Practical Considerations for The Proposed Amendments to The Federal Rules of Civil Procedure

A white paper prepared by the International Association of Defense Counsel

January
2014

International Association of Defense Counsel
303 W. Madison, Suite 925
Chicago, Illinois 60606
www.iadclaw.org

STATEMENT OF INTEREST

The International Association of Defense Counsel (IADC) is an association of approximately 2500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are compensated fairly for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable costs.

The invitation-only IADC membership is comprised of the world's leading corporate and insurance lawyers. They are partners in large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives. Members represent the largest corporations around the world, including the majority of companies listed in the FORTUNE 500.

GENERAL STATEMENT

The hallmark of any strong democracy is a sound, independent, and fair judicial system. The American judicial system, with its constitutional foundation, is the bedrock of our great democracy. The Federal Rules of Civil Procedure have long guided courts and lawyers alike on the manner in which lawsuits should be managed and tried within the parameters of the United States Constitution. Periodic reviews and amendments of these rules keep the American judicial system contemporary, sound, and fair. The amendments presently proposed to the Federal Rules of Civil Procedure facilitate these goals. The IADC supports the proposed amendments to Civil Rules 1, 4, 6, 16, 26, 30, 31, 33, 34, 36, 37, 55, 84, and the Rules' Appendix of Forms.

The IADC agrees the proposed revisions seek (1) to implement a requirement that the scope of permissible discovery be proportional to the litigation at issue, (2) to pare down the presumptive number of discovery requests, (3) to foster more cooperation between the parties

and court involvement in managing litigation, and (4) to provide additional safeguards for parties against sanctions for the failure to preserve discoverable information when the failure was not willful or in bad faith. The IADC concurs the proposed amendments will provide the courts with clearer guidance on the manner in which litigants must practice in today's legal arena, an arena made more complex with advancements in technologies; will keep the legal system fair and balanced for all parties; and, will reduce ever-increasing legal costs which threaten to close access to courts to all but the privileged few.

STATEMENT REGARDING SPECIFIC PROPOSED AMENDMENTS

Rule 26(b)(1) – Scope of Discovery

- **The Advisory Committee's proposed amendment to Rule 26(b)(1) would re-define the scope of discovery to be "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…." The amendment deletes the "subject matter involved in the action" from the scope of discovery in order to make clear that discovery is defined by the claims and defenses identified in the pleadings. This change would provide a meaningful improvement compared to the overbroad scope of discovery defined by current Rule 26(b)(1), which is a fundamental cause of the high costs and burdens of modern discovery.**

- **The proposed amendment would also strike the well-known phrase, "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This language has erroneously been used to establish a very broad scope of discovery even though it was intended only to clarify that inadmissible evidence such as hearsay could still be within the scope of discovery so long as it is relevant (a principle the proposed amendment preserves). The proposed change would affect substantial reductions in the expenditure of resources in responding to unwarranted and irrelevant discovery**

- **Moving the current proportionality language from Rule 26(b)(2)(C)(iii) into Rule 26(b)(1) is a modest edit, but if adopted, it would have the important effect of encouraging judges and parties alike to maintain a pragmatic perspective on what discovery should mean to each individual case. Such a pragmatic perspective will assist practioners in planning for and budgeting the discovery obligations of their clients.**

- **One factor that could prevent the amendment from fulfilling its potential is the historically broad notions of discovery and relevance. The Advisory Committee could help avoid that risk by adding a materiality requirement to the scope of discovery, defining it as "any non-privileged matter that is relevant *and material* to any party's claim or defense…." Such a materiality standard would strengthen Rule 26(b)(1) while still ensuring that parties can obtain the information they need to bring or defend against any claim. A materiality standard would provide a clearer standard for trial courts that might otherwise fail to appreciate the intent of amended Rule 26(b)(1), and the added standard will provide practioners more guidance in advising their clients in the area of information preservation.**

Rule 37(e) – Failure to Preserve Discoverable Information

The new proposed Rule 37(e) "seeks to rectify the conundrum that parties face with the potential of litigation in various jurisdictions that have established divergent standards for preservation and the imposition of sanctions."[1]

[1] Tony Lathrop, *Proposed Amendments to Federal Rules of Civil Procedure Include Limitations on Discovery and Spoliation Sanctions, Published for Comment until February 2014*, August 30, 2013, http://blogs.mvalaw.com/litigationlaw-blog/2013/08/30/ proposed-amendments-to-federal-rules-of-civil-procedure-include-limitations-on-discovery-and-spoliation-sanctions-published-for-comment-until-february-2014/html.

