.

CONCLUSION

Ultimately, these changes to the discovery rules may address the current discovery problems in the federal system, but any change will be slow. The proposed rule amendments were approved by the United States Judicial Conference's Committee on Rules of Practice and Procedure in June 2014. The rule changes will now be recommended to the United States Supreme Court during the Judicial Conference's September 2014 meeting. If the Supreme Court accepts the amendments and enacts the rules, subject to any congressional modification, they could take effect in some form as early as December 2015. Once the rules take effect, precedent set by those judges and lawyers who fully engage within the spirit of the new rules could have a positive impact on discovery as a whole.



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¹ *Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Report to the Standing Committee* (2014) [hereinafter *Committee Report*], at 80, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks>.

² Fed. R. Civ. P. 26(b)(1).

³ *Committee Report, supra* note 1, at 70.

⁴ *Id.* at 80.

⁵ *Id.* at 66.

⁶ *Id.* at 71-76.

⁷ *Id.* at 81-85.

⁸ *Id.* at 84.

⁹ *Id.*

¹⁰ See, e.g., Daniel O. Jamison, *Our Courts Are in Crisis, and Education is the Best Answer*, BAKERSFIELD CALIFORNIAN, May 7, 2014, available at <http://www.bakersfieldcalifornian.com/opinion/hot-topics/x1042370463/Our-courts-are-in-crisis-and-education-is-the-best-answer> ("As of April 26, [2014], there were 87 vacancies in the district and appellate courts, with over 70 of those in the district courts. Over 40 percent are judicial emergencies due to caseloads requiring many more judges.")