

The Costs and Burdens of Civil Discovery: Current Issues and What Lies Ahead

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Introduction

It is no secret that the rising costs of discovery, due in large part to the volume of electronic data produced today, has become a hot topic in recent years. A survey of Fortune 200 companies found that in 2008, the 36 responding companies spent a total of \$4.1 billion on litigation in the United States alone, a figure which did not include judgments, settlements, or internal costs to store and retrieve electronic information.¹ Furthermore, on average, for each dollar of global profit earned in 2008, companies spent 16 to 24 cents on litigation in the U.S.² For the years 2006 through 2008, the companies paid an average per-case discovery cost of \$621,880 to \$2,993,567.³ Companies at the high end of this study reported costs ranging from \$2,354,868 to \$9,759,900 per case.⁴ What do these numbers mean, you may ask? In short, it means that some feel that the current system is not working. The failure of our system to require precise pleadings and limit the scope of discovery leads to companies being forced to over-preserve electronic information, and this cost, in-turn, gets passed on to the consumer and affects the U.S. economy in a negative way. Fortunately, these issues have been recognized by the United States Judicial Conference Rules Committee (hereafter "Judicial Conference") who, through the Advisory Committee

on Civil Rules (hereafter "Civil Rules Advisory Committee"), has undertaken an initiative to study the Federal Rules of Civil Procedure. As part of its responsibility under the Rules Enabling Act, the Judicial Conference is charged with recommending amendments which promote simplicity, fairness, and just determination of litigation in Federal Courts.⁵ In addition to action by the Judicial Conference, the U.S. House of Representatives has begun to monitor these issues as well.

This article will give a brief background on some of the issues with the current system and will summarize the December 13, 2011 "Costs and Burdens of Civil Discovery" hearing conducted by the House Judiciary Subcommittee on the Constitution. Finally, the article will update the current status of potential amendments to the Federal Rules of Civil Procedure, and give a preview on what lies ahead.

Issues with the Current System

In 2006, the Federal Rules of Civil Procedure were amended to address the ever-growing area of electronic discovery. Unfortunately, these amendments did very little to combat the increasing costs and inefficiencies that arise when dealing with electronically stored information. In May of 2010, the Judicial Conference

Standing Committee on the Rules of Practice and Procedure (hereafter "Standing Committee") held a two-day conference at Duke University Law School to begin looking into the issues that plague the current system. Numerous white papers from national organizations were submitted to the committee from both sides – those who believe a change in the rules is needed and those who think the current system is working. The side seeking amendments to the rules suggests the reforms are needed in four main areas: (1) a heightened pleading requirement; (2) a limit on discovery; (3) clearer rules on preservation and spoliation; and (4) more cost splitting between the parties.⁶ For proponents of amending the rules, some of the suggested changes are:

- **Pleadings** – Proposed rule changes in this area would amend the current Rule 8 standard of mere notice pleading, and require the heightened plausibility pleading standards enunciated in *Twobley* and *Iqbal*. Specifically, by revising this rule to heighten the pleading standard to that in *Twobley* and *Iqbal*, that doctrinal confusion that has often plagued lower courts will be eliminated. This will also allow for a consistent standard to be applied across all civil cases, as some types of cases currently adhere to this standard.⁷
- **Discovery** – Suggested rule amendments would narrow the scope of discovery to claims and defenses in the litigation, and would require that discovery requests be in proportion to the stakes and needs of the litigation.⁸ Rule 26 would be amended in several ways to narrow the scope of discovery,

¹ Lawyers for Civil Justice, DRI – The Voice of the Defense Bar, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, *Comment: Supplementing the White Paper Submitted to the 2010 Litigation Conference*, (June 8, 2010).

² *Id.* at 3.

³ *Id.* at 4.

⁴ *Id.*

⁵ Lawyers for Civil Justice, DRI – The Voice of the Defense Bar, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, *White Paper: Reshaping the Rules of Civil Procedure for the 21st Century, The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure*, (May 2, 2010).

⁶ See generally *Supplementing the White Paper Submitted to the 2010 Litigation Conference* at 9-13.

⁷ *Id.* at 9-10.

