LAWYERS FOR CIVIL JUSTICE

COMMENT
To
THE CIVIL RULES ADVISORY COMMITTEE

August 18, 2011

A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action

As has now been widely acknowledged, the "discovery system is broken" and the civil justice system is "in serious need of repair."[1] This is not a new problem, however, and significant effort has been expended to address long standing problems of "skyrocketing costs, over-discovery, and discovery abuse"[2] which have haunted the discovery process for many years.[3] Indeed, "[t]he history of rule amendments since 1970 is largely a history of trying to put the discovery genie back in the bottle. . . ."[4] In that time, many different approaches have been adopted in an attempt to address the problems.[5] In large part, though, those changes have done little to stem the tide of expanding discovery and have been particularly ineffective in addressing electronic discovery and its magnification of the problems of abuse, misuse, and cost.[6]

While the problems of discovery have long been acknowledged, the explosion of electronic discovery has only served to worsen the trouble and has created an untenable situation which threatens the availability of a "just, speedy, and inexpensive determination" for civil actions

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[1] AM. COLLEGE OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., FINAL REPORT, 9, 2 (2009).
[2] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., AMERICA'S AILING CIVIL JUSTICE SYSTEM, THE DIAGNOSIS AND TREATMENT OF THE FEDERAL RULES OF CIVIL PROCEDURE, 4 (2009).
[3] *See Id.* ("Some of the earliest criticisms of the FRCP related to the cost and abusive practice of discovery, although those criticisms were not immediately acknowledged. As early as 1968, studies were being undertaken addressing the relationship between discovery practices and cost increases in civil litigation.").
[4] *Id.* (Discussing the explosion of discovery in the 1970's "when the volume of available information and the scope of permitted discovery both expanded simultaneously.").
[5] *See* LAWYERS FOR CIVIL JUSTICE , A PRESCRIPTION FOR STRONGER MEDICINE: NARROW THE SCOPE OF DISCOVERY (Sept. 2010) [hereinafter "STRONGER MEDICINE"], *available at* http://www.lfcj.com/articles.cfm?articleid=1 and LAWYERS FOR CIVIL JUSTICE, DRI, FEDERATION OF DEFENSE & CORPORATE COUNSEL, INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, WHITE PAPER, RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE (May 2, 2010) [hereinafter "RESHAPING THE RULES"], *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/888E977DFE7B173A8525771B007B6EB5/$File/Reshaping%20the%20Rules%20for%20the%2021st%20Century.pdf?OpenElement .
[6] *See, e.g.*, AM. COLLEGE OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., INTERIM REPORT, A-4 (2008) ("Only 34% of Fellows think that the cumulative effect of changes to the discovery rules since 1976 has significantly reduced discovery abuse; and 45% of Fellows still think discovery is abused in every case.").

before the courts.[7] After only a few years, electronic discovery is already being described as a "nightmare"[8], a "disaster"[9], and "the biggest problem with the system."[10] Coupled with the long-standing problems of discovery abuse, misuse and in particular rising cost, electronic discovery has pushed the civil justice system to the brink and decisive action is necessary to pull it back.

As history has shown, numerous modest amendments to the discovery Rules have done little to address the problems which have long-plagued the discovery process. Indeed, the prediction of Justice Powell has proven true, and acceptance of "tinkering changes" has "delay[ed] for years the adoption of genuinely effective reforms."[11] Now, in the midst of a major discovery paradigm shift from paper to electronic evidence, the danger of tinkering changes is all the more present, particularly where the problems of discovery will continue to grow and expand until they are addressed head on.

As we advocated in our White Paper *RESHAPING THE RULES* and Comment *STRONGER MEDICINE*, decisive action should come in several specific ways:

First, Rule 26 should be amended to narrow the scope of discovery by limiting discovery to "any nonprivileged matter that would support proof of a claim or defense" subject to a "proportionality assessment" as required by Rule 26(b)(2)(C).[12]

Second, Rule 26(b)(2)(B) should be amended to specifically identify categories, types or sources of electronically stored information that are presumptively exempted from discovery absent a showing of "substantial need and good cause" which, in turn, could be used to inform determinations of what constitutes "not reasonably accessible data" where the rule does not specifically address a particular type or category of electronically stored information.[13]

Third, the so called "proportionality rule", Rule 26(b)(2)(C), should be amended to *explicitly* include its requirements to limit the scope of discovery.

