A REQUESTER-PAY DEFAULT: COMMON-SENSE DISCOVERY REFORM CAN REDUCE UNDESIRABLE LITIGATION INCENTIVES

by Rebecca A. Womeldorf

Currently, the Federal Rules of Civil Procedure provide no meaningful recourse for a litigant to challenge the involuntary imposition of sometimes exorbitant costs and expenses imposed by mandatory discovery obligations. The transfer of resources itself raises concerns of constitutional significance that have garnered attention only as discovery costs and abuses have soared. One of the most effective ways to limit excessive, inefficient discovery would be to change the current default under the Federal Rules that a litigant may ask for very liberal discovery, and pay for none of it. Shifting some discovery costs from the “producer” to the “requester” would incorporate a largely self-executing check on expense, inefficiency, and unfairness in discovery. It’s simple, and it makes sense. But apart from the hurdles of getting such a proposed change through the labyrinth of the federal rule making process, the key to change will be a willingness to look at the current state of affairs with a fresh eye and a willingness to clothe the king.

Professor Martin Redish has framed the problem:

Designed to enable litigants to gather the information necessary to facilitate accurate decision making and the effective vindication of substantive rights, the discovery process has a dark side that seems to have been largely undervalued at the time of the Rules’ framing. At least in an important category of litigation – those cases in which significant amounts of discovery are likely to take place – the costs and burdens inherent in the discovery process threaten to give rise both to serious inefficiencies in the adjudicatory process and to a potentially pathological and coercive skewing of the applicable substantive law being enforced.1

The road to amending the Federal Rules is, with good reason, long and even arduous. Rules matter. The Civil Rules Advisory Committee recently proposed a series of revisions to the Federal Rule designed to move federal discovery practice closer to Rule 1’s stated goal of applying the Rules “to secure the just, speedy, and inexpensive determination of every action and proceeding.” Those proposed amendments – though still not final – are the culmination of years of work most recently in the wake of the Duke Litigation Review Conference in 2010 by various judicial committees and advocacy groups on both sides of the “v.” The proposed reforms target proportionality and the scope of discovery, the duty of lawyers to cooperate in discovery, and issues related to preservation sanctions and triggers, among others. Though not perfect, many believe the current constellation of proposed changes – which (depending on how one counts) contemplate more than ten specific alterations to the existing rules – will significantly advance the ball on needed discovery-related reforms.2 But a shift from

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2 Because the pros and cons of the proposed changes have been much discussed and written about, this paper will not pile on to that
“producer pays” to “requester pays” has yet to become a central part of the discussion, and is not part of the package of Amendments approved by the Standing Committee on June 3, 2013. The earliest the current package of amendments could become effective is 2015, which means any change to the “producer pays” default would come later than that, threatening to undermine the positive benefits to the litigation system intended by Committee’s consideration of numerous amendments to the discovery Rules. In short, the Committee cannot achieve Rule 1’s stated objective absent a paradigm shift that requires every litigant to consider the potential benefits of discovery in light of its cost.

How did we end up with the nonsensical notion that the producing party should pay all costs associated with an opposing party’s discovery requests? Tracking back, the Rules did not address responsibility for such costs. De facto “caps” on discovery “production costs” existed simply by virtue of the kinds of “documents and things” available for production, as well as the absence of electronic data. With the explosion of various means and methods of information storage, as well as technologies for collection and reproduction, sharply-rising discovery compliance costs began to get some real attention. Even so, the producer-pays premise has persisted.

The practical reality of mutually-assured destruction continues to contain discovery in discovery cases in which each party maintains roughly equal amounts of potentially relevant information, and each wants to discover information possessed by the other. But when, as is often the case, parties possess wildly asymmetrical amounts of discovery information, and thus face dramatically asymmetrical discovery burdens, “producer pays” becomes at best an open door to inefficient and wasteful discovery, and at worst a tool of litigation leverage.4

Discovery – once exclusively a means of obtaining information relevant to the legitimate end of fact finding – now indisputably provides the requester with court-assisted settlement leverage, irrespective of the merits. A litigant most often cannot meet the rules-based standards for responding to expansive discovery requests absent expensive document preservation, collection, and review. Too often, such requests constitute a transparent effort to force opposing parties to evaluate a “cost-of-defense” settlement with the heavy thumb of excessive litigation costs on the scale. Unavoidably, parties do settle simply based on a business judgment that expensive and protracted discovery must be avoided. The merits-based risk of the dispute that should guide out-of-court claims resolution no longer drives settlement outcomes.

