

# COMMENTS NEEDED ON PROPOSED AMENDMENTS TO FEDERAL DISCOVERY RULES

by  
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Business lawyers and outside counsel now have an excellent opportunity to help shape key amendments to the Federal Rules of Civil Procedure to reduce the costs and burdens of civil discovery, especially electronic discovery. Coming just seven years after adoption of the 2006 federal e-discovery amendments, the new proposed amendments address concerns that businesses of all sizes have expressed about the scope of discovery and sanctions. Still, there are differences of opinion as to whether the proposals go far enough to help mend what some view as a civil justice system “in serious need of repair.”<sup>1</sup> Interested persons can submit comments to the Federal Advisory Committee on Civil Rules (“Committee”) until **February 15, 2014**. The process is explained on the United States Courts website.<sup>2</sup>

Why are further amendments needed? A variety of stakeholders agree the existing discovery rules have failed to keep pace with the electronic information explosion.<sup>3</sup> Many say the failure to curb “unfettered” discovery and establish a national uniform preservation standard helped make preservation of electronic data a significant driver of excessive litigation costs. A comment recently filed by Lawyers for Civil Justice (“LCJ”) notes that parties face inconsistent preservation requirements from courts throughout the country, while much information subject to preservation has little direct relevance to the claims or defenses at issue.<sup>4</sup> As a result, discovery takes too long, costs too much, and increasingly determines the outcome of a case—adversely affecting all litigants.

The proposed changes include a revision of Rule 37(e) that would authorize sanctions for failure to preserve discoverable information only where a party’s failure to preserve was “willful or in bad faith” and causes “substantial prejudice.” Another key proposal would recast Rule 26(b)(1) to allow proportional discovery of nonprivileged information “relevant to any party’s claim or defense” rather than discovery of information related to the subject matter of an action.

The proposed FRCP amendments are a very promising step toward meaningful reform. However, refinements are needed to assure the rules will be as effective as possible. The LCJ

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<sup>1</sup> *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System*, at 2 (2009).

<sup>2</sup> See <http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx>. The website also includes a link to the Advisory Committee’s *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*.

<sup>3</sup> See, e.g., *ACTL and IAALS Final Report*, *supra* n.1.

<sup>4</sup> Lawyers for Civil Justice, [Public Comment to the Advisory Committee on Civil Rules](#) (Aug. 30, 2013) [hereinafter “LCJ Comment”].

Comment presents many thoughtful recommendations that should interest others who wish to file their own comments. LCJ's recommendations seek to enhance the proposed Rules' focus on proportionality and to ensure the new uniform national preservation standard is clear and simple. Key recommendations include:

- Revising proposed Rule 37(e) to make clear that sanctions are available only if the actor had a culpable state of mind (i.e., acted with both "willfulness" *and* "bad faith"), to ensure uniform sanctions decisions throughout all jurisdictions;
- Striking a proposed exception in Rule 37(e)(1)(B)(ii) that authorizes sanctions *without* a showing of willfulness or bad faith when a party is "irreparably deprived" of a meaningful opportunity to present or defend a lawsuit, as the exception arises out of an unusual case and can be addressed by existing measures without allowing sanctions based on often routine claims of irreparable prejudice;
- Adding a "materiality" requirement to proposed Rule 26(b)(1).

The Committee's work to address the costs and burdens of the federal discovery process through these proposed amendments is very much appreciated. The coming months provide a critical opportunity for interested persons to support these efforts while encouraging necessary changes to ensure the amendments are successful in achieving significant and lasting reform.

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