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THE 2000 AMENDMENTS TO THE DISCOVERY RULES

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Abstract

[a.1] In response to various complaints from the bar and the public, the Advisory Committee on Civil Rules of Judicial Conference of the United States appointed a discovery subcommittee in October, 1996 to determine whether modest changes could be made to the Federal discovery rules to reduce the costs of discovery, to increase its efficiency, to restore uniformity of practice and to encourage the judiciary to participate more actively in case management. Professor Marcus was appointed Special Reporter for that discovery subcommittee. Professor Marcus was integrally involved in the ensuing four years of meetings and public hearings. He reports here on the changes, including the controversial mandatory disclosure which is now made nationally uniform. His familiarity with and discussion of the Committee notes is especially valuable.

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[1] Effective Dec. 1, 2000, the discovery rules were amended yet another time. That news might prompt some to say "No, not again!" But this time the package is largely a moderate retooling of the changes made in 1993, with the main shift being that controversial aspects of that package are now made nationally uniform, sometimes in modified form. This article introduces the principal current changes and focuses attention on parts of the accompanying Committee Notes that will hopefully assist courts and lawyers in applying them.

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BACKGROUND ON THE CURRENT CHANGES

[2] It is useful to begin by recalling for a moment what the 1993 amendments introduced. The most controversial feature was the initial disclosure requirement included in Rule 26(a)(1), coupled with the Rule 26(f) meeting of counsel and the Rule 26(d) moratorium on formal discovery until that meeting had been held and a discovery plan discussed. In addition, Rule 26(a)(2) was added to require a comprehensive report from expert witnesses, and pre-trial disclosures were included in Rule 26(a)(3). The Rule 26(e) duty to supplement discovery responses was strengthened, and a new provision was added as Rule 26(b)(5) requiring provision of particulars regarding materials withheld on grounds of privilege. Finally, numerical limitations for interrogatories and depositions were added, as were stringent restrictions on improper deposition behavior.

[3] All in all, this was a dynamic package, and it was also met with considerable resistance. The reaction to that resistance adopted in 1993 was to authorize districts to opt out by local rule from certain provisions -- notably initial disclosure, the required meeting of counsel, and the new numerical limitations. Nobody expected this situation to remain for the long term. Whether anyone then actually anticipated the remarkable diversity of discovery regimes that did result in various districts (diversity fortified in part by activities undertaken pursuant to the Civil Justice Reform Act) is difficult to say. The reality, however, was that the diversity was sufficient to prompt the Federal Judicial Center to issue annual reports including charts showing what it determined were the actual disclosure and discovery practices in each district.

[4] The CJRA ended by its own terms in 1997. In 1996, the Advisory Committee on Civil Rules commenced a review of discovery practice under the rules to assess whether further changes should be made. Although there were no restrictions on the subject matter of those further changes, the extensive study done by the Committee indicated that only moderate further changes were in order. Many were of a "housekeeping" variety. Many important features of the 1993 package, such as expert disclosure and strengthened supplementation requirements, are unchanged.

[5] Overall, one can discern four themes in the current package of amendments: (1) restoring uniformity of discovery practice throughout the federal system; (2) constraining improper or overly expensive discovery; (3) prompting judicial supervision in cases in which discovery is causing problems; and (4) confirming the discretion of the presiding judge to tailor discovery to the needs of the particular case. With that background in mind, I turn to the major changes in the rules wrought by this set of amendments.

UNIFORMITY

[6] Probably the most important change -- particularly for the practicing bar -- is the removal of most of the opt-out provisions included in the 1993 amendments. This takes the form of removing the authorization for deviation by local rule. The authority to tailor discovery by case-specific order remains, but the Committee Note to Rule 26 emphasizes at several points that

"standing" orders applicable to all cases, or to all cases of a certain type, are not authorized any more than local rules. The numerical limitations on depositions and interrogatories, therefore, now apply nationwide.

