tracking THE 2015 AMENDMENTS TO THE CIVIL RULES

EDITOR'S NOTE

The following is an excerpt of an article that first appeared in ABA Litigation, *Vol. 38 No. 4 (2012). In it, Judge James G. Carr responded to major pleading and discovery changes proposed by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System in 2009.*

Carr's original article challenged the recommendations; we omit that here because they are less relevant to the 2015 discovery amendments. But his alternative proposal, which urged judges to hold pre-motion conferences to resolve discovery disputes quickly and efficiently, not only is prescient but also provides insightful guidance to lawyers and judges who are considering adopting this practice.

Fixing Discovery: The Judge's Job

WE AGAIN HEAR THE CALLS: Rein in the costs of civil litigation generally and pretrial discovery in particular. Many of these calls originate with a study that the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System conducted in 2008.

The final report contains interrelated proposals for pleading and discovery that, if adopted, would substantially transform the one and revolutionize the other. Proponents claim that repudiation and abandonment of the notice pleading and open discovery policies underlying the Federal Rules of Civil Procedure since 1938 are necessary to fix a "broken" discovery system.

I disagree. The drastic keelhauling that the final report proposes is unnecessary, will not accomplish the goal of reducing discovery-related costs, and will have other adverse side effects.

Instead, what is needed to repair our current system – overly costly as it is in both money and delay – is a willingness of judges to adjudicate discovery costs informally and promptly.

AN ALTERNATIVE PROPOSAL

Early in my career as a magistrate [judge], I found myself struggling with massive, often indecipherable, and always time-consuming discovery motions in some Title VII class actions. One day it occurred to me, in an effort to comprehend what really was at issue, to talk to the lawyers. After about an hour of doing so, one afternoon 30 years ago, I wrote a two-page order and dumped a three-inch pile of paper in the trash.

I then developed the practice of having an in-person or telephone conference with counsel in every discovery dispute. These sessions invariably resulted in an order resolving the dispute. In 1994, our court adopted a local rule making this approach the default for resolving discovery disputes expeditiously.

Since then, counsel contact chambers perhaps two or three times a month, letting my staff know there is a discovery problem. Sometimes the attorneys tell the staff orally what the problems are; at other times, they send an email or fax a short letter.

Most often, I can arrange a conference call immediately, never later than within the next 24 hours. Usually, the conference lasts a half-hour or so, rarely more than an hour. It is always on the record and most often results in an order.

Perhaps once or twice a year, counsel and I will conclude that further briefing is appropriate. Even then, we have narrowed the issues and can set an expedited schedule.

Recently, I informally surveyed districts with similar rules. The judges' responses mirror my experiences:

- The need to handle discovery informally is generally infrequent; at most, once or twice a week or three or four times a month, or as rarely as once or twice a year.
- Disputes typically come to the judge's attention through a phone call to chambers; otherwise, by email, motion, or request for a pre-motion conference.
- While some district judges handle their own discovery disputes (as I do), most courts with informal resolution rules refer them to magistrate judges.
- Lawyers infrequently appeal magistrate judge rulings, and reversals are extremely rare.
- Although it can take about an hour, sometimes more, to resolve these disputes informally, a half-hour usually suffices.
- Neither respondents nor, according to them, lawyers expressed

[T]he [Rule 16] order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case.

– 2015 Committee Note to Rule 16

any opposition to the informal means of discovery.

POTENTIAL DRAWBACKS

Although lawyers and judges alike endorse this approach, there may be some drawbacks from time to time. Two respondents noted that some lawyers tend to be "frequent flyers" with a "dial-the-court" attitude. One respondent noted the lack of a record, due to the absence of formal motions. Another expressed concerns about fairness, when one party comes prepared to argue, while the other does not.

The fact is that informal resolution provides prompt, efficient disposition – and saves litigants a lot of money and courts a lot of time – by avoiding motion practice, which one respondent referred to as "the death knell of a magistrate judge's time." Other comments: "Because discovery disputes really do bog down a case, it's helpful from a case management standpoint." "Overall, I think the rule is very good. The process works well and provides a solid and efficient manner for managing discovery." "My own experience suggests that, once in a while, trying to handle disputes informally turns out to be inefficient. But this happens rarely."

"I urge all judges to to try this approach. Take a half-hour or so – sometimes more, sometimes less – just a few times each week or month, to hear and address discovery disputes informally.

The judge easily should be able to remedy each of these problems. Reminders that counsel should privately resolve truly minor disputes can curtail frequent flying. A docket record can include any communications from attorneys, not just formal motions. A court can ensure fairness by briefly postponing the conference, if needed.

Also, a court can avoid having informal resolution efforts fall into a shambles, especially in a complex case, by introducing a modicum of formality to discovery conferences. A court can require a statement of issues, brief recitations of positions and arguments, and a modest set of citations. It usually doesn't take much to let the judge know what the issues are.

Lawyers offer a recurrent explanation for the failure of informal resolution to become the norm, rather than a relative rarity: That, especially in state courts, "judges don't want to be bothered by discovery disputes. They tell us to go away and take care of them ourselves."

All judges (and their law clerks) hate discovery disputes. By the time those disputes reach the motion state, they are typically difficult to understand and even harder to resolve. In any event, adjudication of discovery motions takes time. The busier the court, the less time it has for such ancillary disputes.

But many disputes don't go away on their own or through informal proceedings. Then, someone has to invest potentially substantial time and effort to decide them formally. In the meantime, the meter has been running both as to costs and case delay.

I urge all judges to to try this approach. Take a half-hour or so – sometimes more, sometimes less – just a few times each week or month, to hear and address discovery disputes informally.

Widespread adoption of the informal judicial resolution of discovery disputes will not make litigation inexpensive. That's far from possible. But it can, and will, substantially reduce discovery-related costs, save time, and spare judicial resources.

This is not just part of a judge's duty. It's our common responsibility.

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