Assessing the Impact of the Newly Proposed Amendments to the Federal Rules of Civil Procedure on the Discovery Process

By Philip Favro

This will probably sound familiar. Changes are in the works for the rules governing the discovery process that will make discovery more efficient and less costly. Once these changes are in place, matters can finally be litigated on the merits instead of in costly discovery satellite litigation.

This preamble might seem like a repeat of the 2006 amendments to the Federal Rules of Civil Procedure (Federal Rules or Rules). Instead, it describes a new package of proposed amendments to the Rules. Approved for public comment in June 2013 by the Standing Committee on Rules of Practice and Procedure, the draft amendments are generally designed to streamline the federal discovery process, encourage cooperative advocacy among litigants, and eliminate gamesmanship. The Civil Rules Advisory Committee (Committee), which drafted the amendments, has also tried to tackle the continuing problems associated with the preservation of electronically stored information (ESI). As a result of its efforts, the Committee has produced a package of amendments that affects most aspects of federal discovery practice.

In this article, I provide a comprehensive overview of the newly proposed amendments. This includes the changes that are designed to usher in a new era of cooperation, proportionality, and active judicial case management in discovery. I also review the Committee's re-write of Federal Rule 37(e) and its attempt to create a uniform national standard for discovery sanctions stemming from failures to preserve evidence. I conclude by describing the timeline for moving the amendment package forward.

Cooperation, Proportionality and Case Management

The overall thrust of the Committee's proposed amendments is to facilitate the tripartite aims of Federal Rule 1 in the discovery process. To carry out Rule 1's lofty yet important mandate of securing "the just, speedy, and inexpensive determination" of litigation,[1] the Committee has proposed several modifications to advance the notions of cooperation and proportionality.[2] Other changes focus on improving "early and effective judicial case management."[3] The draft amendments that advance these three concepts are each considered in turn.

[1] FED. R. CIV. P. 1.
[2] JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 4 (May 8, 2013) (REPORT).
[3] *Id*.

Cooperation – Rule 1

To better emphasize the need for cooperative advocacy in discovery, the Committee has recommended that Rule 1 be amended to specify that clients share the responsibility with the court for achieving the rule's objectives. The proposed revisions to the rule (in italics with deletions in strikethrough) read in pertinent part as follows:

[These rules] should be construed*,* and administered*, and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding.[4]

Even though this concept was already set forth in the Advisory Committee Notes to Rule 1, the Committee felt that an express reference in the rule itself would prompt litigants and their lawyers to engage in more cooperative conduct.[5] Perhaps more importantly, this mandate should also enable judges "to elicit better cooperation when the lawyers and parties fall short."[6] Indeed, such a reference, when coupled with the "stop and think" certification requirement from Federal Rule 26(g), should give jurists more than enough procedural basis to remind counsel and clients of their duty to conduct discovery in a cooperative and cost effective manner.[7]

Proportionality – Rules 26, 30, 31, 33, 34, 36

The logical corollary to cooperation in discovery is proportionality. Proportionality limitations, which require that the benefits of discovery be commensurate with its burdens, have been extant in the Federal Rules since 1983.[8] Nevertheless, they have been invoked too infrequently over the past 30 years to address the problems of over-discovery and gamesmanship that permeate the discovery process.[9] In an effort to spotlight this "highly valued" yet "missing in action" doctrine, the Committee has proposed numerous changes to the current Rules regime.[10] The most significant changes are found in Rules 26(b)(1) and 34(b).

Rule 26(b)(1) – Tightening the Scope of Permissible Discovery

The Committee has proposed that the permissible scope of discovery under Rule 26(b)(1) be modified to spotlight the limitations that proportionality imposes on discovery. Those limitations are presently found in Rule 26(b)(2)(C) and are not readily apparent to many lawyers or judges.[11] The proposed

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[4] *Id*. at 17.
[5] *Id*. at 16.
[6] *Id*.
[7] *See Bottoms v. Liberty Life Assurance Co. of Boston*, No. 11-cv-01606-PAB-CBS, 2011 WL 6181423 (D. Colo. Dec. 13, 2011).
[8] REPORT, at 9.
[9] *See* Philip J. Favro and Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933, 966 (2012).
[10] REPORT, at 4.
[11] Favro, *supra* Note 9, at 966.

modification (in italics) would address this problem by making clear that discovery must satisfy proportionality standards:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and 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.*[12]

By moving the proportionality rule directly into the scope of discovery, counsel and the courts should gain a better understanding of the restraints that this concept places on discovery.