⁸ Lawyers for Civil Justice, *Statement Submitted to the U.S. House of Representatives Committee on the Judiciary Subcommittee on the Constitution Hearing: The Costs and Burdens of Civil Procedure*, (Dec. 13, 2011).

including the exemption of certain categories of electronically stored information unless there is a showing of “substantial need and good cause.”⁹ Rule 34 would also be amended to limit the number of requests for production to no more than 25, limit the number of custodians to 10, and limit the time period for which discoverable electronic information is available to the requesting party for no more than two years prior to the date of the complaint.¹⁰ These amendments would reduce the volume of information and evidence subject to discovery, provide a clearer standard of relevance, lessen the likelihood of litigation on discovery issues, and limit the overall costs of discovery.¹¹

- **Preservation/Spoilation** – The proposed amendment to Rule 37(c) would permit spoliation sanctions only when willful conduct was carried out for the purpose of depriving another party of the use of the destroyed evidence, if that destruction results in actual prejudice to the other party.¹² By amending this rule, the inconsistency of requirements established by various courts would be alleviated.¹³ Proponents of amending the rules of preservation feel that it should also be addressed in Rule 26. A new Proposed Rule 26(h) would memorialize the duty to preserve and specifically limit the types of electronically stored information that would fall under this duty.¹⁴
- **Cost Allocation** – The suggested amendment for Rule 26 regarding cost allocation would require each party to pay the cost of the

discovery it seeks.¹⁵ According to its proponents, a requester-pays rule will encourage parties to focus the scope of their discovery requests to evidence that is reasonably calculated to lead to relevant information, as opposed to being allowed to seek broad categories of information.¹⁶ This, in turn, would force litigants to analyze the merits of their case, rather than try to force a settlement based on the excessive costs of discovery.

Opponents of amending the Federal Rules of Civil Procedure argue that it is far too soon to amend rules that were promulgated in 2006. They argue that the current data is too flawed, inconsistent, and inconclusive and that we should give the current rules a chance to work before making amendments.¹⁷ In addition, opponents of amending the rules to achieve bright-line guidance feel that it will lead to an increase in the litigation related to discovery and will result in unfairness to some litigants as they could be deprived of their day in court because of the non-availability of evidence key to their case.¹⁸ As with any argument, there is data and statistics to support both sides.

December 13th Hearing – “The Costs and Burdens of Civil Discovery”

On December 13, 2011 the House Judiciary Subcommittee on the Constitution convened a hearing titled the “Costs and Burdens of Civil Discovery” to address whether the Federal Rules of Civil Procedure need to be amended regarding the rules governing discovery, particularly the rules regarding preservation and electronic discovery. This was the first hearing of this type since the Federal Rules of Civil Procedure were last amended in 2006, a hearing which some felt was long overdue.

The hearing opened with Committee Chairman Trent Franks (R-Arizona) stating

that the hearing was needed to “identify rules and regulations that impose undue costs and burdens and destroy American jobs.” Franks added that the current rules “appear to fall short” of encouraging a “just, speedy, and inexpensive” resolution to disputes as envisioned by the Federal Rules of Civil Procedure. He stated that the current system encourages parties to bury each other in requests for data of dubious evidentiary value and that under the current rules the “vague standards and harsh sanctions leave parties no choice but to preserve excessive amounts of data” leading to excessive costs and burdens being placed on companies forced to preserve the data. Franks concluded by arguing that rule changes must be made to combat the rising costs of discovery.

After Franks’ opening statement, Rep. Jerrold Nadler (D-New York) acknowledged that electronic data discovery poses new challenges and burdens, but that discovery of electronic data “has proven particularly valuable in uncovering critical evidence and improving accountability.” He further urged that we should not lose sight of the tremendous benefits of discovery when weighing the costs and burdens. Nadler briefly described two examples of large-scale cases where massive discovery played a critical role. He read briefly from a Department of Justice submission stating that, without concrete empirical data, changes to the rules should not be made. Nadler finished his statement by reading a letter submitted by the Civil Rules Advisory Committee, which urged the subcommittee to “allow the Rules Committee to continue their consideration of these issues through the thorough, deliberate, and time-tested procedure Congress created in the Rules Enabling Act.”

Upon the completion of Nadler’s statement, Rep. John Conyers (D-Michigan) voiced his skepticism about the motives behind the hearing, stating that “one-tenth of 1 percent of federal cases involve the level of discovery costs that are the subject of the

⁹ Lawyers for Civil Justice, *A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action*, (Aug. 18, 2011) (comment submitted to the Civil Rules Advisory Committee).

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² See *Supplementing the White Paper Submitted to the 2010 Litigation Conference* at 12.

¹³ *Id.*

¹⁴ See *White Paper: Reshaping the Rules of Civil Procedure for the 21st Century* at 36-37.

