LAWYERS FOR CIVIL JUSTICE

COMMENT
To
THE CIVIL RULES ADVISORY COMMITTEE

September 1, 2010

A Prescription for Stronger Medicine[1]: Narrow the Scope of Discovery

> *A Pattern has developed. The discovery rules are continually tweaked . . . but they are never subject to a complete overhaul. The amended rules then fall victim to the siren song of liberal discovery. Ultimately, the amendments intended to result in discovery containment are rendered wholly ineffective. Then, the process starts over because the courts, practitioners, and the rulemakers remain concerned about the cost and burden of discovery.*[2]

Debate surrounding the proper scope of discovery has been ongoing for more than a generation. Rule 26 has been amended no less than four times in an attempt to reach the goal of providing "just, speedy, and inexpensive"[3] resolution in each action. To greater and lesser degrees, each amendment attempted to address the ongoing problems of discovery misuse and abuse. Despite these numerous attempts, discovery costs, burdens, abuse, and misuse remain major culprits in the dissatisfaction surrounding our nation's civil justice system. Indeed, the results of a recent, prominent study reveal that "our discovery system is broken"[4] and the civil justice system "is in serious need of repair."[5] Accordingly, bold action is required to address a problem that has long-haunted rule makers, litigants, practitioners and judges. Now is the time for strong medicine – narrow the scope of discovery.

1. Proposed Discovery Rule Amendments.

Solving many discovery problems can be accomplished in several specific ways, as addressed in a recent White Paper submitted for consideration at the Duke Conference on Civil Litigation.[6]

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[1] *Report of the Advisory Committee on Civil Rules* 9 (May 1998) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1998.pdf (Acknowledging that, "Twenty years of failure to reduce worrisome discovery problems to tolerable levels may justify resort to 'stronger medicine.'").

[2] Henry S. Noyes, *Good Cause is Bad Medicine for the New E-Discovery Rules* 21 HARV. J.L. & TECH. 49, 63-64 (2007).

[3] FED. R. CIV. P. 1.

[4] Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., *Final Report*, 9 (2009).

[5] *Id.* at 2.

[6] *See* 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), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/888E977DFE7B173A8525771B007B6EB5/$File/Reshaping%20the%20Rules%20for%20the%2021st%20Century.pdf?OpenElement.

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).[7]

Second, Rule 26(b)(2)(B) should be amended to specifically identify categories, types or sources of electronically stored information that are 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.[8]

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.[9]

These proposed changes seek to accomplish the long held goals of the Committee and many members of the broader legal community, namely, ending discovery abuse and misuse and limiting the skyrocketing costs for litigants seeking fair and efficient resolution of claims.

2. The Need for Strong Medicine.

Perhaps the most compelling evidence of the continuing need to address the myriad of discovery problems plaguing the civil justice system is found in the everyday experience of practitioners and litigants and the uncanny similarity of their views of discovery compared to those expressed during each of the many previous attempts to address these problems. Some of the results of a recent survey conducted by the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS) are instructive: [10]

- 85% of Fellows "thought that litigation in general and discovery in particular are too expensive."[11]
- "*Only 34% of Fellows think that the cumulative effect of changes to the discovery rule since 1976 has significantly reduced discovery abuse*, and 45% of Fellows "believe that there is discovery abuse in almost every case."[12]
- 69% of Fellows "said the civil justice system takes too long."[13]

[7] *Id.* at 24.
[8] *Id.* at 26.
[9] *Id.* at 32.
[10] Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., *Interim Report*, 3 (2008) [hereinafter "*Interim Report*"].
[11] *Id.* at 4.
[12] *Id.* at A-4 (emphasis added).
[13] *Id.* at A-2

- 65% of Fellows "believe the Federal Rules of Civil Procedure are not conducive to meeting the goal of 'just, speedy, and inexpensive determination of every action.'"[14]