The Advisory Committee posed five specific questions regarding the Rule 37(e) revisions for comment:

1. **Should the rule be limited to sanctions for loss of electronically stored information?**

2. **Should Rule 37(b)(1)(B)(ii) be retained in the rule?**

3. **Should the provisions of current Rule 37(e) be retained in the rule?**

4. **Should there be an additional definition of "substantial prejudice" under Rule 37(e)(1)(B)(i)?**

5. **Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)? If so, what should be included in that definition?**

The IADC's position:

- **The proposed new Rule 37(e) would prohibit sanctions for failure to preserve discoverable information unless the failure was "willful or in bad faith" and causes "substantial prejudice." This proposal holds great promise to establish a much-needed uniform national standard that would curtail costly over-preservation and ancillary litigation over allegations of spoliation. It establishes a national standard for the imposition of sanctions that would eliminate a court's ability to impose sanctions under a court's "inherent authority" or state law. This amendment should provide practioners with added security when advising clients on discovery issues. Unlike the current Rule 37(e), the proposed rule applies to all discoverable information and would not be limited to electronically stored information.**

- **It is noted that an exception contained in subsection (1)(B)(ii) could be problematic and allow courts to impose sanctions absent any willfulness or bad faith where the loss of information "irreparably deprives" a party of any ability to present or defend the action. Although the Advisory Committee intends for the exception to apply in only the very rarest of situations, it is likely that some courts would use the exception to avoid the primary rule. The IADC recommends the exception be removed before the proposal is adopted, or more clarification should be provided for the exception.**

- **The proposed Rule 37(e) would authorize sanctions for "willful *or* in bad faith" conduct, which is problematic because some courts define "willfulness" as intentional or deliberate conduct without any showing of a culpable state of mind. As illustrated by other organizations for an example, the act of establishing a standard auto-delete function could be characterized as "willful" because it is intentional, even if not done in bad faith. This problem could be alleviated by the Advisory Committee substituting the conjunctive "and" for the disjunctive "or" thereby making clear that sanctions apply only to conduct that is both willful *and* in bad faith.**

- **The list of "factors to be considered in assessing a party's conduct" in subsection (2) of the proposed rule, while illuminating and potentially helpful, provides too tempting an opportunity for trial courts of varying judicial temperaments to bend the Rule to achieve their own means instead of providing a bright line rule for litigants to understand and follow with confidence. The IADC recommends the list of factors be deleted or, at most, included in the Committee Note rather than the rule text. None of the factors goes to the central point of the proposed rule, which is the determination of whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice." Rather, the list is largely concerned with "reasonableness" and is an incomplete catalog of issues that is highly unlikely to be useful to lawyers or courts. Even more importantly, there is a high degree of risk that misinterpretation of the various factors could convert them into**

- **The proposed Rule 37(e) needs a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. Currently, wasteful over-preservation is driven by a fear of sanctions, and judicial decisions have imposed great affirmative burdens to preserve all relevant material. The "anticipation of litigation" standard incorporated into the proposed rule requires preservation decisions to be made prior to the receipt of a scope-defining complaint, the appearance of an opposing lawyer with whom to negotiate or the assignment of a judge available to resolve preservation issues. Litigants need a clearer roadmap in this area and some adjustments to the proposal could effectuate substantial savings in litigation costs and promote judicial efficiency. Parties who have been sued need some assurance of their discovery obligations; not for purposes of deceit, but for the opportunity to make sound business decisions, to plan defenses and budget resources, human and monetary, within clearly defined legal boundaries, and perhaps to make settlement decisions earlier rather than later. The IADC recommends the Advisory Committee adopt a clear "commencement of litigation" trigger for when a party must take affirmative preservation steps, balanced with a prohibition against willful and bad faith destruction of material that causes substantial prejudice to a potential adversary. This would yield vast benefits without materially damaging any party's ability to prove or defend against any claim.**

FINAL STATEMENT

The proposed amendments are a major step in alleviating the litigation congestion in our courts caused by repetitive discovery disputes and a lack of clarity in the current Rules. The amendments will modernize the manner in which litigation is managed and conducted in the Federal Courts, and they will provide practioners with a clearer guide upon which they may rely in advising clients, whether plaintiffs or defendants. Also,

the amendments should promote judicial economy and reduce litigation costs. With the clarifications noted in this paper, the IADC supports the amendments proposed to The Federal Rules of Civil Procedure.