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Who Makes the Rules Around Here? The Missouri Legislature Redefines Discovery

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NOTE

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I. INTRODUCTION

In 2019, the Missouri General Assembly passed Senate Bill 224, which made significant changes to the Missouri Supreme Court Rules governing discovery.[1] The bill intended to align state discovery rules more closely with the Federal Rules of Civil Procedure ("the FRCP"), mirroring the majority of other states that have already adopted some form of the federal rules.[2] In advocating for the change, the bill sponsor, Senator Tony Luetkemeyer (R-34),[3] stated, "These reforms will expedite lawsuits, ensure more timely resolution of disputes, and reduce costs for all parties involved."[4] While the ultimate impact of the rule change remains to be seen, the bill presents two interesting questions for Missouri's legal community: (1) whether Missouri should go further and adopt the FRCP to ensure state-federal uniformity in court rules; and, more broadly, (2) whether the Legislature should amend the

* B.A., University of Missouri, 2016; J.D. Candidate, University of Missouri School of Law, 2021; Associate Member, *Missouri Law Review*, 2019–2020. I would like to thank Professor Dessem for his insight and suggestions during the writing of this Note, as well as members of *Missouri Law Review* for their help in the editing process. And to my soon-to-be husband, Bradley Green, thank you for your advice and encouragement.

1. Kaitlyn Schallhorn, *Senate Reaches 'Genuine Compromise' on Tort Reform Bill During Another Late Night Debate*, THE MO. TIMES (May 6, 2019), https://themissouritimes.com/senate-reaches-genuine-compromise-on-tort-reform-bill-during-another-late-night-debate/ [perma.cc/H3ZR-CGP3].

2. S.B. 224, 100th Gen. Assemb., Reg. Sess. 1 (Mo. 2019); *see also Rule 26 Duty to Disclose; General Provisions Governing Discovery*, CORNELL LAW SCH., https://www.law.cornell.edu/rules/frcp/rule_26 [perma.cc/6DQ3-BEQE].

3. B.A., University of Missouri, 2006; J.D., University of Missouri School of Law, 2009; After graduating from law school, Senator Luetkemeyer clerked for Missouri Supreme Court Judge Patricia Breckenridge. He was elected to the Missouri Senate on November 6, 2018. In addition to his legislative duties, he practices law in Kansas City, Missouri.

4. Joe Gamm, *Missouri Legislature Pushes Forward on Tort Reform*, NEWS TRIBUNE (May 5, 2019), http://www.newstribune.com/news/local/story/2019/may/05/missouri-legislature-pushes-forward-on-tort-reform/777412/ [perma.cc/G4KP-8E68].

state's civil procedure rules in the first place. The answers to those questions may determine the future of Missouri's civil court rules.

This Note evaluates the process and content of recent changes to Missouri's rules of civil procedure with respect to discovery. Part II gives a brief history of the FRCP relating to discovery and then describes the Missouri discovery rules prior to the passage of Senate Bill 224. Part III provides background on how Senate Bill 224 came to pass, discusses separation-of-powers complaints by opponents of the legislation, and then explains the major provisions included in the bill. Finally, Part IV evaluates two central questions introduced by Senate Bill 224 and discusses the implications of the legislation on Missouri civil practice.

II. LEGAL BACKGROUND

The FRCP govern the procedure in all civil actions in federal courts.[5] Their purpose is "to secure the just, speedy, and inexpensive determination of every action and proceeding."[6] This Part first discusses the history of the FRCP relating to discovery and then examines the Missouri Supreme Court Rules, including reasons for the recent amendments passed by the Missouri General Assembly.

A. History of the Federal Rules of Civil Procedure Relating to Discovery

The basic philosophy underpinning the present FRCP is that "mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[7] The provisions included in FRCP 26 through 37 provide the means for uncovering and exchanging such relevant information.[8] Depositions, interrogatories, requests for production of documents, and the other formal discovery practices allow parties to bring into focus all of the relevant facts for or against their respective positions in a legal dispute.[9] But the formal discovery process is sometimes left open to exploitation.[10] In fact, the very nature of the discovery process creates a significant potential for abuse.[11] Lawyers have incentives to use repetitive, cumulative, and hostile tactics against their opponents to disrupt discovery procedures, overwhelm

5. FED. R. CIV. P. 1.

6. *Id.*

7. Hickman v. Taylor, 329 U.S. 495, 507, 67 S. Ct. 385, 392 (1947); 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2001 (3d ed.).

8. James Holmes, *The Disruption of Mandatory Disclosure with the Work Product Doctrine: An Analysis of a Potential Problem and a Proposed Solution*, 73 TEX. L. REV. 177, 177–78 (1994).

9. *Id.*

10. *Id.* at 177 n.8.

11. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34–35 (1984).

opposing parties, and frustrate the exchange of information.[12] Abuses usually include matters of delay and expense,[13] but they may also implicate "privacy interests of litigants and third parties."[14]

Throughout the years, in response to "costs, delays, and abuses," the federal Advisory Committee on Civil Rules ("the Advisory Committee")[15] has repeatedly amended the federal discovery rules.[16] The amendment process for the FRCP is lengthy. Amendments are reviewed by the Advisory Committee,[17] the Committee on Rules of Practice and Procedure,[18] the Judicial Conference of the United States,[19] the United States Supreme Court,

12. Holmes, *supra* note 8, at 178–79; *see* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change,* 31 VAND. L. REV. 1295, 1311–15 (1978) (arguing that attorneys, responding to adversarial and economic pressures, can use specific discovery tools to limit and distort the flow of relevant data to their opponents and the judge, to increase the cost of gathering and organizing that data, and to reduce the likelihood that settlements or judgments after trial will be just); *see also* William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform,* 50 U. PITT. L. REV. 703, 716 (1989) (arguing that sooner or later, even the best-intentioned lawyer will be forced to adopt adversarial tactics in discovery procedures for reasons of self-defense).

13. FED. R. CIV. P. 1: "These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

14. *Seattle Times Co.*, 467 U.S. at 34–35.

15. The Advisory Committee on Civil Rules is a 12-member subcommittee of the Judicial Conference of the United States, composed of judges, lawyers, and law professors, which formulates and drafts the Federal Rules of Civil Procedure. *See* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 797 n.2 (1991).

16. Holmes, *supra* note 8, at 178.

17. The Advisory Committee on Civil Rules is a 12-member subcommittee of the Judicial Conference of the United States, composed of judges, lawyers, and law professors, which formulates and drafts the Federal Rules of Civil Procedure. *See* Mullenix, *supra* note 15, at 797 n.2.

18. The Committee on Rules of Practice and Procedure (also known as the "Standing Committee") is a committee of the Judicial Conference of the United States tasked with recommending to the Conference "changes in and additions to the rules [appellate rules, bankruptcy rules, civil rules, criminal rules, evidence rules] as it may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." *See* Albert B. Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A. J. 772, 772 (1961); *see also About the Judicial Conference*, ADMIN. OFF. OF THE U.S. COURTS, https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference [perma.cc/7B64-7Q87].