Another relevant survey that was presented at the Duke Conference and administered by the Searle Center on Law, Regulation, and Economic Growth, was undertaken to determine the litigation costs of major companies and returned compelling results. "The survey confirms empirically what corporate counsel have long known anecdotally – the transaction costs of litigation against large companies, especially discovery, are so high that the mandate of Rule 1 ("the just, speedy, and inexpensive determination of every action and proceeding") is simply not being met."[15]

For example, "the average outside litigation cost per respondent was nearly $115 million in 2008, up 73 percent … from 2000. This represents an average increase of 9 percent per year."[16] Put another way, on average, for each dollar of global profit earned, companies spent 16 cents to 24 cents on U.S. litigation in 2008.[17] Specifically regarding discovery, for the years 2006-2008, the average company paid an average per case discovery cost of $621,880 to $2,993,567.[18] Companies at the high ends during the same years reported average discovery costs ranging from $2,354,868 to $9,759,900 per case.[19]

These significant expenditures are made all the more troubling when their value to the administration of justice is considered. In 2008 the average number of pages produced in major cases that went to trial was 4,980,441.[20] Despite such massive discovery, the average number of exhibit pages totaled 4,772 – **just one tenth of one percent (0.1%) of the pages produced**.[21] This is a sobering number and clearly illustrates the need to narrow the scope of discovery. Moreover, it directly refutes speculation that narrowing the scope of discovery will preclude litigants from proving their claims because of a lack of access to information, where the current system is clearly resulting in massive over-discovery of irrelevant, duplicative, cumulative, or otherwise unnecessary information.

Narrowing the scope of discovery, rather than harming litigants, will bring us closer to the goal of achieving just, speedy, and inexpensive resolution of actions by focusing discovery efforts and

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[14] *Id.*
[15] Lawyers for Civil Justice et al., Statement on Litigation Cost Survey of Major Companies 2 (2010) *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/33A2682A2D4EF700852577190060E4B5/$File/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf?OpenElement [hereinafter, "Statement on Litigation Cost Survey"].
[16] *Id.* at 2.
[17] Letter from Henry Butler to The Honorable Lee H. Rosenthal, *et al.*, June 2, 2010, *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Discussion/0DEC29D460FD45DA85257737004648DB/?OpenDocument. The information in the Butler letter was developed by the Northwestern University Law School Searle Center on Law, Regulation & Economic Growth in response to questions raised by participants at the May 2010 Conference on Civil Litigation at Duke Law School and was based on analysis of the Litigation Cost Survey.
[18] Statement on Litigation Cost Survey, *supra* note 15, App. 1 at 15 fig. 11.
[19] Statement on Litigation Cost Survey, *supra* note 15, App. 1 at 15 fig. 11.
[20] Statement on Litigation Cost Survey, *supra* note 15, App. 1 at 16.
[21] Statement on Litigation Cost Survey, *supra* note 15, App. 1 at 16.

resources on the information most relevant to the claims and defenses of the parties and eliminating the excessive discovery that has drastically expanded over time.

3. A Brief History of Discovery Amendments.

The appropriate scope of discovery became a major topic for consideration by the Rules Committee beginning in 1970. At that time, the rules governing discovery were significantly amended, and Rule 26 was expanded to govern the scope of discovery generally. Notwithstanding its expansion, the Advisory Committee Notes specifically recognized the "broad powers" of the court to regulate discovery.[22] Despite the court's power, however, by 1976 discovery abuse had emerged as a major concern.[23]

In October 1977, the Special Committee for the Study of Discovery Abuse of the Section of Litigation of the American Bar Association published its recommendations for amendments to the civil rules.[24] This report introduced, for the first time, the proposal to narrow the scope of discovery by replacing the language allowing discovery of any matter "relevant to the subject matter" with language allowing discovery of any matter "relevant to the issues raised by the claims or defenses of any party."[25] The Advisory Committee proposed instead to amend the rule to allow for discovery of any matter "relevant to the claim or defense. . . "[26], but that proposal was eventually withdrawn. Instead, the Committee supported judicial intervention as the best method for addressing the problems of discovery.[27] Accordingly, the rule was amended to allow the court or the parties to call for a discovery conference to resolve troublesome issues.