Rule 26(b)(1) has additionally been modified to enforce the notion that discovery is confined to those matters that are relevant to the claims or defenses at issue in a particular case. Even though discovery has been limited in this regard for many years, the Committee felt that this limitation was being "swallowed" by the "reasonably calculated" provision in Rule 26(b)(1).[13] That provision currently provides for the discovery of relevant evidence that is inadmissible so long as it is "reasonably calculated to lead to the discovery of admissible evidence."[14] Despite the narrow purpose of this provision, the Committee found that many judges and lawyers unwittingly extrapolated the "reasonably calculated" wording to broaden discovery beyond the benchmark of relevance.[15] To disabuse courts and counsel of this practice, the "reasonably calculated" phrase has been removed and replaced with the following sentence: "Information within this scope of discovery need not be admissible in evidence to be discoverable."[16]

Similarly, the Committee has recommended eliminating the provision in Rule 26(b)(1) that presently allows the court – on a showing of good cause – to order "discovery of any matter relevant to the subject matter."[17] In its proposed "Committee Note," the Committee justified this suggested change by reiterating its mantra about the proper scope of discovery: "Proportional discovery relevant to any party's claim or defense suffices."[18]

Rule 34(b) – Eliminating Gamesmanship with Document Productions

The three key modifications the Committee has proposed for Rule 34 are designed to eliminate some of the gamesmanship associated with written discovery responses. The first such change is a requirement in Rule 34(b)(2)(B) that any objection made in response to a document request must be

[12] REPORT, at 19-20.
[13] *Id*. at 11.
[14] FED. R. CIV. P. 26(b)(1).
[15] REPORT, at 11.
[16] *Id*.
[17] REPORT, at 10-11.
[18] *Id*.

stated with specificity.[19] This recommended change is supposed to do away with the assertion of general objections. While such objections have almost universally been rejected in federal discovery practice, they rather remarkably still appear in Rule 34 responses.[20] By including an explicit requirement for specific objections and coupling it with the threat of sanctions for non-compliance under Rule 26(g), the Committee may finally eradicate this practice from discovery.

The second change is calculated to address another longstanding discovery dodge: making a party's response "subject to" a particular set of objections.[21] Whether such objections are specific or general, the Committee concluded that such a conditional response leaves the party who requested the materials unsure as to whether anything was withheld and if so, on what grounds.[22] To remedy this practice, the Committee added the following provision to Rule 34(b)(2)(C): "An objection must state whether any responsive materials are being withheld on the basis of that objection."[23] If enforced, such a requirement could make Rule 34 responses more straightforward and less evasive.

The third change is intended to clarify the uncertainty surrounding the responding party's timeframe for producing documents.[24] As it now stands, Rule 34 does not expressly mandate when the responding party must complete its production of documents.[25] That omission has led to delayed and open-ended productions, which can lengthen the discovery process and increase litigation expenses. To correct this oversight, the Committee proposed that the responding party complete its production "no later than the time for inspection stated in the request or [at] a later reasonable time stated in the response."[26] For so-called "rolling productions," the responding party "should specify the beginning and end dates of the production."[27] Such a provision should ultimately provide greater clarity and increased understanding surrounding productions of ESI.

Other Changes – Cost Shifting in Rule 26(c), Reductions in Discovery under Rules 30, 31, 33, 36

There were several additional changes the Committee recommended that are grounded in the concept of proportionality. While space does not allow for a detailed review of all of these changes, practitioners should take note of the new cost shifting provision in Rule 26(c). That change would expressly enable courts to allocate the expenses of discovery among the parties.[28]

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[19] *Id*. at 15.
[20] *See*, *e.g.*, *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359 (D. Md. 2008).
[21] REPORT, at 15
[22] *Id*.
[23] *Id*.
[24] *Id*. at 15-16.
[25] *Id*. at 16.
[26] *Id*. at 26.
[27] *Id*.
[28] *Id*. at 12, 20-21, 23.