Even putting aside the cases in which discovery is sought to achieve settlement leverage – a percentage of civil cases on which many would disagree – seemingly all would have to concede that conducting discovery unmoored to any cost/benefit analysis produces drastic diseconomies. The Federal Rules can and should eliminate the perverse incentives that arise under the producer pays regime by adopting a common-sense rule that litigants must pay for what they ask for. A shift to “requester pays” will require patience and persistence to achieve given both the lengthy entrenchment of the “producer pays” regime as well as the false notion that a “requester pays” default rule seems somehow at odds with the spirit if not the letter of the deeply engrained “American Rule.” The “American Rule” provides that each party is responsible for paying its own attorneys’ fees and costs, absent a specific statute or contract that allows the assessment of those fees and costs against the other party. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Fed. R. Civ. P. 54(d). The American Rule demands that even those prevailing parties unjustly forced to defend a lawsuit must pay their own defense costs, including attorneys’ fees. The premise underlying the American Rule (doubted by some) is that society’s interests are not well served if a person chooses not to file a meritorious lawsuit seeking expansion

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3 Generally, the Civil Rules Advisory Committee provides recommendations to the Standing Committee on Rules of Practice and Procedure, which in turn reports to the Judicial Conference of the United States. If the Judicial Conference approves the Standing Committee’s report and recommendations, the report goes to the U.S Supreme Court, which can then approve, modify or disapprove the report’s recommendations. The Supreme Court forwards any adopted recommendations to Congress and, absent action by Congress within 90 days, the proposed rule(s) automatically become(s) law, with an effective date as stated in the proposed rule(s).


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of existing law or redress for perceived wrongs simply due to the fear that an unsuccessful result would lead to liability for the defendant’s fees and expenses.

As Walter Olson has observed, “America differs from all other Western democracies (indeed, from virtually all nations of any sort) in its refusal to recognize the principle that the losing side in litigation should contribute toward ‘making whole’ its prevailing opponent.” Walter Olson, Loser Pays, http://www.pointoflaw.com/loserpays/overview.php (2004). English law (as most others) takes precisely the opposite approach, so-called “loser pays,” meaning the losing litigant pays the prevailing party’s attorneys’ fees.

Many have criticized the “American Rule” given the obvious inefficiencies it creates, and have called for a shift to a “loser pays” regime. Whatever the merit of such proposals, “requester pays” is not “loser pays.” The American Rule in no way mandates the “producer pays” discovery default scheme. In no sense can the costs of answering discovery requests from an opponent be considered an expense of prosecuting one’s own claims or defenses. This goes even beyond “loser pays,” because for the most part, even when a massive consumer of discovery loses the case, the consumer still does not pay.

Lawyers for Civil Justice (LCJ), a defense-oriented group focused on legal reform through involvement in ongoing legislative and procedural rules initiatives, has put the “requester pays” ball in play. LCJ just last month submitted a comment to the Discovery Subcommittee of the Civil Rules Committee in which LCJ argues that a discovery scheme that allows a party to request liberal discovery from an adversary without financial consequence at best incentivizes inefficient discovery and at worst invites tactical abuse. LCJ advocates the adoption of a “requester pays” discovery rule in its comment entitled, “A Modest Proposal for Limitations on Cyberdiscovery,” (available at http://www.lfcj.com/articles.cfm?articleid=169). As LCJ outlined in the comment, such a rule would “encourage each party to tailor its discovery requests to the needs of the case by placing the cost-benefit decision onto the requesting party – the party in the best position to control the scope of those demands.”

