Jay C. Zainey
U.S. District Judge

UNITED STATES DISTRICT COURT
Eastern District of Louisiana
500 Poydras Street, Chambers C-455
New Orleans, Louisiana 70130

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle
Washington, DC 20544

February 7, 2014

Dear Committee Members:

Initially, I would like to express my sincere appreciation for your fine work.

I have served as a United States District Judge in the Eastern District of Louisiana for more than a decade. Prior to my appointment to the bench, I was in private practice for twenty-five years and enjoyed a very active litigation practice. My comments on the proposed amendments to the Federal Rules of Civil Procedure are based on my practical experiences as a member of the bar and bench.

While I believe that the proposals to amend Rule 16 will help with case management in many cases, I am concerned that the proposed amendments to Rules 26, 30, 31, 33, 36, and 37 will undermine cooperation among the parties, create a tremendous amount of litigation that will further burden the federal judiciary and that may prove unmanageable, and heavily tilt the scales of justice against those parties who do not have access to the information necessary to carry their burdens of proof. In addition, the proposed change to Rule 4(m) is simply not necessary.

The Scope of Discovery

The proposed amendments to Rule 26(b) constitute the most dramatic change to the scope of discovery since the advent of the Federal Rules of Civil Procedure. If the new language goes into effect, it will profoundly change the way parties and courts understand what information is discoverable, and will lead to protracted satellite litigation about the meaning of the amendments that will cost the parties and the courts countless hours and dollars. I suggest that the Committee not approve these amendments, which will unquestionably delay trials while the parties and the courts determine the contours of allowable discovery under the new definition.

Changing the very definition of discoverable information to require that it be both relevant and proportional to be discoverable is a Pandora's Box that will have consequences far

beyond what I believe the Committee anticipates. The current Rule allows parties to discover relevant information subject to limitation by the court upon a finding that discovery of relevant information should be limited for any of a number of reasons, including that the burden or expense of the discovery outweighs its likely benefit (what the Committee has reordered and called "proportionality").[1]

Under the current Rule, the party requesting discovery has to demonstrate that the discovery requested is relevant to the claims or defenses. The party who seeks to limit discovery must then demonstrate why discovery should be limited, which the requesting party can oppose. The court must then make findings. This is no less true when discovery is limited by the court acting on its own. The burden of demonstrating that discovery should be limited is never on the party requesting discovery.

The proposed amendment flips this calculus upside down. Instead of responding to arguments about why discovery should be limited, the requesting party will have to positively demonstrate that the discovery is both relevant and proportional. There is nothing in the proposed Rule that changes the requesting party's burden of demonstrating that the discovery requested is within the scope of discovery. It simply changes the definition of the scope. If it is not the Committee's intention to place the burden on the requesting party to demonstrate that the requested discovery is within the new scope of discovery—that it is both relevant and proportional—then it must clarify the text of the Rule to say so with specificity.

Another amendment to the Rule that has little basis or explanation is the elimination of the language "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Again, there is no evidence that this language is superfluous or problematic in any way. If anything, the language helps the parties and courts define the scope of discoverable information.

Respectfully, there is no reason to eliminate from Rule 26 the familiar language, "information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This proposed change will overrule more than 60 years of jurisprudence interpreting that language and leave parties to civil litigation and federal judges without the guidance that the case law has provided. This language has been clarified and sufficiently narrowed by the addition of the word "relevant." There is no need to get rid of this language or the decades of case law that relies upon it. The Committee proposes this change without citing any empirical evidence demonstrating that this language has actually swallowed any other limitation on the scope of discovery. The proposal is explicitly meant "to offset the risk that the provision addressing admissibility may defeat the limits otherwise defining the scope of discovery." (emphases added). This is not an adequate justification for removing language that is well-understood and overruling more than six decades of case law.

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[1] Why the Committee believes this particular limitation on discovery is more important than the other two co-equal limitations listed in 26(b)(2)(C) is not explained. Even though, using the Committee's reasoning, the scope of discovery would also be subject to the limitations in subsections (i) and (ii), the proposed amendment exalts (iii) above any other limitation on discovery and uses it to define the scope of discovery.

New Presumptive Limits

The Committee proposes to further reduce the number of depositions and interrogatories that parties are presumptively entitled to, and limit the number of requests for admission for the very first time. The Committee thinks that these new limits will allow for "sufficient" discovery in all of federal civil litigation, and does not seem to think these new presumptive limits will be a problem. As a former practitioner and a current judicial officer, I respectfully disagree.

The proposed presumptive limits are arbitrary and will likely lead to more cost and delay for the parties and for the courts. Under the current Rules, most attorneys take only the amount of discovery that they need to prove their cases. They do not take more discovery than is necessary simply because more discovery is permitted under the Rules. This is borne out by the data provided by the Federal Judicial Center. Attorneys will not take more than 5 depositions unless they need to, and they do not do so now even though the current presumptive limit is 10. Why limit them to 5 and force them to seek leave of the court if they need 7 or 10 depositions? There is no evidence of abuse under the current Rules. Respectfully, there is no justification for the proposed presumptive limits in Rules 30, 31, 33 and 36.

The Committee seems to think that if more discovery is needed, it will be easily had by agreements between the parties or by leave of the court. But if the new presumptive limits are so easily overcome, why are they even needed? Support for a rule cannot be found in the ability of parties to get around it.

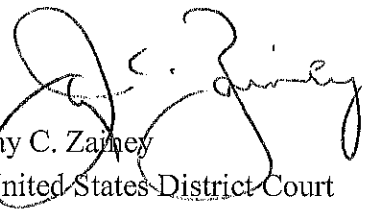
In practice, it will likely be more difficult to get the same discovery that parties get under the current Rules. Parties resisting discovery will have little incentive to agree to additional discovery, and will force requesting parties to spend time and resources seeking leave of the court to get it. This excessive and unnecessary motion practice will increase the burdens and costs for the federal judiciary, and will delay cases until the courts render decisions. In the end, the parties requesting discovery may not be able to get it, because they will have to show that it is both relevant and proportional under the new scope of discovery. The proposed changes to Rules 30, 31, 33 and 36 are unnecessary, and they will create more problems for the parties and for the courts. The Committee should not approve them.

Time for Service

A short note on the proposed amendment of Rule 4(m) is appropriate. The only reason offered for the proposal is "the commonly expressed view that four months to serve the summons and complaint is too long." The Committee does not say who has expressed this view. Clearly, neither defendants nor courts are burdened when a plaintiff takes 61 days or 119 days to serve a summons and complaint. Plaintiffs already have incentive to serve as soon as possible to get their cases moving along. There is no evidence of abuse by plaintiffs, or harm from delayed service. The proposed amendment will impose a burden on plaintiffs in a wide variety of cases, including admiralty cases and cases against foreign defendants.

I understand that the Committee's desire to move civil cases to trial more quickly. The proposed amendment will not accomplish that goal, but will instead impose greater costs on plaintiffs and on the courts that will have to deal with more unnecessary motions.

Very truly yours,



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