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Maryland Discovery Changes: Reform or Retreat?

Prof. John A. Lynch Jr.

On June 13, 1994, the Court of Appeals issued a rules order which included, among other things, four changes in Maryland discovery procedure.[1] These changes became effective October 1, 1994.[2] The portions of the rules order that affect discovery are:

1. The insertion of a new Rule 2-401(c) which provides that the parties are "encouraged" to reach an agreement on a plan for the scheduling and completion of discovery;

2. An amendment to Rule 2-421 that permits a party to serve more than one set of written interrogatories directed to any other party (though not increasing the maximum number of thirty interrogatories);

3. A new rule providing for a scheduling order in most cases, Rule 2-504, which must include a date by which all discovery must be concluded,[3] and which may include terms:

   a. Limiting discovery otherwise permitted under the rules, including reasonable limitations on the number of interrogatories, depositions, and other forms of discovery,[4] and

   b. Resolving any disputes between the parties relating to discovery;[5] and

4. A new rule providing for a scheduling conference in certain instances, one of which is when a request for such a conference by a party states that, despite a good faith effort, the parties have been unable to reach an agreement on a plan for the scheduling and completion of discovery,[6] and which permits a court to order that parties complete discovery prior to such conference that enables them to participate meaningfully and in good faith.[7]

On one hand, one might argue that the rules changes that focus on the activity of the parties and the courts in scheduling, completing and, yes, perhaps even *limiting* discovery may provide a new framework for resolving the two most aggravating discovery problems: the overuse of discovery and the refusal of some counsel to respond to discovery in a cooperative manner. On the other hand, one might contend that these provisions are simply a "feel-good" addition to discovery control methods that exist already.[8] Which of these analyses is more likely to prove true is addressed below. What is indisputable, however, is that these discovery changes are remarkably modest in light of the ferment concerning discovery in the last few years among procedural policy-makers in the Maryland and federal judicial systems.

I. The Controversial "Core Discovery" and Other Discovery Limits

That the discovery provisions adopted by the June 13, 1994 rules order are but a pale reflection of more dramatic proposals may be seen in a comparison of the new rules with proposals contained in the two previous versions of the 124th report of the Rules Committee.

The first ancestor of the report ultimately adopted by the Court of Appeals was submitted by the Rules Committee in March of 1993.[9] It would have reduced the limit on interrogatories under Rule 2-422(a) from thirty to twenty, limited requests for documents and property under Rule 2-422(a) to thirty and, most significantly, limited depositions of "fact" witnesses to not more than five. It contained roughly the same provision for scheduling orders as what was ultimately adopted, but most significantly, it would have added new Rule 2-403, providing for initial disclosure of information. It would have amended Rule 2-401(b) to preclude any other discovery until the initial disclosure was completed and would have prevented parties from altering by

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stipulation such initial disclosure.

This initial disclosure, also called "core discovery," was the heart of the Rules Committee's discovery proposals. It would have required, within thirty days after service of a pleading or motion responsive to a complaint, that each party disclose to every other party to the extent then known:

1. The identity, etc., of persons other than experts, having discoverable information that tends to support a position that the disclosing party has taken or intends to take in the action, including any claims for damages;

2. A copy or description of all discoverable documents and other tangible things in control of the party that tend to support a position that the disclosing party has taken or intends to take in the action, including any claim for damages;

3. An itemization of any economic damages claimed by the disclosing party; and

4. The identity of any insurer and the applicable policy limits of any insurance agreement with any insurer which might be liable to satisfy any judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

This initial discovery proposal generated vociferous opposition from many quarters. This should not have been surprising, since it was modeled on new Federal Rule 26(a). Opposition to that rule, which became effective on December 1, 1993, was so strong that the House of Representatives passed a bill eliminating initial disclosure from the federal rules amendments,[10] a rare congressional intrusion into the federal rulemaking process.

In December, 1993, the Rules Committee proposed revisions to its rules change proposals.[11] The effects of the vigorous opposition to the Committee's proposals concerning discovery were apparent. The Committee abandoned its proposals concerning quantitative limits on fact depositions, interrogatories, and requests for production of documents and property, and it limited the initial disclosure to motor tort cases. Ultimately even this slimmed-down initial disclosure requirement was rejected by the court of appeals.

II. Reasons for Proposed Changes

Was Maryland discovery practice "broke" to the degree that such a controversial "fix" was required? Clearly, the federal judiciary has expressed much disenchantment with discovery.[12] A change to the Federal Rules in 1980 was aimed at creating more judicial management of discovery;[13] other changes in 1983 required the court to limit discovery in certain circumstances,[14] and required counsel to sign discovery requests, responses and objections.[15] None of these changes to federal discovery were adopted in the 1984 revision of the Maryland Rules or in the modest revisions to the discovery rules that have been made since then.