19. The Judicial Conference of the United States is the nationwide policy-making body for the federal courts, comprised of the Chief Justice of the United States, who serves as the presiding officer, the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial

and the United States Congress.[20] Several of the review periods include public hearings and opportunity for public comment and testimony.[21] The legal community has gone to great lengths to ensure that amendments to the rules incorporate, as best as possible, the thinking and expertise of the legal community as a whole by taking input from sources as varied as scholars and legislators to practitioners and judges.[22]

In 1993, the Supreme Court cut down significantly on the length and cost of litigation by limiting the scope of discovery under the FRCP.[23] The Advisory Committee noted that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression."[24] And the "explosion" was further exacerbated by the arrival of electronic discovery.[25] The Advisory Committee went on to explain that the purpose of the amendment was to encourage "continuing and close judicial involvement" in cases where the parties could not effectively manage the discovery process on their own.[26] The Supreme Court made additional revisions in 2006 to address the ever-growing area of electronically stored discovery,[27] in 2010 to remedy concerns about expert discovery,[28] and then again in 2015 to further amend FRCP 26(b)(1) regarding proportionality.[29] FRCP 26 is one of the most frequently amended Civil Rules.[30]

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circuit. *See* 28 U.S.C. § 331 (2018); *see also About the Judicial Conference*, *supra* note 18.

20. Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501, 502 (2016); *see also* Administrative Office of the U.S. Courts, *How the Rulemaking Process Works*, UNITED STATES COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [perma.cc/RDP9-JSFJ].

21. Subrin & Main, *supra* note 20, at 502; *see also How the Rulemaking Process Works*, *supra* note 20.

22. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1005 (4th ed.). ("The Committee has always believed that no committee can safely recommend the adoption of rules which have not run the gauntlet of examination and criticism by the judges, bar associations, and the legal profession generally. They attribute the success of the federal rules to the fact that they have represented the united effort of the lawyers of the nation and not merely the views of a relatively small group of lawyers.").

23. Matthew Diller, *Impact of the 1993 Amendments to the Federal Rules of Civil Procedure on Legal Services Practice in the Federal Courts*, 28 CLEARINGHOUSE REV. 134 (1994).

24. FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.

25. *Id.*

26. *Id.*

27. FED. R. CIV. P. 26 advisory committee's note to 2006 amendment.

28. FED. R. CIV. P. 26 advisory committee's note to 2010 amendment.

29. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

30. WRIGHT & MILLER, *supra* note 7.

B. State Adoption of the Federal Rules of Civil Procedure

Some argue the lengthy and thorough process for altering the FRCP produces high quality amendments that states should adopt.[31] Indeed, this argument goes, because civil discovery rules have been developed and refined over the years by the greatest minds of legal society, states would be acting inefficiently by starting from square one and attempting to replicate them without some borrowing.[32] In addition, replication by the states would provide uniformity and efficiency, making it easier for judges, lawyers, law professors, and law students to master civil procedure in various jurisdictions by studying and utilizing one set of procedural rules instead of fifty.[33]

Others argue that states should not replicate the FRCP.[34] Since 1993, at least thirty-two of the fifty states have adopted versions of the FRCP in their state court systems.[35] One opponent of states adopting federal rules, Stephen Subrin, argues that even where states have replicated the FRCP in part, most states have not "kept pace" with all of the amendments.[36] Subrin argues that because states seldom update their own rulebooks with the pace of the federal rule changes, there is a lack of both intrastate and interstate uniformity.[37] Therefore, states should not aim to replicate the FRCP because *absolute* replication is "beyond the control of (textual) rulemakers."[38] He further argues that states should not replicate the FRCP because (1) there are significant differences between state and federal civil caseloads, (2) the federal level has adopted "ineffective and unwise" amendments,[39] (3) the changes in federal civil procedure require judicial resources that are unavailable in state courts, and (4) the states are in a better position to experiment with better rules and methods for civil litigation.[40] This argument seems to be based on a general dissatisfaction with recent amendments to and interpretations of the FRCP, rather than a preference of working toward uniform (or very similar) state and federal procedural rules.[41]

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31. Subrin & Main, *supra* note 20, at 502–03.

32. WRIGHT & MILLER, *supra* note 22 (Chief Justice Hughes describing the Advisory Committee as "eminent experts who have had the advantage of wide experience and have made a special study of procedural questions.").

33. Subrin & Main, *supra* note 20, at 517.

34. *Id.* at 502–03.

35. *See* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 382 (2003).

36. Subrin & Main, *supra* note 20, at 505.

37. *Id.* at 514.

38. *Id.* at 516.

39. WRIGHT & MILLER, *supra* note 22 ("While the rules and the rulemaking process have not been immune from criticism, one line of critique has been that recent amendments to – and judicial interpretations of – the civil rules have deviated too far from the core features that were adopted in 1938.").

40. Subrin & Main, *supra* note 20, at 517–34.

41. *Id.* at 506.

C. Missouri Discovery Rules Prior to Senate Bill 224

Until Missouri enacted new legislation, the state's civil procedure rules did not place any meaningful limits on the use of various discovery tools.[42] Practically, this meant that in Missouri state court, a litigant could serve a limitless number of interrogatories, requests for production, and requests for admission on a party-opponent, then proceed to take multiple days-long depositions in the case. Only the judge's discretion could rein in such broad and expensive discovery.[43] And, unlike in federal court, there was no requirement in Missouri state courts that the scope of discovery requests or the burden of responding to electronic discovery demands be proportional to the needs and value of the case.[44] As a result, some lawsuits dragged on for years, languishing in the discovery phase, before a case was finally resolved.[45] Most attorneys know that the single most time-consuming aspect of a civil action is discovery.[46] Pleadings, motion practice, damages calculations, expert testimony, and the ever-elusive civil jury trial – which receives the majority of the attention and energy in headlines – actually account for the minority of the time, expense, and value proposition of an average civil lawsuit.[47]

Not only were cases time-consuming because of the lack of limits on discovery, they were also costly.[48] The United States Chamber Institute for Legal Reform's recent study on the costs and compensation of the U.S. tort system examined the overall cost of litigation, including compensation actually paid to plaintiffs.[49] In 2016, the costs and compensation paid in the tort system amounted to $429 billion or 2.3% of the U.S. gross domestic

42. Schalie Johnson, *Changes in the 2019 Missouri Discovery Rules*, WALLACE SAUNDERS (July 2019), https://wallacesaunders.com/changes-in-the-2019-missouri-discovery-rules-harmonizing-state-court-pre-trial-practice-with-the-federal-rules-and-a-practical-a [perma.cc/NF93-J49V].

43. *Id.*

44. *Id.*

45. Hearing on S.B. 224 Before the Committee on the Judiciary, 100th Gen. Assemb. Reg. Sess. 1 (Mo. May 9, 2019) (statement of Sen. Tony Luetkemeyer); *see also* Missouri Chamber of Commerce and Industry, *Stopping Costly Litigation Delay Tactics*, MISSOURI BUSINESS HEADLINES (May 9, 2017), https://mochamber.com/legal-climate/stopping-costly-litigation-delay-tactics/ [perma.cc/2V24-HG3N]; Karen Kidd, *Tort Reform Enjoyed Numerous Wins in 'Historic' 2019 Legislative Session*, THE ST. LOUIS RECORD (July 26, 2019), https://stlrecord.com/stories/512672262-tort-reform-enjoyed-numerous-wins-in-historic-2019-legislative-session-advocate-says# [perma.cc/84E6-EM8K].

46. Hearing on S.B. 224 Before the Committee on the Judiciary, *supra* note 45.

47. *Id.*

48. *Costs and Compensation of the U.S. Tort System*, U.S. CHAMBER INST. FOR LEGAL REFORM 1 (Oct. 2018), https://www.instituteforlegalreform.com/uploads/sites/1/Tort_costs_paper_FINAL_WEB.pdf [perma.cc/AJ4K-H253].

