

# **MISSOURI SUPREME COURT RELEASES MUCH-NEEDED REVISIONS TO MISSOURI'S CIVIL DISCOVERY RULES**

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On March 2, 2021, the Missouri Supreme Court released an order (Order) amending the Missouri Rules of Civil Procedure (Missouri Rules) to enact new discovery provisions.<sup>1</sup> This is the culmination of the attempts over the last two years to revise the civil discovery rules in Missouri, and hopefully one that will bring clarity to practitioners across the State.

While the Federal Rules of Civil Procedure (FRCP) have been updated several times over the last 15 years, the Missouri Rules have remained largely unchanged.<sup>2</sup> One particularly glaring absence has been any mention of the discovery of electronically stored information (ESI), or e-discovery, in the Missouri Rules. The FRCP were amended in 2006 to include provisions on e-discovery, but the Missouri Rules remained silent on the issue.<sup>3</sup>

In October of 2018, the Missouri Supreme Court made minor changes to Rule 56.01, the general discovery provision rule, and Rule 58.01, the rule regarding production of documents.<sup>4</sup> These revisions took effect in July 2019.<sup>5</sup> Notably, the Court included factors for courts to consider in ruling on a party's objection that discovery creates an undue burden or expense. The revised rule also included a requirement that parties make reasonable efforts to cooperate on discovery issues.<sup>6</sup> These changes went largely unnoticed due to concurrent legislative attempts to amend the discovery rules.

In 2019, the Missouri legislature passed a bill that amended the Missouri Rules in order to bring them more in line with the FRCP. Senate Bill 224 (SB 224) was signed by Governor Parsons on July 10, 2019 and took effect on August 28, 2019.<sup>7</sup> SB 224 included major revisions to the Missouri Rules, including the addition of a proportionality test, limits on the quantity of discovery, and provisions on ESI.<sup>8</sup> SB 224 did not, however, include the provisions adopted in the Missouri Supreme Court's October 2018 order.

Following the enactment of SB 224, the Missouri Supreme Court's publication of the rules on its website did not reflect the changes contained in SB 224. Rather, the Court noted under each affected Rule that SB 224 "purports to amend this Rule."<sup>9</sup> This resulted in some confusion among attorneys and courts about whether SB 224 actually amended the Missouri Rules, whether there would be challenges to SB 224, and what rules were to apply to discovery disputes. The Missouri legislature introduced additional

legislation in the 2021 session to address this confusion, but the bill likely will not pass, given the Supreme Court's adoption of the substance of the proposed changes.<sup>10</sup>

The Supreme Court's March 2, 2021 Order regarding the Missouri Rules has brought much-needed clarity to civil discovery. The Order adopts the changes proposed to civil discovery rules in SB 224, and adds new language on virtual depositions. The Order also incorporates the Court's October 2018 revisions (which had been omitted from SB 224). These updates bring the Missouri Rules more in line with the FRCP and should result in reasonable parameters to the scope of discovery in state court litigation. The updated Missouri Rules go into effect September 2, 2021.<sup>11</sup>

### **Summary of Changes to Civil Discovery Rules**<sup>12</sup>

The vast majority of the changes enacted in the Order were also present in SB 224. Differences and deviations between SB 224 and the Order are noted in the summary below where applicable.

#### **Rule 56: General Provisions Governing Discovery**

- Rule 56.01(a): Explicit reference to electronic discovery added.
- Rule 56.01(b)(1): Substantial language regarding proportionality added.
- Rule 56.01(b)(1): Language added noting that discoverability does not equate to admissibility.
- Rule 56.01(b)(2): Section regarding limitations on discovery added – including limitations on burdensome electronic discovery.
- Rule 56.01(b)(9): Section containing safe harbor for privileged materials and non-waiver for production of privileged materials added. While the Order changed the wording that appeared in SB 224 for this provision, the substance of the provision remains the same.
- Rule 56.01(c): Specific language added referencing e-discovery as subject matter eligible for inclusion in a protective order. This reference was not included in SB 224.
- Rule 56.01(c)(2): Language added allowing protective orders for allocation of expenses. The Order also includes the factors for courts to consider when ruling on objections based on a claim that a request creates an undue burden or expense, which were not included in SB 224.
- Rule 56.01(d): Language added allowing parties to stipulate to the timing of discovery.
- Rule 56.01(g): Requirement added that parties make reasonable efforts to cooperate for the purpose of minimizing the burden and expense of discovery. This provision from the October 2018 Order was not included in SB 224.

