



STATES ARE EMBRACING PROPORTIONAL DISCOVERY, MOVING INTO ALIGNMENT WITH FEDERAL RULES

by Mark A. Behrens and Christopher E. Appel

Major changes to state civil discovery rules are quietly sweeping the country. At least 15 states and the District of Columbia have updated their state court civil discovery rules to more closely align with December 2015 amendments to the Federal Rules of Civil Procedure (FRCP).¹ Perhaps the most significant change redefines the scope of discovery from any information “reasonably calculated to lead to the discovery of admissible evidence” to discovery that is “proportional to the needs of the case.” On July 1, 2020, Ohio became the latest state to adopt the proportionality concept along with other civil discovery provisions of the federal rules.

2015 FRCP Amendments Target Discovery Abuse

The federal judiciary spent years developing the 2015 amendments with a goal of improving early case management and addressing abuse of the discovery process. Surveys had found that litigation “takes too long and costs too much” in many jurisdictions.² Civil defendants expressed concerns about the cost of overbroad discovery “fishing expeditions” and use of the tools of discovery to harass and pressure opponents into settlements. One survey found that “[i]nefficient and expensive discovery does not aid the fact finder. The ratio of pages discovered to pages entered as exhibits is as high as 1000/1.” The amended federal rules sought to address these concerns in several key ways:

- Require discovery to be “proportional to the needs of the case” (FRCP 26(b)(1)).
- Authorize protective orders that allocate expenses to the requester, such as when the requester seeks disproportionate or unduly burdensome discovery (FRCP 26(c)(1)(B)).
- Establish a clear standard for sanctions and curative measures for a party’s failure to preserve electronically stored information (ESI) (*e.g.* emails) (FRCP 37(e)).

State Rule Changes Bring Greater Uniformity

The march toward greater harmony between federal and state court rules of civil procedure began shortly before the federal rules changes took effect³ and has progressed steadily. States have

¹ The states are Alabama, Arizona, Colorado, Delaware, District of Columbia, Indiana (commercial court), Kansas, Michigan, Minnesota, Missouri, Nevada, Ohio, Oklahoma, Vermont, Wisconsin and Wyoming.

² See, *e.g.*, Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System 2 (revised Apr. 15, 2009).

³ See Colo. Rule Change 2015(05) (effective July 1, 2015).

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updated their civil rules by court rule in jurisdictions where such changes are addressed primarily by the judiciary, and through legislation in jurisdictions where the legislature traditionally plays an important role in the development and adoption of civil court rules.

The federal proportionality concept is well on its way to becoming the majority rule in the states⁴ along with the authority of courts to enter protective orders to shift the cost of overly burdensome discovery to requesters.⁵ States are also limiting the frequency or extent of discovery that is “cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.”⁶ Improvements to ESI rules are limiting production of ESI that is “not reasonably accessible”⁷ and clarifying the standard for imposing sanctions on parties who fail to preserve ESI.⁸ Momentum also exists for presumptive limits on interrogatories⁹ and depositions¹⁰ as in the federal civil rules. In addition to these changes, states are setting presumptive limits on requests for admission¹¹ and some require disclosure of third-party litigation funding agreements.¹²

The March for Proportional Discovery Rules Will Continue

Other states should consider following the lead of the pioneering states that have adopted the proportionality concept and other key provisions of the current federal civil rules. Widespread adoption of reforms will curb discovery abuse and harmonize federal and state civil court rules.

⁴ See Ala. R. Civ. P. 26(b)(1); Ariz. R. Civ. P. 26(b)(1); Colo. R. Civ. P. 26(b)(1); Del. Ch. Ct. R. 26(b)(1); Del. Super. Ct. R. Civ. P. 26(b)(1); D.C. Super. Ct. R. Civ. P. 26(b)(1); Ind. Commercial Ct. R. 6(A); Kan. Stat. § 60-226(b)(1); Mich. Ct. R. 2.302(B)(1); Minn. R. Civ. P. 26.02(b); 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 56.01); Nev. R. Civ. P. 26(b)(1); Ohio R. Civ. P. 26(B)(1); Okla. Sta. tit. 12 § 3226(B)(1); Vt. R. Civ. P. 26(b)(1); Wis. Code § 804.01(2)(a); Wyo. R. Civ. P. 26(b)(1).