49. *Id.*

product ("GDP").[50] Further, the study estimated that 57% of tort system costs were paid in compensation to plaintiffs and the remaining 43% covered the cost of litigation, insurance expenses, and risk transfer costs.[51] In Missouri specifically, the tort cost per household was $3099, or 2.5% of the state's GDP, which is only slightly below the national average of $3329 per household.[52] The study presents clear evidence of the high cost of litigation.[53] Proponents of streamlining discovery rules to bring them more in line with the FRCP contend that these changes are one way to bring more efficiency to litigation and ultimately bring down the costs for everyone involved.[54]

Further, at a congressional hearing in 2011 to discuss proposed amendments to further limit the scope of discovery, Thomas Hill, counsel for General Electric ("GE"), argued that companies waste millions of dollars to preserve and produce information for claims that may never materialize.[55] He discussed one case where GE reasonably anticipated litigation but no claim had yet been filed; there, the company spent $5.4 million in fees *before litigation commenced* to cover the cost of preserving 16 million pages.[56] Second, he noted that in another case where the amount in dispute was $4 million, GE had already spent $6 million on discovery.[57]

Support for modifying the federal rules of discovery to import limiting principles and proportionality comes from groups like the United States Chamber of Commerce, comprised of major U.S. corporations like GE.[58] At the same hearing, Representative John Conyers (D-Michigan) downplayed Hill's argument, noting that "less than one-tenth of one percent of the total

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50. *Id.*

51. *Id.*

52. *Id.* at 22–23.

53. *Id.* at 1.

54. *See Costs and Burdens of Civil Discovery: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary H.R.*, 112th Cong., 1st Sess. 318–20 (2011) [hereinafter *Hearing on Costs and Burdens of Civil Discovery*] (statement of Thomas H. Hill, Associate General Counsel, General Electric Company).

55. *Id.*; *see also* Thomas H. Hill, *House Judiciary Subcommittee On The Constitution: Hearing On The Costs And Burdens Of Civil Discovery,* CORP. COUNS. BUS. J. (Feb. 22, 2012), https://ccbjournal.com/articles/house-judiciary-subcommittee-constitution-hearing-costs-and-burdens-civil-discovery [perma.cc/ZTL8-ANFM].

56. *Hearing on Costs and Burdens of Civil Discovery*, *supra* note 54; *see also* Hill, *supra* note 55.

57. *Hearing on Costs and Burdens of Civil Discovery*, *supra* note 54; *see also* Hill, *supra* note 55.

58. *The State of American Business 2014, Remarks by Thomas J. Donohue, President and CEO*, U.S. CHAMBER OF COM. (Jan. 8, 2014), https://www.uschamber.com/speech/state-american-business-2014-remarks-thomas-j-donohue-president-and-ceo-us-chamber-commerce [perma.cc/RQ7X-QS5G] ("Our Institute for Legal Reform is fighting the expansion of lawsuits on all fronts – in the Congress, in the federal agencies, in the states, and even around the globe where U.S. companies are getting sued.").

number of cases" involve the level of discovery costs that were the subject of the hearing.[59] He went on to suggest that the purpose of the hearing "may be based on some corporation insisting that they be heard about this matter" rather than a genuine need for changes to the rules.[60] Another witness, William Butterfield, argued that discovery costs are cheaper today than they were fifteen years ago, even though parties must preserve more data.[61] He cited a report from the Federal Judicial Center that found the median discovery cost for cases involving electronic discovery was $30,000 to $40,000, which was "modest in comparison to the stakes of the litigation and in comparison to the total litigation costs."[62]

In response to complaints that the lack of limits on discovery made cases too time-consuming and costly, the Missouri Legislature passed Senate Bill 224.[63] The bill aligned the Missouri Supreme Court Rules more closely to the FRCP and the other states that have already adopted some form of the federal rules.[64]

III. RECENT DEVELOPMENTS

Senate Bill 224 significantly altered the Missouri Supreme Court Rules governing discovery and will impact Missouri civil practice in many ways. This Part provides background on how Senate Bill 224 came to pass, describes the reaction from opponents to the legislation, and then explains the major provisions of the bill, including a proportionality test, limits on quantity of discovery, electronically stored information ("ESI"), and a "clawback" provision.[65]

A. Background on Senate Bill 224

Senator Tony Luetkemeyer, Chair of the Senate Committee on Judiciary and Civil and Criminal Jurisprudence, sponsored Senate Bill 224 in the 2019 legislative session.[66] Luetkemeyer, the only practicing attorney in the

59. *Hearing on Costs and Burdens of Civil Discovery*, *supra* note 54 (statement of Rep. John Conyers).

60. *Id.*

61. *Id.* (statement of William Butterfield).

62. *Id.*

63. *Missouri in Hot Pursuit of Tort Reform in 2019*, U.S. CHAMBER INST. FOR LEGAL REFORM (July 8, 2019), https://www.instituteforlegalreform.com/resource/missouri-in-hot-pursuit-of-tort-reform-in-2019 [perma.cc/3FH4-MUYU].

64. *Id.*

65. S.B. 224, 100th Gen. Assemb., Reg. Sess. 1 (Mo. 2019).

66. Alisha Shurr, *Tort Reform Legislation Signed Into Law*, MO. TIMES (July 10, 2019), https://themissouritimes.com/tort-reform-legislation-signed-into-law/ [perma.cc/J8VV-J3WH]; Parkville's Luetkemeyer Named to Chair Judiciary Committee, PLATTE COUNTY CITIZEN (Feb. 11, 2019),

Republican Senate caucus,[67] described the proposal in a legislative update to his constituents:

> Discovery accounts for about 75 percent of the time and cost of any lawsuit. This legislation streamlines that process and will lower the cost and length of court proceedings for all parties. Plaintiffs who have been wronged can receive compensation sooner, and defendants facing frivolous lawsuits can have them resolved with minimum delay and cost. It's a win-win for everyone.[68]

His goal was to narrow the scope of discovery, increase effectiveness of discovery practices, and discourage parties from using discovery "as an offensive tool, a sword, to increase costs."[69]

The business and tort reform communities championed the bill as an efficiency measure to reduce the cost and length of litigation.[70] At the Senate committee hearing, many representatives from medical, insurance, and business industries testified in favor of the bill.[71] The Missouri Circuit Judges Association testified "for informational purposes" about the bill.[72] The Missouri Association of Trial Attorneys, which represents Missouri's plaintiffs' lawyers, was the only party to testify in opposition to the bill.[73]

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http://www.plattecountycitizen.com/theplattecountycitizen/parkvilles-luetkemeyer-named-to-chair-judiciary-committee1122019 [perma.cc/CXB5-AVBZ].

67. It may be important to note that four of thirty-four senators have law degrees (Senators Luetkemeyer, Onder, Sifton, and White), and only two practice law (Senators Luetkmeyer and Sifton).

68. *Governor Signs Luetkemeyer's Court Rules Reform Bill*, MO. SENATE (July 10, 2019), https://www.senate.mo.gov/19web/governor-signs-luetkemeyers-court-rules-reform-bill/ [https://perma.cc/X49P-D7Z8].

69. Schallhorn, *supra* note 1.

70. *See Missouri Stands Out for Economic Progress Under Gov. Parson, Missouri 2030*, MO. CHAMBER OF COM. & INDUSTRY (May 17, 2019), https://mochamber.com/economic-development/missouri-stands-out-for-economic-progress-under-gov-parson-missouri-2030/ [perma.cc/Q4K4-WA62]; *Missouri in Hot Pursuit of Tort Reform in 2019*, *supra* note 63; Shurr, *supra* note 66.

71. Representatives from the following organizations testified in favor of the legislation: Property Casualty Insurers Association of America, Insurers of America, The Doctors Company, Missouri Civil Justice Coalition, Inc, BNSF Railway Company, Associated Industries of Missouri, Missouri Chamber of Commerce & Industry, Missouri Insurance Coalition, Shelter Insurance, and Missouri Organization of Defense Lawyers. *Committee Minutes, SB 224 – Modifies Various Supreme Court Rules Relating to Discovery*, MO. SENATE (Feb. 11, 2019), https://www.senate.mo.gov/19info/BTS_BillMinutes/Default?BillPref=SB&BillNum=224&SessionType=R&BillID=1055374 [perma.cc/GMT3-N3AN].