The current Rules demonstrate the advantages of “requester pays” in the context of expert discovery. Rule 26(b)(4)(C) allows for cost-shifting of expert discovery costs, requiring the requesting party to pay most of

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5 Professional and ethical rules arguably impose no limitation on aggressive and overbroad discovery tactics; indeed, arguably duties to one’s client may require such conduct in certain circumstances. Richard Eisenberg, A Modest Proposal for Limitations on Cyberdiscovery, 64 FLA. L. REV. 965, 975 (2012).

6 LCJ advocates the adoption of a “requester pays” discovery rule in its comment entitled, “The Un-American Rule: How the Current "Producer Pays" Default Rule Incentivizes Inefficient Discovery, invites Abusive Litigation Conduct and Impedes Merits-Based Resolutions of Disputes.” (available at http://www.lfcj.com/articles.cfm?articleid=169). As LCJ outlined in the comment, such a rule would “encourage each party to tailor its discovery requests to the needs of the case by placing the cost-benefit decision onto the requesting party – the party in the best position to control the scope of those demands.”

7 As the Supreme Court noted in Bell Atlantic v. Twombly, the Federal Rules were designed to allow liberal access to courts with weak claims being weeded out as litigation progressed. However, as discovery has grown increasingly expensive and complex, the Court noted that “[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.” 550 U.S. at 559.
its adversary’s expert discovery costs. The rule is not invoked in every case, because expert expenses are often a roughly equivalent expense for both parties, although there are obviously exceptions to this observation. LCJ correctly offers that this example proves the point that when discovery costs are roughly symmetrical, parties work it out, often without the need for judicial intervention. Absent symmetrical burdens, discovery interests diverge.

There is nothing unfair or “punitive” about starting from the premise that a litigant must bear the costs of litigating his claim. Hitting the reset button on cost allocation will not inhibit access to justice; the American Rule will remain intact. In practice, the contingency-fee systems that prevail in the U.S. often insulate private litigants from discovery costs entirely, despite the exorbitant potential cost of most litigation beyond the small-claims variety.

A requester pays rule could be both simple and largely self-executing. One possible approach:

A party submitting a request for discovery is required to pay the reasonable costs incurred by a party responding to a discovery request.

(1) Such costs include the costs of preserving, collecting, reviewing, and producing electronic and paper documents, producing witnesses for deposition, and responding to interrogatories.

(2) Each party is responsible for its own costs related to responding to Disclosure Requirements under Rule 26.

(3) Non-parties responding to Subpoenas under Rule 45 shall be entitled to recovery of reasonable costs associated with compliance with the subpoena.

(4) The costs described in subsection (1) and (3) above shall be considered Taxable Costs under Rule 54(d).

Such a proposed rule could of course be subject to modification for good cause shown in individual cases. For example, Professor Redish recommends that “Rule 26 should therefore be amended to state unambiguously that discovery costs are attributable to the requesting party, unless applicable substantive law provides to the contrary or the court finds that a compelling reason for shifting the costs to the responding party exists.”

It is not so revolutionary to suggest that different rules should apply when a litigant – for whatever reason – is not “paying to play.” The current Rules exempts litigants from filing fee requirements if they proceed in forma pauperis, but condition this benefit on jumping through a hoop the Rules do not require of “paying” litigants. In forma pauperis lawsuits cannot proceed without surviving pre-service, threshold review to weed out claims that are defective, frivolous, or malicious. The Rules thus already recognize the core justification of a requester-pays regime: if something is “free,” incentives may be skewed. For in forma pauperis actions, the curb on potential abuse is additional judicial scrutiny. For discovery requests, the “fix” is even easier, because it has the benefit of being largely self-executing.

An explicit change in the baseline assumption about which party pays for requested discovery will be a gamechanger in encouraging efficient, cost-effective discovery. As for fairness concerns, any negative consequences from a policy perspective can be accommodated, while correcting the systemic injustice now enshrined in modern discovery practice. Absent such a change, other Rule amendments will inevitably fall far short of stated goals, and costs will continue to escalate without corresponding benefits to justice.

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8 Redish, supra note 1, at 12-13.