Notably, Justices Powell, Stewart and Rehnquist dissented from the order adopting the amendments to Rules 26, 33, 34, and 37 – those that regulated discovery.[28] Justice Powell, writing for the dissent, reasoned that "the changes embodied in the amendments fall short of those needed to accomplish the reforms of the civil justice system".[29] He referenced the American Bar Association's then-rejected proposal for "significant and substantial reforms"[30] (namely, narrowing the scope of discovery) and indicated his belief that the amendments as adopted were "inadequate" and unlikely to have "an appreciable effect on the problems associated with discovery."[31] The "problems" that needed fixing, mentioned in Justice Powell's discussion, were the same plaguing our system today: the "scope and duration" of discovery such

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[22] FED. R. CIV. P. 26 advisory Committee's note (1970).
[23] In 1976, at the fall American Bar Association meeting, 590 lawyers unanimously voted that discovery was being abused. Advisory Committee on Rules of Civil Procedure Meeting Minutes, May 23, 1977 at 19, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV05-1977-min.pdf.
[24] *Report of the Advisory Committee on Civil Rules* 2 (June 1979) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-1979.pdf.
[25] *Id.*
[26] *Id.* at 3; Notably, this language is the substantially the **same language** that is proposed today.
[27] FED. R. CIV. P. 26 advisory committee's note (1980) ("In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.").
[28] *Amendments to the Rules of Civil Procedure,* 85 F.R.D. 521 (1980) (Powell, J., dissenting).
[29] *Id.*.
[30] *Id.* at 522.
[31] *Id.*.

that district judges "often [could not] keep the practice within reasonable grounds."[32] Justice Powell also identified "intolerable" litigation costs as casting "a lengthening shadow over the basic fairness of our legal system."[33] In closing, he warned that "Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms"[34] – a prescient prediction.

Unsurprisingly, problems persisted. Indeed, the importance of the discovery problem was highlighted in the opening lines of the Advisory Committee's notes to Rule 26 in 1983 which identified "excessive discovery" as posing a significant problem.[35] Accordingly, Rule 26 was again amended in an effort to curb abuse. This time, once again reflecting the Committee's belief in the value of judicial intervention, language was added to the rule allowing a court to limit discovery that was duplicative, burdensome, or available from another source.

Discovery problems continued and in 1993, the rule makers experimented with "disclosure" and amended Rule 26 to require the parties to disclose specified materials "without awaiting a discovery request."[36] Minor amendments were also made to the scope and limitations of discovery "to enable the court to keep tighter rein on the extent of discovery."[37] In the Advisory Committee notes, the Committee specifically recognized that "the information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay and oppression."[38]

Despite these changes dissatisfaction remained. A mere two years later, in April 1995, the continuing calls for discovery reform were acknowledged by the Advisory Committee. [39] In meetings that followed, discovery reform once again emerged as a major issue for consideration, particularly the possibility of finally narrowing the scope of discovery under 26(b)(1). Among the primary drivers for the need to consider "changes more fundamental than those made in recent years" were "concerns with the costs and delays associated with discovery" which the committee acknowledged "may justify further study."[40] While further study of the issues revealed evidence that the problems surrounding discovery were most troublesome in complex cases, broad support for narrowing the scope of discovery remained, particularly from the American College of Trial Lawyers, who "adopted the recommendation as the recommendation

