

Comment from Vincent LaMonaca, on behalf of QVC, Inc.

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QVC, Inc. (“QVC”) is the world's leading video and ecommerce retailer, offering a curated collection of desirable brands to millions of customers around the globe each day through broadcast, Internet, and mobile sales platforms.

QVC fully supports and endorses the Comment filed by Lawyers for Civil Justice (“LCJ”) on September 3, 2013. The proposed amendment to Rule 26(b)(1), which would narrow the scope of discovery to information that is relevant to the claims and defenses asserted in the parties’ pleadings, would go a long way toward tempering the exorbitant costs of civil litigation. Especially in patent lawsuits in which QVC is one of many corporate defendants, plaintiffs often request a voluminous amount of information that: (1) has virtually no relevance to the asserted claims; (2) is expensive and burdensome to collect and review; and (3) is intended to coerce settlement rather than support their claims. QVC also supports LCJ’s proposal that a “materiality” requirement be added to the rule, such that information would have to be both “relevant” and “material” to an asserted claim or defense in order to be discoverable.

QVC further supports LCJ’s comments on proposed new Rule 37(e), which would adopt a single uniform standard governing preservation of information and sanctions for spoliation. The proposed standard, which would permit sanctions only if the failure to preserve discoverable information is “willful or in bad faith” and caused “substantial prejudice” to the requesting party is an important step in the right direction. However, QVC joins the other commenters in their requests that sanctions apply only to conduct that is both “willful” and “in bad faith” to avoid the likely possibility that a party is sanctioned for conduct that is deliberate yet done without a culpable state of mind. QVC also believes that the proposed exception, which would permit sanctions in any event if the spoliation “irreparably deprives” a party of any ability to present or defend the action, should be removed because it swallows the rule and risks sanctioning parties that act innocently.

Finally, while QVC applauds the Advisory Committee’s attempt in the proposed rule to curb the costly over-preservation of materials that has become the norm among corporations, QVC requests that the proposed new Rule 37(e) also articulate a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. Like many other companies, QVC is forced to preserve far more material than could ever be used at trial or produced in discovery. QVC currently has over 600 email custodians on legal hold, and only a small fraction of this vast amount of information will ever be reviewed, let alone produced in discovery or offered at trial. Clarity is needed on when a party should “anticipate” litigation and begin to preserve potentially discoverable information. QVC supports LCJ’s proposal that the “trigger” should be the commencement of litigation.

QVC thanks the Advisory Committee for its ongoing efforts to improve the federal discovery rules and their practical application to real-life entities.