It appears, however, that the perception of a need to get litigation under control has come to Maryland, and that a good part of what needs to be controlled is discovery. In 1991, the Rules Committee and the Maryland State Bar Association formed an Ad Hoc Committee on the Management of Litigation. This body, which included Rules Committee members, persons appointed by the president of the Bar Association and three circuit court judges, produced a report that asserted:

> Although the Maryland court system has historically been one of the more efficient in the nation ... it is on the brink of losing its ability to handle fairly and efficiently the constantly increasing stream of cases that flow through it.[16]

Highlighting the role of discovery in this situation, the report stated that:

> [u]nnecessary and abusive discovery may well be the single most contributing factor in the cost and delay involved in litigation.[17]

The report resulted in the creation of a special subcommittee of the Rules Committee which fashioned the basis of the proposed discovery rules changes discussed above.

As noted above, the rules changes pertaining to discovery that were ultimately adopted bore faint resemblance to the original proposals of the Rules Committee. Whether the end product represents a failure of the rulemaking process to respond to a crisis or the sensible rejection of a flawed solution to the crisis, depends upon one's view of the merits of the original proposal. This writer believes that the original proposals, particularly core discovery, would not have solved the larger problems connected with discovery, and that they would simply have created new problems.

III. Not the Right Medicine at All

As noted above, the core discovery proposal was modeled on new Federal Rule 26(a). The assumption of the drafters of the federal rule was that it would be more efficient to require an exchange by the parties of certain information instead of having the parties request such information from each other as they chose.[18] Any efficiencies to be gained from such compulsory discovery rest upon the validity of two assumptions: 1) that this process would not require the production of more information initially (plus later discovery) than would be requested eventually, and 2) that it would function without creating significant new administrative difficulties. Both of these assumptions seem questionable.

That core discovery would have diminished the volume of discovery is simply counter-intuitive. It would have required that there be an exchange of paperwork in every case. As Justice Scalia stated in his dissent to the Supreme Court order implementing the federal version of core discovery, "the duty-to-disclose regime does not replace the current, much-criticized discovery process, it *adds a further layer of discovery*."[19]

"As the years have passed, discovery techniques and tactics have become a highly developed litigation art – one not infrequently exploited to the disadvantage of justice."

It is doubtful that the new limits on discovery originally proposed by the Rules Committee -- twenty rather than thirty interrogatories, a maximum of thirty requests for documents, and five depositions of fact witnesses -- would have brought about a reduction in the use of existing discovery devices that would have offset the increase caused by core discovery. The most draconian limitation, that on depositions of fact witnesses, would probably not have reduced *any* discovery that core discovery was intended to supplant. Core discovery and, to some extent, the limit on depositions of fact witnesses, would have created administrative problems that would likely have offset advantages that might have been derived from an initial mandatory exchange of information.

In one respect, the Maryland core discovery proposal was superior to that which became part of the federal rules: the standard for production of the names of persons possessing information or documents was whether they "tend[ed] to support a position that a disclosing party has taken or intends to take in the action, including any claims for damages." The standard for disclosure in Federal Rule 26(a) is "relevan[ce] to disputed facts alleged with particularity in the pleadings." This difference between the Maryland proposal and the federal rule avoided a significant ethical conflict likely to be faced under the federal rule. Under the federal rule, counsel will face a dilemma between conscientious compliance with the disclosure rule and the professional obligation not to assist his or her opponent.[20]

Nonetheless, the phrase "tends to support a position," unlike relevance, the federal standard, is a neologism. It could have taken several trips to appellate courts and many years for the definition of this term, and hence, the scope of disclosure, to be determined. In the meantime, parties conducting "post-core discovery" discovery would have been expected to assume that their opposing counsel had construed the scope of required disclosures conservatively, necessitating broad discovery requests. Under such circumstances it is doubtful that resort to traditional discovery would have been much diminished by the "reform."

The proposed core discovery in Maryland would have required production within thirty days after service of the defendant's pleading. This would have been a procedural nightmare for institutional defendants that can often barely piece together the details of the transaction at issue and answer the complaint within thirty days.[21]

The limit of five depositions for "fact witnesses" also could either have been too inflexible or have generated a need for judicial involvement in discovery that does not exist now.

The proposal shadowed a change to Federal Rule 30 which limits the number of depositions that may be taken by a party to ten.[22] The federal rule contains an explicit provision that the court may grant leave for a party to take more depositions.[23] The amendment to

Maryland Rule 2-411 that would have imposed the limit of five depositions for fact witnesses did not have a specific provision, or standards, by which a court could order that a party be permitted to take more. It is possible that a proposed amendment to Rule 2-401(f) would have permitted a court to allow a party a larger number of depositions of fact witnesses.[24] Whether it did so would have been an issue that would have required appellate attention. If there had been no way for a court to increase the number of fact depositions a party could take upon an appropriate showing, the rule would have been intolerably restrictive. Many complex product liability, libel or even, yes, motor tort cases require a party exercising only reasonable diligence to take more than five depositions to learn what happened or to preserve testimony. Even if one assumes that a court might have permitted a party to take more than five, that number is so small that trial courts would not infrequently have had to entertain disputes concerning whether to allow more.

