Debate sharpens on proposed changes to federal rules on discovery

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By Alison Frankel

Last August, the rules committee of the Judicial Conference of the United States published its long-awaited proposed changes to the Federal Rules of Civil Procedure [1]. The advisory committee on civil rules – which included private lawyers **John Barkett** of **Shook, Hardy & Bacon, Elizabeth Cabraser** of **Lieff Cabraser Heimann & Bernstein, Parker Folse** of **Susman Godfrey** and **Peter Keisler** of **Sidley Austin** as well as federal judges, law professors and a Justice Department representative – suggested amendments to 10 rules, all with the goal of speeding up the pretrial litigation process. You're forgiven if you didn't dive right into the document. It's more than 350 pages long, and you have to thumb past more than 200 pages of proposed changes to federal bankruptcy rules before you even get to the section on proposed civil rules amendments. But every civil practitioner will be affected by these changes, which are open for public comment until Feb. 15. So it's probably time to start paying attention.

Happily, the Senate Judiciary Committee's Subcommittee on Banking and the Courts has done a lot of your work for you. On Tuesday, the subcommittee held a hearing entitled "Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice? [2]" (The title of the hearing gives you a pretty good idea of where subcommittee chair Chris Coons, a Delaware Democrat, stands on the proposed changes.) The two-hour hearing featured some pontification by Senator Sheldon Whitehouse, a Rhode Island Democrat and former trial lawyer who blamed defendants for outsized litigation costs, and by Senator Jeff Sessions, an Alabama Republican who fretted about defendants being forced to settle frivolous suits to avoid the cost of litigation. But ideological musings aside, the session and accompanying written testimony – from Arthur Miller [3], the New York University professor and civil procedure guru; Sherrilyn Ifill [4], the president of the NAACP Legal Defense and Education Fund; and Supreme Court advocate Andrew Pincus [4] of **Mayer Brown** – highlight the three most controversial proposed changes: presumptive limits on depositions and interrogatories; a sanctions standard for e-discovery violations; and a new emphasis on the "proportionality" of discovery demands.

The senators didn't talk much about the new proposed standard for sanctions, which is intended to impose a clear, uniform standard for e-discovery obligations, replacing inconsistent judge-made law. The advisory committee has recommended that only willful or bad-faith destruction of

evidence with a discernible impact on the underlying litigation should be sanctioned. That very high bar, said Ifill of the NAACP in written testimony, gives defendants an incentive to delete potentially damning information and just take its chances. "The moving party," she said, "may be unable to demonstrate the degree of harm it has suffered since it will not fully know what the lost information would have revealed." Pincus of Mayer Brown, who often represents the U.S. Chamber of Commerce and other big business interests, said, on the other hand, that the new sanctions standard will save defendants the cost of preserving terabytes of e-discovery because they're afraid they'll otherwise be sanctioned for inadvertently deleting something. Mere storage costs for e-discovery are so burdensome, Pincus said, that they've become a factor for defendants considering whether to settle cases.

That larger question of whether e-discovery costs have a distorting impact on civil litigation was very much on the mind of several of the senators, who asked both Pincus and NYU professor Miller whether the civil justice system really needs the repairs proposed by the new amendments. Pincus pointed out that two respected groups with lawyers from both the defense and plaintiffs' side – the American College of Trial Lawyers and the Sedona Conference – have both said that discovery "takes too long and costs too much," in Pincus's words. Miller, in contrast, opined that the proposed elevation of the proportionality test – in which defendants can refuse discovery demands if, in their view, the cost of production is disproportionate to the size and significance of the claims against them – is yet another big and unnecessary obstacle standing between plaintiffs and civil trials. "Defense interests have made (e-discovery) the 800 pound gorilla in the debate in an attempt to justify the latest discovery limitations that have been put forth by the Advisory Committee," Miller said in his written testimony. "Once again one hears Chicken Little crying that the sky is falling. It is not."

Indeed, according to Miller and Ifill, the proposed change to reflect the proportionality of requested discovery would actually complicate pre-trial litigation, not streamline it. Whether it's defendants filing motions to exclude discovery they consider disproportionate or plaintiffs moving to compel production despite defense proportionality arguments, judges are going to end up deciding more discovery disputes than ever, Miller and Ifill said. "Even assuming there are substantial problems concerning discovery costs in at least some cases, the proposed amendment will merely serve to further exacerbate those problems," Ifill said in her written testimony. "Requiring parties to conduct proportionality reviews will delay and lengthen the discovery process, and likely have the unintended consequence of increasing the adversarial nature of parties' communications."

Ifill said that at the same time the proposed changes make it more onerous for plaintiffs to get their hands on e-discovery, they also restrict access to old-fashioned, low-cost evidence obtained through depositions, interrogatories and requests for admissions. Coons, who chaired the subcommittee hearing and had by far the most nuanced view of the civil rules amendments of any of the senators who asked questions of the witnesses, picked up on Ifill's point. The burden of too many depositions is "worrisome" in only a small number of high-stakes cases, Coons said, yet those are precisely the cases in which judges would probably permit both sides to exceed the rules' presumptive limit anyway. So the new restrictions would make the biggest difference in smaller cases, in which the rules don't need to be changed because no one's complaining.

In response, Pincus said that the advisory committee intended the proposed deposition and interrogatory limits to come into play in large cases, not small ones. He also gently disputed Miller's and Ifill's assessment of the impact of the proportionality consideration. "The principal proposed amendment relating to the scope of permissible discovery simply moves a standard already in the rule – requiring that discovery be proportional to the needs of the case – in order to give it increased emphasis," he said in written testimony. "As the Advisory Committee observed, 'The problem is not with the rule text but with its implementation – it is not invoked often enough to dampen excessive discovery demands.' The proposal is designed to remedy that deficiency, and hopefully it will have that effect."

The process to implement the new rules is a long one, involving public comments, a final recommendation of changes by the U.S. Supreme Court, and Congressional consideration of the Supreme Court's proposal. So Tuesday's hearing is just one stop along the way. On Thursday, there's another: a public hearing on the proposed amendments will take place at the Thurgood Marshall Federal Judiciary Building in Washington, the first of three public hearings on changes in the rules. More than 40 people are on the witness lis [5]t for Thursday, including lawyers from public interest groups, private firms, corporations and law schools.

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[1] proposed changes to the Federal Rules of Civil Procedure:
http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf
[2] Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?:
http://www.judiciary.senate.gov/hearings/hearing.cfm?id=5fa8a4fcfd512d43b3816f1ee70c1891
[3] Arthur Miller: **http://www.judiciary.senate.gov/pdf/11-5-13MillerTestimony.pdf**
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