Changing Federal Rules to Reduce Discovery Costs

Vladislav Kochelaevs - Fotolia

A hallmark of the U.S. legal system is the notion that the parties can present their evidence to a judge and jury and get a just decision based on the merits of their case. In a significant subset of cases, most involving corporate defendants, the results increasingly are driven by the costs of litigation, not the merits of the case.

Much of this is due to the escalating cost of discovery, especially electronic discovery. The sheer volume of electronic information to be preserved, processed and potentially produced for litigation has far outpaced the ability of current discovery rules to manage discovery effectively.

As a result, a tool that was intended to help the parties reach a just outcome can too often become the primary focus of the lawsuit and create injustice and perverse incentives. Corporate defendants facing expensive collateral litigation (or worse, discovery sanctions despite having acted in good faith) may choose to settle even the strongest of cases when facing millions of documents to process, extremely broad interpretations of relevance, discovery on discovery and the lack of a uniform standard on preservation obligations.

The Federal Judicial Conference's Civil Rules Advisory Committee has proposed amendments to the federal civil discovery rules to better align the rules with the needs of modern litigation, and to help litigants get the information they need to resolve claims without getting caught up in lengthy side disputes over the discovery process. Corporate legal community support for these proposals, where appropriate—plus examples of the problems under the existing rules—can help establish the need for change.

The public comment period is open until February 15, 2014, and information is available on the United States Courts website.

With a few modifications, the committee's proposed amendments to Rules 26(b) and 37(e) should help reduce the costs and burdens of civil discovery while ensuring litigants can fully and fairly adjudicate their disputes.

The exceedingly broad scope of discovery allowed under current Rule 26(b)(1) creates an overwhelming burden for corporate litigants while providing little evidentiary benefit to any party at trial. This is illustrated by a 2010 Fortune 200 company survey that found an average of 1,000 pages was produced in discovery in major cases for every one page used at trial, or one-tenth of 1 percent. More recent figures provided by individual companies in their filings with the committee put the ratio in the hundredths of 1 percent range.

The committee's proposed amendments are modest, but they refocus the scope of discovery on information that is relevant to any party's claim or defense rather than the amorphous standard of "relevant to the subject matter of the action." They also bring in the concept of proportionality from Rule 26(c), moving it front and center to emphasize its importance as a consideration in the discovery process.

Adding a materiality requirement to the proposed rule to ensure discovery is allowed into non-privileged matters that are "relevant *and material* to any party's claim or defense" will provide a meaningful basis for discovery decisions and prompt parties to focus discovery on information they need to make or defend their cases. Without language this direct, the proposed rule risks being undermined by historically broad views of discovery and relevance that have made previous scope of discovery reforms ineffective.

Properly limiting the scope of discovery, and consequently the scope of the preservation obligation, will *significantly* improve the operation of the U.S. civil litigation system by reducing costs and abuses, and making it easier for all of the parties to get the important information they need to resolve their disputes more quickly.

Rule 37(e): Preservation

The current system encourages the costly over-preservation of information. Over-preservation is certainly due to the current scope of discovery and the breadth and ambiguity of the preservation obligation—but the inconsistent standards governing the imposition of discovery sanctions play an equally important role. Many corporate litigants take an extremely conservative approach to the preservation, collection, review and production of documents.

As just one example of the amounts of data at issue, my own company, GlaxoSmithKline, has preserved 57.6 percent of its company email, amounting to 203 terabytes of information. This would be 20 times the amount of the printed collections of the Library of Congress.

Hosting, processing, collecting and reviewing these amounts of material are not without significant cost. Pfizer has submitted written comments in which the company recounts its experience in recent product liability litigation. For eight years, Pfizer said it preserved 1.2 million backup tapes, each of which holds up to 100 gigabytes of data. Preservation of the tapes cost the company nearly $40 million, but Pfizer never had to retrieve a single document from the tapes.

To address preservation issues, the committee set forth the current proposal, which focuses on reasonable preservation decisions, making the most serious
sanctions unavailable if the party who lost information acted reasonably.

Proposed Rule 37(e) is an incredibly important step toward establishing a national preservation standard, which is desperately needed to allow corporate defendants to reduce costly over-preservation and spend the money on more socially valuable activities.

The proposed rule should be further revised to make clear that sanctions are available only if the actor had a culpable state of mind and acted with both "willfulness" *and* "bad faith," not "willfulness" *or* "bad faith. Some courts define "willfulness" as intentional or deliberate conduct without any showing of a culpable state of mind.

The committee also should strike the proposed exception in Rule 37(e)(1)(B)(ii), which would authorize sanctions without a showing of willfulness or bad faith when a party is "irreparably deprived" of a meaningful opportunity to present or defend a lawsuit. At the least, the remedy under this proposed exception should be limited to curative measures. This exception is likely to be raised frequently, and what it means to be "irreparably deprived" is susceptible to widely varying interpretations from court to court. If left in place, this exception is likely to quickly erode the uniform national standard that is so badly needed.

These efforts to restore balance are important because of their potential to help us return the courtroom focus where it needs to be—the merits of the cases. The beneficiaries will be plaintiffs, defendants and ultimately the public.

Dan Troy is senior vice president and general counsel for GlaxoSmithKline. Previously he was a partner at Sidley Austin, and he has served as chief counsel for the U.S. Food and Drug Administration.