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The state of the states: Under the national radar, state discovery rules are changing, too

Technology, Privacy, and eCommerce

Whether it is through the legislative process, state rules committee action, or judicial fiat, more and more states are following the example set by the Federal Civil Rules Advisory Committee with its 2015 amendments to the Federal Rules of Civil Procedure (FRCP) and changing their civil procedure to adapt to the new reality of big data. The growing national trend is geared to curtailing out-of-control discovery costs, particularly those associated with electronically stored information (ESI). Companies— especially those that possess significant amounts of data and litigate in state courts—are well-advised to stay abreast of the rapidly changing landscape of discovery rules in those courts.

These efforts to update procedural rules are driven by informed parties and practitioners, and we can all be involved in helping courts and rulemaking bodies in our respective states match procedural rules to the new reality in order to make litigation just, speedy, and inexpensive. This article will discuss a sampling of states that have made such changes and provide insight into navigating the changing landscape of state discovery rules.

Background – the 2015 amendments

Perhaps most important among the 2015 amendments to the FRCP were the changes to Rules 26(b)(1) and 37(e).

First, Rule 26(b)(1) expressly incorporated a standard of proportionality in order to contain discovery costs and limit the rise of “discovery on discovery.” Under the new rule, information is discoverable only if it is “relevant to any party’s claim or defendant and proportional to the needs of the case.”

Second, Rule 37(e), which governs sanctions arising from failure to preserve ESI, was amended to limit the imposition of serious sanctions to only those cases in which the producing party acted with a demonstrable intent to deprive the requesting party of the subject information. Further, under the new Rule 37(e), the duty to preserve ESI arises only when litigation is reasonably anticipated, and if the failure to preserve ESI results in prejudice to the requesting party, the court may order “measures no greater than necessary to cure the prejudice.”

The trailblazers

Although generally speaking the states are playing catch-up with the federal rules, two states were ahead of the curve. In 2014, **Illinois** adopted rules relating to ESI, and explicitly incorporated the concept of proportionality as a way of controlling discovery costs. Illinois Rule 201, like its counterpart in new FRCP 26(b)(1), provides a list of factors for the court to consider in determining whether the burden or expense of the proposed discovery outweighs the likely benefit.

Utah likewise incorporated proportionality prior to 2015, giving courts the authority to order a requesting party to pay some or all of the costs of discovery if necessary to achieve proportionality. Further, cases filed in Utah state court are assigned one of three discovery tiers based on the amount in controversy.

Although a very small number of states had implemented similar changes prior to 2015, it was only after the FRCP amendments went into effect that more states undertook serious efforts to streamline discovery, provide clarity to litigating parties, and reduce the cost of litigation. No two amendments are exactly alike in substance, and states often take different routes on the way to achieving the changes.

Legislative action

After 2015, a growing number of state legislatures have passed amendments to state rules of civil procedure. In **Wisconsin**, Act 235 was signed into law in 2017, effective in 2018, with the chief stated purpose of making litigation in Wisconsin courts less expensive. The law adopts the proportionality standard and balancing factors of FRCP 26(b) (1). Although Act 235 did not adopt the FRCP 37(e) revision, it did add a change, similar to revised FRCP Rule 1, to require both the parties and the court to ensure the just, speedy, and inexpensive determination of actions. The Wisconsin rules also were amended to allow courts the discretion to award expenses associated with producing discovery subject to a motion for protective order.

> In states that have not yet amended discovery rules, parties should push for favorable change by leaning heavily on persuasive authority, including federal rules and decisions, other states' rules changes, secondary sources and commentary, and published best practices, including from industry sources.

Missouri's newly-enacted law, effective August 2019, adopts FRCP 26(b)(1)'s proportionality standard. It also absolves parties of the need to provide discovery of ESI if the source of the information is not reasonably accessible because of an undue burden or cost.

Oklahoma's law, effective November 2017, echoes FRCP 1's directive to "secure the just, speedy, and inexpensive determination of every action." Oklahoma courts now have the freedom to allocate discovery expenses between and among the parties. Unlike FRCP 26(b)(1), however, Oklahoma's amended Section 3226 still includes the phrase "reasonably calculated to lead to the discovery of admissible evidence" in addition to the proportionality requirement.