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[32] *Id.*
[33] *Id.*
[34] *Id.* at 523.
[35] FED. R. CIV. P. 26 advisory committee's note (1983) ("Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems.").
[36] FED. R. CIV. P. 26(a)(1) (1993).
[37] FED. R. CIV. P. 26 advisory committee's note (1993).
[38] *Id.*
[39] Advisory Committee on Rules of Civil Procedure Meeting Minutes, April 20, 1995 at 5, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-1995-min.pdf. ("One of the perennial proposals for reform was again advanced, cutting back from the Rule 26(b)(1) permission for discovery of 'any matter, not privileged, which is relevant to the subject matter involved in the pending action.' The reference to subject matter would be replaced by limiting discovery to matters relevant to the issues framed by the pleadings.").
[40] Advisory Committee on Rules of Civil Procedure Meeting Minutes, October 17-18, 1996, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv10-1796.htm.

of the College itself" a "highly unusual step."[41] Specifically, the American College advocated adoption of the "discovery scope limitation first advanced by the American Bar Association Section on Litigation in 1977."[42]

Once again, however, the notion of judicial intervention as the salvation of discovery permeated the discussion and soon became an integral part of the Committee's consideration of how to amend the rules.[43] Accordingly, the idea of simply narrowing the scope of discovery as a general matter was abandoned, and the discussion turned instead to a compromise by which discovery would initially be narrowed to the exchange of information related to a claim or defense, but could be expanded by the court upon a showing of good cause.[44] This proposal ultimately won the day. Thus, as rule 26(b)(1) currently reads, lawyer-managed discovery is restricted to matters relevant to any party's claim or defense which may be expanded, through court-managed discovery, to include matters relevant to the subject matter, upon a showing of good cause.[45]

Somewhat surprisingly, despite ubiquitous support for discovery reform and an acknowledgement by the Committee that "[t]wenty years of failure to reduce worrisome discovery problems to tolerable levels may justify resort to 'stronger medicine'," [46] the 2000 amendments to Rule 26 did not serve to narrow the scope of discovery *to any degree*, but merely added an additional procedural step to discovery while maintaining the already-established scope. Perhaps even more surprising: this was the intended result. Indeed, as was reported to the Standing Committee in 1998 regarding the then-proposed amendment, "we have not proposed reducing the breadth of discovery, nor have we intended to undermine the policy of full and fair disclosure in litigation. Where we have narrowed the scope of *attorney managed* discovery, we have preserved the original scope under court supervision."[47] Accordingly, despite the acknowledged need for bold action and the belief expressed by many lawyers that

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[41] Advisory Committee on Rules of Civil Procedure Meeting Minutes, March 16-17, 1998 at 12, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv10-1796.htm.

[42] *Id*. at 11; As reflected in Advisory Committee's minutes from December, 1977, the American Bar Association proposed language stated: "(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the ~~subject matter involved in the pending action, whether it relates to the~~ *issues raised by the* ~~claim or defense~~ *claims or defenses* of ~~the~~ *any* party. ~~seeking discovery or to the claim or defense of any other party, including~~ *The discovery may include* the existence, description, nature, custody, condition and location of any books, documents, or other tangible things; and the identity and location of persons having knowledge of any discoverable matter; *and the oral testimony of witnesses*. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." American Bar Association Section of Litigation, *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, 149 (1980).

[43] Advisory Committee on Rules of Civil Procedure Meeting Minutes, March 20-21, 1997 *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv3-97.htm ("It was also suggested that the key to successful discovery is active judicial oversight."); Advisory Committee on Rules of Civil Procedure Meeting Minutes, March 16-17, 1998, *supra* note 41 ("The single most important discovery change championed by lawyers is greater judicial involvement in problem cases.").

[44] Advisory Committee on Rules of Civil Procedure Meeting Minutes, March 16-17, 1998, *supra* note 41, at 14.

[45] FED. R. CIV. P. 26(b)(1).

[46] *See* Noyes, *supra* note 2 at 9.

[47] *Report of the Advisory Committee on Civil Rules supra* note 1, at 4.

"the committee should not 'tinker'"[48] and that "changes should be significant"[49], the amendment to rule 26 once again fell short of the goal of providing "stronger medicine" to heal the problems of discovery.