And finally, Rule 34 should be amended to limit the number of requests for production, absent stipulation of the parties or court order, to no more than 25, covering a time period of no more than two years prior to the date of the complaint, and limited to no more than 10 custodians.[14]

These steps would serve to address a myriad of discovery problems by reducing the volume of information and evidence subject to discovery (a major contributor to cost), providing a clearer standard of relevance, lessening the likelihood of satellite litigation on discovery issues and,

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[7] *See, e.g., Id.* at B-3 ("Discovery rules and Rule 26 add significantly to cost of litigation, therefore diminishing access to justice.").
[8] *Id.* at B-1.
[9] *Id.* at B-3.
[10] *Id.* at B-2.
[11] Amendments to the Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).
[12] *See* RESHAPING THE RULES, supra note 5, at 23.
[13] *See* RESHAPING THE RULES, supra note 5, at 25-26.
[14] *See* RESHAPING THE RULES, supra note 5, at 31-32.

consequently, limiting the skyrocketing costs for litigants seeking fair and efficient resolution of claims.[15]

It bears repeating that similar proposals have been proffered for the Committee's consideration on numerous occasions in the last 34 years and have been widely acknowledged to constitute appropriate action to reduce discovery costs, misuse, and abuse and increase its efficiency[16]

The "Sanctions Tort" Proposals

The modest proposals of Rules Committee member Dan Girard[17] currently being considered by the Subcommittee are insufficient to address the major problems of discovery. First, the proposed amendments are a perfect example of the type of tinkering changes which have repeatedly proven ineffective in making any substantive headway in addressing the real problems of discovery and which have long served as a justification for deferring meaningful action on necessary reforms. Second, the proposed amendments fail to address a major cause for the problems of discovery, namely the breadth of discovery *requests.* Third, the proposed amendments will not only fail to meaningfully address the problems of discovery, they will worsen them.

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[15] For a broader discussion of the benefits of these proposals, *See* RESHAPING THE RULES, *supra* note 5; STRONGER MEDICINE, *supra* note 5.

[16] *See* STRONGER MEDICINE, *supra* note 5, at 4-6, 11 (discussing support from the American Bar Association and the American College of Trial Lawyers for narrowing the scope of discovery).

[17] *See* Daniel C. Girard & Todd I. Espinoza, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 Denv. U. L. Rev. 473 (2010). These Proposed Amendments were summarized as follows in the December 6, 2010 Report of the Civil Rules Advisory Committee:

> (1) Evasive responses: This proposal draws from concern that discovery responses often are evasive, and the process often transforms from the intended "request-response" sequence to "an iterative, multi-step ordeal" in which the pre-motion conference requirement itself serves as an invitation to overbroad requests that anticipate over-narrow responses, negotiation, and eventual responses that may or may not be evasive. Rule 26(g) implicitly forbids evasive responses, but it should be made explicit by adding just two words to Rule 26(g)(l)(B)(i): signing a discovery request, response, or objection certifies that it is "not evasive, consistent with these rules and * * *."
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> (2) Rule 34: Production added to Inspection: Rule 34(a)(l) refers to a request "to produce and permit the requesting party * * * to inspect, copy * * * "documents. Rule 34(b)(1)(B) directs that the request "specify a reasonable time, place, and manner for the inspection and for performing the related acts." 34(b)(2)(B) directs that for each item or category, the response must "state that inspection and related activities will be permitted as requested," or object. "Producing" enters only in (b)(2)(D), referring to electronically stored information, and then again in (b)(2)(E), specifying procedures for "producing documents or electronically stored information." Rule 34(c) invokes Rule 45 as the means of compelling a nonparty to "produce documents and tangible things." Girard observes that the common practice is simply to produce, rather than make documents available for inspection and copying. This leaves gaps in the language of the rules. Rule 37(a)(3)(B)(iv) should be amended to include "fails to produce documents" -a motion to compel may be made if "a party fails to produce documents or fails to respond that inspection will be permitted or fails to permit inspection -as requested under Rule 34." In addition, a new provision should be added to Rule 34(b)(2)(B): "If the responding party elects to produce copies of documents or electronically stored information in lieu of permitting inspection, the response must state that copies will be produced and the production must be completed no later than the date for inspection stated in the request."