⁵ See Ala. R. Civ. P. 26(c); Colo. R. Civ. P. 26(c); Del. Ch. Ct. R. 26(c); Del. Super. Ct. R. Civ. P. 26(c); D.C. Super. Ct. R. Civ. P. 26(c); Iowa R. Civ. P. 1.504(1)(a)(2); Kan. Stat. § 60-226(c); Mass. R. Civ. P. 26(c)(2); Minn. R. Civ. P. 26.03(a); 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 56.01); Nev. R. Civ. P. 26(c); Ohio R. Civ. P. 26(C); Okla. Sta. tit. 12 § 3226(C)(1)(b); Vt. R. Civ. P. 26(c); Wis. Code § 804.01(3)(A)(2); Wyo. R. Civ. P. 26(c).

⁶ See Ala. R. Civ. P. 26(b)(2)(B); Ariz. R. Civ. P. 26(b)(2)(C); Colo. R. Civ. P. 26(b)(2)(F); Del. Ch. Ct. R. 26(b)(1); Del. Super. Ct. R. Civ. P. 26(b)(1); D.C. Super. Ct. R. Civ. P. 26(b)(2)(C); Idaho R. Civ. P. 26(b)(1)(C); Iowa R. Civ. P. 1.503(8); Kan. Stat. § 60-226(b)(2); Minn. R. Civ. P. 26.02(b)(3); 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 56.01); Nev. R. Civ. P. 26(b)(2); Ohio R. Civ. P. 26(B)(6); Okla. Sta. tit. 12 § 3226(B)(2); Vt. R. Civ. P. 26(b)(2)(B); Wis. Code § 804.01(2)(am); Wyo. R. Civ. P. 26(b)(2)(C); see also Fed. R. Civ. P. (b)(2)(C).

⁷ See Ala. R. Civ. P. 26(b)(2); Ariz. R. Civ. P. 26(b)(2)(B); D.C. Super. Ct. R. Civ. P. 26(b)(2)(B); Idaho R. Civ. P. 26(b)(1)(B); Kan. Stat. § 60-226(b)(2)(B); Mich. Ct. R. 2.302(B)(6); 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 56.01); Nev. R. Civ. P. 26(b)(2)(B); Ohio R. Civ. P. 26(B)(5); Okla. Sta. tit. 12 § 3234(B)(2)(e); Vt. R. Civ. P. 26(b)(2)(A); Wis. Code § 804.01(2)(e)(1g); Wyo. R. Civ. P. 26(b)(2)(B); see also Fed. R. Civ. P. (b)(2)(B).

⁸ See Ala. R. Civ. P. 37(g); Del. Ch. Ct. R. 37(e); Del. Super. Ct. R. Civ. P. 37(b)(2)(F); D.C. Super. Ct. R. Civ. P. 37(e); Ind. Commercial Ct. R. 6(E); Kan. Stat. § 60-237(e); Mich. Ct. R. 2.313(D); Minn. R. Civ. P. 37.05; Nev. R. Civ. P. 37(e); Vt. R. Civ. P. 37(f); Wyo. R. Civ. P. 37(e); see also Fed. R. Civ. P. 37(e).

⁹ See Ariz. R. Civ. P. 26.2; Colo. R. Civ. P. 26(b)(2); D.C. Super. Ct. R. Civ. P. 33(a)(1); Fla. R. Civ. P. 1.340(a); Ill. S. Ct. R. 213(c); Ind. Commercial Ct. R. 6(D)(1); Iowa R. Civ. P. 1.509(1)(e); Ky. R. Civ. P. 33.01; Maine R. Civ. P. 33(a); Mass. R. Civ. P. 33(a)(2); Mich. Ct. R. 2.309(A)(2); 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 57.01); N.Y. Ct. R. § 202.70, Rule 11-a; Nev. R. Civ. P. 33(a)(1); Wis. Code § 804.08(1)(am); Wyo. R. Civ. P. 33(a); see also Fed. R. Civ. P. 33(a)(1).

¹⁰ See Ariz. R. Civ. P. 26.2; Colo. R. Civ. P. 26(b)(2); D.C. Super. Ct. R. Civ. P. 30(a), (d); Ind. Commercial Ct. R. 6(D)(2); Mich. Ct. R. 2.306(A)(3); 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 57.03); N.Y. Ct. R. § 202.70, Rule 11-d; Nev. R. Civ. P. 30(a), (d); Wis. Code § 804.045; Wyo. R. Civ. P. 30(a), (d); see also Fed. R. Civ. P. 30(a), (d).

¹¹ See Ariz. R. Civ. P. 26.2; Colo. R. Civ. P. 26(b)(2)(E); Ky. R. Civ. P. 33.01; 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 59.01); Nev. R. Civ. P. 36(a)(7).

¹² See Wis. Code § 804.01(2)(bg); W. Va. Code Ann. § 46A-6N-6 (consumer lending lawsuits).