72. *Id.*

73. *Id.*

The bill passed out of Luetkemeyer's committee with a five-to-two partisan vote in the early days of the legislative session.[74] Lawmakers made several significant changes to the bill during an all-night, nine-hour filibuster in early May, including eliminating the requirement of expert reports and additional limitations on the scope of expert discovery.[75] In the end, Majority Floor Leader Caleb Rowden called the perfected bill a "genuine compromise that's good for the state."[76]

The Legislature passed the measure twenty-four to nine[77] in the final hours of the 2019 regular session. Governor Parson signed the bill on July 10, 2019, and the law went into effect on August 28, 2019.[78] However, the Supreme Court of Missouri has yet to update their website, which leaves room for speculation about whether the court will change the new rules.[79]

B. Separation of Powers Tension?

The fact the Legislature amended the Missouri Supreme Court Rules instead of the judiciary created separation of powers tension between the two branches.[80] The Supreme Court of Missouri, rather than the Legislature, typically revises the rules governing court procedures, leading opponents of the bill to complain that departure from tradition was a reason to oppose the measure.[81] Some critics of the bill took issue with the Legislature revising the rules, including at least one senator.[82] Missouri Senator Scott Sifton (D-01), a lawyer, said, "[W]e ought to let the Judiciary and the Bar continue to drive what the rules of the road are going to be with regard to civil procedure."[83] According to the Missouri Constitution, "The supreme court may establish rules relating to practice, procedure and pleading for all courts and

74. Yes: Luetkemeyer (R-34), Onder (R-02), Emery (R-31), Koenig (R-15), White (R-32); No: Sifton (D-01), May (D-04). *Committee Minutes*, *supra* note 71.

75. Schallhorn, *supra* note 1.

76. *Id.*

77. Yes (24): Bernskoetter (R-06), Brown (R-16), Burlison (R-20), Cierpiot (R-08), Crawford (R-28), Cunningham (R-33), Eigel (R-23), Emery (R-31), Hegeman (R-12), Hoskins (R-21), Hough (R-30), Koenig (R-15), Luetkemeyer (R-34), Nasheed (D-05), O'Laughlin (R-18), Onder (R-02), Riddle (R-10), Romine (R-03), Rowden (R-19), Sater (R-29), Schatz (R-26), Wallingford (R-27), White (R-32), Wieland(R-22); Nays (9): Arthur (D-17), Curls (D-09), Holsman (D-07), May (D-04), Rizzo (D-11), Schupp (D-24), Sifton (D-01), Walsh (D-13), Williams (D-14); Absent (1): Libla (R-25). *Journal of the Senate*, MO. SENATE 989 (May 6, 2019), https://www.senate.mo.gov/19info/pdf-jrnl/DAY62.pdf#page=4 [perma.cc/7G8B-D5HH].

78. S.B. 224, 100th Gen. Assemb., Reg. Sess. 1 (Mo. 2019).

79. MO. R. CIV. P. 56 (noting under past amendments to the rule that, "SB 224 (2019) purports to amend this Rule."). As such, this Note cites to the updated rules on Westlaw rather than the Supreme Court of Missouri's website.

80. MO. CONST. art. II, § 1.

81. Gamm, *supra* note 4.

82. *Id.*

83. *Id.*

administrative tribunals, which shall have the force and effect of law."[84] Further, the Constitution provides the Legislature with a mechanism for modifying rules by providing that "[a]ny rule may be annulled or amended in whole or in part by a law limited to the purpose."[85] The Supreme Court of Missouri has specified that "[a] law, to qualify as one 'limited to the purpose' of amending or annulling a rule, must refer expressly to the rule and be limited to the purpose of amending or annulling it."[86] However, the Constitution does not "limit or constrict the power of the General Assembly. Its power is plenary, so long as it follows the constitutional procedure."[87] Therefore, since the Legislature has the power to annul or amend procedural rules under the Missouri Constitution,[88] lawmakers across the aisle agreed it was within their constitutional authority to revise the Missouri Supreme Court Rules.[89]

While it is evident the Legislature has the constitutional authority to revise the rules, some raised the question of whether it *should* revise them.[90] And, more saliently, whether the state of civil litigation in Missouri demanded such a change. In the absence of amendments to the civil rules by the Supreme Court of Missouri,[91] which is the court's prerogative, the General Assembly's decision to pass Senate Bill 224 will impact Missouri trial practice for the immediate future in several key ways.

C. Provisions Included in Senate Bill 224

Senate Bill 224 contained several major provisions including a proportionality test, limits on the quantity of discovery, ESI, and a "clawback" provision.[92] This Part discusses each major provision in turn.

1. The Proportionality Test

Perhaps the most significant change to the law is the inclusion of a proportionality test. To ensure that the cost of discovery is proportional to the

84. MO. CONST. art. V, § 5.

85. *Id.*

86. State *ex rel.* Collector of Winchester v. Jamison, 357 S.W.3d 589, 592 (Mo. 2012) (en banc) (quoting State *ex rel.* K.C. v. Gant, 661 S.W.2d 483, 485 (Mo. 1983) (en banc)).

87. *Gant*, 661 S.W.2d at 485; *see also Jamison*, 357 S.W.3d at 592.

88. State v. Emerson, 573 S.W.3d 93 (Mo. Ct. App. 2019) (noting that the General Assembly has the power to annul or amend procedural rules under State Constitution).

89. Gamm, *supra* note 4.

90. *Id.*

91. Unless expressly amended by legislation, the rules supersede inconsistent statutory provisions pursuant to the Court's authority to prescribe practice and procedure in the courts. MO. CONST. art. V, § 5.

92. S.B. 224, 100th Gen. Assemb., Reg. Sess. 1 (Mo. 2019).

dispute at issue,[93] amended Rule 56.01(b)(1) now requires that discovery be "proportional to the needs of the case considering the totality of the circumstances."[94] Under the revised rule, as in FRCP 26(b)(1), which has been amended several times over the years "to deal with the problem of over-discovery,"[95] a court may consider six factors: (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources, (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expenses of the proposed discovery outweighs its likely benefit.[96] This provision allows judges to identify and discourage discovery abuse by analyzing proportionality before ordering production of information.[97] Assume a lawsuit where the amount of damages claimed is $10,000. If the plaintiff requested discovery that would cost the defendant $50,000, a judge may find that request disproportionate to the needs of the case and limit the discovery. Amended Rule 56.01(b)(1) would retain its broader definition of relevancy as compared to the federal rule: parties may obtain discovery regarding any nonprivileged matter that is "relevant to *the subject matter involved in the pending action* . . . ."[98]

In 2015, the Advisory Committee moved the proportionality considerations from present FRCP 26(b)(2)(C)(iii) to FRCP 26(b)(1) and slightly rearranged the FRCP with one addition.[99] One criticism of the amendment is that the proportionality test was already included in FRCP 26(b)(2) per a 1983 amendment, so there was no reason to rewrite the rule to move the mention of that test forward or simply repeat the rule.[100] In 2000, the Advisory Committee explained that it had been told repeatedly that courts were not using the proportionality limitations as originally intended, so the otherwise redundant cross-reference was added to "emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."[101]

93. *See* Rockney S. Taveau, *The Costs and Burdens of Civil Discovery: Current Issues and What Lies Ahead,* THE MDLA QUARTERLY, 13, 15 (Fall 2013) (One witness, Ms. Kourlis, arguing the cost of discovery is frequently not proportional to the dispute at issue).