#### **Rule 57: Interrogatories and Depositions**

- Rule 57.01(a): Language added limiting number of Interrogatories to twenty-five (25), including subparts. The Order allows for additional Interrogatories that are part of “approved” Interrogatories promulgated by a circuit court in its local rules.
- Rule 57.03(a): Language added limiting number of depositions to ten (10) per party and prohibiting depositions in other circumstances without leave of court.
- Rule 57.03(b): Language added limiting depositions to one day of seven (7) hours and allowing sanctions for party who impedes deposition. Language added allowing depositions to be taken remotely by telephone or videoconference upon stipulation of the parties or order of the court.
- Rule 57.04(a): Similar limiting language as Rule 57.03(b) added for written depositions.

### **Rule 58: Production of Documents and Things**

- Rule 58.01(a)(1): Language added specifically contemplating electronic discovery; requiring production only for items in a party’s possession, custody, or control; and permitting production of designated tangible things.
- Rule 58.01(b)(1)(A): Language added requiring that responses specify the item or category of items produced.
- Rule 58.01(b)(1)(C): Language added allowing a party to require production of electronic discovery in native format.
- Rule 58.01(c): Language added requiring that a party asserting a partial objection specify to what the party is objecting and to allow inspection or production of all responsive documents that are not subject to the objections.

### **Rule 59: Admission of Facts and Genuineness of Documents**

- Rule 59.01(a): Language added limiting number of Requests for Admission to twenty-five (25) without leave of court or stipulation of parties but allowing more than twenty-five (25) Requests for Admission regarding genuineness of documents.

### **Proportionality and Undue Burden**

One of the most important changes to the Missouri Rules is the introduction of proportionality. Proportionality has long been included in the FRCP and was further emphasized in the 2015 amendments to FRCP 26.<sup>13</sup> But the Missouri Rules have never contained language limiting discovery to what is proportional to the needs of the case, which often left practitioners fighting a losing battle for reasonable limits on the scope of discovery.

While the Order is an improvement in many ways over the previous Missouri Rules, the proportionality test established in Rule 56.01(b)(1) is not as stringent as the test established in FRCP 26(b)(1). Further, the Order seemingly establishes a second, separate test for courts to use in evaluating objections to discovery based on undue burden or expense. This inclusion of a second test may create confusion as

practitioners and courts attempt to interpret and apply the limits the Order places on the discovery process.

Rule 56.01(b)(1) now allows for relevant discovery, “provided the discovery is proportional to the needs of the case.” When determining whether discovery is proportional to the needs of the case, a court is to consider the “totality of the circumstances” including, but not limited to:

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.<sup>14</sup>

This proportionality test allows for slightly broader discovery than the proportionality test of FRCP 26(b)(1)—while Rule 56.01(b)(1) includes the same six factors as FRCP 26(b)(1), the Missouri Rule includes the additional language “proportional to the needs of the case considering ***the totality of the circumstances, including but not limited to***” before listing the six factors.<sup>15</sup>

In contrast, FRCP 26(b)(1) does not instruct a court to consider the totality of the circumstances, nor is a federal judge to analyze other factors beyond the six identified above. Because the six factors are the same, however, federal caselaw on this issue should be persuasive to Missouri courts as they begin to interpret the revised Rule 56.01. To producing parties seeking to limit overly broad discovery, the inclusion of a proportionality test is a vast improvement over the prior discovery rules, but the Missouri Rules still allow for broader discovery than that permitted under FRCP.

