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THE LITIGATION LEADER

FOS's Litigation Newsletter

When push comes to shove. . .

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Editor: Diane Slomowitz

GAME-CHANGING FEDERAL "PROPORTIONALITY" DISCOVERY RULE EFFECTIVE DECEMBER 1, 2015

By Michael J. Hanrahan

Excessive discovery requests. We've all received them.

A $30,000 contract case "demands" multiple interrogatories, document requests, and deposition notices. More time and fees are spent on preparing responses or protective order motions than on the case's limited issues.

Unending discovery becomes a settlement tactic, not an investigational tool.

All that will change for federal cases on December 1, 2015, when amended Fed. R. Civ. Pro. 26(b)(1) is scheduled to take effect:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.* (Emphasis supplied).

Under the amended rule, discoverable information must be relevant - not merely "reasonably calculated to lead to admissible evidence," as before.

The amended rule also requires proportionality. Parties must now really weigh potential discovery's importance to the issues against its costs. The new standard cuts both ways. It prevents plaintiffs from using discovery to extract a "cost of defense" settlement (especially in a small case), and checks defendants' prying into a plaintiff's background/finances when the yield is low.

The Advisory Committee's Notes state that amended Rule 26(b)(1) restores the rule's intended original proportionality focus, which had morphed into a cost-benefit analysis under Rule 26(b)(2)(iii). A case, for example, may involve a small

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WHEN THE DAUBERT STANDARD DOES NOT APPLY

By Laurna A. Kinnel

Most everyone is aware that, in 2011, Wisconsin became a *Daubert* state – meaning that Wisconsin adopted the *Daubert* standard for determining whether expert testimony is admissible as evidence.

Earlier this year, the Wisconsin Supreme Court issued its 5-2 ruling in the consolidated cases *State v. Alger* and *State v. Knipfer*, 2015 WI 3, that "[t]he *Daubert* standard applies to 'actions' or 'special proceedings' commenced on or after February 1, 2011."

This means that, where an underlying case was commenced before February 1, 2011, the *Daubert* standard does not apply.

Wisconsin codified the *Daubert* standard in § 907.02, Wis. Stats., which states that experts can offer testimony

> "if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case."

The pre-*Daubert* standard, commonly

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PRACTICE CORNER: STRATEGIC ARBITRATION - EVERYTHING COUNTS

Lawsuits involve a bit of procedural jockeying – substitution, consent to a magistrate judge, removal, picking a mediator.

In arbitration, everything is up for grabs. Parties choose the arbitrators, set discovery's scope, decide the hearing rules, and even choose the form of decision. If the arbitration agreement is basic, parties can challenge the arbitration locale and controlling law.

Each decision point can substantially impact your case. A clear strategy from Day 1 is imperative.

Picking the Arbitrator. Take this seriously - a good arbitrator makes all the difference. Create a spreadsheet of the potential arbitrators, including their location, practice background, judicial and arbitration experience, age and billing rates. Solicit comments from within your firm, and colleagues in other cities where the candidates practice. Exclude the chaff, and rank the remaining top 10; then work with the client on a final ranking.

Arbitration Locale and Controlling Law. If not contractually specified, fight hard for your preferred locale and controlling law (one generally follows the other). Home field is great. An AAA panel will make the first decision, which the parties can challenge. Federal venue law generally applies. In a multi-state contract dispute where convenience factors are split, the key consideration can be the "great deference" to a plaintiff's choice of a home forum. *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981). This is critical: if your arbitration clause specifies no locale, be first to file.

Discovery Scope. Arbitrators look to the parties to set discovery's scope – what rules, how many depositions, how to resolve disputes, etc. Agreeing to a set of

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New Federal Rules, Continued from page 1

dollar amount, but large issues of important personal or public values.

The amended rule applies to "information asymmetry" - one party with little information and the other with lots. The burden of responding is greater on the party with more information.

The change does not approve boilerplate "proportionality" objections. The parties and court have a collective responsibility.

The Notes encourage "greater judicial involvement in the discovery process." Litigators are often reluctant to bring discovery motions, viewing courts as disfavoring them. Aggressive discovery demands then ensue. Early motion practice may now quell these abuses.

December 1 creates a strategic opportunity. Counsel should send a standard letter to opposing counsel, at the start of every federal lawsuit, noting and applying the proportionality rule. If opposing counsel ignores your warning, bombarding your client with excessive demands, the letter will tee up a motion.

Proportionality cuts both ways. In a complex case raising important substantive issues of major financial concern, the amended rule may justify crucial, if extensive, discovery.

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The Litigation Leader—*When push comes to shove. . .*

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IF YOU'RE NOT AMENDING, YOU'RE NOT TRYING

By Matthew W. O'Neill

We teach our kids: the only good writing is re-writing. Pleading is the same: the only good pleading is re-pleading.

Before filing, you do your due diligence: gather client information, interview friendly witnesses, research the law, and navigate multiple drafts of the complaint.