94. MO. R. CIV. P. 56.01(b)(1).

95. FED. R. CIV. P. 26 advisory committee's note to 1983 amendment.

96. MO. R. CIV. P. 56.01(b)(1).

97. FED. R. CIV. P. 26 advisory committee's note to 1993 amendment ("The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery . . . .").

98. MO. R. CIV. P. 56.01(b)(1).

99. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

100. FED. R. CIV. P. 26 advisory committee's note to 2000 amendment.

101. *Id.*

2. Limitations on Quantity of Discovery

Several provisions of Senate Bill 224 limit the quantity of discovery, bringing Missouri's rules in line with the FRCP.

Amended Rule 56.01(b)(2) requires the court, upon motion of any party or on its own, to limit the frequency or extent of discovery if it determines: (A) the discovery sought is cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (C) the proposed discovery is outside the scope permitted by Rule 56.01(b)(1).[102] The rule is nearly identical to its federal counterpart, except the FRCP require the discovery sought to be "*unreasonably* cumulative or duplicative . . . ."[103]

Amended Rule 57.01(a), comparable to FRCP 33(a), limits the number of written interrogatories a party can serve to twenty-five, including subparts.[104] Interrogatories in excess of twenty-five require permission from the court.[105] Amended Rules 57.03 and 57.04 impose limits on the number and length of depositions, whether oral or written.[106] Amended Rule 57.03(a), comparable to FRCP 30(a), limits the number of oral depositions to ten per party.[107] Amended Rule 57.03(b), comparable to FRCP 30(d), limits the amount of time for each oral deposition to one day of seven hours.[108] Amended Rule 57.04(a), comparable to FRCP 31(a), limits the number of written depositions to ten per party.[109] Additional or longer depositions require permission from the court or agreement by the parties.[110] The amended rules also set forth specific circumstances where a party must seek court approval for a deposition.[111] Further, amended Rule 57.03 allows the court to impose sanctions, including expenses and attorney's fees, if a party "impedes, delays, or frustrates" a deposition.[112]

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102. MO. R. CIV. P. 56.01(b)(2).

103. FED. R. CIV. P. 26(b)(2)(A)–(C).

104. MO. R. CIV. P. 57.01(a); FED. R. CIV. P. 33(a)(1)–(2).

105. MO. R. CIV. P. 57.01(a); FED. R. CIV. P. 33(a)(1)–(2).

106. MO. R. CIV. P. 57.03(a)(2)(A)(i); MO. R. CIV. P. 57.04(a)(2).

107. MO. R. CIV. P. 57.03(a)(2)(A)(i); FED. R. CIV. P. 30(a).

108. MO. R. CIV. P. 57.03(b)(5)(A); FED. R. CIV. P. 30(d).

109. MO. R. CIV. P. 57.04(a)(2); FED. R. CIV. P. 31(a).

110. MO. R. CIV. P. 57.03(a)(2); MO. R. CIV. P. 57.04(a)(2).

111. MO. R. CIV. P. 57.03(b)(2) ("Leave of court, granted with or without notice, must be obtained only if: (A) the parties have not stipulated to the deposition and: (i) the deposition would result in more than 10 depositions being taken . . . ; (ii) the deponent has already been deposed in the case; or (iii) the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and petition upon any defendant, except that leave is not required if the defendant has served a notice of taking deposition or otherwise sought discovery; or (B) the deponent is confined in prison.").

112. MO. R. CIV. P. 57.03(b)(5)(B).

If such discovery devices are costly and can be used as a means of harassment, placing presumed limits on them subjects their use to judicial control and aims to curb potential abuses. Attorneys will have to narrow their cases to include only the most important issues that fit within the new limits on written discovery and depositions. However, the rules still allow for the discretion of the court.[113] The court may grant additional written interrogatories or depositions or allow additional time for a deposition.[114]

Additionally, amended Rule 59.01(a), limits the number of requests for admission to twenty-five per party, but there is no limit to requests for admission regarding the genuineness of documents.[115] Like interrogatories, requests for admission in excess of twenty-five require permission from the court or agreement by the parties.[116] This amended rule limits discovery beyond its federal counterpart, FRCP 36(a).[117] But again, like written interrogatories or depositions, the rules still allow courts to exercise discretion.[118]

3. Electronically Stored Information

Another notable change to the law is the added guidance regarding ESI. The exponential growth of ESI in the last two decades has changed the way lawyers do business. Electronic storage systems typically make it easier for lawyers to locate and retrieve information, but it can be expensive to process and store such information.[119] In response, FRCP 26(b)(2) was amended in 2006 to "address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information."[120] This is the first time the Missouri Supreme Court Rules have addressed ESI.[121]

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113. *See generally* MO. R. CIV. P. 57.04(a)(2).

114. MO. R. CIV. P. 57.01(a) ("*unless otherwise stipulated or ordered by the court*, any party may serve upon any other party no more than 25 written interrogatories, including all discrete subparts." (emphasis added)); MO. R. CIV. P. 57.03(b)(5) ("*unless otherwise stipulated or ordered by the court*, a deposition shall be limited to 1 day of 7 hours. *The court may allow additional time* consistent with Rule 56.01 if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination." (emphasis added)).

115. MO. R. CIV. P. 59.01(a).

116. *Id.*

117. FED. R. CIV. P. 36(a) does not limit the number of requests for admissions.

118. MO. R. CIV. P. 59.01(a) ("[A] party may serve upon any other party no more than 25 written requests for the admission *without leave of court or stipulation of the parties* . . . ." (emphasis added)).

119. FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendment; *see also* Hill, *supra* note 55 (arguing that American companies must "over-preserve" documents at great costs in anticipation of litigation to avoid the risk of sanctions under federal discovery rules).

120. FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendment.

121. *See Significant Changes to Missouri Trial Practice: Senate Bill No. 7 and Senate Bill No. 224*, CAPES SOKOL INSIGHTS (July 11, 2019),

Amended Rule 56.01(b)(3), which was adopted directly from FRCP 26(b)(2)(B), provides that a party does not have to provide ESI that is "not reasonably accessible because of undue burden or cost."[122] However, the party resisting discovery must show that the information is not reasonably accessible because of the undue burden or cost.[123] Even so, the court may still order discovery if the requesting party shows good cause.[124] Additionally, amended Rule 58.01(a)–(b), similar to FRCP 34(a)–(b), now expressly includes ESI in the kinds of documents that are discoverable and allows parties to request production of ESI in its "native format."[125] Such amendments aim to help parties produce documents sooner and at lower costs.[126]

4. "Clawback" Provision – Protection of Privileged or Work Product Material

Lastly, Senate Bill 224 adds new protections for privileged or work product materials.[127] Under amended Rule 56.01(b)(9), a "clawback" procedure is available if a party accidentally sends attorney-client privileged or trial preparation protected materials to the opposition.[128] Prior to Senate Bill 224, no such rules existed if these materials were inadvertently disclosed.[129] This revision, modeled after FRCP 26(b)(5)(B), provides added protection to lawyers should they inadvertently send information to the wrong person.[130] A party claiming that privileged or protected information has been produced may notify the receiving party of their claim and the basis of the claim.[131] The receiving party must promptly return, sequester, or destroy the information; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for the determination of the claim.[132]

Amended Rule 56.01(b)(9) goes a step further than its federal counterpart and requires the attorney who receives the privileged information to stop reading, promptly notify the attorney who sent the communication,

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https://www.capessokol.com/insights/significant-changes-to-missouri-trial-practice-senate-bill-no-7-and-senate-bill-no-224/ [perma.cc/9XEK-4PHL].