[7] The impact of this change in any given district depends on the extent to which that district had availed itself of the opportunity to opt out in the first place. In some districts, this impulse carried over even to provisions for which there was never any express authority to opt out in the first place, such as the expert disclosure provisions of Rule 26(a)(2). It seems likely that a number of districts will need to review their current local rules to make adjustments when the transition occurs on Dec. 1.

INITIAL DISCLOSURE

[8] As eventually adopted in 1993, the initial disclosure requirement applied only to disputed facts alleged with particularity, but did call for revelation by the disclosing party of harmful information even absent a formal discovery request. That requirement particularly antagonized a significant segment of the bar.

[9] The most salient change in disclosure, therefore, is to its scope, which henceforward will apply to witnesses or documents the disclosing party "may use to support its claims or defenses." Given this revision, the limitation of disclosure to matters pleaded with particularity was eliminated. There may nonetheless be an incentive for parties to be specific in their pleadings to obviate arguments that an opponent did not initially appreciate what it would use to support its case. And the recently strengthened supplementation provisions of Rule 26(e) should prompt additional disclosures as the issues and positions of the parties become clearer during the litigation.

[10] The Committee Note tries to make clear that this is a bilateral obligation (192 F.R.D. at 386.): "The disclosure obligation applies to 'claims and defenses,' and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. It thereby bolsters the requirement of Rule 11(b)(4), which authorizes denials 'warranted on the evidence,' and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials."

[11] The new scope of initial disclosure ties in directly with the exclusion provisions of Rule 37(c)(1); the thrust is on ensuring that anything a party may want to use in the proceeding will be promptly revealed to the other side. As the Committee Note points out, "use" includes not only submitting material at trial or in support of a motion, but also use at a pretrial conference or during discovery (such as during a deposition). Accordingly, any time that something pops up that was not previously disclosed, lawyers may argue that exclusion under Rule 37(c)(1) should apply.

[12] A second change builds on the authority already in the rule allowing stipulations not to engage in initial disclosure. That stipulation provision means that if both sides agree disclosure

would not be worth the effort, the rule does not require it. If one side favors disclosure and the other opposes it, the amended rule allows a party who contends that "initial disclosures are not appropriate in the circumstances of the action" to present that contention to the court by stating the objection in the Rule 26(f) discovery plan. As the Committee Note makes clear (see 192 F.R.D. at 387), this is not an occasion for indulging in philosophical objections to the disclosure concept. The beginning assumption is that disclosure is warranted for most cases, and the objector needs to explain why this particular case is one in which it should not be done. Judges presented with such objections should focus on whether there is such a reason in this case.

[13] A third change repairs an oversight in the 1993 amendments by providing for disclosure by parties added later in the suit. Absent an agreement otherwise, they are to make initial disclosures 30 days after they are added. It is expected, of course, that if the original parties have stipulated out of initial disclosure or modified it in other significant ways the added parties will normally be treated the same way.

[14] Finally, in keeping with the uniformity theme, the rule itself lists eight categories of proceedings in which initial disclosure is not required. This listing is meant to be administered with some flexibility, as explained in the Committee Note (see 192 F.R.D. at 386), but except for these eight categories there should be no other categories of cases exempted from disclosure by local rule or standing order. At the same time, the Committee Note makes clear that the presiding judge may prescribe the nature of disclosure in any case -- even ordering it when the parties have stipulated out -- and that such a case-specific order is required if a party objects to disclosure as described above.

SCOPE OF DISCOVERY

[15] For more than 20 years there has been debate about whether to revise the scope provision now contained in Rule 26(b)(1), and the 2000 amendments do so. There are four changes to that provision: (1) The scope of attorney-managed discovery is reformulated to include anything "relevant to the claim or defense of any party." (2) For good cause, the court may order discovery to the "subject matter" limit contained in the current rule. (3) The last sentence has been rewritten to say that discovery "calculated to lead to the discovery of admissible evidence" is limited to relevant material. (4) A sentence is added reminding the bar and the bench that all discovery is subject to the "proportionality" limitations of Rule 26(b)(2).