¹⁵ See *LCJ Statement Submitted to the U.S. House of Representatives Committee on the Judiciary Subcommittee on the Constitution Hearing* at 3.

¹⁶ See *Supplementing the White Paper Submitted to the 2010 Litigation Conference* at 12-13.

¹⁷ Milberg LLP and Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules*, 2011 Fed. Cts. L. Rev. 4 (February 2011).

¹⁸ Letter to The Honorable David G. Campbell from Milberg LLP and Hausfeld LLP, November 6, 2011 at 2.

hearing, which suggests this hearing may be based on some corporation insistence that they be heard about this matter, rather than a genuine need for rules changes.” He also inquired of Franks as to why no members of the Judicial Conference Advisory Committee had been invited to testify at the hearing. Franks replied that some judges on the Advisory Committee believed that it was more appropriate for that committee to convey its stance by letter, to which Conyers replied “perhaps their letter wasn’t as persuasive as they had hoped,” as Franks had chosen to continue the hearing anyway.

After the opening statements were given, four witnesses were introduced – Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System at the University of Denver and former Colorado Supreme Court Justice; William H.J. Hubbard, Assistant Professor of Law at the University of Chicago Law School; William P. Butterfield, Partner at Hausfeld LLP; and Thomas H. Hill, Associate General Counsel for Environmental Litigation and Legal Policy at General Electric Corporation. Each witness was asked to submit a truth in testimony written statement and were given five minutes each to summarize their position.

The first witness to testify was Ms. Kourlis, who stated ultimately that as it is today, “the civil justice system in the United States is too expensive and too complex.” She went on to say that lawsuits take too long and cost too much, and that the current discovery process does not lend itself to the “just, speedy, and inexpensive” system envisioned by the Federal Rules of Civil Procedure. Ms. Kourlis stated that the electronic age has affected both plaintiffs and defendants alike, and that the cost of discovery is frequently not proportional to the dispute at issue. In fact, Ms. Kourlis pointed out that the costs of e-discovery are not only affecting large cases and defendants, but cases of all sizes, and plaintiffs and defendants alike. She cited a survey stating that most attorneys will not take a case unless there is a minimum \$100,000 at issue. She testified further that lesser cases are not reaching trials on the merits, and that the result is settlements due to the increasing costs of discovery. Ms. Kourlis believes that the solution to fixing problems with the current system is a multi-faceted one, with rule changes, more effective case management by judges, and more cooperation between attorneys in the discovery process all playing a role.

However, rule changes are the first step as they prevent a case-by-case and courtroom-by-courtroom discovery system that is present now.

The next witness to testify was Professor William H.J. Hubbard. The focus of Professor Hubbard’s testimony was the excessive cost of discovery and preservation under the current rules. He stated that, although discovery for the average federal civil case costs around \$12,000, these costs have a “long tail.” Professor Hubbard cited a study in which the top 5 percent of cases in terms of discovery costs account for 60 percent of all litigation costs in federal courts. These cases have discovery costs going into the hundreds of thousands of dollars. As for preservation, Professor Hubbard testified that the “long tail” phenomenon is present as well. He stated that because parties are required to alter their normal business activities even before a lawsuit is filed, many unnecessary costs are incurred. Moreover, many of the costs associated with preservation are for cases that never go to litigation. For these reasons, the current rules are not working. In closing Professor Hubbard stated that a change is needed and that “clear federal rules should help to reduce the ambiguity and over-breadth of current case law and to reduce the costs of civil litigation to society.”

The third witness to testify was William Butterfield. Mr. Butterfield, the lone witness calling for no change in the rules, stated that discovery costs are generally proportional to the stakes in the litigation and to change the rules “for a few thousand” of the 300,000 cases filed in federal court per year would pose a “substantial risk” to the civil justice system. Mr. Butterfield argued that the proponents of rule changes are choosing to focus on the outliers (the cases in the “long tail” discussed by Professor Hubbard) and that discovery in those cases will always be expensive, with or without rule changes. Mr. Butterfield then addressed the issue of over-preservation. He cited a study that showed in only 1/15th of 1 percent of cases where sanctions were sought for spoliation. In those cases, the offending party was only sanctioned half of the time. Mr. Butterfield also cautioned that some of the proposed rule changes, such as the one that would trigger the duty to preserve only upon the filing of a complaint, would have adverse consequences. In his example, people would rush to file lawsuits before evaluating all options available, and this would drive up the costs of litigation due to the fact

that there would be more lawsuits, which would not reduce costs. He also cautioned that a rule such as this would encourage the destruction of evidence in cases where a lawsuit has not yet been filed, but it is likely that one will be.

