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Can E-Discovery Violate Due Process? Part 1

Proposed amendments to the Federal Rules of Civil Procedure for e-discovery don't go far enough.

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The escalating cost of discovery in U.S. commercial litigation has garnered a lot of attention in recent years as requests for electronic discovery have spiraled out of control, with some defendants having to pay hundreds of thousands — or even millions — of dollars to respond to discovery requests in civil litigation. As one report succinctly put it: "[o]ur discovery system is broken."[1]

The federal Advisory Committee on Civil Rules (Committee) is currently contemplating a series of discovery-related changes to the Federal Rules of Civil Procedure. In the main, these changes would advance several proposals stemming from the 2010 Duke Conference on U.S. Civil Litigation that are aimed at reducing the costs and delays associated with unfettered discovery. The Committee would also establish clearer standards for imposing curative measures and sanctions when electronically stored information is lost.

While the reasons offered by the Committee in support of these changes are largely normative in nature, there is another — even more fundamental — justification for the changes: current discovery rules impose substantial burdens that pose a significant threat to defendants' due process rights. Under the current producer-pays discovery system, a plaintiff can propound broad and costly discovery requests on a defendant well before there is any finding of liability. Requiring a defendant to spend thousands (if not millions) of dollars on discovery without any financial contribution from the plaintiff under these circumstances may infringe the defendant's due process rights.

This article, in two parts, examines whether the proposed changes to the governing discovery rules sufficiently account for due process rights and what other steps should be taken to rein in discovery abuse.

THE ADVISORY COMMITTEE PROPOSALS

The Committee is currently considering two major discovery-related changes to the Federal Rules of Civil Procedure. The first is a comprehensive set of discovery rule changes emanating from the 2010 Duke Conference on U.S. Civil Litigation that would promote the "principal aspirations" of "cooperation, proportionality, and early hands-on case management" to reduce the cost and delay inherent in complex civil discovery.[2] The second is an amendment to Rule 37(e), which governs electronically stored information. The amendment, if enacted, would establish clearer standards for the imposition of curative measures when discoverable information is lost.[3]

Duke Conference Rules Package. The first component of the Committee's proposals is based on the 2010 Duke Conference on U.S. Civil Litigation, which addressed a number of problems plaguing the federal civil discovery regime, not the least of which is the lack of proportionality under the current system. In 1983, Rule 26(b)(2)(C)(iii) was adopted to enforce proportionality of discovery, providing that "[o]n motion or on its own, the court must limit the frequency or extent of discovery ... if it determines that ... (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[4] However, "[a]s both judges and commentators have noted, this proportionality requirement has not proven to be an effective limitation on the scope or costs of discovery," with many courts simply giving lip service to this particular rule.[5] As one leading civil procedure treatise notes, "[w]hatever the theoretical possibilities," the proportionality rule "created only a ripple in the case-law"; "no radical shift has occurred."[6] In light of Rule 26(b)'s ineffectiveness at promoting meaningful proportionality in civil discovery, scholars and courts alike have advocated changes to the rule that would provide clearer standards for reducing the burden on the party bearing the cost of responding to discovery requests.

One such change is the proposal under consideration by the Committee that would add some teeth to Rule 26. Specifically, Rule 26 would be amended to provide that discovery may be obtained only if it is "proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, 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."[7] The Committee is

considering the following proportionality changes to the discovery rules as well:

• Limiting discovery to "claims and defenses" as identified in the pleadings.

• Reducing the presumptive limit on the number of depositions from 10 to 5.

• Reducing the presumptive duration of each deposition to one day of 6 hours from the current 7-hour limit that often spans two days.

• Reducing the presumptive limit on the number of interrogatories (including subparts) to 15 from the current 25.

• Limiting the presumptive number of admission requests to 25, exempting document authentication requests.[8]

Rule 37(e) Amendment. The second proposal is an amendment to Rule 37(e), which governs sanctions for failing to preserve electronically stored information. The current rule provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."[9] The current rule has not proven to be entirely effective, as "electronic discovery has become a prime tool used offensively by litigants, with sanctions motions turning into their own minilitigations."[10] The Committee is cognizant of this trend, recognizing that Rule 37(e) has "not been sufficiently effective" in reducing "preservation sanction risks."[11] In response to this concern, the Committee has proposed an amendment to Rule 37(e) focusing more on curative measures (such as permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information) and clarifying when sanctions for failure to preserve electronically stored information are appropriate.[12]