The Committee has also suggested reductions in the number of depositions, interrogatories, and requests for admission. Under the draft amendments, the number of depositions is reduced from 10 to 5.[29] Oral deposition time has also been cut from seven hours to six.[30] As for written discovery, the number of interrogatories would decrease from 25 to 15 and a numerical limit of 25 has been introduced for requests for admission.[31] That limit of 25, however, does not apply to requests that seek to ascertain the genuineness of a particular document.[32]

Case Management – Rules 4, 16, 26, 34

To better ensure that its objectives regarding cooperation and proportionality are achieved, the Committee has introduced several rules changes that would increase the level of judicial involvement in case management.[33] Most of these changes are designed to improve the effectiveness of the Rule 26(f) discovery conference, to encourage courts to provide input on key discovery issues at the outset of a case, and to expedite the commencement of discovery.

Rules 26 and 34 – Improving the Effectiveness of the Rule 26(f) Discovery Conference

One way that the Committee felt that it could enable greater judicial involvement in case management was to have the parties conduct a more meaningful Rule 26(f) discovery conference.[34] Such a step is significant since courts generally believe that a successful conference is the lynchpin for conducting discovery in a proportional manner.[35]

To enhance the usefulness of the conference, the Committee recommended that Rule 26(f) be amended to specifically require the parties to discuss any pertinent issues surrounding the preservation of ESI.[36] This provision is calculated to get the parties thinking proactively about preservation problems that could arise later in discovery. It is also designed to work in conjunction with the proposed amendments to Rule 16(b)(3) and Rule 37(e). Changes to the former would expressly empower the court to issue a scheduling order addressing ESI preservation issues.[37] Under the latter, the extent to which preservation issues were addressed at a discovery conference or in a scheduling order could very well affect any subsequent motion for sanctions for failure to preserve relevant ESI.[38]

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[29] *Id*. at 12-14.
[30] *Id*. at 14.
[31] *Id*. at 14-15.
[32] *Id*. at 15.
[33] *Id*. at 4.
[34] *Id*. at 23.
[35] *See, e.g.*, 7th CIR. ELEC. DISCOVERY COMM. PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION, at princ. 2.05-2.06 (2010).
[36] REPORT, at 21.
[37] *Id*. at 23.
[38] REPORT, at 23.

Another amendment to Rule 26(f) would require the parties to discuss the need for a "clawback" order under Federal Rule of Evidence 502.[39] Though underused, Rule 502(d) orders generally reduce the expense and hassle of litigating issues surrounding the inadvertent disclosure of ESI protected by the lawyer-client privilege. To ensure this overlooked provision receives attention from litigants, the Committee has drafted a corresponding amendment to Rule 16(b)(3) that would enable the court to weigh in on Rule 502 related issues in a scheduling order.[40]

The final step the Committee has proposed for increasing the effectiveness of the Rule 26(f) conference is to amend Rule 26(d) and Rule 34(b)(2) to enable parties to serve Rule 34 document requests prior to that conference.[41] These "early" requests, which are not deemed served *until* the conference, are "designed to facilitate focused discussion during the Rule 26(f) conference."[42] This, the Committee hopes, will enable the parties to subsequently prepare Rule 34 requests that are more targeted and proportional to the issues in play.[43]

Rule 16 – Greater Judicial Input on Key Discovery Issues

As mentioned above, the Committee has suggested adding provisions to Rule 16(b)(3) that track those in Rule 26(f) so as to provide the opportunity for greater judicial input on certain eDiscovery issues at the outset of a case.[44] In addition to these changes, Rule 16(b)(3) would also allow a court to require that the parties caucus with the court before filing a discovery-related motion.[45] The purpose of this provision is to encourage judges to informally resolve discovery disputes before the parties incur the expense of fully engaging in motion practice.[46] According to the Committee, various courts have used similar arrangements under their local rules that have "proven highly effective in reducing cost and delay."[47]

Rules 4 and 16 – Expediting the Commencement of Discovery

The Committee has also recommended that the time for the commencement of discovery be shortened after the filing of the complaint so as to expedite the eventual disposition of a given case. In particular, Rule 4(m) would be revised to shorten time to serve the summons and complaint from 120

[39] *Id*. at 7, 23.
[40] *Id*. at 7, 18.
[41] *Id*. at 8-9.
[42] *Id*. at 23.
[43] *Id*. at 9.
[44] *Id*. at 7.
[45] *Id*. at 7-8.
[46] *Id*. at 7.
[47] *Id*. at 23.