In addition to the proportionality test included in Rule 56.01(b)(1), Rule 56.01(c) now also contains a separate test for evaluating objections that discovery requests create an undue burden or expense. This Rule instructs a court reviewing an objection that a request creates an undue burden or expense to consider “the issues in the case and the serving party’s need for information to prosecute or defend the case.”<sup>16</sup> A court is also to look at, “among other things,” the “amount in controversy and the parties’ relative resources in determining whether the proposed discovery burden or expense outweighs its benefit.”<sup>17</sup> This provision creates a test with mandatory and optional factors for the court to consider. The court ***must*** consider the first two factors—1) the issues in the case and 2) the requesting party’s need for the information to prosecute or defend the case. The court ***may*** consider the remaining two factors—3) the amount in controversy and 4) the parties’ relative resources.

This Missouri Rule also takes a different approach than federal caselaw interpreting the FRCP. In evaluating claims that discovery requests create an undue burden or expense and related requests for cost shifting, federal courts look to the

proportionality factors in FRCP 26(b)(1).<sup>18</sup> These factors, which we also now see in Rule 56.01(b)(1), are: 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.<sup>19</sup>

While similar to the proportionality factors outlined in Rule 56.01(b)(1) and FRCP 26(b)(1), the undue burden and expense analysis in Rule 56.01(c) differs from the federal rules in a few important ways. First, Rule 56.01(c) directs courts to look to "the issues in the case." In contrast, federal caselaw instructs courts to analyze "the *importance* of the issues *at stake in litigation*." An analysis of the "issues in the case" allows a court to consider any issue in the case – beyond just the issues that are "important" or "at stake in the litigation." This open-ended phrasing seems to grant a state court more discretion in analyzing what constitutes an undue burden than a federal court.

Both the proportionality factors listed in Rule 56.01(b)(1) and the undue burden test of Rule 56.01(c) include an analysis of necessity. However, the undue burden analysis contained in Rule 56.01(c) is more subjective, requiring a court to focus on the requesting party's need, whereas the proportionality test of Rule 56.01(b)(1) instructs a court to objectively analyze "the importance of the discovery in resolving the issues." Thus, a judge analyzing whether discovery is proportional is entitled to make an independent determination of whether the discovery requested is important to resolve the issues at stake in the case. In analyzing whether discovery is an undue burden, however, the judge is instructed to consider a party's subjective reasoning as to why the discovery sought is necessary for the case.

While both the proportionality standard and undue burden test include an analysis of the amount in controversy and the party's relative resources, under the undue burden framework in Rule 56.01(c), these two factors are optional and not required to be considered by a court. Further, the undue burden analysis required by the Rule 56.01(c) omits consideration of the parties' relative access to the information.

By also including the language "among other things" in the permitted undue burden analysis under Rule 56.01(c), the Supreme Court opens the door to any number of additional factors being asserted for consideration by the parties.

The addition of this "among other things" language can cut both ways. A party arguing against production could and should argue that the more stringent federal requirements apply and cite federal caselaw as persuasive authority in support. A party requesting production will undoubtedly point out that courts are not bound by the delineated undue burden factors and could argue that other facets of their case require more expansive discovery. Both parties likely will argue that the flexibility introduced by this "among other things" language should bend in their direction in absence of further interpretation of this Rule by the courts.

Rule 56.01(b)(1) sets out the scope of discovery permitted and limits discovery to that which is proportional to the needs of the case. It therefore applies to all discovery requests and motions on discovery. The undue burden analysis is included in Rule 56.01(c)'s provisions regarding protective orders, and will be the standard the courts look to in evaluating whether protective orders should be granted to limit discovery that creates an undue burden or expense. As the Missouri Rule now also contains a provision allowing courts to shift costs of discovery from the producing party to the requesting party as part of a protective order, the test will also apply to requests for cost shifting. It is unclear from the plain text of Rule 56.01(c) if it only applies in the context of a motion for protective order, or to any discovery motion.

This has the potential to create confusion for parties and the courts, as Rules 56.01(b)(1) and Rule 56.01(c) set slightly different standards, as discussed above, for courts to consider when deciding very similar issues. A court faced with a motion to compel might wonder if the proportionality test should govern or the undue burden analysis should win the day.

Practically speaking, a party objecting to overly broad discovery should argue both that the discovery sought is not proportional to the needs of the case **and** that the request creates an undue burden. Thus, both tests likely will guide courts' decisions in applying these new Missouri Rules.

