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# Message To Corporate Counsel From Lawyers For Civil Justice (LCJ): Please Express Your Support For Proposed Rules Governing E-Discovery No Later Than February 15

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LAWYERS FOR CIVIL JUSTICE (LCJ)

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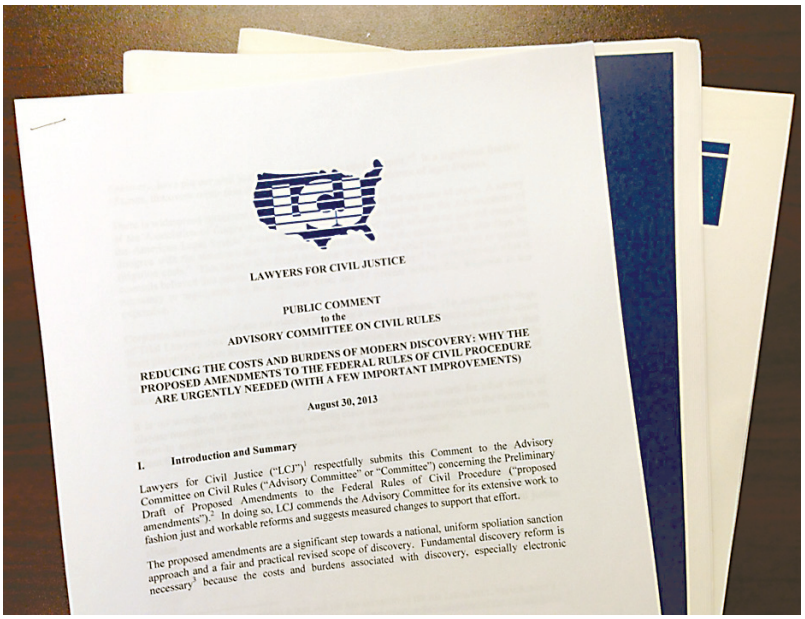
*Editor's Note: Links to underlined references can be found on the version of this article on our website at www.metrocorpcounsel.com.*

On August 15, 2013, the Federal Civil Rules Advisory Committee proposed changes to the Federal Rules of Civil Procedure that promise to substantially decrease the costs and burdens associated with discovery. **February 15** marks the end of the public comment period, and Lawyers for Civil Justice strongly encourages all parties to electronically file a comment in support of the rules, which you can do here or via the U.S. Courts website at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx. LCJ is a national organization of corporate and defense counsel supporting civil justice reform.



LAWYERS FOR CIVIL JUSTICE

PUBLIC COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

REDUCING THE COSTS AND BURDENS OF MODERN DISCOVERY: WHY THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE ARE URGENTLY NEEDED (WITH A FEW IMPORTANT IMPROVEMENTS)

August 30, 2013

I. Introduction and Summary

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Advisory Committee" or "Committee") concerning the Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure ("proposed amendments").[2] In doing so, LCJ commends the Advisory Committee for its extensive work to fashion just and workable reforms and suggests measured changes to support that effort.

The proposed amendments are a significant step towards a national, uniform spoliation sanction approach and a fair and practical revised scope of discovery. Fundamental discovery reform is necessary[3] because the costs and burdens associated with discovery, especially electronic

The two most important rules amendments are a revision to Rule 26(b)(1), which redefines the scope of discovery, and a rewrite of Rule 37(e) to provide for the first time a rules-based standard for imposing sanctions for failure to preserve discoverable information.

For almost six months, the Judicial Conference Advisory Committee on Civil Rules has received input from "all sides" of the bench and bar who have expressed an opinion either by formal comment or by testifying at any of the three hearings which occurred during the six-month period. In its final comment, LCJ, acting on behalf of a broad coalition of corporate and defense counsel, offered a compilation of stunning examples of the current challenges unique to the American system of discovery and how these are impacting corporate health and the economy. LCJ argued that substantial evidence is now before the Committee that shows that American businesses are preserving and producing staggering amounts of information that have no bearing on the merits of their cases. Here are a few highlights:

- Altec Industries spent twice as much on discovery as it did to pay claims in 2012.[1]
- Services Group of America spent $1 million dollars on discovery in cases where legal costs exceeded the amount in controversy and no findings were made against the company.[2]
- Bayer recently produced 2.1 million pages in a case that went to trial for eight weeks, and only 0.04 percent of that information was used at trial.[3]
- At Boston Scientific, one-half of all employees are subject to litigation holds, and preservation has cost $35 million since 2005 -- $5 million of which was spent last year alone.[4]
- ExxonMobil has 5,200 employees subject to litigation holds and estimates that the navigation of those holds requires an average of 10 minutes per day per employee, for a total of 867 hours a day or 327,000 hours a year in lost productivity. An overwhelming amount of that wasted time is for no purpose whatsoever, since only 3.8 percent of preserved data is ever produced,

and only 16 percent of what's produced is processed.[5]

• GlaxoSmithKline's U.S. outside litigation costs have been 50 times higher than its non-U.S. outside litigation costs during the last 10 years, and its preservation burden has increased 316 percent in the last two years. Although 45 percent of its U.S. employees are subject to a litigation hold, that's true for only 12.4 percent of its employees outside the U.S.[6]

• Microsoft has spent $600 million on discovery over the last decade – and that's only for outside counsel, not in-house lawyers. The company preserves an average of 1.3 million pages per custodian, but on average, only one page out of every 600,000 is used in litigation.[7]