[16] Some predict a substantial increase in the frequency of discovery disputes. That might be seen as providing more judicial overview of discovery in contentious cases. In operation, however, these changes should not have a dramatic effect on the scope of discovery. The Committee Note acknowledges that "[t]he dividing line between information relevant to the claims and defenses and that relevant only to the subject matter cannot be defined with precision." 192 F.R.D. at 389. The change surely does not erect an automatic barrier to discovery that may present problems of calibration of the proper scope in specific cases. Instead, the amendment should involve the court in that calibration, and the Committee Note also tries to make it clear

that it is up to the assigned judge to do so in light of the circumstances of the case (192 F.R.D. at 389):

> A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable. In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.

[17] Thus, the vast majority of current discovery would not be affected at all by this change. Yet, as the Committee Note adds, the change "signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings." (192 F.R.D. at 389) This is where the power to expand discovery to the "subject matter" limit can come into play. Ordinarily, one would expect the proponent of expanding discovery to articulate a cogent reason for broadening discovery beyond that relevant to the current claims or defenses. At the same time, as another change to Rule 26(b)(1) reminds the court, the limitations of Rule 26(b)(2) should be kept in mind when the question of expansion arises.

ONE-DAY DEPOSITIONS

[18] As amended, Rule 30(d)(2) says that "a deposition is limited to one day of seven hours." This provides a benchmark for all depositions. The parties can stipulate to extend the time for the deposition. The Committee Note observes that the limitation "contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition." The court may order a longer time for the deposition, and the amended rule also says that the court must allow additional time "if needed for a fair examination of the deponent." In evaluating arguments for more time, however, the judge might well take account of the way in which the moving party made use of the time allotted under the rule.

[19] The reality should be that parties will ordinarily handle this problem sensibly among themselves, so judges will not be called upon to referee too many disputes. The Committee Note provides suggestions about some possibly recurrent situations prompted by concerns raised during hearings on the amendment proposals (192 F.R.D. at 395-96):

> Parties considering extending the time for a deposition -- and courts asked to order an extension -- might consider a variety of factors. For example, if the witness needs an interpreter, that may prolong the examination. If the examination will cover events occurring over a long period of time, that may justify allowing additional time. In cases in which the witness will be questioned about numerous or lengthy documents, it is often desirable for the interrogating party to send copies of the documents to the witness sufficiently in advance of the deposition so that the witness can become familiar with them. Should the witness nevertheless not read the documents in advance, thereby prolonging the deposition, a court could consider that a reason for extending the time limit. If the examination reveals that documents have been requested but not produced, that may justify further examination once production has occurred. In multiparty cases, the need for each party to examine the witness may warrant additional time, although duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest. Similarly, should the lawyer for the witness want to examine the witness, that may require additional time. Finally, with regard to expert witnesses, there may more often be a need for additional time -- even after the submission of the report required by Rule 26(a)(2) -- for full exploration of the theories upon which the witness relies.

MANDATORY CONFERENCE OF COUNSEL TO PLAN DISCOVERY

[20] The 1993 amendments included changes to Rule 26(f) that directed that counsel meet and confer before formal discovery began to develop a discovery plan that would in turn be delivered to the judge before the Rule 16(b) scheduling order was entered. But like other features of the 1993 package, this one came with an opt-out provision that meant that many districts exempted lawyers from complying with it.

[21] Lawyers who practice in districts that adhere to the meeting requirement informed the Committee that it was one of the most productive features of the 1993 amendments. But there remained concern about whether a requirement of face-to-face meetings would be appropriate in all districts even though that probably would often prove more productive than interaction by electronic means. The resolution was to remove the opt-out authorization, but to require only a "conference," with the court authorized to enter an order (but not adopt a local rule) requiring that the conference be conducted in person. In addition, a new provision was added authorizing courts that move too fast to accommodate the conference schedule contemplated by the rule to provide by local rule that the conference occur a shorter time than provided in Rule 26(f) before the Rule 16(b) scheduling conference, and that the report be submitted a shorter time before that meeting with the court, or that it be made orally.