122. MO. R. CIV. P. 56.01(b)(3).

123. *Id.*

124. *Id.*

125. MO. R. CIV. P. 58.01(a)–(b); FED. R. CIV. P. 34(a)–(b).

126. FED. R. CIV. P. 34(b) advisory committee's note to 2006 amendment.

127. *See Significant Changes to Missouri Trial Practice: Senate Bill No. 7 and Senate Bill No. 224*, *supra* note 121.

128. MO. R. CIV. P. 56.01(b)(9).

129. *See generally* S.B. 224, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019).

130. MO. R. CIV. P. 56.01(b)(9)(A)(i); FED. R. CIV. P. 26(b)(5)(B).

131. MO. R. CIV. P. 56.01(b)(9)(A)(i).

132. *Id.*

delete it if it was sent in electronic form, and take reasonable measures to ensure that no one else can access the information.[133] It also goes a step further than the requirements set forth in the Missouri Rules of Professional Conduct by placing affirmative and immediate responsibilities on the attorney beyond the simple duty to promptly notify the party who sent the information.[134]

Additionally, under the new rule, the production of privileged or work-product protected documents, ESI, or other information, whether inadvertent or not, is not considered a waiver of privilege or protection from discovery.[135] The rule is loosely modeled after Federal Rule of Evidence ("FRE") 502(b).[136] Under FRE 502(b), to prevent the disclosure from operating as a waiver in a federal or state court proceeding, the holder of the privileged or protected information is required to take reasonable steps to (1) prevent the disclosure and (2) promptly rectify the error, including following FRCP 26(b)(5)(B).[137] However, neither of these requirements are included in amended Rule 56.01(b)(9).[138] Still, this provision is an added protection should the case move to federal court because FRE 502(c) provides that "a disclosure [of a communication or information covered by the attorney-client privilege or work-product doctrine] does not operate as a waiver in a federal proceeding if the disclosure . . . is not a waiver under the law of the state where the disclosure occurred."[139] Therefore, since the rule now provides that the disclosure is not a waiver in state court, it cannot be considered a waiver in federal court.[140]

IV. DISCUSSION

Senate Bill 224 presents two key questions for Missouri's legal community: (1) whether Missouri should adopt the FRCP to ensure state-federal uniformity, and (2) in what circumstances, if any, the Legislature should exercise its authority to amend the state's civil procedure rules. This Part discusses these two questions before outlining implications of the legislation on Missouri civil practice.

133. MO. R. CIV. P. 56.01(b)(9)(A)(ii).

134. MO. SUP. CT. R. 4-4.4(b) ("A lawyer who receives a document or electronic stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.").

135. MO. R. CIV. P. 56.01(b)(9)(B).

136. FED. R. EVID. 502(b).

137. *Id.*

138. FED. R. CIV. P. 56.01(b)(9)(B); FED. R. EVID. 502(b).

139. FED. R. EVID. 502(c).

140. *See id.*

A. Should Missouri Adopt the Federal Rules of Civil Procedure?

On one hand, adopting the FRCP could make it easier for attorneys to practice law across the country.[141] Missouri borders eight states, [142] more than any other state in the country, and its two largest cities are positioned along state borders.[143] Many Missouri lawyers likely practice in both Missouri and at least one other state, especially Kansas or Illinois.[144] Some procedures are close to or exactly like the FRCP, but there are also many outliers – state and local rules that do not look anything like the FRCP.[145] Such inconsistencies make it difficult for attorneys to practice across multiple jurisdictions.[146] Replicating the FRCP could alleviate such issues for Missouri practitioners.

The legislation aimed to bring the state exactly in line with the federal rules, however, there are several ways in which Senate Bill 224 deviates from its federal counterpart. This is precisely why some scholars[147] urge against states' wholesale adoption of the FRCP.

Unlike FRCP 26(b)(4), Senate Bill 224 does not require expert reports or limit the scope of expert discovery.[148] Under amended Rule 56.01(b)(4), a party may use interrogatories to require other parties to identify an expert witness by providing the expert's name, address, occupation, place of employment, qualification to give an opinion or curriculum vitae, the general nature of the subject matter on which the expert is expected to testify, and the expert's hourly deposition rate.[149] A party may also depose the expert to discover "the facts and opinions to which the expert is expected to testify."[150] However, an earlier draft of the bill required any interrogatory identifying a party as an expert witness to be accompanied by a written report that included:

> (1) a complete statement of all opinions the witness will express and the basis and reasons for them; (2) the facts or data considered by the witness in forming them; (3) any exhibits that will be used to summarize or support them; (4) the witness's qualifications, including

141. *See* Subrin & Main, *supra* note 20, at 517.

142. Arkansas, Iowa, Illinois, Kansas, Kentucky, Nebraska, Oklahoma, and Tennessee.

143. Illinois and Kansas.

144. It is fitting that this rule change comes at a time when the bar admission rules are also becoming more uniform, due to the recognition that lawyers today often practice in multiple jurisdictions. Take, for example, the Uniform Bar Exam and standardization of bar admission requirements in Oregon, Washington, and Idaho.

145. Hearing on S.B. 224 Before the Committee on the Judiciary and Civil and Criminal Jurisprudence, 100th Gen. Assemb., 1st Reg. Sess. (Mo. Feb. 11, 2019) (This hearing was not recorded, and some statements throughout this Note are supported by conversations with the witnesses after the hearing; however, they shall go unnamed.).

146. *Id.*

147. *See* Subrin & Main, *supra* note 20, at 502–03.

148. FED. R. CIV. P. 26(b)(4).

149. MO. R. CIV. P. 56.01(b)(4).

150. *Id.*

> a list of all publications authored in the previous ten years; (5) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and (6) a statement of the compensation to be paid for the study and testimony in the case.[151]

Such language would have been identical to FRCP 26(b)(4). The earlier draft would have also protected "drafts of any report or disclosure."[152] Currently, the rules do not specify whether report drafts and correspondence between experts and counsel are protected.[153]

The earliest draft of Senate Bill 224 was a wholesale adoption of the FRCP.[154] However, in an effort to mitigate some of the potential impacts on litigators, legislators compromised on some topics, including the requirement of expert reports, during the all-night debate in early May.[155] Opponents of the expert report requirement argued that there are situations where an expert report is not necessary.[156] Further, when small amounts of money are in controversy, an expert witness report can be so expensive that the party decides to opt out of the litigation completely. In addition, opponents argued that it is burdensome for Missouri trial court judges without clerks to review large expert witness reports. Therefore, lawmakers removed the provisions, supporting the proposition that Missouri should not adopt the FRCP in its entirety given the differences in state and federal cases.

Additionally, unlike FRCP 26(f), Senate Bill 224 fails to require that parties confer to consider the nature and basis of their claims and defenses and the possibilities for settling or resolving the case, discuss any issues about preserving discoverable information, and develop a proposed discovery plan.[157] However, Rule 62.01 does allow the court, upon its own motion or the motion of any party, to require the parties to engage in a "case management conference" to discuss a number of discovery-related issues.[158] Some practitioners argue that requiring parties to meet early to discuss such matters can mitigate conflicts that might otherwise arise later in the case.[159]

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151. S.B. 224, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019) (S. Sub. #3 offered by Luetkemeyer (0633S.09F)), https://www.senate.mo.gov/19info/BTS_web/amendments/0633S.09F.pdf [perma.cc/ZSF3-S4EE].

152. *Id.*

153. *See generally* MO. R. CIV. P. 56.01(b).