The final witness to testify was Thomas Hill. Mr. Hill began his testimony by stating that in these tough economic times, companies are wasting millions of dollars on preservation, and the current system yields minimal discovery benefit to courts, litigants, and juries. Under the current system, companies are forced to preserve information for claims that may never materialize, and companies are given little guidance on the scope of their preservation duties. Mr. Hill cited two real-world examples of GE being forced to over-preserve. The first case Mr. Hill described is one where GE has reasonably anticipated litigation and the breadth of the legal hold is relatively narrow, with 96 custodians. Although no case has been filed, GE has spent \$5.4 million to date in fees for preserving the 16 million pages of data produced by these custodians. This figure does not include money spent for legal review of the documents. The second example of over-preservation that Mr. Hill cites is a case where the amount in dispute is \$4 million, yet GE has spent \$6 million on discovery to date. He focuses on the fact that since courts rarely impose cost shifting, plaintiffs have little motivation to narrow the focus of discovery. Hill stated that this creates a “perverse incentive” to leverage dispute resolution on the economics rather than the merits of a claim. In concluding his testimony, Mr. Hill stated, “With clearer rules, including a narrower scope to avoid this waste, the discovery process will be faster, more fair, litigants can have the disputes resolved on the merits, and the savings can be used to create jobs, invest in the future, and benefit the U.S. economy.”

After the conclusion of the witness testimony, Representatives Franks, Nadler, Conyers, and Bobby Scott were all allowed five minutes each to ask questions of the witnesses. It was confirmed that all witnesses had communicated their positions and recommendations to the Civil Rules Advisory Committee. It was agreed that Congress would do nothing at this time, but would report to the Civil Rules Advisory Committee its findings from the hearing. Rep. Conyers even suggested the possibility of scheduling another hearing when the Civil Rules Advisory Committee reports its findings. In some of his final comments,

Chairman Franks indicated that he was “hopeful” and even “optimistic” that the Civil Rules Advisory Committee would come forward with ideas and proposed changes to the rules.

Package of Proposed Amendments Approved For Comment

After meeting multiple times throughout 2012 and 2013 to discuss the issues brought forward in the December 13, 2011 hearing, the Civil Rules Advisory Committee presented a package of amendments to the Federal Rules of Civil Procedure in April 2013, which the Standing Committee approved for publication and public comment on June 3, 2013. This package of amendments that was unanimously approved by the Standing Committee for public comment contains a heavily revised Rule 37(e) and a group of amendments that are known as the “Duke Proposals” that revise rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. These amendments have three primary goals: (1) advance early hands-on case management by judges; (2)

promote proportionality in discovery; and (3) improve cooperation among litigants.¹⁹

The new Rule 37(e) would permit curative measures for failure to preserve information that is discoverable, but would permit sanctions only for a failure to preserve which results from a “willful or bad faith act” that causes substantial prejudice.²⁰ This revision narrows the scope and subjectivity with which sanctions can be administered. Other highlights of the proposed amendments include a revised Rule 26(b)(1) which would require discovery to be more proportional to the needs of the case and would strike the phrase “relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence”, and the reduction of numerical limits in several discovery categories.²¹

What to Look for Next

The approval of this package of amendments by the Standing Committee means that the rules will be published for a

six-month public comment period, running from August 15, 2013, through February 15, 2014. Within this comment period will be three additional hearings: November 7 in Washington, D.C.; January 9 in Phoenix, AZ; and sometime in the first part of February, 2014, in Dallas, TX. Following these hearings and the comment period, the Civil Rules Advisory Committee will meet to discuss the proposed rule changes in light of the public comments and will submit its proposed amendments, whether revised due to the public comments or not, to the Standing Committee for approval. If the Standing Committee approves those amendments they will then go to the Judicial Conference for approval and then, if approved, onto the Supreme Court. If the Supreme Court approves the proposed rule changes, the rules then go to Congress for approval, which has six months to reject, modify, or defer the proposal. Should Congress choose not to act, the proposed rules would become part of the Federal Rules of Civil Procedure in December, 2015.²² ■

¹⁹ Maureen O’Neill, *Proposed Amendments to the Federal Rules of Civil Procedure: What the Future Holds and Why the Potential Changes Matter Today*. (May 23, 2013).

²⁰ Lawyers for Civil Justice, *Executive Summary: Standing Committee June 2013 Meeting*, (June 3, 2013).

²¹ *Id.* at 1.

²² *Id.* at 2.

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