1. These "Sanctions Tort Proposals" will merely tinker with the rules and will not serve to fix our broken discovery system. Indeed, the authors describe their proposals as "modest" and admit that evasive conduct, the primary problem sought to be addressed, is "already prohibited" by the rules. Such tinkering amendments have been repeatedly adopted with little success. Consider, for example, the bifurcation of attorney-managed and court-managed discovery in 2000. Despite the *appearance* of decisive change, in practice, the amended rule did not affect the scope of discovery and, consequently, did little (or nothing) to make discovery less costly or more efficient. In fact, the changes are widely recognized as being, essentially, ignored. [18]

Beyond being ineffectual, however—a very real possibility as evidenced by the track record of such changes so far—is the danger that the acceptance of tinkering changes, such as those offered by these proposals, will once again justify a delay in taking meaningful action. While past delay (more than 30 years worth) has no doubt resulted in substantial and unacceptable hardship to those suffering from abusive discovery tactics, to delay again could be disastrous. Now, unlike any time in the Rules' history, major changes in how evidence is created and stored (namely through electronic means) are changing the face of the litigation landscape, and are affecting in particular the realities of discovery. Moreover, those changes are occurring at a rapid and steadily accelerating pace and illustrate clearly the need for serious reconsideration of the discovery paradigm, and in particular the proper scope of discovery in this electronic age. Accepting the placebo of tinkering changes now will unnecessarily delay adoption of effective amendments for years. Meanwhile, the problems of discovery will *inevitably* worsen (as they have continued to do in years past), creating an even larger morass to be cleaned up in future.

2. The proposals fail to address the major problem of overly broad discovery *requests*, which encourage broad responses. As acknowledged by Magistrate Judge Grimm in, *Mancia v. Mayflower*, "kneejerk discovery requests served without consideration of cost or burden to the responding party" are "one of the most prevalent of all discovery abuses." [19] He went on to explain that "lawyers customarily serve requests that are far more burdensome than necessary to obtain sufficient facts to enable them to resolve the case through motion, settlement, or trial."[20] The authors of the Girard Proposals themselves acknowledge that "the problems often begin with overbroad, poorly crafted 'kitchen sink' style document requests"[21] and that the current rules may "encourage propounding parties to serve broader discovery requests that they otherwise would in order to leave themselves room to bargain"[22] which "encourage similarly broad objections, in turn leading to further bargaining and significantly driving up costs."[23] The authors attempt to minimize this problem by opining that "[c]ourts have shown little hesitation in paring back or restricting these overzealous or insufficiently focused discovery requests"[24] when, in fact, courts have instead clung to the tradition of very broad and liberal discovery which has

[18] *See* STRONGER MEDICINE, *supra* note 5, at 7-8.
[19] Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 358 (D. Md. 2008).
[20] *Id.*
[21] *See* Girard & Espinoza, *supra* note 17, at 474-475.
[22] *See* Girard & Espinoza, *supra* note 17, at 477.
[23] *See* Girard & Espinoza, *supra* note 17, at 477.
[24] *See* Girard & Espinoza, *supra* note 17, at 475.

contributed greatly to the problems.[25] It falls to the Rules Committee, then, to finally take the necessary action to address the problem at its root and to narrow the scope of discovery.

3. More serious than merely delaying the adoption of meaningful reform, adoption of these Proposals would likely worsen the problems of discovery. For example, despite acknowledging that evasive discovery is prohibited under the current rules, the first proposal contemplates the addition of a specific prohibition against evasiveness in Rule 26(g) by requiring that counsel certify that the responses to discovery are "not evasive." Such language would likely serve to increase the frequency of motions for sanctions which arguably result from the common *misunderstanding* of many parties that their opponent is obligated to produce ALL potentially responsive information in their possession—a nearly impossible task[26]—and that failure to do so must result from an attempt to evade discovery. Even now, without specific language prohibiting "evasive" responses, the courts are inundated with motions to compel additional discovery and motions for sanctions based upon speculation that responsive material is being withheld with nefarious intent. The addition of a specific prohibition against evasion would only serve to embolden accusations of discovery violations, particularly where the notion of what constitutes evasive behavior is open to interpretation and likely to encourage disagreement amongst the parties. Moreover, where courts are also known to fall prey to the myth of full and complete disclosure, the danger of more frequent instances of unjust sanctions is great, and a major threat to the administration of justice.

