Begin with the End in Mind: Collaboration with Outside Counsel in Preparing Trial-Ready Initial Pleadings

Andrew B. Flake

If there is a secret to effective business litigation, it is planning early and well – as early as preparing the complaint or, for defendants, their answer and defenses. While a cogent, powerful opening pleading has always been a means to create case momentum, in light of the December 1, 2015 amendments to the Federal Rules of Civil Procedure, a party's initial pleading assumes even greater importance in shaping discovery.

As revised, Rule 26(b)(1) – the rule that defines the scope of allowable discovery efforts like document requests and depositions – will require courts to set discovery boundaries based not only on what is relevant to claims and defenses, but also upon whether the discovery is "*proportional.*" According to the revised text, courts must evaluate proportionality in light of "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, [and] the importance of the discovery in resolving the issues."

For prepared and creative counsel, these proportionality factors give rise to opportunity and, for the unaware, danger. The opportunity is to use the complaint or answer to actively shape available discovery, expanding or limiting it as necessary. Armed with a clarified set of guidelines for proportional and cost-effective discovery, courts are likely to rely more heavily on a party's statements of its claims or defenses. If a party needs more fulsome discovery to support its claims, then it will need to prepare a complaint with a wider factual range – and potentially to include allegations that identify certain documents or classes of documents and to highlight their importance to the case. For defendants, this could mean including additional detail in affirmative defenses. And where a party wishes to narrow the opportunities for discovery, it will need to focus its claims or defenses with rifle-shot precision.

By contrast, taking an *ad hoc* approach to discovery – assuming a court will allow counsel to cast as wide a net in discovery as he or she wishes – has become decidedly more dangerous. Indeed, many lawyers still treat the complaint or answer as a merely functional document -- in this view, the company just needs to "gets something on file," even if the facts are fuzzy and some of the story is filled in "on information and belief." Discovery, the thinking goes, will let counsel backfill any gaps and reinforce the story. Avoid this approach. In addition to creating risk in motion practice, not harmonizing the complaint with anticipated discovery practice is now more likely to result in sustained objections.

Finally, framing the complaint in a way that supports your discovery efforts requires meaningful and intensive collaboration between lawyer and client. Drafts of the complaint should be exchanged early in the process, to facilitate discussion of what discovery will be sought from the other side and from non-parties, as well as what discovery the opponent may seek from the client. It is the client that will usually have the best initial sense of what documents and other information it maintains, and of the corresponding burdens should it need to review and produce them. Can the complaint or answer serve to inoculate against these requests of concern, and how might that pleading set up an argument based on the Rule 26(b)(1) proportionality factors?

So start thinking about proportionality early. Use the rule revisions creatively, being mindful that their purpose is to help the parties and the court secure the “just, speedy, and inexpensive determination” of the case. As it applies to complex business litigation, the planning and lawyer-client collaboration that ensures trial success occurs well before the first juror is seated, and well before any wrangling over discovery or drafting of document requests. It occurs even before counsel makes the first appearance in the case, with a well-conceived litigation plan that links your pleading up with focused and proportional discovery.

Plan well and early, using the applicable rules of procedure to your advantage, and the battle will indeed be won long before trial.

Authors and Contributors

Andrew B. Flake
Partner, Atlanta Office
404.873.7026
andrew.flake@agg.com

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Atlanta Office
171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office
1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006

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