4. The 2000 Amendments Failed to Solve Discovery Problems.

Unfortunately, although hopes for the 2000 amendments were high, discovery excesses, costs, and burdens continued unabated. Within little more than two years the "subdued impact on discovery" was being attributed to "the courts' ingrained mindset of liberal discovery…and their apparent attempt to read and apply the new standard to fit consistently within the traditional liberal discovery theme."[50]

Five years after the 2000 amendments, it was observed that the amendments were generally ignored:

> My experience ... is that discovery has not been narrowed in any meaningful way. Discovery is not generally limited to that which is relevant to a claim or defense. Attorneys rarely argue for or against the existence of "good cause" for broader discovery. In fact, attorneys appear to assume that the broader discovery contemplated by Rule 26(a)(1) is allowed in the normal course. [51]

And he was not alone. A review of relevant commentary in the ten years following the 2000 amendments reveals a widespread belief that "two-tier" discovery has failed to achieve its goal of addressing longstanding discovery problems.[52]

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[48] Advisory Committee on Rules of Civil Procedure Meeting Minutes, October 6-7, 1997 at 4, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv10-97.htm.

[49] *Id.*

[50] Christopher C. Frost, Note, *The Sound and The Fury Or the Sound of Silence?: Evaluating the Pre-Amendment Predictions and Post-Amendment Effects of the Discovery Scope-Narrowing Language in the 2000 Amendments to Federal Rule of Civil Procedure 26(b)(1)*, 37 GA. L. REV. 1039, 1062 (Spring 2003).

[51] Noyes, *supra* note 2, at 64 (citing Written Statement, Ronald J. Hedges, U.S. Magistrate Judge, Comments on Proposed Amendments to Rules 26 and 37 of the Federal Rules of Civil Procedure 4 (Feb. 8, 2005)); *See also*, Hon. Ronald J. Hedges, *A View from the Bench and the Trenches*: *A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.D.R. 123, 126 (May 2005) ("What has been my experience with the concept of bifurcated discovery under the 2000 amendment? (1) Attorneys do not as a general rule attempt to limit discovery to that which is relevant to a claim or defense; and (2) attorneys do not as a general rule address the existence of good cause, either for broader discovery as Rule 26(b)(1) contemplates or to counter such arguments.").

[52] *See e.g.*, Frost, *supra* note 50; Noyes, *supra* note 2, at 64, ("The 2000 amendments generally have failed to change the practice of federal judges in granting broad discovery because judges remain unwilling to contravene the liberal discovery mantra. Instead, in the absence of explicit direction, courts default to the maxim that discovery rules should be afforded a broad and liberal construction."); Gordon W. Netzorg & Tobin K. Kern, *Proportional Discovery: Making it the Norm Rather Than the Exception*, 87 DENV. U. L. REV. 513, 522 (2010) (quoting *Medcorp, Inc. v. Pinpoint Techs., Inc.*, 2009 WL 1049758, *2-4 (D. Colo. Apr. 20, 2009) ("Judicial opinions appear to confirm that little has changed since the 1983, 1993, and 2000 amendments to Rule 26(b)(1). The default rule of broad and liberal discovery remains intact. In 2010, even after all these rule amendments, the presumption continues to be that if there exists 'any possibility' that information or material is relevant to the case, 'it should generally be produce.'"); John H. Beisner, *"The Centre Cannot Hold" – The Need for Effective Reform if the U.S. Civil*

Reviewing much of the same (and earlier) history in *Mancia v. Mayflower Textile Servs. Co,*[53] Magistrate Judge Paul Grimm reached a similar conclusion: "Comparing these recent lamentations about the costs of civil litigation to those voiced eighteen years ago when the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471 *et seq.*, was passed, and comprehensive changes to the discovery rules enacted, reflects that little has changed, despite concerted efforts to do so...."