• Pfizer was required to spend $40 million to preserve 1.2 million backup tapes for eight years – but never had to retrieve a single document from those tapes.[8]

• Allergan, Inc. noted that it collected over 1M documents in a patent case where it was a plaintiff, produced 391,000 to defendants of which only 0.2 percent ended up as exhibits.[9]

None of these organizations is asking the Committee for protection against liability where it is warranted. Nor, given that they also use the judicial system as plaintiffs to vindicate their rights, "do [they] seek amendments that unfairly impact plaintiffs."[10]

However, corporations are using these examples to urge the Advisory Committee to move forward with its proposed amendments to Rule 26(b)(1), which would redefine the scope of discovery to allow discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…." The proposed amendment deletes the language allowing the court to permit discovery related to "subject matter involved in the action" and also deletes the often misconstrued language "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Importantly, the language includes proportionality into the scope of permissible discovery rather than the current language, which permits assertion of lack of proportionality as a basis to seek protection from discovery. These changes will be a meaningful improvement compared to the overbroad scope of discovery typically permitted under current Rule 26(b)(1), which is a fundamental cause of the high costs and burdens of modern discovery.

The amendment to Rule 26(b)(1) will not only decrease the damaging monetary consequences present under the current rules, but would also increase the global competitiveness of American companies. This theme is increasingly prevalent in the comments and testimonies of general counsel and corporations. In the comment submitted by Bayer Inc., it states that "civil litigation in the United States is disproportionately expensive compared to almost any other jurisdiction in the world...the reason for the unusually high cost of litigation in the United States is almost entirely discovery." Tim Pratt, General Counsel of Boston Scientific and President of the Federation of Defense and Corporate Counsel states that "e-discovery costs, burdens and fear of sanctions drive litigation strategy, settlement decisions, and even the decision whether to litigate in the American court system in the first instance."

In addition, and for the first time, the proposed new Rule 37(e) would require that before a court can impose sanctions for failure to preserve discoverable information, the court must find that the failure was "willful or in bad faith" *and* caused "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.

According to Kaspar Stoffelmayr, Vice President and Associate General Counsel, at Bayer, "The current system virtually guarantees the costly overpreservation of evidence: No clear standards govern when a party should "reasonabl[y] anticipate litigation," triggering an obligation to preserve evidence; the sanctions for a failure to comply with preservation obligations (again, without clear standards) can be severely prejudicial or fatal to a party's ability to prosecute or defend a case, to say nothing of their impact on profession reputations and careers."

However, Rule 37(e) contains two points of serious concern. As stated in Ford Motor Company's comment, "Ford is concerned... that the proposed revision permits sanctions upon a finding of "irreparable deprivation" even in the absence of bad intent" which, as illustrated in LCJ's Briefing Points, is the exception that could "swallow the rule." Furthermore, the language willfulness *or* bad faith should be altered to *and* as elaborated on in Pfizer's comment, "Pfizer could be sanctioned for intentionally destroying information pursuant to an existing document retention policy, even if that policy was implemented in good faith. Because willfulness does not require bad faith, the current wording of the amended Rule appears inconsistent with the intention of the Committee."

In addition to receiving the formal comment of several major corporations, some bar organizations from throughout the United States have also reaffirmed their support for the proposed rule revisions. For example, in comment filed by the New York State Bar Association, it reiterated that it supports the changes because it would "signal strongly that the scope of discovery should be narrowed."[11]

LCJ has compiled numerous resources, including the set of aforementioned Briefing Points which provide additional detail on the proposals which can be accessed via the LCJ website at www.lfcj.com.

With the plaintiffs' bar orchestrating the overwhelming number of submitted comments **in opposition** of the proposed rules (currently approximately 90 percent of the comments are in opposition to the proposed rules), it is vitally important that the corporate community counteract the efforts the plaintiffs' bar has made. Additional resources and model comments in support of the proposals are available on the LCJ website. Comments need not be long (they can even be submitted directly on the website), and LCJ will assist parties interested in participating in our efforts. If you have questions please contact Barry Bauman, Executive Director of LCJ at bbauman@lfcj.com.

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1. See the testimony of Rob Hunter, General Counsel of Altec, Inc., Jan. 9, 2014.
2. Testimony of Steven J. Twist, Vice President and General Counsel, Services Group of America, Inc., Jan. 9, 2014.
3. Testimony of Kaspar Stoffelmayr, Vice President and Associate General Counsel, Bayer Corporation, Jan. 9, 2014.
4. Testimony of Timothy A. Pratt, Executive Vice President, Chief Administrative Officer, General Counsel and Corporate Secretary, Boston Scientific Corporation, Jan. 9, 2014.
5. Testimony of Robert L. Levy, Counsel – Civil Justice Reform and Law Technology, Exxon Mobil Corporation, Nov. 7, 2013.
6. Testimony of Dan Troy, Senior Vice President and General Counsel, GlaxoSmithKline, Nov. 7, 2013.
7. Testimony of David M. Howard, Microsoft Corporation, Jan. 9, 2014.
8. See Pfizer's public comment, available at: http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0327.
9. Allergan, Inc., January 22, 2014.
10. *Id*., at 1.
11. N.Y. State Bar Assn. Comment, October 2, 2013.