

News Release



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FOR IMMEDIATE RELEASE

October 8, 2013

WLF Urges Meaningful Reform Of Federal Discovery Rules

(In re Proposed Amendments to the Federal Rules of Civil Procedure)

The Washington Legal Foundation (WLF) this week urged the Advisory Committee on Civil Rules to move forward with proposed rule changes that would significantly improve the way discovery is conducted in federal civil litigation. In formal comments to the Committee, WLF shared its concerns that requiring litigants to retain and produce vast amounts of discovery without regard to cost skews the outcome of civil litigation by (for all practical purposes) forcing defendants to enter into settlements as a less-expensive alternative to complying with overly broad preservation and production orders. WLF also offered a variety of suggestions for improving the Committee's proposed amendments to the Federal Rules of Civil Procedure.

WLF's comments focused primarily on the Committee's proposed revisions to rules regulating discovery in civil litigation. As WLF explained, the potency of discovery as a leverage weapon has intensified greatly in the past two decades with the explosion of electronic data. The nature of such data, which can be easily and unintentionally deleted, has also given rise to an increase in spoliation claims, where one litigant accuses the other of document destruction and urges the court to sanction the alleged defender. At the same time, as WLF's comments point out, the outside costs of litigation for American businesses over the past decade have steadily increased and are disproportionately higher in the United States than the rest of the world.

"Costs associated with the need to preserve and produce exceedingly vast amounts of material constitute an unnecessary drain on American free enterprise, at a time when American businesses are already impacted by economic hardship," said Senior Litigation Counsel Cory Andrews after filing WLF's comments. "Common-sense revisions to the Federal Rules will go a long way towards reducing these discovery costs and improving federal litigation practice in a way that would benefit all parties," Andrews said.

Among other things, WLF's comments specifically call on the Advisory Committee to:

- Amend proposed Rule 37(e) to eliminate a stated exception that can swallow the Rule; alter the conduct trigger for sanctions from "willful or in bad faith" to "willful **and** in bad faith"; eliminate the list of factors to be assessed when evaluating conduct, or move the list from the Rule to the Committee Note; specify the exact trigger for when parties must preserve documents; and clarify the prejudice standard that judges will use to impose "curative measures" under the Rule.

- Require that under proposed Rule 26(b)(1), the scope of discovery be “any non-privileged matter that is relevant **and material** to any party’s claim or defense.”
- For Rules governing the presumptive numerical limits on discovery devices (depositions, interrogatories, etc.), consider limiting discovery to five “custodians” in the first instance, chosen by the requesting party, and then five more in the second instance; any further discovery would require a showing of good cause.
- Eliminate, as proposed, Rule 84, which provides sample forms such as Form 18 used for patent litigation that elevate antiquated requirements over current Supreme Court precedents on pleading standards. In addition, the Committee should modify the Rule on pleading standards, Rule 8, to acknowledge those recent Court precedents.

WLF filed its comments with the Committee as part of its Civil Justice Reform project. WLF litigates and advocates to restore balance to the nation’s civil justice system and to protect the rights and interests of consumers. WLF works in both the courts and the regulatory agencies to cut down on frivolous lawsuits, oppose overreaching by regulators and plaintiffs’ attorneys, and cut down on litigation abuses generally.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending economic liberty, free enterprise, and a limited and accountable government.

For further information, contact WLF Senior Litigation Counsel Cory Andrews, (202) 588-0302. A copy of WLF’s comments is posted on its web site, www.wlf.org.