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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Proposed Discovery Limits Set To Rock Federal Litigants

By **Greg Ryan**

Law360, New York (August 30, 2013, 6:18 PM ET) -- A major battle is brewing over proposed restrictions on the number of depositions and other discovery requests allotted to parties in federal litigation, with defense attorneys applauding the proposal as a cost-saving godsend and plaintiffs lawyers contending that it will hurt their ability to prevail in court.

A rules committee for the U.S. Judicial Conference, the body of judges, attorneys and others that helps set policy for the nation's federal courts proposed on Aug. 15 a host of changes to the Federal Rules of Civil Procedure. Among the changes are reductions in the number of discovery requests that each side can make in a case without asking a judge or an opponent for an extension.

Under the proposal, the presumptive limit on the number of depositions would fall from 10 to five, and the presumptive maximum length from seven to six hours. The presumptive limit on the number of interrogatories would be reduced from 25 to 15.

The committee also proposed putting a presumptive limit on the number of requests for admissions per side for the first time, floating a 25-request ceiling. It considered establishing a 25-request limit for the production of documents and electronically stored information, but decided against it.

The proposed caps sparked controversy before they were even officially released. More than 260 people have weighed in on the amendments, with many of the comments coming earlier in the year in response to draft versions of the proposal. With the comment deadline more than five months away, experts expect the measures to draw a torrent of praise and criticism.

The criticism, for the most part, will come from plaintiffs attorneys. Many have blasted the committee's embrace of request limits as an effective way to curtail discovery abuses. The emphasis of any rule change should focus on the quality of requests, not on their volume alone, they say.

“A lot of people say, 'Oh, don't worry about numeric limits, judges can just ignore them.' But if they're there to be ignored, what's their purpose?” said Stuart Ollanik of Ollanik Law LLC.

Lower presumptive limits — or in the case of admissions, the establishment of any presumptive limit — will hamper plaintiffs' ability to get the information they need from a defendant, they argue. Since defendants, by the nature of litigation, hold most of the information at issue in a case, plaintiffs are more reliant on discovery for success.

Reducing the presumptive length of depositions, for instance, will make it easier for corporate executives and other deponents to evade questioning, plaintiffs attorneys charge.

“It's cutting for the sake of cutting,” said Scott Moss, a University of Colorado Law School professor who represents both plaintiffs and defendants in securities fraud and other commercial cases. “It achieves no purpose I can see and it will increase the prevalence of disputes over running down the clock and bringing back witnesses for another day.”

Cutting the presumptive limit on the number of depositions from 10 to five is unfair because some types of lawsuits routinely require more than five depositions, they say.

The rules committee justified the harsher deposition limits by noting that less than 25 percent of federal cases include more than five depositions by a side, and those cases have the highest discovery costs and the worst complaints about discovery abuse. Fears that judges won't lift the presumptive limit when necessary are not well-founded, it said.

“[T]he lower limit can be useful in inducing reflection on the need for depositions, in prompting discussions among the parties, and — when those avenues fail — in securing court supervision,” the committee said.

The committee said the proposed restrictions on admissions and interrogatories had not garnered much response. But plaintiffs attorneys contend that putting a presumptive limit on admissions requests can actually make discovery more cumbersome for defendants. Often, information gleaned through admissions is information that does not have to be gleaned through depositions, and admissions are easier to handle and less expensive than depositions, according to the attorneys. The same logic applies to interrogatories, they say.

Defense attorneys, meanwhile, say the proposed presumptive limits will effectively cut down on unnecessary discovery, as well as on the fees they charge their clients. Many times, litigants will request up to a presumptive limit just because they can, according to the attorneys. The presumptive limits give judges a marker to evaluate the requests a party makes, they say, stressing that the limits are meant to be flexible.

Brendan Kenny of Blackwell Burke PA said the presumptive limits would force parties to take a clear-eyed look at the cost-benefit ratio of large amounts of discovery.

“What it's going to encourage, for small- and medium-size cases, is for those cases to be worked up and

tied more directly to their worth, instead of having the expense and time ratcheted up by both sides, as often happens today," Kenny said.

The defense firm Bowman and Brooke LLP is such a proponent of the power of presumptive limits that it has urged clients to submit comments asking the committee to reconsider putting such a limit on requests for documents and electronically stored information. The firm suggested a 50-request limit. Several commenters have already used the firm's suggested language to push the committee to implement a cap.

Bowman & Brooke partner Mary Novacheck, who co-wrote an alert to clients about the lack of limit on document requests, said that 50 requests is more than enough for parties to obtain the documents they need.

"Really, by the time you get to number 50, it's already been asked for," Novacheck said. "And it's a presumptive limit. If it's relevant and it hasn't been asked for, go ahead and ask the court."

Plaintiffs attorneys pushed back strongly against a presumptive limit on document requests.

"These are the most effective and efficient form of discovery requests," Ollanik said. "They're the way to get to the truth quickest, and limiting them would only empower those interested in hiding the truth rather than getting to the truth."

Rather than cut down on presumptive request limits, the committee should trust judges to handle discovery disputes, plaintiffs attorneys say.

"I sometimes feel like appellate judges give too little credit to magistrate and district judges' ability to manage discovery. They can exercise their judgment to say, 'This document request goes too far and should be narrowed in this specific way,'" Moss said.

--Editing by Andrew Park and Philip Shea.