The need for a numerical limitation on fact depositions is somewhat perplexing since the rules already limit a party, unless a court orders otherwise, to one deposition per witness.[25] The deposition takes place outside of court supervision and generally places most of the effort and expense connected therewith on the discovering party. As with the core discovery proposal, it is doubtful that limiting depositions of fact witnesses to five would have reduced the total cost or need for judicial management of discovery. That it did not survive the process of changing the discovery rules probably speaks well of the process.

IV. Conclusion

At the end of the day, the most significant reforms are probably the requirement that a scheduling order under new Rule 2-504 includes a cutoff date for discovery and the possibility that it may contain limits on discovery and the resolution of discovery disputes. Significant also is the ability of a party under new Rule 2-504.1 to obtain a scheduling conference when the parties have been unable to reach agreement on a plan for discovery. Both provide mechanisms to confront with meaningful deadlines that legion of foot-dragging counsel who refuse to cooperate with discovery requests in a timely manner. If trial judges make it clear that failure to follow discovery deadlines in scheduling orders will have serious consequences, and that counsel who are simply trying to obtain from their opponents what the rules permit will receive vigorous assistance in scheduling conferences, these rules changes will make litigation more manageable.

If these things do not come to pass, there will be time later for more quantitative limits on discovery and perhaps even core discovery. Ultimately, however, intricate discovery rules, such as those that have been developing in the federal system,[26] are likely to be a poor substitute for cooperative compliance with relatively open-ended discovery rules, such as Maryland's, engendered, when necessary, by purposeful judicial enforcement.

ENDNOTES

[1]21 Md. Reg. 1146 (1994). This order adopted provisions proposed in the revised 124th report of the Standing Committee on Rules of Practice and Procedure [hereafter Rules Committee]. 21 Md. Reg. 736, 739-40 (1994).

[2]Under the court's order the changes apply to actions pending on October 1, 1994, insofar as practicable. 21 Md. Reg. 1146 (1994). Since the discovery changes affect the earliest stages of the discovery process, they should have little or no effect on actions pending on their effective date that have proceeded past or significantly into the discovery process.

[3]Md. R. 2-504(b)(1)(C).

[4]Md. R. 2-504(b)(2)(A).

[5]Md. R. 2-504(b)(2)(B).

[6]Md. R. 2-504.1(a)(2)(i).

[7]Md. R. 2-504.1(c)(1).

[8]For example, Rule 2-401(b) already permits the court to order that discovery be completed by a specified date or time. Rule 2-403(a) permits the court to enter protective orders to shield litigants from oppressive or excessive discovery.

[9]The report appeared at 20 Md. Reg. 691 *et seq.* (1993).

[10]H.R. 2814, 103d Cong., 1st Sess. (1993). The Senate did not get around to voting on this bill before the congressional session ended, thus initial disclosures became part of the federal rules.

[11]21 Md. Reg. 16 (1994).

[12]This was stated, for example, by Justice Powell, concurring in *Herbert v. Lando*, 441 U.S. 153, 179 (1979): "As the years have passed, discovery techniques and tactics have become a highly developed

litigation art -- one not infrequently exploited to the disadvantage of justice."

[13]This change created former Federal Rule 26(f), which permitted the court to direct the parties to attend a discovery conference. This has been superseded by the scheduling conference now provided for by Federal Rule 16(b), as amended in 1993, which requires the court to enter an order that limits the time to complete discovery.

[14]Fed.R.Civ.P. 26(b)(2) so requires if the court determines that discovery otherwise permitted:

(i) . . . is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

[15]Fed.R.Civ.P. 26(g). The attorney's signature constitutes a certification that such request, response or objection is consistent with the rules, not interposed for any improper purpose, such as harassment, delay or needless increase in the cost of litigation and not unreasonable in light of the needs of the case, discovery already had, the amount in controversy, and the importance of the issues at stake in the litigation.

[16]*Report of the Ad Hoc Committee on the Management of Litigation* 3 (1991). This report may be found in the Management of Litigation File of the Rules Committee.

[17]*Id.* at 9. The report also addressed and made recommendations concerning differentiated case management and the development of alternative dispute resolution techniques.

[18]*See* Fed.R.Civ.P. 26(a), Advisory Committee Note, 146 F.R.D. 401, 629 (1993) which states that "[a] major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paperwork involved in requesting such information . . . ."

[19]*Communication from the Chief Justice of the United States Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. 2072*, 146 F.R.D. 402, 510 (1993) (dissenting statement of Scalia, J.) (emphasis in original).

[20]*Id.* at 511.

[21]The federal core discovery rule, Rule 26(a) does not fix a precise date, but allows a little over three months for the parties to make the required disclosure. *See also* Fed.R.Civ.P. 16(b) and 26(f).

[22]Fed.R.Civ.P. 30(a)(2)(A).

[23]Fed.R.Civ.P. 30(a)(2). This may be granted to the extent consistent with Rule 26(b)(2).

[24]Under the Rules Committee's original proposal, Rule 2-401(f)(1) would have read: "The court, on motion or its own initiative, may alter alteration of the discovery procedures provided by this Chapter."

[25]Md. R. 2-411(b).

[26]Rules which require reference to three sections of two different rules to determine approximately when initial disclosures must take place may fairly be characterized as intricate.