MASSACHUSETTS RULES OF CIVIL PROCEDURE

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

Reporter's Notes--2016

At the request of the Rules Committee of the Supreme Judicial Court, the Standing Advisory Committee on the Massachusetts Rules of Civil and Appellate Procedure ("Standing Advisory Committee") considered possible changes to the Massachusetts discovery rules that were based on amendments to the federal discovery rules. The proposed amendments to the Massachusetts discovery rules were intended to address the burdens of discovery that have been the subject of significant debate across the country over the past few years.

There were three proposed changes involving the Massachusetts discovery rules, all taken from amendments to the federal discovery rules.

The first proposed change to Rule 26(b) would have involved the scope of discovery by deleting the language that discovery must be "relevant to the subject matter involved" in the action. The proposal would have added in place of the deleted language that discovery must be relevant to a party's claim or defense. This language was drawn from a 2000 amendment to Rule 26 of the Federal Rules of Civil Procedure refining the scope of discovery.

The second proposed change to Rule 26(b) would have adopted the principle of proportionality for discovery requests--i.e., discovery should be "proportional to the needs of the case." This proposed amendment would have adopted the principle of proportionality as set forth in amendments to the Federal Rules of Civil Procedure that were effective in 2015. The proposed rule listed the factors that were to be taken into account in determining whether a discovery request was proportional to the needs of a case: "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."

The third proposed change would have deleted the language in Rule 26(b)(1) that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." In its place, the proposal would have added language that information "need not be admissible in evidence to be discoverable."

The Standing Advisory Committee reviewed the many comments submitted by both lawyers and judges after the proposal was published for public comment and voted not to recommend to the Supreme Judicial Court adoption of the three changes to the discovery rules. The comments reflected significant opposition to the proposed changes and described them as unnecessary and inadvisable at the present time. The principal objection to the amendments by the Standing Advisory Committee was based on the perception by many Committee members of

drawbacks and unintended consequences of imposing the federal changes on the Massachusetts trial courts, as well as the newness of the federal changes. Most Committee members were in favor of a "wait and see" approach that would allow review of how the federal amendments affect litigants and civil litigation prior to considering whether similar amendments should be adopted in Massachusetts.

The Standing Advisory Committee also prepared draft language for consideration by the Supreme Judicial Court that alluded to proportionality in discovery, not in the context of the scope of discovery, but in the context of a court's decision to grant a protective order involving discovery under Rule 26(c). The Standing Advisory Committee referred to this as "compromise" language in the event that the Supreme Judicial Court did not accept the Standing Advisory Committee's recommendation not to change the Massachusetts discovery rules, at least until there is sufficient experience under the federal amendments. It is this compromise language that the Supreme Judicial Court adopted in 2016.

The amendment to the protective order language of Rule 26(c) lists factors similar to those that are relevant to a court's decision to limit the discovery of electronically stored information under Rule 26(f)(4)(E). These factors are:

> (1) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive;
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> (2) whether the discovery sought is unreasonably cumulative or duplicative; and
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> (3) whether the likely burden or expense of the proposed discovery outweighs the likely benefit of its receipt, taking into account the parties' relative access to the information, the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

Under Rule 26(f)(4)(E)(iii), a relevant factor in limiting electronic discovery is "whether the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought." This factor has been omitted from the listing of factors in the 2016 amendment to Rule 26(c).

The addition of these factors to Rule 26(c) should not result in any significant change to Massachusetts practice. The amendment confirms the existing authority of a trial judge in determining whether to grant a protective order.