154. *See* FED. R. CIV. P. 34(b); S.B. 224, 100th Assemb., 1st Reg. Sess. (Mo. 2019) (S. Sub. 3 offered by Luetkemeyer (0633S.09F)).

155. Schallhorn, *supra* note 1.

156. *Id.* For example, certain legislators expressed concern that expert witness reports could be unnecessary in cases of divorce or probate.

157. FED. R. CIV. P. 26(f).

158. MO. R. CIV. P. 62.01.

159. *See* Helen Geib, *How to Use a Rule 26(f) Conference to Cut Discovery Costs and Disputes*, LAW TECHNOLOGY TODAY (Feb. 2, 2015), https://www.lawtechnologytoday.org/2015/02/use-rule-26f-conference-cut-discovery-costs-disputes/ [https://perma.cc/W5NF-ASRC].

Others argue that conferences are not needed for every case, and the issue should be left to the judge's discretion.

Senate Bill 224 also fails to address a duty to preserve electronic information required under FRCP 37(e) and consequently, does not provide the availability of sanctions for failure to preserve such information.[160]

Finally, Senate Bill 224 limits the quantity of discovery in excess of the FRCP by limiting the number of requests for admissions, except for those dealing with the genuineness of documents.[161] Under FRCP 36(a), there is no limit on the number of admission requests.[162] The theory behind requests for admissions is that they should, when used properly, narrow the parties' disputes by eliminating matters from the lawsuit.[163] For example, if someone admits that the car hit the pedestrian, there is no need to pursue this question any further in discovery or at trial. In practice, many complain that unfettered use of requests for admission, numbering hundreds in certain class- or plaintiff-heavy cases, serves to overwhelm party-opponents and drive up the costs of discovery, forcing disputes into early settlement.[164] However, the rules still allow for the discretion of the court so, given the purpose of a request for admission, a judge would likely allow more than twenty-five.[165]

B. Should the Legislature Amend the State's Civil Procedure Rules?

While it is evident that the Legislature has constitutional authority to revise the Missouri Supreme Court Rules, the question is whether it should exercise that authority. Historically, the Missouri Legislature has not acted to revise the state court rules of procedure. In fact, while the Legislature frequently changes statutes dealing with legal proceedings, it is less common for the General Assembly to amend court rules.

In 2017, the Legislature passed House Bill 153, which established heightened parameters for what constitutes admissible expert witness

160. *See* FED. R. CIV. P. 37(e) ("If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.").

161. S.B. 224, 100th Gen. Assemb, 1st Reg. Sess. (Mo. 2019).

162. FED. R. CIV. P. 36(a).

163. FED. R. CIV. P. 36 advisory committee notes to 1970 amendment.

164. *See generally*, Colin Flora, *It's a Trap! The Ethical Dark Side of Requests for Admission*, 8 ST. MARY'S J. LEGAL MAL. & ETHICS 2 (2018).

165. MO. R. CIV. P. 59.01(a) ("[A] party may serve upon any other party no more than 25 written requests for the admission *without leave of court or stipulation of the parties* . . . .") (emphasis added)).

testimony in the state's courts.[166] The legislation was closely modeled after the *Daubert* standard, which is applied in federal courts and forty other states.[167] However, the legislation amended a statute rather than a Missouri Supreme Court Rule.[168] Further, in 2019, the Legislature made significant changes to Missouri's venue and joinder rules as part of its extensive tort reform agenda.[169] Again, the legislation amended a statute rather than a rule.[170] However, there could be a trend toward increased legislative involvement in court rules. As one example, in 2020, the Missouri House proposed legislation that would amend the Supreme Court of Missouri's recently adopted rules on bail.[171]

Opponents of Senate Bill 224 argue that the Legislature should leave civil rulemaking to the court, if for no other reason than to involve the legal community and provide additional transparency. When revised by the court, the Missouri Supreme Court Rules move through a committee comprised of a cross-section of the practice appointed by the Chief Justice of the court.[172] The court also provides an opportunity for public comment and leaves a lengthy gap of time between when the rules are adopted and when they become effective.[173] Despite the court's attempts at transparency, their meetings are not covered by media or well attended by the public at large.

On the other hand, proponents of the legislation argue that neither the Missouri Bar nor the bench have taken steps to amend the rules in years, even

166. *See Missouri Adopts Daubert Standing Governing Admissibility of Expert Opinion Evidence*, THE NAT'L L. REV. (Mar. 29, 2017), https://www.natlawreview.com/article/missouri-adopts-daubert-standard-governing-admissibility-expert-opinion-evidence [perma.cc/YN4M-PAYN].

167. FED. R. EVID. 702; *see also Gov. Greitens Signs Expert Witness Reform into Law*, MO. CHAMBER OF COM. & INDUS. (Mar. 28, 2017), https://mochamber.com/news/gov-greitens-signs-expert-witness-reform-law/ [perma.cc/MZE9-HDHQ].

168. *See* MO. REV. STAT. § 490.065 (2018).

169. *See Missouri Stands Out for Economic Progress Under Gov. Parson, Missouri 2030*, MO. CHAMBER OF COM. & INDUS. (May 17, 2019), https://mochamber.com/economic-development/missouri-stands-out-for-economic-progress-under-gov-parson-missouri-2030/ [perma.cc/578Q-6Y26].

170. *See* MO. REV. STAT. §§ 375.1800–1806, 507.040–050, 508.010–012, 537.762 (2018).

171. *See* Summer Ballentine, *Lawmakers Slam Missouri Supreme Court Over Bail Rules*, ST. LOUIS POST-DISPATCH (Jan. 24, 2020), https://www.stltoday.com/news/local/crime-and-courts/lawmakers-slam-missouri-supreme-court-over-bail-rules/article_574395b2-ea71-58b7-a37e-320137774b01.html [perma.cc/5QAX-SYYW].

172. Alisha Shurr, *Missouri Supreme Court Civil Rules Committee Gains 6 New Members*, THE MO. TIMES (Dec. 19, 2018), https://themissouritimes.com/missouri-supreme-court-civil-rules-committee-gains-6-new-members/. [perma.cc/6AQB-QPGZ].

173. *See* MO. CONST. ART. 5, § 5; *see also Supreme Court Operating Rules*, MO. COURTS, https://www.courts.mo.gov/page.jsp?id=46 (last visited Mar. 3, 2020).

though the FRCP have been amended many times during that time period.[174] Such inaction, they say, required the Legislature to respond, both in order to modernize the rules to keep up with the demands of twenty-first century technology and also to respond to calls from the business community about the burdens of Missouri's civil justice system on defendants.[175] The Supreme Court of Missouri did act in late 2018 to amend the state's proportionality standard and such changes became effective on July 1, 2019.[176] Most notably, the court amended Rule 56.01 to include:

> In ruling on an objection that the discovery request creates an undue burden or expense, the court shall consider the issues in the case and the serving party's need for such information to prosecute or defend the case and may consider, among other things, the amount in controversy and the parties' relative resources in determining whether the proposed discovery burden or expense outweighs its benefit.[177]

It also added: "All parties shall make reasonable efforts to cooperate for the purpose of minimizing the burden or expense of discovery."[178] However, the Legislature was clearly unwilling to wait for the court to take additional steps to modernize its civil discovery rules.

C. What Implications Will Senate Bill 224 Have on Trial Practice?

One important feature of Senate Bill 224 is that it leaves room for exceptions, which supports the rationale behind the 1993 amendments to the FRCP.[179] Criticism of the bill's substantive changes are ameliorated by the fact that any trial judge, for good cause, can deviate from the civil rules to allow additional, or different, discovery.[180] Practitioners may obtain

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174. *See Orders for Rules*, MO. COURTS, https://www.courts.mo.gov/page.jsp?id=128693 (last visited Mar. 3, 2020).

