

# EXPERT GUIDE

CORPORATE *LiveWire*

NOVEMBER 2013

## PRODUCT LIABILITY 2013

Product Development

Research



Manufacturing



Test



Design



**Mark A. Behrens**

mbehrens@shb.com  
+1 202 639 5621 (Direct)  
+1 202 783 8400 (Main)



**Virginia Knapp Dorell**

vdorell@shb.com

## New Rules Under Consideration in U.S. to Lessen Costs and Burdens of Litigation

By Mark A. Behrens & Virginia Knapp Dorell



Civil litigation in the United States is widely perceived to take too long and cost too much. Much of this time and expense relates to pretrial discovery. All too often the discovery process is subject to abuse, marked by “fishing expeditions” by plaintiffs and use of the tools of discovery to harass and pressure defendants into settlements. The asymmetrical burden of discovery on defendants gives plaintiffs significant advantages under the current rules that apply in United States courts.

Improvements may be on the horizon. An influential committee that helps craft the Federal Rules of Civil Procedure (“FRCP”) has proposed amendments to the rules governing discovery in the federal court system. The proposed amendments are aimed at reducing the costs and burdens of discovery. The proposed changes would help fix a part of the American legal system that is broken and badly in need of repair.



The Advisory Committee on Civil Rules is accepting public comments on the proposed rules until 15 February 2014. The Committee is also holding a series of public hearings to hear testimony from interested persons. These hearings will be held on 7 November in Washington, DC; 9 January in Phoenix, Arizona; and 7 February in Dallas, Texas.

Under the current U.S. system, plaintiffs’ attorneys can leverage the high cost of discovery against the value of the case to drive the outcome of a dispute. A 2009 survey of American Bar Association members found that 83% believe that litigation costs force settlement in cases that should not be settled on their merits. Litigation is a hard-fought endeavour, and some lawyers are well-schooled at using discovery to their advantage. Here are a few examples:

- The baldest example of how discovery costs can determine the outcome of a case may be in patent infringement claims, which are being increasingly

filed by those seeking to leverage the high costs of discovery to drive settlements. Studies have shown that in patent cases, average defence costs are \$1.6 million through discovery in cases where \$1 million to \$25 million is at stake. In some cases, plaintiffs’ lawyers have been so blunt as to explain that they price settlement offers at a level that induces defendants to pay to avoid litigation costs rather than defend the case on its merits.

- In personal injury claims, defendants often face discovery “gamesmanship.” It is well-documented that some attorneys will initiate discovery disputes to discolour a defendant in the judge’s eyes and, when possible, generate sanctions. Monetary sanctions can help contingency fee attorneys lock in proceeds, regardless of a case’s merits. Negative inferences can sway a jury in the plaintiff’s favour, and the striking of a defendant’s pleadings can produce an easy win for the plaintiff. This type of motion practice has been termed “litigation by sanction.” Regardless of how well one complies with discovery requests, there can always be allegations that a page, document, or flash drive has

not been produced. This item may not be relevant or may be duplicative, but the diversion of explaining its absence can derail an entire case.

- A recent technique by plaintiffs for increasing a defendant’s discovery costs and laying the groundwork for sanctions has been to challenge the process a defendant uses for responding to discovery requests, rather than the results of that process. For example, some plaintiffs have insisted on detailed explanations of the criteria defendants use to review documents; requested up-front production of hold notices and distribution lists; insisted that corporate parties list all of their records and information systems, regardless of a system’s relevance to the litigation; and demanded access to non-relevant documents in the review sets that defendants used to make predictive coding decisions. Courts have allowed such “discovery on discovery” without any allegations that the defendant’s discovery procedures were deficient.

The amendments that have been proposed would help address these concerns in two important ways. First, the rule changes themselves are significant steps toward addressing the high, asymmetrical costs and burdens of excessive discovery. Second, the amendments convey to judges at both the federal and state levels that the imbalance of discovery is a national concern and they need to be stewards of discovery in their courts to counterbalance the improper effect that discovery costs and disputes can have on the outcome of a case.



affirmatively inject proportionality into the scope of discovery in federal court litigation. The amendment has the potential to significantly reduce much of the undue burden that defendants routinely face responding to discovery requests, and as third-parties responding to subpoenas. Another proposed change helps focus discovery on information that is relevant to the claims or defences in the case, stemming the tide of overly broad document production.

#### **Preventing Asymmetrical Costs From Driving Outcomes**

Another proposed amendment expressly recognises that courts have the authority to fairly apportion the expenses of document production. This is a significant step toward addressing the inequities in the allocation of discovery costs. The change also may result in parties asking for fewer documents and focusing their requests on materials relevant to their claims.

#### **Changes to Make Discovery Proportional and Relevant to the Case**

Proportionality should be the most important principle applied to all discovery. Discovery should be limited to documents or information that would enable a party to prove or disprove a claim or defence or enable a party to impeach a witness. A proposed amendment would

#### **Helping Judges Assess When Sanctions are Appropriate**

Currently, disputes over what should be preserved for discovery are roadblocks to efficient judicial process and resolution of cases on the merits. The proposed rules amendment takes an important step toward establishing a uniform standard for sanctionable conduct.

These and the other rule changes are important, both for the technical fixes they provide and to assure that judges are involved in the discovery process so they can minimise discovery tactics from having an undue influence on the outcome of litigation. The plaintiffs' personal injury bar in the U.S. has mounted an aggressive attack against the proposed changes in an effort to preserve the litigation advantages they enjoy today. Companies that do business in the U.S. should file comments to inform the Advisory Committee of the need for reforms and continue to monitor the rule amendments process as it progresses.

Mark Behrens co-chairs Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. For over two decades, Mark has been extensively involved in liability law, defense litigation, civil justice reform, and counseling in the prevention of liability exposure. He is a member of The American Law Institute (ALI) and was recently invited to serve as an Adviser to the ALI's Restatement Third, Torts: Intentional Torts to Persons project. Mark is a Martindale-Hubbell AV Preeminent Rated attorney. He has served on the adjunct faculty of The American University's Washington College of Law. In the fall of 2010, Mark taught Advanced Torts as a Distinguished Visiting Practitioner in Residence at Pepperdine University School of Law in California.

Mark has been listed as one of Washington, D.C.'s "top lawyers" by Washingtonian magazine and as a leading product liability defense attorney by Who's Who Legal: The International Who's Who of Business Lawyers. He has authored or coauthored over 149 amicus briefs on behalf of national and state business and civil justice

organizations in cases before the United States Supreme Court, seven different federal circuit courts of appeal, 30 different state courts of last resort, and seven different state appellate courts. He has also testified before Congress and numerous state legislatures. He has served as an expert witness in trials.

Virginia Knapp Dorell is an attorney in Shook, Hardy & Bacon, L.L.P.'s Public Policy Group.