Practitioners have long feared what has come to be known as the "sanctions tort" or "litigation by sanction." At its most dramatic, the "sanctions tort" has been described as discovery gamesmanship in which one party purposefully seeks impossibly broad discovery or, alternatively, discovery of the same information from multiple sources, and when mistakes are inevitably uncovered, moves for terminating sanctions.[27] The result of the moving party's success is not only to win their motion, but to deny the responding party's opportunity for a trial on the merits. Of course, "litigation by sanction" need not result in terminating sanctions to deprive a party of the opportunity for fair adjudication of their claims or defenses; sanctions short of default judgment or dismissal can also be devastating to a case and are becoming increasingly common in the modern age.

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[25] *See* STRONGER MEDICINE, *supra* note 5, at 7-9.

[26] *See* Hopson v. The Mayor and City Council of Baltimore, 232 F.R.D. 228, 245 (D. Md. 2005) ("The days when the requesting party can expect to 'get it all' and the producing party to produce whatever they feel like producing are long gone. In many cases, such as employment discrimination cases or civil rights cases, electronic discovery is not on a level playing field. The plaintiff typically has relatively few electronically stored records, while the defendant has an immense volume of it. *In such cases, it is incumbent upon the plaintiff to have reasonable expectations as to what should be produced by the defendant.*" (emphasis added)); *Report of the Advisory Committee on Civil Rules* 4 (May 1998) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1998.pdf ("As we continue to adapt to this information age, the notion of having all information on a subject is almost unattainable. We are going to have to move increasingly to a notion that although disclosure must be fair and full, it does not necessarily require that every copy of every document that relates to a particular proposition be introduced. You need only think about the amount of material on every desktop computer in a large corporation to visualize what that entails."). *Cf.* Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 217 (2003) ("Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, "no". Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation").

[27] Charles F. Herring, Jr., *The Rise of the Sanctions Tort*, TEXAS LAWYER, Jan. 28, 1991, at 3-4.

The Sanction Tort Proposals, by creating additional obligations for responding parties (despite widespread agreement that the burden of discovery is already threatening the administration of justice), would only serve to create more "discovery related 'traps' to trigger sanctions."[28] For example, a corporate defendant that produced large volumes of responsive material and whose counsel made the requisite certifications could be subject to a motion for sanctions for "evasion" or false certification upon discovery of even one email that was produced by a third party but not the defendant. Perhaps even more probable is a scenario in which the parties disagree regarding what constitutes responsive evidence, resulting in accusations of evasion against the responding party. This likelihood is all the more probable in light of many practitioners' misunderstanding of the difficulties of responding to discovery in the modern age. Indeed, in arguing for their proposals, the authors opined that "it is usually relatively clear whether a document is responsive to a particular request"—a premise that if true would have precluded the need for many of the discovery motions before the courts today. Even where sanctions are ultimately denied, the resources expended by a responding party to defend itself can never fully be recouped nor the accusations erased.

The second Proposal, like the first, would not meaningfully address any of the major problems of discovery and would likely serve to worsen them. Specifically, the proposal to require that parties choosing to produce electronically stored information (rather than allowing inspection) state that production will be completed "no later than the date for inspection stated in the request"[29] will only serve to *encourage* the sort of discovery motions that result in the costs and delay which the Committee seeks to fix. It is inevitable that disputes will arise regarding the reasonableness of the timeframe laid out by the requesting party, particularly in cases where individual litigants seek discovery from large corporate entities and (as discussed above) misunderstand the difficulty of their requests. Indeed, the authors acknowledge that parties "seeking to compel compliance with wide-ranging requests without giving the producing party adequate time … can expect to be met with a motion for a protective order."[30] Consequently, rather than discouraging the need for judicial intervention (which inevitably results in delay and added cost), the proposed amendment would encourage it.