PROPORTIONALITY AND COST BEARING

[22] In 1983, the "proportionality" provisions now contained in Rule 26(b)(2) were adopted, and the Committee's Reporter then said that they constituted a "180 degree shift" from the prior attitude toward over-discovery. Those provisions direct the court to forbid discovery that is unreasonably cumulative, that the discovering party has already has had ample time to obtain by prior discovery in the action, or that imposes a burden outweighing its likely benefit.

[23] Whether or not this constituted a 180 degree shift in 1983, the obvious purpose of adopting these limitations was to prompt lawyers and judges to think more carefully about the possibility that some discovery is unreasonable under the circumstances of the given case even though within the general scope of discovery. Many have expressed concern about whether sufficient attention was actually given to these new provisions after they came into effect. In recognition of that concern, Rule 26(b)(1) now reminds lawyers and judges that "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)."

[24] The question whether this added reminder would suffice to prompt judicial evaluation of discovery efforts alleged to be problematic also prompted another proposal -- to provide explicitly that courts may condition discovery exceeding the limitations of Rule 26(b)(2) on payment by the discovering party of all or part of the resulting cost. This technique could provide a method for the court to ration access to highly questionable discovery by giving the party seeking the discovery the choice whether the cost was worth it. Initially, the amendment proposals published in 1998 included a proposed amendment providing explicit authority for such cost bearing orders in Rule 34(b), but after further consideration the Committee determined that an explicit provision should more properly be included in Rule 26(b)(2) itself in order to make this authority explicit with regard to all discovery, and not just to document production.

[25] At least two possible issues arose in connection with these cost-bearing proposals. First, there was no question in the Committee's mind that the courts have had this authority all along, so that the change might be unnecessary. In its draft amendments as published in 1998, the Committee thus emphasized that "[t]his authority was implicit in the 1983 adoption of Rule 26(b)(2)," and that the main goal of the proposed amendment was to make the authority explicit. See 181 F.R.D. at 89. A number of witnesses during the hearings, and comments submitted by others, argued that the change was not needed. Some who commented cited examples of courts using this authority, contending that these proved that there was no need to remind courts they had this authority because they were using it sufficiently frequently even without the reminder. Indeed, there was concern that limiting the explicit cost-bearing provision to Rule 34 (as initially proposed in the 1998 published draft amendments) might incorrectly imply that the authority did not exist with regard to other methods of discovery, thereby cutting back on the utility of the proportionality limitations.

[26] A second concern was related to the first: Those who emphasized the courts' use of this power under the rules as currently written expressed worries that changing the rules to make the

authority explicit might cause an undue proliferation of requests for such orders. Better to leave the authority as it had been, they argued, unstated but implicit.

[27] Ultimately the decision of the Judicial Conference was to leave the addition of explicit cost-bearing authority out of the current amendment package. But the addition of a sentence to Rule 26(b)(1) reminding litigants and courts of the limitations of Rule 26(b)(2) should help to cure whatever lack of attention there has been to the proportionality limitations in the past. And the existing authority of courts to permit some such discovery only subject to cost-bearing orders may therefore be employed with greater frequency than in the past. At the least, courts should have the Rule 26(b)(2) limitations and the cost-bearing possibility in mind when confronted with marginal discovery.

CONCLUSION: A MODEST PACKAGE WHICH STRIVES FOR BALANCE

[28] The Advisory Committee embarked on a broad-gauged review of discovery practices and needs four years ago, and initially considered the possibility of amendments covering a similarly broad array of topics. Ultimately it produced a package of proposed amendments that was quite modest, and one that sought to avoid favoring either plaintiffs or defendants overall. This marks the fourth major package of discovery rule amendments in just twenty years. It is impossible to say whether this set will endure unchanged for a longer period than efforts of the recent past. But it can be said that the Committee has no present plans to give immediate consideration to further possible amendments of the discovery rules except in two discrete areas -- problems reportedly encountered with discovery of electronically stored or computer-based materials, and difficulties in discovery resulting from broad concepts of privilege waiver. So it may be that the bar can look forward to a period of practice under the rules as amended in 2000 before they are changed again.