Moreover, Courts routinely default to the traditional standard of broad and liberal discovery. For example, in 2007, a court in the District of Nebraska defined the proper scope of discovery as follows:

> Parties may discover any relevant, unprivileged information that is admissible at trial or is reasonably calculated to lead to admissible evidence. See Fed.R.Civ.P. 26(b)(1). Relevancy is to be broadly construed for discovery issues and is not limited to the precise issues set out in the pleadings. Relevancy, for purposes of discovery, has been defined by the United States Supreme Court as encompassing "any matter that could bear on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Discovery requests should be considered relevant if there is any possibility that the information sought is relevant to any issue in the case and should ordinarily be allowed, unless it is clear that the information sought can have no possible bearing on the subject matter of the action. See *Burlington Ins. Co. v. Okie Dokie, Inc.*, 368 F.Supp.2d 83, 86 (D.D.C.2005).[54]

Other courts explicitly note the failure of the 2000 amendments to bring about the intended change in discovery practice:

> A number of courts and commentators have addressed the scope of discovery since the 2000 Amendments to Rule 26(b). There seems to be a general consensus that the Amendments to Rule 26(b) "do not dramatically alter the scope of discovery." *World Wrestling Fed'n Entm't, Inc., v. William Morris Agency, Inc.*, 204 F.R.D. 263, 365 n. 1 (S.D.N.Y.2001). Most courts which have addressed the issue find that the Amendments to Rule 26 still contemplate liberal discovery, and that relevancy under Rule 26 is extremely broad. *See, e.g., Saket v. American Airlines, Inc.*, 2003 WL 685385, at *2

Discovery Process, 24 (2010) (prepared for the Duke Conference on Civil Litigation) *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Library/7280C07F541F8DB2852576E900725DBA/?OpenDocument ("Like its predecessors, the 2000 amendments failed to rein in the discovery practices. The bench and bar have largely ignored the amendments' limitations on the scope of discovery, clinging instead to entrenched notions of liberal information gathering.")

[53] *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 360 (D. Md. 2008).

[54] *Fleet Sys., Inc. v. Fed. Coach, LLC*, 2007 WL 2264618, at *4 (D. Neb. Aug. 6, 2007); *See also, Payless Shoe Source Worldwide, Inc. v. Target Corp.*, 2007 WL 1959194, at *14 (D. Kan. June 29, 2007) ("Further, relevancy is 'broadly construed,' and a discovery request 'should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party.' A request for discovery 'should ordinarily be allowed unless it is clear that the information sought can have no possible bearing on the subject matter of the action.'").

(N.D.Ill. Feb. 28, 2003); *Richmond v. UPS Service Parts Logistics*, 2002 WL 745588, at *2 (S.D.Ind. Apr. 25, 2002). See also *Johnson v. Mundy Indus. Contractors, Inc.*, 2002 WL 31464984, at *3 (E.D.N.C. Mar. 15, 2002) (stating that the 2000 Amendments to Rule 26(b)(1) are "basically a semantic change unlikely to have much salutary effect on the conduct of discovery....").[55]

Even courts that acknowledge the amended standard as controlling admit that it has had little effect: "[T]he scope of discovery has narrowed somewhat under the revised rule. The change, while meaningful, is not dramatic and broad discovery remains the norm."[56]

5. The Effects of Electronic Discovery.

Not only has the repeated tinkering with Rule 26 failed to stem the tide of liberal discovery and address ongoing discovery problems, the rise of electronic discovery has magnified the need for action.[57] As one court recently opined, "With the rapid and sweeping advent of electronic discovery, the litigation landscape has been radically altered in terms of *scope*, mechanism, cost and perplexity."[58] This result is no surprise. The likelihood that technology would increase the cost and complexity of discovery was recognized by the Advisory Committee as early as 1993, during a previous attempt to address the problem of expansive discovery.[59] Moreover, the landscape of discovery, particularly electronic discovery, will likely continue to change with the seemingly boundless expansion of technology and the creation of ever more electronically stored information. A recent study revealed that in 2007, the "digital universe" contained 281,000,000,000 gigabytes of data, which works out to 45 gigabytes per each person on the planet.[60] By 2011, the digital universe is expected to be 10 times the size it was in 2006.[61] Failure to take definitive steps to address the inevitable problems that will follow from such a radical shift in the practical realities of information creation and storage could have disastrous effects on practitioners struggling to meet their disclosure obligations, on the courts tasked with managing the fray, and most importantly on the litigants seeking to balance the demands of litigation with their responsibility to manage their affairs efficiently. Coupled with the already recognized need to control discovery (as evidenced by the repeated efforts to achieve this result),

