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# 'Proportional' Discovery Proposed for Fed. Civil Cases

The proposed amendments to the Federal Rules of Civil Procedure present not only a significant shift in the scope of discovery allowed in federal court, but also would usher in a new era of other limitations on discovery.

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On August 15, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published its "Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure." While the committee has not yet approved the potential rule changes and has only published them for public comment running through February 15, 2014, these proposed changes could become effective December 1, 2015, if they are approved by the committee and thereafter the Judicial Conference and the Supreme Court. The proposed amendments present not only a significant shift in the scope of discovery allowed in federal court, but also would usher in a new era of other limitations on discovery. All of these proposed changes suggest that the committee is looking to revise Rule 26 of the Federal Rules in a way to expedite civil litigation and limit the costs incurred by litigants, which, depending on which side you find yourself on in a given dispute, may be a good or bad thing.

Rule 26 of the Federal Rules of Civil Procedure has long been the most important discovery rule for civil litigators practicing in the federal courts, as it provides the general framework of discovery. As set forth in the preliminary draft of the committee, Rule 26 would see the most significant changes in decades by the committee's proposal to alter the scope of discovery rule in federal court. The rule in federal court, which is mirrored in several state civil rules, has long been that parties are allowed to seek discovery that is "reasonably calculated to lead to the discovery of admissible evidence." Most who practice in federal court have this phrase from Rule 26(b)(1) memorized, and the courts are generally willing to grant the parties the ability to conduct broad-based discovery of parties, facts and issues based on this rule. However, "reasonably calculated to lead to the discovery of admissible evidence" in Rule 26(b)(1) is deleted in the committee's proposed changes, and a new cost-benefit analysis rule is being proposed.

The proposed amendment to Rule 26(b)(1) would fundamentally shift the scope of the rule by setting for a "proportional" standard. Specifically, the amendment provides that the scope of discovery would be "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 issues, and whether the burden or expense of the proposed discovery outweighs the likely benefit." The committee's Memorandum to the Bench, Bar and Public explains that this proposal is designed to "promote responsible use of discovery proportional to the needs of the case" and that the committee has found that "excessive discovery occurs in a worrisome number of cases." The committee further commented that the number of cases with excessive discovery and the burdens they impose "present serious problems." Indeed, the committee expressly states in its explanation of this proposed amendment

that "these considerations frame the proposal to revise the scope of discovery defined in Rule 26(b)(1) ... to become a limit on the scope of discovery."

Clearly, the proposed amendment's intent is to limit broad-based discovery and change the analysis to one that considers the needs of the case. For some litigators, this may be a welcomed change to ward off delay tactics and what they deem excessive discovery, whereas others may see it as a limit against what they feel is needed and that it may unfairly shift the burden to one seeking discovery to prove that "the needs of the case" demand more than what one adversary is willing to agree to or turn over.

Another interesting proposed change to the Federal Rules of Civil Procedure that echoes the underlying theme of the committee to streamline civil cases in the federal courts is the proposal to add a new Rule 26(d)(2), which in practical effect would amend Rule 34 relating to requests for production, to allow parties to make early requests for materials before the first conference. The proposal would allow one party, more than 21 days after the summons and complaint have been served on a party, to serve requests under Rule 34, which would occur prior to the first Rule 26(f) conference. The new rule states that the requests would be deemed served at the time of the conference. The committee explains in its memorandum accompanying its preliminary draft that these changes are designed to facilitate the parties' discussion of issues at the Rule 26(f) conference "by allowing consideration of actual requests." While new Rule 26(d)(2) is specifically limited to requests under Rule 34 and does not include interrogatories or requests for admissions, it seems clear that the committee is looking to speed up the pace of discovery.

Furthermore, although not addressed by the committee, the effect of adding Rule 26(d)(2) for requests under Rule 34 creates an interesting new twist on discovery, because it would allow one to request documents or materials and perhaps have them in hand to review before finalizing and serving interrogatories or requests for admissions after the initial conference. Of course, this would depend on how quickly the parties agree to or the court orders that interrogatories and requests for admissions be served after the initial Rule 26(f) conference. But there is the possibility that this proposed change would allow litigators to employ a new tactic to focus their interrogatories and requests for admissions in light of documents already produced, which, as set forth below, may also be shrinking in number very soon.

There are several other proposed changes set forth by the committee in its recent publication, but the other ones that bear the most relevance to the shift in the scope of discovery and newly proposed Rule 26(d)(2) present new proposed limitations on interrogatories, depositions and requests for admissions. The following is a brief overview of the additional proposed changes to Rule 26:

- Limiting the number of requests for admissions to 25.

- Reducing the number of standard fact witness depositions allowed from 10 to five.

- Reducing the standard time allowed for depositions from seven hours to six hours.

- Reducing the number of interrogatories allowed per party from 25 to 15.

- Reducing the time for serving process on a defendant from 120 to 60 days, although leave can still be sought for more time upon filing a motion.

Like the shift in the rule on the scope of discovery, these changes to familiar discovery mechanisms also limit discovery available to parties and stress the committee's apparent intent to increase the pace of cases on civil dockets. For example, in connection with the proposed revision to Rule 4(M) shortening the time to serve a summons and complaint from 120 to 60 days, the committee explained, "The effect will be to get the action moving in half the time." In connection with the limitation on depositions, the committee's report explains that "less than one-quarter of federal civil cases result in more than five depositions" and that the aim of the limit to five depositions is to "decrease the cost of civil litigation." These proposals, when considered with the proposed change to Rule 26(b)(1) on the scope of discovery, exhibit a significant shift in how discovery will take place in federal civil cases if the proposed amendments are eventually adopted by the Supreme Court.

Arguably, all of the proposed changes will be branded as new "limitations" on discovery, but, for some, they may be a welcomed breath of fresh air that provide new tools to expedite civil cases and avoid unnecessary discovery and costs to their clients. As with anything, it is a matter of perspective and which side you find yourself on in the discussion (or a given case). Regardless of how you view the proposed changes, the impact will be significant, far-reaching, and will require litigators to rethink discovery strategies and weigh the burdens and benefits of discovery in new ways. To borrow from the proposed amendments, litigators will have to evaluate what is proportional to the case.

If approved, the proposed changes could take effect December 1, 2015, which would likely apply to all pending and future cases if adopted. While this may seem a long way off, the changes are significant and are worth keeping an eye on if you regularly litigate civil cases in the federal courts, as they could impact cases filed over the next year. For better or worse, a new standard on the scope of discovery is on the horizon and litigators in the federal courts should keep a watchful eye on the coming storm.

If you are interested in reviewing the proposed changes in detail or commenting to the committee on the proposals, the proposals and other information regarding the committee's preliminary draft can be found at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.

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