The New Scope of Discovery: Will the Amendments to the FRCP Prompt Change for Wisconsin?

David Blinka is an Associate at Habush Habush & Rottier in Madison, Wisconsin. He graduated from the University of Wisconsin Law School in 2012. In addition to his membership in WAJ, David serves on the board of the New Lawyers Section for the Dane County Bar Association. Prior to studying law, he earned his M.A. in history from the University of Wisconsin.

On December 1 a package of amendments to the Federal Rules of Civil Procedure (FRCP) went into effect, encompassing changes to early case management techniques, scope of discovery, requests for production and preservation of electronically stored information. These amendments are largely the product of conclusions reached at the May 2010 Conference held at Duke University where panels considered the results of empirical studies, surveys, and opinions from the legal community. The Advisory Committee on the FRCP proposed the amendments after finding that the goal of securing a "just, speedy and inexpensive determination" of cases, as set forth in Rule 1, would be more obtainable by achieving, among other objectives, proportional use of discovery.

> *"...restructured Rule creates internal checks and balances..."*

Although the concept of proportionality was previously contained within the discovery rules, the amendments utilize this language to explicitly redefine the scope of discovery. The amended Rule 26(b)(1) maintains that discovery must be relevant to any claim or defense, but now it must also be proportional to the needs of the case. The Rule enumerates certain factors that must be considered, most of which were relocated from Rule 26(b)(2)(C)(iii) save for one that is newly added ("the parties relative access to relevant information"). No factor is accorded greater weight than another.

It may turn out that the additions to Rule 26(b)(1) are less significant than its subtractions. The new Rule eliminates the description of specific types of discoverable matter (documents, tangible things, persons, etc...) as well as the sentence permitting broader subject-matter discovery upon a showing of good cause. The amendment, moreover, removed the sentence that includes the phrase: "reasonably calculated to lead to admissible evidence."

According to the Chair of the Advisory Committee on the FRCP, the "reasonably calculated" phrase was never intended to have the effect of broadly defining the scope of discovery. This phrase was added in a 1946 amendment in response to the practice of lawyers objecting in depositions on the grounds that answers would not be admissible at trial. It was intended to apply only to that information already within the scope of discoverable information. The sentence is now eradicated after prior attempts to clarify proved unsuccessful in curtailing the apparent misreading that any inquiry reasonably calculated to lead to beneficial information is allowable.

In essence, the restructured Rule creates internal checks and balances by use of proportional limitations. The measures taken to modify the scope of discovery signify the Committee's belief that parties continuously overlooked proportionality, thereby necessitating the Rule's redefinition in order to reduce discovery excesses. The Committee Note explains that the requesting party does not bear a burden of proving proportionality, yet parties will be required to consider cost-effective means of obtaining discovery while measuring the need against any production burden. Although Rule 26(c)(1)(b) now explicitly grants authority to shift costs on the responding party, the Note cautions that courts and parties should continue to assume that a responding party ordinarily bears the cost.

Legal professionals must consider whether a similar revamping of Wisconsin's discovery rules would achieve a salutary effect: reducing cost without sacrifice to fairness. Wis. Stat. 804.01(2)(a) is substantially similar to the former federal counterpart, meaning it has now been rendered partially incompatible with the amendment. The Wisconsin Judicial Council's Advisory

Committee on the Rules of Evidence and Procedure has not yet undertaken any discussion of the amendments, according to a search of the meeting minutes. It is understood, however, that the Judicial Council and Wisconsin Supreme Court have a preference for following the federal model. Wisconsin courts also recognize federal case law on corresponding procedural rules as persuasive authority, thereby enabling courts to rely on a broader range of authority even if not precedential.

Proportionality is not a foreign concept under Wisconsin law. It has long been germane to resolving disputes even though the rules and decisions do not explicitly feature the phrasing now incorporated within the amended federal rule. Additionally, the 2010 Wisconsin Supreme Court Note following Wis. Stat. 804.01 advises courts to weigh the costs and benefits of discovery of electronically stored information (ESI) and to consider several "proportionality" factors now enshrined within Rule 26(b)(1). In short, Wisconsin has already been on track to conduct the same proportionality balancing, at least with respect to disputes over ESI.

As the new amendments mature in federal courts, Wisconsin's legal community can utilize this time to discern what outcomes may be directly attributable to the amendments themselves as opposed to other factors such as the structure of federal court and availability of resources.

Nevertheless, if Wisconsin were to make a complete transition to proportionality, and eschew the broader, more liberal standards of requests based on subject-matter and whether they are "reasonably calculated," concerns over whether it would inherently benefit one side over another might be kept in abeyance because of the balanced yet elastic nature of proportionality language.

Welcome New Members

Welcome aboard to our new members who have joined from August to December 2015.

Erika Strebel, Madison
Patrick Madden, Mayville
Whitney A. Johnson, Madison
Amy M. Burger, Milwaukee
John A. Birdsall, Milwaukee
James J. Mathie, Waukesha
Matthew Kirkpatrick, Eau Claire
Pat Bomhack, Milwaukee
Jennifer Ohlrich, Bensenville
Alison Gonzalez, Sheboygan
Michael J. Ganzer, Milwaukee
Jennifer Canavan, Milwaukee
Mackenzie Campbell, New Richmond
Sean E. Lees, Wauwatosa
Jack S. Lindberg, Madison
Kate Metzger, Plover
Andrea Springer, Appleton
Judith A. Howard, Madison
Elizabeth Cooney, Milwaukee
Mark DesRochers, Appleton
Katie Garrity, Madison
Aaron Halstead, Madison
Teuta Jonuzi, Madison
Amy Hetzner, Brookfield

Book Review

(Continued from page 27)

confronted in a personal injury lawyer's practice. While imitation may be the sincerest form of flattery, when the American Association of Justice decides to hold a two-day seminar based entirely upon this book—with the very authors presenting—it is a feather in the cap of everyone involved and speaks volumes about the utilitarian nature of the book and is, well, quite flattering.

While I certainly do not profess to be a handyman, I agree with John Romano's assessments that "[t]his book is to a trial lawyer what a hammer is to a carpenter" and that it "is the ultimate resource manual for handling each and every aspect of a plaintiff's personal injury or wrongful death case." In the end, it is my own personal assessment that this book should not only be on your book shelf but referenced often; and certainly provided to any new lawyers interested in joining the plaintiff's personal injury fray.