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[55] *EEOC v. Caesars Entm't, Inc.*, 237 F.R.D. 428, 431 (D. Nev. Aug. 22, 2006); *See also, Klein v. Freedom Strategic Partners, LLC*, 2009 WL 1606467, at *2 (D. Nev. June 5, 2009).

[56] *EEOC v. Caesars Entm't, Inc.*, 237 F.R.D. 428 at 431 (*citing Thompson v. Dept. of Hous. & Urban Dev.*, 199 F.R.D. 168, 172 (D. Md. 2001).

[57] John H. Beisner, *supra* note 52, at 13 ("The ascendancy of electronic discovery in recent years has brought to bear the need for fundamental changes to our discovery system.").

[58] *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, 2007 WL 2687670, at *1 (N.D.N.Y. Sept. 7, 2007) (Emphasis added.); *See also, CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F.Supp.2d 1376, 1381(N.D. Ga. Dec. 30, 2009) (stating, "The enormous burden and expense of electronic discovery are well known.").

[59] FED. R. CIV. P. 26 advisory committee's note (1993) ("The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument of delay or oppression.").

[60] John F. Gantz, *The Divers and Exploding Digital Universe: An Updated Forecast of Worldwide Information Growth Through 2011, 7* (IDC 2008), *available at* (http://www.emc.com/collateral/analyst-reports/diverse-exploding-digital-universe.pdf).

[61] *Id.* at 2.

the new technological realities of our modern world make bold action to narrow the scope of discovery an even more important priority.

The effects of electronic discovery can already be seen. The results of the ACTL/IAALS survey discussed above reveal a troubling reality:

- Over 80% of Fellows indicated that e-discovery increases the costs of litigation;
- Nearly 77% of Fellows say that courts do not understand the difficulties in providing e-discovery;
- Over 75% of Fellows agreed that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery;
- 71% of Fellows say that the costs of outside vendors have increased the cost of e-discovery without commensurate value to the client;
- 63% of Fellows say e-discovery is being abused by counsel; and
- Less than 30% of Fellows believe that when properly managed, discovery of electronic records can reduce the costs of discovery.[62]

Additionally, respondents to the survey commented that "e-Discovery is a morass" [63] and that it "is crushing"[64] and "could ruin"[65] the system. There were many other, similar comments.[66]

Once again, the difficulties reported above are illustrated in case law. Take the case of *In re Fannie Mae*[67] in which a third-party government agency spent *over $6 million dollars*, more than 9% of the agency's annual budget, to respond to defendants' subpoena. A significant portion of this cost resulted from the need to restore and search the agency's disaster recovery tapes, a necessity not contemplated in the "old world" of paper. In another recent case, the cost of hiring a vendor to restore approximately 13 years of electronically stored information was estimated between $1 million and $1.5 million.[68] Those figures did not include the time necessary to perform a review for relevance and privilege.[69] In one final and dramatic example, litigants in a recent copyright infringement case involving "huge" amounts of electronic data (including databases containing up to ten terabytes of data) each spent "millions of dollars" in discovery costs, including defendants' expenditure of $100,000 per custodian on document review and

