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BigLaw, Corporations Push For Discovery Rule Changes

By **Brian Mahoney**

Law360, Washington (November 07, 2013, 5:31 PM ET) -- Top attorneys from the defense bar and major corporations urged a federal judicial committee on Thursday to adopt proposed changes to federal rules that curtail discovery and depositions in civil cases, while plaintiffs attorneys and nonprofit law groups warned that the changes would limit their clients' access to the justice system.

In a daylong public hearing on the proposed changes held by the Judicial Conference Committee on Rules of Practice and Procedure, attorneys from major companies like GlaxoSmithKline PLC, Pfizer Inc. and Exxon Corp., and large law firms like Reed Smith LLP, pushed the committee to adopt the new rules.

GSK general counsel Dan Troy argued that discovery rules are too burdensome on business interests and harm the reputation of the U.S. legal system. He told the committee that the current rules are pushing the global company to draft contracts and seek resolution of disputes in Europe, saying the continent's legal system is "not as burdensome, not as costly, not as random" as the U.S. system.

"In general, the U.S. litigation system does not have a very good reputation abroad," Troy told the panel.

"Our system is the ridicule of the world," he later added.

Among the proposed changes are reductions in the number of discovery requests that each side can make in a case without asking a judge or an opponent for an extension. Under the proposal, the presumptive limit on the number of depositions would fall from 10 to five, and the presumptive maximum length from seven to six hours. The presumptive limit on the number of interrogatories would be reduced from 25 to 15.

The committee also proposed putting a presumptive limit on the number of requests for admissions per side for the first time, floating a 25-request ceiling.

The proposed caps had **sparked controversy** before they were even officially released. Hundreds of people have weighed in on the amendments, with many of the comments coming earlier in the year in response to draft versions of the proposal.

That pushback was evident at the hearing on Thursday, particularly among representatives from the plaintiffs bar, the legal academy and nonprofit legal organizations.

"I'm not persuaded that the real purpose here is to save costs," said Duke University School of Law professor Paul D. Carrington. "There is an underlying purpose ... to make American business more competitive by protecting it from liability ... it's not always candidly presented that way."

The most discussed rule change on Thursday was a change to Rule 26 that would require plaintiffs to provide substantial evidence showing their discovery requests are reasonable and likely to lead to admissible evidence. Proposed amendments to the rule would also allow responding parties to determine which discovery requests are proportional to the needs of a case.

Those proposals were generally seen by plaintiffs attorneys as drastic measures that would reduce litigants' access to documents necessary to bring their cases.

"By limiting discovery, these changes would further serve to discourage victims from going to court and privilege parties with money and power," Michelle D. Schwartz, a director at the nonprofit law group the Alliance for Justice, said.

The tightened proportionality requirement also drew the ire of civil rights attorneys from the National Association for the Advancement of Colored People.

"The addition of this proportionality requirement will only exacerbate the information asymmetry between plaintiffs and defendants in civil rights cases," said NAACP attorney Johnathan Smith.

"The current formulation of the rule, which places that review squarely in the hands of the court, strikes a better balance," Smith said.

Proponents of the rule changes said that the current state of e-discovery is causing firms to overspend on document review. Reed Smith LLP partner David R. Cohen, who heads a practice group devoted entirely to e-discovery and global records, says his firm currently has 64 attorneys who perform document review "every minute, every hour" of each workday.

Several veteran defense attorneys alluded to the days before e-discovery when it was less risky and costly to bring cases to trial.

"We need a way to bring the focus back to the merits and not the money," said John Pierce, a partner at Butler Pappas, which supports the rule changes.

The committee will hold another public hearing on Friday to take comments on the rule changes.

Public comment on the proposed amendments will be accepted until Feb. 15, 2014. If the changes are approved by the relevant committees, the Judicial Conference Advisory Committee, the U.S. Supreme Court and Congress, they will become effective on Dec. 1, 2015.

The hearing came two days after the Senate heard **similar remarks** from the defense bar, plaintiffs and the academy.

--Additional reporting by Greg Ryan and Kelly Knaub. Editing by Edrienne Su.