Moreover, despite the express acknowledgement by the authors of the Proposals that the amendments to Rule 34 were "not meant to create a routine right of access to a party's electronic information system," (as expressed in the Advisory Committee's notes) the language of their proposed amendment nonetheless implicitly relies on the premise that responding parties may avoid the timeline trap by simply choosing to allow inspection. [31] This "choice" fails to address the difficulties of creating an inspection protocol for ESI that does not first require its production[32] (thus rendering the choice a fiction) or require the acceptance of the incredible risk

[28] Brief for Chamber of Commerce of the United States of America et al. as Amici Curiae Supporting Respondent, Bahena v, Goodyear Tire & Rubber Co., No. A503395, at 11 (Nev. July 26, 2010).
[29] Girard & Espinoza, *supra* note 17, at 481.
[30] Girard & Espinoza, *supra* note 17, at 481.
[31] *See* Girard & Espinoza, *supra* note 17, at 481 (providing the proposed language to be incorporated in Rule 34: "**If** the responding party elects to produce copies of documents or electronically stored information **in lieu of permitting inspection**, the response must state that copies will be produced and the production completed no later than the date for inspection stated in the request." (Emphasis added.)).
[32] E.g., by printing the ESI for review by opposing counsel or by loading responsive information into a review platform for use by opposing counsel.

and considerable expense of allowing direct access to a responding party's information systems. In short, because "inspection" of ESI is not a practical or realistic alternative to its production, the proposed amendment would only serve to trap responding parties into unreasonable timelines or require expensive and time consuming satellite litigation to resolve disagreement surrounding production, as discussed above.

Additionally, the authors argue that under the current discovery processes parties are left without a "specific timeframe for production" while at the same time acknowledging that parties are subject to a standard of reasonableness (a widely used and accepted standard in legal jurisprudence) and altogether ignore the discovery cut off date present in every case. Once again, the proposed amendment has shown itself to be nothing more than tinkering, a strategy that will not bring about the necessary changes to discovery and, meanwhile, worsen discovery problems.

The third proposed amendment would also serve to fuel existing discovery problems rather than dampen them. The creation of yet another discovery obligation, particularly coupled with a heightened threat of accusations of evasion, would only serve to add to the burden of discovery, which in turn results in additional delays and inevitable disagreements regarding compliance. Moreover, the adoption of such an amendment creates for requesting parties yet another "sanctions trap" in which to snare their opponents. As proposed, the amendment would also negate the premise in at least one jurisdiction that where a discovery request is overly broad on its face, the respondent need not "provide specific detailed support" for its objection.[33] Facially overbroad requests often seek information "relating to" or "concerning" a "broad range of items" [34] and are quite common in modern discovery practice. Even requests which cannot be reasonably characterized as overly broad *on their face*, but which are nonetheless likely to result in undue burden to the responding party, would create an unfair obligation under the proposed amendment. Responding parties should not be required to first determine what if anything is responsive or not responsive to such a request in a manner sufficient to state whether information is being withheld. To require an objecting party to nonetheless determine the existence of responsive material for purposes of identifying it as being withheld would render moot the original objection—an absurd result.

Conclusion

Meaningful solutions to the problems of discovery will only come from decisive action to narrow the scope of discovery. No amount of tinkering will do. While the Girard Proposals are no doubt a good faith attempt to address long-recognized problems, they will only succeed in making them worse. Time after time meaningful action has been avoided. Now, with the rise of electronic discovery, the comfort of small change can no longer take priority over the need for

[33] Contracom Commodity Trading, Co. v. Seaboard Corp., 189 F.R.D. 655, 665 (1999) ("A party resisting facially overbroad or unduly burdensome discovery need not provide specific, detailed support." (citing Mackey v. IBP, Inc., 167 F.R.D. 186, 197 (D.Kan. 1996))).
[34] Cardenas v. Dorel Juvenile Group, Inc., 232 F.R.D. 377 381-382 (D. Kan. 2005).

decisive action. Indeed, "the process of change" can be "tortuous and contentious" but the consequences of failing to change will be worse.[35]

Respectfully Submitted,

Lawyers for Civil Justice

[35] Amendments to the Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting).