PBA Federal Practice Committee

Cases, News & Updates

Third Quarter 2014

U.S. Supreme Court 2013-14 Term: Review the Top Cases and Preview the Top Cases to Be Argued in 2014

The PBA Federal Practice Committee provided a successful CLE program at the PBI Center in Pittsburgh on August 26, 2014. The program reviewed cases from the 2013 term that addressed free speech and religion; the Fourth Amendment; civil rights; federalism and separation of powers; federal courts and civil procedure; patent and copyright law; bankruptcy; and criminal law and trial rights. Highlights of some of the more interesting cases that will be argued during the 2014 term were also provided to the more than 60 people attending this program. Participants were able to earn 2 substantive CLE credits.

Program faculty included: Hon. D. Michael Fisher, U.S. Court of Appeals for the Third Circuit, Pittsburgh; Hon. Maureen P. Kelly, U.S. District Court for the Western District of PA, Pittsburgh; Dean William M. Carter, Jr., University of Pittsburgh School of Law, Pittsburgh; Robert L. Byer, Esq., Duane Morris, LLP, Pittsburgh; and Dean Kenneth G. Gormley, Duquesne University School of Law, Pittsburgh.

Do you have ideas for a CLE program in your area?

Let the Chair know if you would like us to host a local CLE program in your area, either independently or jointly with your local bar. We are prepared to present our "Tips and Traps" program and are exploring other program topics. The committee is interested in providing educational programs wherever interest exists.

SAVE THE DATES

November 20, 2014 ◆ PBA Committee & Section Day, Holiday Inn East, Harrisburg, PA
1:30-3:30 - Federal Practice Committee Meeting

January 27-31, 2015 ◆ PBA Midyear Meeting, Hilton Rose Hall Resort & Spa, Montego Bay, Jamaica

Seeking Volunteers

The PBA Federal Practice Committee, Local Rules Subcommittee, is seeking volunteers to consider whether the PBA should draft comments in response to the following:

The Judicial Conference Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules on August 15, 2014 proposed amendments to their respective rules and forms, and requested that the proposals be circulated to the bench, bar, and public for comment through February 17, 2015. Hearings will be held on the proposed amendments between October and February. Information on the proposed amendments is here: http://1.usa.gov/1ksGwez

If interested, please contact PBA Committee staff liaison Susan Etter at susan.etter@pabar.org.

Judicial Conference Further Amends Proposed Discovery Rule Changes in Response to Extensive Comments
October 2014

By Thomas G. Wilkinson, Jr. & Joshua N. Ruby*

In August 2013, the Judicial Conference Committee on Rules of Practice and Procedure ("Standing Committee") published proposed amendments to the Federal Rules of Civil Procedure.[1] The proposed amendments included significant limits on the presumptive scope of discovery, as well as a highly restrictive standard for imposing spoliation sanctions based on lost electronically stored information ("ESI"). After substantial public participation – over 2,300 written comments and testimony from more than 120 witnesses at public hearings – the Standing Committee approved and promulgated a much more limited set of amendments in June 2014.[2] Absent changes imposed by the Supreme Court and Congress, these new rules will go into effect on December 1, 2015. Although not as expansive as the draft amendments proposed last year, these proposals substantially revise the Rules governing discovery practice in the federal courts.

The Revised Amendments

The Standing Committee has approved and forwarded proposed amendments to the Federal Rules of Civil Procedure aimed at reducing costs and delay in civil litigation to the Supreme Court and Congress for their consideration. The proposed amendments are based on the recommendations of the Advisory Committee on Federal Rules of Civil Procedure ("Advisory Committee") and are specifically designed to increase cooperation among lawyers, proportionality in the use discovery tools, and early and active judicial case management. Assuming – as is typical – that the Supreme Court and Congress do not alter the proposed amendments, Rules 26 and 37 will undergo substantial revision.

Presumptive Limits on Discovery Requests – Proposed Amendments Withdrawn

The Standing Committee initially proposed cutting the presumptively permissible number of depositions and interrogatories and including, for the first time, a presumptive number of requests for admission.[3] In addition, the draft amendments would have limited depositions to six hours, instead of the current presumptive limit of seven hours.

In the face of "fierce resistance," the Standing Committee withdrew these proposed amendments. In a memorandum explaining the proposed amendments as adopted, Judge David G. Campbell, chair of the Advisory Committee, cited to the "fear [many expressed] that the new presumptive limits become hard limits in some courts and would deprive parties of the evidence needed to prove their claims or defenses."[4]

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Broadly speaking, the plaintiffs' trial bar were outspoken in their opposition to further reductions in the discovery available without leave of court. The Philadelphia Trial Lawyers Association's comment on the draft amendments noted that:

> "[p]laintiffs often rely on the use of these inexpensive discovery tools to obtain the information they need to meet their burden of proof. ... [T]hese proposed amendments tip the scales of justice toward the side of big corporations and make it difficult, if not impossible, for an individual to obtain the information necessary to try their case on the merits."[5]

Support for the proposed amendments came from the defense bar and frequent corporate defendants. But even organizations with members in both groups – like the Pennsylvania Bar Association and the Philadelphia Bar Association – objected to some or all of the new constraints in the draft amendments.[6] As the written comment the Pennsylvania Bar Association ("PBA") submitted to the Standing Committee noted, "[w]hile reducing the cost of discovery is a worthwhile endeavor, a party's access to justice and ability to obtain facts should not be sacrificed solely in the name of reducing costs."[7]

The Advisory Committee listened. Judge Campbell explained that "[t]he intent of the proposals was never to limit discovery unnecessarily," and that "[t]he [Advisory] Committee concluded that it could promote the goals of proportionality and effective judicial case management through other proposed rule changes. ..."[8] So, at least through the next round of revisions to the Rules, the presumptive limits on depositions, interrogatories, and requests for admission remain unchanged.

Narrowing the Scope of Discovery – Rule 26

The Standing Committee also proposed meaningful revisions to the scope of discovery defined in Rule 26. As with the proposed – and withdrawn – presumptive limits on discovery, the proposed amendments to Rule 26 generated significant opposition, primarily, but not exclusively, within the plaintiffs' bar.[9] In response to these comments, the Advisory Committee made minor revisions to its proposed amendments and explained at length that the amendments worked no material change in the proper scope of discovery under Rule 26.

The proposed new Rule 26(b) provides that a party may obtain discovery of:

> any nonprivileged matter that is relevant to a party's claims or defenses *and proportional to the needs of the case considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, 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*.[10]

The proposed Rule also deletes the familiar language noting that discovery may be relevant, even if inadmissible, if it is "reasonably calculated to lead to the discovery of admissible evidence." Instead, the proposed Rule simply provides that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."[11]

Many public comments expressed concern about the initial draft of the Rule. Because the initial draft proposed by the Standing Committee had included "the amount in controversy" as the first factor in the proportionality analysis, many objected that the test would turn on simple math – how much the claims sought versus how much the discovery was likely to cost. The PBA's public comment is again instructive: it recommended that the explanatory comment clarify that "the amount in controversy and the burden or expense of discovery are simply two factors to be considered . . ., and that no single factor may be dispositive or even determinative in the proportionality analysis."[12]

The Advisory Committee again responded by revising the list of factors relevant to the proportionality inquiry to address these concerns. The new proposed Rule places "the amount in controversy" as the second factor in the proportionality analysis – behind "the importance of the issues at stake in the action"– and includes "the parties' relative access to relevant information" as a relevant factor.[13] Judge Campbell explained that these changes "avoid[] any implication that the amount in controversy is the most important concern [in assessing proportionality]" and "emphasize that courts should consider the private and public values at issue in the litigation – values that cannot be addressed by a monetary award."[14]

The Advisory Committee also expanded its explanatory note to clarify that the amendments "do[] not change the existing responsibilities of the court and the parties to consider proportionality, and ... do[] not place on the party seeking discovery the burden of addressing all proportionality considerations."[15] In sum, these changes are designed to limit the unintended consequences of placing such burdens on the party seeking discovery that some suggested the initial draft of the proposed amendments would have.

With respect to the deletion of the familiar "reasonably calculated to lead to the discovery of admissible evidence" language, the Advisory Committee note explains that the proposed amendment deletes the phrase because it has "been used by some, incorrectly, to define the scope of discovery."[16] Judge Campbell addressed the public comments opposing this change by noting that such comments "complained that it would eliminate a 'bedrock' definition of the scope of discovery, reflecting the very misunderstanding the amendment is designed to correct."[17]

A Unified Standard for Imposing Sanctions for Spoliation

The proposed amendments also contain a revised Rule 37(e) governing sanctions for discovery violations involving ESI. The amended Rule 37(e) approved by the Standing Committee is a wholesale rewrite not only of the existing Rule 37(e) but also of the amended Rule 37(e) in the initial draft of the proposed amendments. Once again, extensive public comment informed the Advisory Committee's decision to make substantial revision to the initial draft amended Rule in the proposed amendments the Standing Committee approved.

The current version of Rule 37(e) provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The federal

circuit courts have split on the requisite mental state for the imposition of sanctions based on such a loss: negligence or willfulness.[18]

The initial draft of the revised Rule 37(e) attempted to resolve this division by only permitting sanctions where a party's failure to retain evidence "caused substantial prejudice in the litigation and [was] willful or in bad faith[,]" unless the "other party's actions . . . irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation."[19] The initial draft also enumerated several factors relevant to determining whether a party had acted willfully or in bad faith.[20] Finally, the Advisory Committee Note to the initial draft stated that the burden would fall on the party seeking the lost ESI to prove substantial prejudice flowing from the loss.[21]

This initial draft of Rule 37(e) met with substantial criticism from Judge Shira Scheindlin of the Southern District of New York, a leading ESI jurist and author of the influential *Zubulake* series of decisions. In a decision issued the same day as the initial draft proposed amendments were released, Judge Scheindlin wrote "I do not agree that the burden to prove prejudice from missing evidence lost as a result of willful or intentional misconduct should fall on the innocent party. Furthermore, imposing sanctions only where evidence is destroyed willfully or in bad faith creates perverse incentives and encourages sloppy behavior."[22]

Again, the Advisory Committee addressed these critiques and adopted an entirely rewritten Rule 37(e). Instead of the narrow focus on culpability that the current circuit split emphasizes, the proposed Rule permits a court to take corrective action when ESI is lost "because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery."[23] Upon a finding of prejudice – without requiring a finding of culpability – the court "may order measures no greater than necessary to cure the prejudice." Alternatively, upon finding that a party acted with intent to deprive its adversary of the use of the ESI in litigation – but without requiring a finding of prejudice – the court may make an adverse inference, give an adverse inference instruction to the jury, or end the litigation by dismissal or default judgment.[24]

In addition to permitting judges to order curative measures without a finding of willful misconduct the Advisory Committee Note to the revised Rule also addresses the allocation of the burden of showing prejudice. "The rule does not place a burden of proving or disproving prejudice on one party or the other. ... The rule leaves judges with discretion to determine how best to assess prejudice in particular cases."[25] The Advisory Committee's public dialogue with Judge Scheindlin thereby produced a new standard for sanctions based on lost ESI that removes much of the existing legal uncertainty and preserves remedial measures for negligent and reckless destruction of ESI while reserving the most serious sanctions for cases of intentional misconduct.

Other Amendments

The proposed amendments include revisions to other portions of the Rules which generated much less public comment and controversy. In brief, they are:

- Rule 1 would change to "emphasize" that the Rules should be "*employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding."[26]
- Rule 4 would be amended to reduce the presumptive time limit for service of a summons and a complaint from 120 to 60 days.[27]
- Rule 16 would be amended to require the court to hold a scheduling conference with the parties in-person or by telephone or videoconference, reduce the time limit for a judge to issue a scheduling order, and permit the scheduling order to direct parties to preserve electronically stored information and/or require the parties to request a conference with the court before moving for an order relating to discovery.[28]
- Rule 26 would be amended to delete the provisions permitting discovery regarding the "subject matter of the action" upon a showing of "good cause."[29]
- Rule 26 would also be amended to permit parties to serve document requests under Rule 34 after 21 days have elapsed since service, regardless of whether the adversary has answered the complaint or the scheduling conference has taken place.[30]
- Rule 34 would be amended to require parties to state their objections to documents requests with "specificity" and to "state whether any responsive materials are being withheld on the basis of that objection." This proposed change addresses "confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections."[31]
- Rule 84 references certain forms that are intended to "illustrate the simplicity and brevity of statement that these rules contemplate."[32] The Standing Committee has recommended that Rule 84 and the associated forms be removed, except for Form 5 (Notice of a Lawsuit and Request to Waive Service of a Summons) and Form 6 (Waiver of the Service of Summons).

What Will Be the Effect of the Proposed Amendments?

In response to much of the public comment opposing the amendments to Rule 26, the Advisory Committee emphasized how *little* change the proposed amendments will effect. The Advisory Committee notes that proportionality has been part of Rule 26 since the 1983 amendments and that the 2000 amendments attempted to clarify that the "reasonably calculated to lead to the discovery of admissible evidence" language did not define the scope of discovery. Other than directing that courts and litigants pay more attention to proportionality considerations, only time will tell whether the amendments to Rule 26 will have a material impact.

The changes to Rule 37 will have at least one clear impact: the circuit split concerning the culpable mental state required to impose discovery sanctions should become moot. But new case-by-case determinations will arise about what constitutes "reasonable steps" to preserve ESI, what constitutes

sufficient evidence to find prejudice, and who must produce evidence showing or disproving prejudice. Considerable opportunity exists for new uncertainty even under the revised Rule 37.

While more limited in scope than the initial recommended rule changes, the revised proposed amendments should prove to be more helpful guidance to federal court practitioners and judges as to the scope of available discovery and the standard for imposing sanctions or other remedies arising from the mishandling of electronically stored information.

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1. Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (Aug. 15, 2013) [hereinafter "Draft Amendments"].
2. Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure, (June 14, 2014) [hereinafter "Proposed Amendments"].
3. Memorandum from Judge David G. Campbell, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Judge Jeffrey Sutton, Chair, Standing Committee on Rules of Civil Procedure Regarding Proposed Amendments to Federal Rules of Civil Procedure at 4 (June 14, 2014) [hereinafter "Campbell Memorandum"].
4. *Id.*
5. Letter from Nancy Winkler & Lawrence Cohen, Philadelphia Trial Lawyers Association, to Advisory Committee on Civil Rules (Feb. 14, 2014) [hereinafter "PTLA Letter"].
6. PBA Federal Practice Committee Recommendation [hereinafter "PBA Comment"]; Report and Recommendations of the Federal Courts Committee of the Philadelphia Bar Association on the Proposed Amendments to the Federal Rules of Civil Procedure Promulgated for Public Comment in August 2013 [hereinafter "Philadelphia Bar Association Report"].
7. PBA Comment at 3.
8. Campbell Memorandum at 4.
9. *See, e.g.*, PTLA Letter.
10. Proposed Amendments at 10 (emphasis on proposed new language).
11. Proposed Amendments at 10-11.
12. PBA Comment at 1.
13. Proposed Amendments at 10-11.
14. Campbell Memorandum at 8.
15. Proposed Amendments at 19.
16. Proposed Amendments at 24.
17. Campbell Memorandum at 10.
18. Campbell Memorandum at 17-18.
19. Draft Amendments at 315.
20. Draft Amendments at 316-17.
21. Draft Amendments at 322.
22. *Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494, 503 n. 51 (S.D.N.Y. 2013).
23. Proposed Amendments at 36.
24. Proposed Amendments at 37.
25. Proposed Amendments at 43.
26. Proposed Amendments at 1-2.
27. Proposed Amendments at 3-4.
28. Proposed Amendments at 5-7.
29. Proposed Amendments at 11.
30. Proposed Amendments at 14-15.
31. Proposed Amendments at 34.
32. Proposed Amendments at 49.