THE PROPOSALS DON'T GO FAR ENOUGH

Efforts by the Committee to reform the current civil discovery rules are laudable, but they are not sufficient to rein in the costs and burdens inherent in complex civil discovery. Most importantly, while mandating that all discovery be proportional to "the needs of the case, [considering] the amount in controversy, ... the importance of the issues at stake in the action" will likely reduce the overall scope of discovery in certain cases, such a requirement still does not address a fundamental shortcoming of our current civil discovery system — namely, that the producer of discovery generally bears all of the costs associated with production.[13] "In many instances, these costs will no doubt be substantial, particularly when the requesting party seeks production of electronically stored information that must first be restored or reformatted by the producing party."[14] This is particularly troubling given the dramatic growth in electronic discovery costs over the past several years in U.S. commercial litigation. Law Technology News has reported that the total cost of electronic discovery rose from $2 billion in 2006 to $2.8 billion in 2009 and estimated that the total cost would rise ten to fifteen percent annually over the next few years.[15] In a more recent case study of Fortune 500 companies, the RAND Institute found that the median total cost for electronic discovery among participants totaled $1.8 million per case.[16]

The reality for most civil litigation is that the defendants' obligation to bear these exorbitant discovery costs incentivizes plaintiffs to serve burdensome discovery requests on defendants with zero downside risk to themselves. As Professor Martin Redish has explained, "the fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger the expense to be borne by the opponent, the bigger the incentive to make the request."[17] And because defendants seek to avoid these exorbitant costs, discovery is all too often used as a weapon to coerce settlement of claims, regardless of their merit.[18]

The "Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System" (ACTL-IAALS Report), by the American College of Trial Lawyers & Institute for the Advancement of the American Legal System, found unsurprisingly that cases of "questionable merit ... are settled rather than tried because it costs too much to litigate them."[19] Even the Supreme Court has recognized this problem, lamenting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" trial."[20]

See part 2.

::::ENDNOTES::::

1. Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., "Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System" (ACTL-IAALS Report), at 9 (PDF).

2. Duke Conference Rules Package, at 77, Apr. 11-12, 2013 (PDF).

3. Advisory Committee on Civil Rules, Rule 37(e) Proposal, at 143, Apr. 11-12, 2013 (PDF).

4. Fed. R. Civ. P. 26(b)(2)(C)(iii).

5. Martin H. Redish & Colleen McNamara, Back to the Future: Discovery Cost Allocation and Modern Procedural Theory, 79 Geo. Wash. L. Rev. 773, 780-81 (2011) (footnotes omitted).

6. 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2008.1, at 121 (2d ed. Supp. 2008); see also Ronald J. Hedges, A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure, 227 F.R.D. 123, 127 (2005) ("[T]he proportionality principle of Rule 26(b)(2) ... is not being utilized by judges[.]"); Hon. Shira A. Scheindlin & Jeffrey Rabkin, Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?, 41 B.C. L. Rev. 327, 349 (2000) (describing the proportionality requirement of Rule 26(b)(2) as "seldom-used"); Richard L. Marcus, Retooling American Discovery for the Twenty-First Century: Toward a New World Order?, 7 Tul. J. Int'l & Comp. L. 153, 162-63 (1999) (characterizing proportionality rule as "something of a dud").

7. Duke Conference Rules Package, at 83, Apr. 11-12, 2013.

8. Id. at 84-87.

9. Fed. R. Civ. P. 37(e).

10. Danielle M. Kays, Reasons to "Friend" Electronic Discovery Law, 32 Franchise L.J. 35, 36 (2012).

11. Advisory Committee on Civil Rules, at 122, Nov. 1-2, 2012 (PDF).

12. See Advisory Committee on Civil Rules, at 143, Apr. 11-12, 2013; Advisory Committee on Civil Rules, at 122-24, Nov. 1-2, 2012.

13 See Fed. R. Civ. P. 26(b)(2)(C)(iii).

14. Redish & McNamara, supra note 5, at 788.

15. George Socha & Tom Gelbmann, Climbing Back: Revenue Climbing Back for EDD Industry, Law Tech. News (Aug. 1, 2010).

16. See Nicholas Pace & Laura Zakaras, Rand Institute for Civil Justice, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery, 17 (2012).

17. Martin H. Redish, Electronic Discovery and the Litigation Matrix, 51 Duke L.J. 561, 603 (2001).

18. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"); see also John H. Beisner, Discovering a Better Way: The Need for Effective Civil Litigation Reform, 60 Duke L.J. 547, 549 (2010) ("Plaintiffs' attorneys routinely burden defendants with costly discovery requests and engage in open-ended 'fishing expeditions' in the hope of coercing a quick settlement.").

19. See Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., supra note 1, at 2.

20. Twombly, 550 U.S. at 558-59.

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