[62] *Interim Report, supra* note 10, at A-4.
[63] Interim Report, supra note 10, at B-1.
[64] *Interim Report, supra* note 10, at B-4.
[65] *Interim Report, supra* note 10, at B-3.
[66] *See, e.g., Interim Report, supra* note 10, at B-1 ("In many cases the cost of doing e-discovery may run into the millions of dollars (in some cases to each side.) The cost of complying with e-discovery has become an impediment in the way to the doors of the Court House."); *Interim Report, supra* note 10, at B-1 ("The new rules concerning electronic discovery are a nightmare. The bigger the case, the more the more the abuse and the bigger the nightmare."); *Interim Report, supra* note 10, at B-2 ("My belief is that the greatest change that could be made is to reduce the scope of discovery. The latest e-discovery adds incredible layers of work at the client's business and with its staff, as well as the lawyers, and has spawned a new layer of consultants all its own (a very bad sign), if one is looking to speedy and inexpensive, while being fair, justice. [sic]").
[67] *In re Fannie Mae Sec. Litig.*, 552 F.3d 814 (D.C. Cir. 2009).
[68] *Takeda Pharm. Co., Ltd. v. Teva Pharm. USA, Inc.*, 2010 WL 2640492, at *1 (D. Del. June 21, 2010).
[69] *Id.*

production alone.[70] The parties had agreed to a limit of 140 custodians.[71] More than just money, though, the case also consumed huge amounts of time and judicial resources where the court held thirteen discovery conferences and at least six contested hearings on discovery motions.[72] There are many other examples, but the point is clear: electronic discovery is expensive, time consuming, and complicated and has the potential to overtax a system already in need of rescue.

6. The Time for Change is Now.

After more than 30 years of tinkering and in light of expansion of discovery in this technological age, the time has come to take definitive action to finally narrow the scope of discovery. The wisdom of this conclusion is affirmed by the history of the rules. The calls to narrow the scope of discovery began in 1976 and have continued ever since. The Committee, in turn, has repeatedly acknowledged the need to address the escalating costs, burdens, abuse, and misuse of discovery and, of course, previously considered amending the scope of discovery in accordance with the current proposal, but ultimately chose a different path.[73] Moreover, the proposal to narrow the scope of discovery has received high-profile support over its more than 30-year life, including from the American Bar Association, the American College of Trial Lawyers, The Institute for the Advancement of the American Legal System, and, implicitly, United States Supreme Court Justices Powell, Stewart, and Rehnquist.

As Justice Powell acknowledged in his dissent, "the process of change, as experience teaches, is tortuous and contentious."[74] Nonetheless, opposition to narrowing the scope of discovery based on exaggerated adverse consequences fails to recognize the discovery policy that "full disclosure does not require the production of all witnesses or of all documents."[75] As articulated in the Committee's May, 1998 Report to the Standing Committee:

> 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.[76]

Twelve years later, the notion of discovering *all* relevant information has moved so far beyond the bounds of reasonableness as to be practically impossible and it is time for strong medicine.

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[70] *Oracle USA v. SAP AG,* 246 F.R.D. 541, 543 (N.D. Cal. 2009).
[71] *Id.*
[72] *Id.* at 542.
[73] *Report of the Advisory Committee on Civil Rules* 2 (June 1979), *supra* note 24.
[74] *Amendments to the Rules of Civil Procedure,* 85 F.R.D. at 523.
[75] *Report of the Advisory Committee on Civil Rules, supra* note 1, at 4.
[76] *Id.*

Conclusion.

Like the practice of medicine, once reliant on old fashioned remedies but now driven by modern technology, the practice of law must recognize the need for modern solutions to modern problems i.e., "stronger medicine" to cure an ailing system. The rise of technology and the proliferation of electronic discovery make clear boundaries on the scope of discovery more necessary than ever. After more than a generation of debate and study and in the face of undeniable evidence that a myriad of discovery problems persist, the remedy is clear: the Committee must finally take bold action to narrow the scope of discovery.

Respectfully submitted,

Lawyers for Civil Justice

Lawyers for Civil Justice is a national coalition of corporate and defense counsel supporting excellence, fairness, and improvements in the civil justice system and includes DRI – The Voice of the Defense Bar, the Federation of Defense & Corporate Counsel, and the International Association of Defense Counsel.