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# Lawyers Spar Over Discovery Rules

Judge Shira A. Scheindlin, Southern District of New York
Rick Kopstein/NYLJ

Another major front in the war between plaintiffs and corporate defendants over the high costs of litigation has opened up in an obscure corner of judicial bureaucracy: proposed changes to the Federal Rules of Civil Procedure.

More than 2,200 lawyers and others took the time in recent weeks to file sometimes impassioned comments with a committee of the Judicial Conference over proposals to narrow pretrial discovery and ease sanctions for failure to preserve documents. The deadline for comments was Feb. 18.

Dense terms like "spoliation" and "proportionality" punctuate soaring claims that the changes would either save the economy from ruinous discovery expenses or slam shut the courthouse door for legitimate claims of civil rights and other violations.

"There's been a huge outpouring of interest," said professor Edward Cooper of the University of Michigan Law School, the reporter for the committee that will read the comments. The response is "way beyond" what any past court rulemaking generated, Cooper said, at least since he became part of the process in 1992.

Most of the controversy has focused on two proposals that could significantly change the way civil litigation is conducted across the country. One would give high priority to confining discovery to documents that are relevant and proportional to the needs of a case — eliminating the "ask for everything" approach that critics say has drastically increased costs. The other change would make it easier for parties to destroy or not retain millions of documents they now preserve for fear of being sued for "spoliation."

Under the new rule, judges could punish parties for losing documents only if "bad faith" is shown.

Dry as the issues may seem, the proposed changes seem to make lawyers' blood boil. Take former Arizona Republican Sen. Jon Kyl, now senior of counsel to Covington & Burling, who endorses the changes.

"There is a pent-up demand for reform," Kyl said. He disputed the notion that the changes would shut the door to legitimate lawsuits. "Anybody who tells you that is either blowing smoke or hasn't read the proposals," he said. "The changes are quite modest."

Asked about Kyl's comment, Stephen Burbank of the University of Pennsylvania Law School replied with a barnyard epithet. A veteran of civil procedure debates, Burbank said the changes are "at best premature and at worst overkill," serving the needs of big corporate defendants when evidence shows that deposition costs in smaller disputes are not burdensome.

Karen Harned of the National Federation of Independent Business disagrees. She asserts that the costs and fear of litigation are high even for her small-business members. "Litigation can mean the end of the business," she said. David Stevens, an Ohio campground owner, told the committee, "I spend about as much time trying to minimize the threat of litigation as I do trying to win more customers."

## LITIGATION COSTS

The debate comes in the wake of several U.S. Supreme Court decisions that plaintiffs say made it harder to sue corporations. The Iqbal and Twombly rulings on pleading standards and the Wal-Mart ruling on class action certification imposed new burdens on plaintiffs at the outset of litigation. Adding new limits on discovery, critics say, will put plaintiffs in a Catch-22 of being able to learn less about their adversary's behavior while needing to prove more to get in the door of litigation.

"Defendants often hold most or all the evidence plaintiffs need to prove their case, especially in civil rights and employment cases," Rep. John Conyers Jr. (D-Mich.) wrote in a comment on behalf of Democrats on the House Judiciary Committee. It is rare for members of Congress to comment on pending rules changes.

But defense advocates say relevant evidence will still be discoverable. "We don't see the proposed amendments affecting anyone's ability to obtain the information that's important to their case," said Alexander Dahl of Brownstein Hyatt Farber Schreck, counsel to Lawyers for Civil Justice. He helped recruit counsel of 309 corporations, including Google Inc., Caterpillar Inc. and Anheuser-Busch Cos. LLC to join a letter endorsing the rules changes. The new rules, Dahl said, will only thwart "gotcha" tactics aimed at forcing settlements to avoid litigation costs "regardless of the merits."

Microsoft Corp. weighed in with a multicolor inverted pyramid chart showing that it preserves 673,693 pages of documents for every page that is used at trial. The U.S. Chamber Institute for Legal Reform claims discovery now accounts for 50 to 90 percent of total litigation costs.

But "broad access to discover is a necessity" to vindicate judicially supported constitutional and legal rights, civil procedure guru Arthur Miller of New York University School of Law said.

Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York also asserts that relaxing the rule on preservation of documents will encourage sloppiness.

"If only bad faith conduct can be sanctioned, then why should any party be careful about preservation and make a real effort to preserve relevant non-privileged information?" Scheindlin wrote in a comment about the proposed changes.

The rules-changing process, which began in 2010, has a long way to go. Any recommendations must go through review stages before, ultimately, ratification in Congress. The earliest the new rules could take effect is May 2015.

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