175. *See Missouri Stands Out for Economic Progress under Gov. Parson, Missouri 2030*, *supra* note 169.

176. *See Order Dated October 15, 2018: Re: Rules 56.01 and 58.01*, MO. COURTS, https://www.courts.mo.gov/page.jsp?id=132253 (last visited Mar. 3, 2020).

177. *Id*.

178. *Id*.

179. FED. R. CIV. P. 26 advisory committee notes 1993 amendment (the purpose of the 1993 amendments was to encourage "continuing and close judicial involvement" in cases where the parties could not effectively manage the discovery process on their own).

180. MO. R. CIV. P. 57.01(a) ("*unless otherwise stipulated or ordered by the court*, any party may serve upon any other party no more than 25 written interrogatories, including all discrete subparts." (emphasis added)); MO. R. CIV. P. 57.03(b)(5) ("*unless otherwise stipulated or ordered by the court*, a deposition shall be limited to 1 day of 7 hours. *The court may allow additional time* consistent with Rule 56.01 if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination." (emphasis added)); MO. R. CIV. P.

additional discovery if they simply ask the judge or the other party to alter the limits set forth in the rules. While Missouri courts will revise their local rules to adhere to the new rules, litigants are free to request leave of the court to serve additional interrogatories or take a deposition longer than seven hours. And, where good cause is shown, Missouri's judges are likely to freely grant such requests. For example, in a particularly complicated product liability case that necessitates numerous technical experts, the judge may determine that more than ten depositions are necessary and order expanded discovery. The bill simply places *presumed* limits on discovery but affords the judge and parties the flexibility to adjust those presumptions based on the individual needs of the case.[181]

At its crux, Senate Bill 224 aims to diminish abusive discovery tactics and reduce the cost and length of litigation.[182] Proponents believe it will ensure that defendants will no longer be harassed by abusive litigation practices or locked into endless, expensive litigation.[183] Conversely, some lawmakers argued that the changes might actually make it harder and more expensive for average Missourians to access the courts.[184] While the bill's primary opponent, the Missouri Association of Trial Attorneys, argued that the changes would lead to more litigation, it remains to be seen if bringing Missouri's civil rules largely in line with federal court practice will truly increase courts' caseloads. The same criticism was offered in 2011 during discussions to amend the FRCP.[185]

Proponents also argue that Senate Bill 224 will ensure that plaintiffs who are legitimately wronged receive timely compensation so they can move on with their lives.[186] But critics claim that the limits on discovery will make it harder for lawyers to obtain the discovery they need to best represent their clients.[187] For example, one witness testified about two ways the new rules would harm one of her current clients, the plaintiff in a medical malpractice

59.01(a) ("[A] party may serve upon any other party no more than 25 written requests for the admission *without leave of court or stipulation of the parties* . . . ." (emphasis added)).

181. *See supra* note 180.

182. Mark Zinn, *Parson Gives Approval to Local Legislation*, NEWS PRESS NOW (July 14, 2019), https://www.newspressnow.com/news/local_news/parson-gives-approval-to-local-legislation/article_db318ff8-a318-11e9-85bc-9ff850808cce.html.

183. Hearing on S.B. 224 Before the Committee on the Judiciary, 100th Gen. Assemb., 1st Reg. Sess. (Mo. May 9, 2019) (statement of Senator Tony Luetkemeyer).

184. Gamm, *supra* note 4.

185. Taveau, *supra* note 93 ("Opponents of amending the rules to achieve bright-line guidance feel that it will lead to an increase in the litigation related to discovery and will result in unfairness to some litigants as they could be deprived of their day in court because of the nonavailability of evidence key to their case.").

186. Hearing on S.B. 224 Before the Committee on the Judiciary, 100th Gen. Assemb., 1st Reg. Sess. (Mo. May 9, 2019) (statement of Senator Tony Luetkemeyer); *see also Stopping Costly Litigation Delay Tactics*, *supra* note 45.

187. Taveau, *supra* note 93.

suit.[188] In that case, she deposed a physician early in the case.[189] New information surfaced later in the discovery process, so she wished to depose him again.[190] However, the new rules limit the amount of time for each deposition to one day of seven hours, which means she could not depose him again unless the court granted leave.[191] Even though the rules leave room for exceptions, opponents argue there is no guarantee the court will grant them. If the judge refused to allow the lawyer to depose the physician a second time, she would lose the opportunity to obtain valuable information to support her client's case. In the same case, she requested discovery from the hospital, but the hospital refused because it was too expensive.[192] The judge offered for both parties to split the cost of the discovery.[193] However, her client could not afford the high price.[194] Again, a lost opportunity. Yet this argument presumes Missouri's trial court judges lack the judgment to make reasoned decisions tailored to the individual needs of each case; like federal trial judges adjudicating complicated discovery disputes, the new rules' built-in discretion and proportionality analysis ensures courts will at least be required to consider the impact on all parties of the requested discovery. And, Missouri's appellate system provides another level of review should a court abuse its discretion in denying discovery that is essential and proportional to the case.

V. CONCLUSION

Whether Missouri should adopt the FRCP as its own is a question of policy and ultimately preference. Either answer is likely to have little effect on Missouri trial practice in the long run. However, whether and when it is appropriate for the legislature to amend the state's civil procedure rules is a more interesting question. The court will likely maintain the changes set forth by the General Assembly in Senate Bill 224, lest it find itself in the position of a perpetual back-and-forth with the legislative branch about the proper role of civil discovery. Here, the court's civil rules committee will likely pick its battles, preferring a wait-and-see approach to observe how, if at all, the changes to Missouri's civil discovery rules impact the pace, tone, and overall functioning of Missouri's civil trial system before acting to revise or further amend these rules. Should the Court act to change the rules outlined in Senate Bill 224, it will set a precedent for the legislature to amend the rules again in the future. No matter the future actions of the court, the legislative changes under Senate Bill 224 will clearly impact Missouri trial practice for the near

188. Hearing on S.B. 224 Before the Committee on the Judiciary and Civil and Criminal Jurisprudence, 100th Gen. Assemb., 1st Reg. Sess. (Mo. Feb. 11, 2019).

189. *Id.*

190. *Id.*

191. MO. R. CIV. P. 57.03(b)(5)(A).

192. Hearing on S.B. 224 Before the Committee on the Judiciary and Civil and Criminal Jurisprudence, 100th Gen. Assemb., 1st Reg. Sess. (Mo. Feb. 11, 2019).

193. *Id.*

194. *Id.*

future in some key ways, requiring lawyers to change how they practice law. These new "rules of the road" will soon be second nature for Missouri litigators. One thing is for sure: even critics of the Legislature's decision to amend the rules can agree that their doing so has cast a spotlight on the court's inaction on ESI. As one law firm noted,

> In analyzing Senate Bill 224's proposed amendments with regard to ESI specifically, we were reminded of the adage "better late than never." [With] Senate Bill 224 . . . signed into law, the Missouri Supreme Court Rules . . . expressly address discovery of ESI for the first time. Parties and courts in Missouri have encountered ESI for years, albeit with no guidance from the Missouri Supreme Court Rules.[195]

With the passage of Senate Bill 224, the General Assembly has taken a more proactive approach than the courts: going forward, it is likely the Supreme Court of Missouri may keep its rules more up-to-date to avoid the risk of the Legislature stepping back in and revising them again. Time will tell.

195. *Significant Changes Coming to Missouri Trial Practice: Discovery Limits*, CAPES SOKOL (June 4, 2019) https://www.capessokol.com/insights/significant-changes-coming-to-missouri-trial-practice-discovery-limits/ [perma.cc/4J23-CL64].