

November 21, 2013

Proposed Amendments to the Federal Rules of Civil Procedure Regarding Discovery

A Call to Action for Support

In August, we [urged our clients and friends to support proposed amendments to the Federal Rules of Civil Procedure](#) (FRCP) by filing comments during the six-month public comment period.

This update provides (1) a summary of comments posted so far, (2) reasons for supporting the amendments, and (3) a renewed call for comments in support of the proposed amendments before the comment period closes on February 15, 2014.

Comments Opposing Outnumber Supporting Comments 20-to-1
November 15, 2013, was the mid-point of the public comment period. As of then there were 339 public comments posted: 316 of those comments oppose some or all of the proposed amendments; only 16 favored the amendments.

Action in Support of the Proposed Amendments Is Needed
If the trend of comments to date continues, the proposed rules may not make it out of committee or they may be significantly revised to remove some or all of the proposed proportionality requirements. We encourage you to support the changes by either submitting comments supporting the changes or by using your influence to convince organizations to which you belong to submit comments. Such comments should describe specific problems you have faced under the current discovery rules and explain why those rules must be amended. Keep in mind that even if you rarely face litigation in federal courts, most states' discovery rules are patterned after the federal rules, and federal rules amendments are often adopted by state court rulemaking bodies.

What Opponents of the Proposed Amendments Are Saying
Posted comments range in length from one sentence to 50 pages. While the majority are from individual lawyers, almost 50 plaintiffs' attorney organizations have submitted comments opposing the amendments. In contrast, there have been just seven defense attorney organizations or corporations supporting the amendments and/or proposing changes to strengthen the amendments. Plaintiff attorney groups voicing their opposition to the changes include organizations whose members routinely sue all of our corporate clients:

- Consumer Attorneys of California
- Public Interest Law Project
- National Association of Shareholder & Consumer Attorneys
- American Association for Justice, f/k/a Association of Trial Lawyers of America
- Reglan Litigation Group
- Trial Lawyers Associations for several states

The following comments are typical of many of generalized criticisms of the amendments:

- "The proposed changes would improperly shift the balance in favor of the defense bar . . ."
- "the proposed discovery limitations . . . would only heighten the incentives for defendants to dissemble and delay."
- "The rules changes are designed to facilitate a defendant's ability to defend, deny delay and obfuscate."
- "Each of the proposed rule changes appears to be to be straight out of the 'Defense Research Institute's' playbook."
- "Almost every plaintiff in every defective product case is at the mercy of the defendant manufacturer . . . [T]he defense does everything possible to prevent Plaintiffs from obtaining useful and detailed information to prepare the case for trial."
- "The proposed rule changes reek [sic] of the influence of big corporations and the big law firms that represent them."
- "The proposed rule changes will give defendants an incentive to limit the information they disclose."
- "We should not wrest justice from the oppressed."

Some criticisms describe the change in the scope of discovery standard as a "paradigm shift." They compare the proposed amendments to recent U.S. Supreme Court decisions they claim have erected "stop signs" to justice. We regularly rely on these "stop sign" opinions to defend our clients in personal injury cases, class actions and coordinated mass torts filed in federal court including decisions affecting:

- Personal Jurisdiction – *Nicastro* and *Goodyear Dunlap Tires Operations, SA*
- Pleading standards – *Twombly* and *Iqbal*
- Class Actions – *Dukes* and progeny
- Expert Witness Opinions – *Daubert* and progeny

Why You Should Comment in Support of the Proposed Amendments

The existing FRCP concerning discovery are vexing at best. Consider, for example:

- Have you or your company spent excessive time and resources responding to seemingly boundless inquiries into matters "reasonably calculated to lead to the discovery of admissible evidence?"
- Would you prefer a new standard expressly rejecting this old discovery standard and requiring, at the threshold, discovery be limited to information "relevant to plaintiff's claims and proportional to the needs of the case"?
- Have you worried whether your preservation efforts would be second guessed under varying standards for preservation in federal courts?

- Have you preserved multiple gigabytes of data when the plaintiffs only used a miniscule fraction of the materials preserved?
- Have your settlement decisions been unduly influenced by discovery costs in an otherwise meritless case?

Bowman and Brooke support the proposed amendments because they would bring proportionality to discovery in federal courts and standardize rules regarding preservation of electronically stored information (ESI), among other changes.

We also support the timeline changes and presumptive limits on discovery:

- Complaint: time to serve shortened from 120 to 60 days
- Scheduling Order: time for issuance shortened from 120 to 90 days from when you were served or from 90 days to 60 days from when you appeared
- Number of Depositions: Reduced from 10 to 5
- Duration of Depositions: Reduced from 7 to 6 hours
- Interrogatories: Reduced from 25 to 15
- Requests for Admissions: Creates a limit of 25 (excluding document authentication admissions)

While the Committee on Rules of Practice and Procedure considered, and has already rejected, a limit of 25 for Rule 34 Requests for Production, we believe the Committee should consider some limit. A limit of 50, for example, would significantly reduce the attorneys' fees and costs expended responding to hundreds of requests for production in a single product liability case.

The clock is ticking to provide input to the Committee. Bowman and Brooke attorneys will be testifying in the two remaining public hearings on January 9, 2014, in Phoenix and on February 7, 2014, in Dallas. We welcome the participation of our clients and organizations they support at these hearings.

FOR MORE INFORMATION

If you have questions about the proposed amendments or need help preparing comments and testimony, please contact the attorneys with Bowman and Brooke LLP with whom you regularly work or [contact the author of this piece](#) or any other of the members of the [Bowman and Brooke Discovery Coordination and eDiscovery Practice](#).



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