Rules changes

In other states, procedural rules have been amended through the courts themselves. For example,

the **Arizona** Supreme Court adopted changes to that state's rules of civil procedure, effective July 2018. The scope of discovery was amended to comport generally with new FRCP 26(b)(1) by incorporating the proportionality standard. In addition, Arizona adopted a three-tier system for civil litigation similar to what Utah employs, with the aim of fostering civil case management consistent with the new proportionality standard. Cases are assigned to different tiers (or agreed upon by the parties) depending on complexity and potential damages.

In **Ohio**, that state's Supreme Court chose not to adopt the 2015 FRCP amendments, but it did create a five-factor analysis for determining whether sanctions should be imposed for failing to preserve ESI. The Ohio analysis echoes the amended FRCP 37(e) in that it relies heavily on whether the preserving party operated its electronic information system in good faith.

More recently, in June 2019, **Michigan**'s Supreme Court modified that state's discovery rules. The amended rules require mandatory initial disclosures and limits on interrogatories. The proportionality standard has been added to the defined scope of discovery, and is explicitly and separately incorporated in relation to ESI discovery. There are sanctions available for failure to preserve ESI, but like with the amended FRCP 37(e), a court must first determine that the preserving party acted with the intent to deprive that information from the requesting party.

Changes through litigation

Passing legislation or amending rules can be a difficult process, but not all is lost for practitioners in states without amended discovery rules. In fact, courts in some states have relied on the amended federal rules in reaching commonsense decisions relating to the scope of discovery.

In **Georgia**, attempts to pass e-discovery legislation failed for years. The Georgia Civil Procedure Code has not been updated in more than two decades, and a 2016 Georgia State Bar proposal based on the 2015 FRCP amendments was considered and rejected. But, earlier this year, in Anthem Companies v. Willis, 823 S.E.2d 781 (Ga. 2019), the Georgia Supreme Court held that an adverse inference instruction is only appropriate where the producing party has acted in bad faith or intentionally spoliated evidence. That holding is consistent with the amended FRCP 37(e). At present, Georgia is once again considering formal rules amendments, as are a number of other states.

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In **Texas**, the state's Supreme Court applied the FRCP 26(b)(1) proportionality factors, notwithstanding the fact that the Texas rules themselves had not been amended. In In re State Farm Lloyds, 520 S.W.3d 595 (Tex. 2017), faced with a dispute over production of ESI, the court balanced the proportionality factors to achieve the express goal of limiting delay and expense strain on courts and parties in discovery.

The decisions in Anthem and In re State Farm Lloyds indicate that some state courts are eager to apply the federal rules' concepts in their decisions to fill the void in state civil procedure rules. Educating courts of these and other decisions is a key—and typically underutilized—tool for litigators faced with intractable discovery disputes.

Navigating the changing landscape

The process to bring about the federal rules amendments began well before 2015 and in some respects continued well after their adoption. Indeed, many parties in federal litigation, and even some judges, have been slow to apply the amended rules and use them to their advantage. It is likely that parties litigating in states with recent rule changes will face similar hurdles. It is therefore incumbent upon parties to stay abreast of these changes, educate the courts as necessary, and advocate for common sense, reasonable, and cost-effective discovery.

In states that have not yet amended discovery rules, parties should push for favorable change by leaning heavily on persuasive authority, including the federal rules and related decisions, other states' rules changes, secondary sources and commentary, and published best practices, including from industry sources. Do not hesitate to educate the court on the technological or logistical challenges involved, and use common sense to appeal to judges' practical side.

Of course, the challenges of navigating such a disparate system do not end in the courtroom. Remaining cognizant of jurisdictional requirements is also important when it comes to communicating with, and managing expectations of, custodians, business leaders, and other stakeholders.

Conclusion

Our full pretrial disclosure civil litigation system is unique in the world. Parties and courts have struggled to maintain the ideals of 1938, when the then-radical Federal Rules first adopted pretrial disclosure, while also grappling with the explosion in data volumes and sources. The 2015 federal amendments were a great leap forward in that effort, but without matching changes in the states' rules, large data-producing entities are still at risk. We can work to bring the state law changes into mainstream consciousness and achieve beneficial changes in those states that have not yet acted, in order to keep our civil litigation system functioning efficiently and fairly.

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