Producing parties should certainly point to both provisions as a clear indication of the Supreme Court's intent to limit overly broad discovery. Further, Rule 56.01(g) now makes it the responsibility of all parties to make reasonable efforts to cooperate for the purposes of minimizing the burden or expense of discovery.

While the Supreme Court's Order brings the Missouri Rules more in line with the FRCP and is meant to place limits on the burdens of discovery, the Missouri Rules still allow for broader discovery than the FRCP. The Missouri Rules are the frozen yogurt to the ice cream of the FRCP. Good, but not quite the same. And only time will tell whether circuit courts will strictly apply the limitations to discovery contained in the new Rules to their fullest extent.

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<sup>1</sup> Missouri Supreme Court Order dated March 2, 2021, re: Rules 56.01, 57.01, 57.03, 57.04, 58.01, 59.01, and 61.01 (<https://www.courts.mo.gov/page.jsp?id=174293>) [hereinafter March 2 Order].

<sup>2</sup> Maddie McMillian, *Who Makes the Rules Around Here? The Missouri Legislature Redefines Discovery*, 85 Mo. L. Rev. 585, 588 (2020) (comparing revisions to FRCP 26 in 2006, 2010, and 2015, and to only minor edits made to Rule 56.01 during same time frame).

<sup>3</sup> Fed. R. Civ. P. 26, advisory committee's note to 2006 amendment.

<sup>4</sup> Missouri Supreme Court Order dated October 15, 2018, re: Rules 56.01 and 58.01 (<https://www.courts.mo.gov/page.jsp?id=132253>).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Senate Bill 224 (2019), <https://www.senate.mo.gov/19info/pdf-bill/tat/SB224.pdf>; Actions Regarding SB 224, [https://www.senate.mo.gov/19info/BTS\\_Web/Actions.aspx?SessionType=R&BillID=1055374](https://www.senate.mo.gov/19info/BTS_Web/Actions.aspx?SessionType=R&BillID=1055374).

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<sup>8</sup> Senate Bill 224.

<sup>9</sup> See e.g., Rule 56.01, available at

<https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/b83f5cb e4450f09686256ca60052134e?OpenDocument>.

<sup>10</sup> Senate Bill 52 (2021),

[https://www.senate.mo.gov/21info/BTS\\_Web/Bill.aspx?SessionType=R&BillID=54105454](https://www.senate.mo.gov/21info/BTS_Web/Bill.aspx?SessionType=R&BillID=54105454).

<sup>11</sup> March 2 Order, *supra* note 1.

<sup>12</sup> March 2 Order, *supra* note 1, and Senate Bill 224.

<sup>13</sup> Fed. R. Civ. P. 26, advisory committee's note to 2015 amendment.

<sup>14</sup> March 2 Order, *supra* note 1.

<sup>15</sup> Emphasis added to additional language that appears in Rule 56.01(b)(1) that does not appear in FRCP 26(b)(1).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See e.g. *Lawson v. Spirit AeroSystems, Inc.*, 2020 WL 3288058, at \*10 (D. Kan. June 18, 2020) (“Courts evaluate the Rule 26(b)(1) proportionality factors to determine whether discovery imposes undue burden or expense such that allocating expenses under Rule 26(c)(1)(B) is warranted.”) and *Oxbow Carbon & Mins. LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 11 (D.D.C. 2017). However, some federal courts have used a slightly different formulation of the proportionality factors to evaluate undue burden and expense in relation to cost shifting. See e.g. *McClurg v. Mallinckrodt, Inc.*, 2016 WL 7178745, at \*3 (E.D. Mo. Dec. 9, 2016) (“Costs for producing documents are generally shifted only when an “undue burden or expense” is imposed on the responding party, ‘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.’) and *Kirschenman v. Auto-Owners Ins.*, 280 F.R.D. 474, 488 (D.S.D. 2012), objections overruled, 2012 WL 13040020 (D.S.D. Apr. 18, 2012).

<sup>19</sup> Fed. R. Civ. P. 26, and March 2 Order, *supra* note 1.