days to 60 days.[48] In addition, Rule 16(b)(2) would reduce by thirty days the time when a court must issue a scheduling order.[49]

Preservation and Sanctions under a Revised Federal Rule 37(e)

The Committee has separately considered issues regarding the over-preservation of evidence and the appropriate standard of culpability required to impose sanctions for any failures to preserve relevant information. Even though the current iteration of Rule 37(e) is supposed to provide guidance on these issues, amendments were deemed necessary given the inherent limitations with the rule.[50]

As it now stands, Rule 37(e) is designed to protect litigants from court sanctions when the programmed operation of their computer systems automatically destroys ESI.[51] Nevertheless, the rule has largely proved ineffective as a national standard because it does not apply to pre-litigation information destruction activities. As a result, courts often used their inherent authority to bypass the rule's protections and punish clients that negligently, though not nefariously, destroyed documents before a lawsuit was filed. Moreover, the rule applied only to ESI and did not address issues surrounding the preservation of paper documents or other forms of evidence.[52] All of which has caused confusion among parties over what needs to be maintained for litigation, resulting in the over-preservation of information.[53]

The amendments to Rule 37(e) are designed to address these issues by "providing a uniform standard in federal court for sanctions for failure to preserve."[54] They do so by removing the possibility that courts could impose sanctions under Rule 37(b)(2)(A) for either negligent or grossly negligent conduct in connection with preservation obligations.[55] Instead, the proposal would shield pre-litigation destruction of information from sanctions except where "the party's actions" resulted in either of the following:

(i) caused substantial prejudice in the litigation and were willful or in bad faith; or

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.[56]

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[48] *Id*. at 4-5.
[49] *Id*. at 5-6.
[50] *Id*. at 44.
[51] *See* Philip J. Favro, *Sea Change or Status Quo: Has the Rule 37(e) Safe Harbor Advanced Best Practices for Information Management?*, 11 MINN. J.L. SCI. & TECH. 317 (2010).
[52] REPORT, at 44.
[53] *Id*. at 35.
[54] *Id*. at 46.
[55] *Id*.
[56] *Id*. at 43.

In making a determination on this issue, courts could not just rely on their inherent powers.[57] Instead, they would employ a multifaceted analysis to examine the nature and motives underlying the party's information retention decisions. Such factors include:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;

(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.[58]

By ensuring that the analysis includes a broad range of considerations, the proposed rule appears to delineate a balanced approach to preservation questions. Such an approach may very well benefit companies, which could justify a reasonable document retention strategy on best corporate practices for defensible deletion. The Committee contemplates as much, observing that "a party that adopts reasonable and proportionate preservation measures should not be subject to sanctions."[59]

While the draft amendments to Rule 37(e) provide some key protections to organizational litigants, the proposed rule also addresses some of the lingering concerns from the plaintiffs' bar. For example, the rule specifically empowers the court to order "additional discovery" or other "curative measures" when a litigant has destroyed information that it should have retained for litigation.[60] Under these provisions, an aggrieved party can ferret out the circumstances surrounding the destruction of that data. If the party uncovers evidence suggesting the destruction was sufficiently grievous, it could ultimately justify the imposition of sanctions under either of the above tests.

The Timeline for Action on the Proposed Amendments

Whether you favor or disagree with the proposed amendments, now is the time to share your opinion with the Committee. Public comment on the amendments is open through February 15, 2014. Comments may be provided in writing. Alternatively, oral testimony may be offered at one of the Committee's three public meetings.

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[57] *Id*. at 45.
[58] *Id*. at 43-44.
[59] *Id*. at 35.
[60] *Id*. at 48.

The public comment period is important to the Committee and often results in revisions to draft amendments. For example, before the 2006 amendments to the Rules became effective, the Committee revised Rule 37(e) based on feedback received during the public comment period.[61] This latest round of amendments may prove no different as the Committee is seeking feedback on five issues relating to its proposal to amend Rule 37(e).[62]

Once the public comment period has closed, the amendments will go back to the Committee for reflection and possible revision. After winding their way through approval channels in the Federal Judicial Conference, the amendments will eventually be sent to the U.S. Supreme Court. Assuming the Supreme Court approves the amendments and Congress has no objections, the earliest date the amendments could take effect would be December 1, 2015.

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[61] Favro, *supra* Note 51, at 329.
[62] REPORT, at 50-51.