Still, you only know half the story. The defendants and less friendly witnesses know the other half.

To craft the complete narrative and identify all potential claims, the best practice is to amend your complaint after learning the full story.

An amended complaint is allowed as of right within six months of the initial pleading or per the scheduling order. Wis. Stat. § 802.09; FRCP 15.

Otherwise, the standard for court approval is mild – freely given when justice requires. As long as time exists to defend new claims, leave is routinely granted.

Amending is an important right. Discovery and motion practice will identify new claims, expose meritless claims, and give grist for fraud-based claims requiring more detailed pleading.

In a recent case, a deposition showed grounds for a Wis. Stat. § 100.18 claim, adding more damages and a potential fee shift.

In another, defendants' mammoth document drop resulted in a mammoth, fact-specific amended pleading.

A richly detailed amended complaint serves many purposes. For starters, it will help set the Judge's or mediator's understanding of the case.

Your awesome pleading will then guide further discovery, summary judgment filings, jury instructions, and the special verdict.

So treat your initial complaint like a good first draft. Let it sit, do your homework, then make an amended pleading sing.

Strategic Arbitration, Continued from page 2

rules, like Chapter 804 or the federal rules, is better than leaving the process undefined. Also make sure to have a single arbitrator resolve disputes, to ensure efficiency and minimize cost.

Motion Practice. Narrow the issues early. Arbitrators work for a fee, and will eagerly consider motions to dismiss, for partial summary judgment, or to limit the arbitration's scope. Effective motion practice yields early settlement talks, and otherwise tailors the hearing.

Arbitration Hearings. Think carefully about the hearing you want. AAA rules give arbitrators wide latitude in conducting hearings - allowing video or written testimony, excluding evidence as cumulative, briefing discrete issues, or any creative lawyer's other suggestion. Finally, always elect a reasoned award. Win or lose, it always helps to know the arbitrator's rationale.

Daubert Standard Does Not Apply, Continued from page 1

known as the relevancy standard, allowed the admission of expert testimony if 1) it would assist the trier of fact, 2) it was based on "scientific, technical, or other knowledge" and 3) the expert was qualified "by knowledge, skill, experience, training, or education." § 907.02, Wis. Stats. (2009-10).

In *Alger*, the Supreme Court provided specific guidance to litigants regarding what is considered an "action" or a "special proceeding:"

> "The word 'action' in the Wisconsin statutes denotes the entire controversy at issue. For example, a motion to establish paternity is not an action. Similarly, a probate matter is not an action. A special proceeding, like an action, is a stand-alone proceeding that is not part of an existing case….Examples of special proceedings include a stand-alone proceeding for contempt or to condemn land, a non-party's motion to intervene, a voluntary assignment for the benefit of creditors and a proceeding to obtain discovery of books."

2015 WI 3, ¶ 29. (Internal citations omitted, emphasis supplied).

In short, special proceedings involve "a separate filing outside of an action." *Id*. The *Alger* ruling has special application to litigators, especially those working in the context of criminal and family law, or those involved in especially lengthy litigation or appeals.

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IN THIS ISSUE

DON'T FORFEIT YOUR RIGHT TO CHALLENGE FEDERAL FORFEITURES

By Jacob A. Manian

We typically think of government forfeitures involving the seizure of money or fancy vehicles from suspected drug dealers pursuant to an arrest.

This is not always the case.

A person found to be traveling with lots of cash, or a small business owner who regularly makes bank deposits of $10,000 or less, such as a restaurant or grocery store owner, can be thrust into a government forfeiture action, based on nothing more than a hunch of wrongdoing.

The government ultimately bears the burden to prove that it is entitled to keep the cash.

However, the owner, also known as the claimant, must jump through hoops and meet strict deadlines to challenge the seizure.

A claimant who doesn't hire a lawyer, thinking he or she has done nothing wrong, may fail to comply with the rules and deadlines to properly assert a claim.

In a federal administrative forfeiture action, the claimant must file what is known as a claim of ownership, and must do so thirty (30) days after receiving notice in the mail that the government has seized the asset(s).

The claim must identify the specific property claimed and state the claimant's interest in the property.

The claim must be made under oath by the claimant (not counsel) under penalty of perjury consistent with 28 U.S.C. § 1746.

A claim found to be frivolous may subject the claimant to hefty civil fines.

Failure to comply with these requirements may deny a claimant the ability to contest the forfeiture in court.

Litigating forfeitures can be very costly and time consuming.

A prompt and proactive response on behalf of a claimant can make all the difference between a quick return of the assets versus protracted litigation where the end result is uncertain.

LITIGATORS HONORED

FOS litigation shareholder **Laurna Kinnel** has been named one of the 2015 Up and Coming Lawyers by the *Wisconsin Law Journal*.

FOS litigation shareholder **Mike Hanrahan** has been named a member of the Nation's Top One Percent, by the National Association of Distinguished Counsel.