

Litigation Alert

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Proposed Federal Rules of Civil Procedure Amendments

Since their introduction 75 years ago, the Federal Rules of Civil Procedure have embodied a policy of “broad and liberal” discovery, and state court procedures generally have followed suit. In the last two decades, the universal adoption of electronic mail for business communications and the decreasing cost of electronic storage have dramatically increased the cost of litigation, as liberal discovery has required extensive and expensive efforts to collect and review documents.

Responding to this growing burden, the body charged with overseeing the development of the Federal Rules, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, is proposing to amend the Federal Rules to impose important new limitations on discovery in federal civil litigation.

Rule 26 of the Federal Rules currently allows a party to pursue discovery requests that are “reasonably calculated to lead to the discovery of admissible evidence.” That broad language, which can lead to an unnecessarily wide scope of permissible discovery, is a significant factor in the rise in discovery costs. The committee is now proposing to amend Rule 26 to impose a new “proportionality” standard that will limit discovery. The new language would entitle a party only to discovery that is

proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

The current version of Rule 26 contains similar language in describing how a court may restrict the scope of discovery upon motion of a party. Under the proposed rule change, this limitation would be automatically imposed by rule upon all discovery.

The proposed changes would also give the courts explicit power to enter a protective order governing the “allocation of expenses . . . for the disclosure of discovery,” opening the door for motions to shift the costs of otherwise burdensome document review and production.

The proposals would also impose a limit of 25 on the number of requests for admission that a party may make, and reduce the default number of depositions and interrogatories allowed to each party to five and 15, respectively. Depositions would be limited in time under the new rules to six hours, absent court order. Also, in response to concerns by parties about stringent document preservation requirements, the proposals would limit the conditions under which a party would face spoliation sanctions when the party has attempted in good faith to preserve documents.

The committee has indicated that it will publish its proposals in draft form on August 15, 2013 with an opportunity for public comments that will run through February 16, 2014. A copy of the Report of the Advisory Committee On Civil Rules containing a draft of the proposed amendments can be found [here](#). Akin Gump will closely monitor this process and will provide updates through alerts as they are warranted.

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