

Top Five Steps to Prepare for the Ediscovery-Related Amendments to the Federal Rules of Civil Procedure

By Matthew Gillis & Nadine Weiskopf

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The 2006 amendments to the Federal Rules of Civil Procedure helped establish some best practices, but they didn't anticipate the explosion of electronic evidence and its associated costs and risks (e.g., Facebook had just opened its doors to people other than college students). To address the problems that have arisen, a new set of ediscovery amendments is working its way through the approval process. In this issue of *LitigationWorld*, ediscovery experts and lawyers Matthew Gillis and Nadine Weiskopf discuss what to expect, how to prepare, and the benefits of incorporating their advice now in advance of the new rules.

With states modernizing their civil procedure rules for electronic discovery (ediscovery) and courts continually interpreting the 2006 amendments to the Federal Rules of Civil Procedure (FRCP), litigators and their teams already have enough to worry about.

However, on top of these developments, you also need to prepare for a major set of amendments to FRCP 26 and other rules designed to address areas of concern that have arisen since the 2006 amendments. Virtually everyone agrees that the current rules governing electronically stored information (ESI) have become increasingly problematic amid the explosion of data even in small cases let alone in complex litigation.

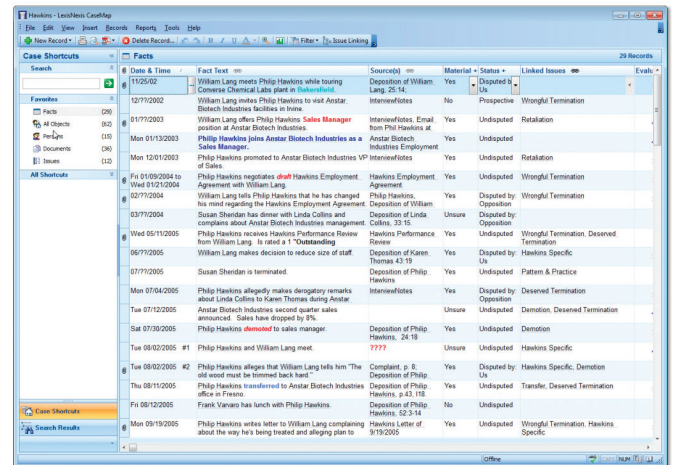
In April 2013, the United States Courts' Advisory Committee on Civil Rules voted to send these proposed

amendments to the Standing Committee on Rules of Practice and Procedure, recommending they be approved for public comment later this year.

In this issue of *LitigationWorld*, we'll discuss five steps to prepare for the amendments, which will likely take effect in 2015. Many state court systems follow the lead of the FRCP so even litigators who practice exclusively in state court should take heed.

1. Get Into a Proportional Mindset
Perhaps the most impactful of the changes will narrow the scope of discovery under Rule 26(b). The key concept that the Committee seeks to introduce is "proportionality" — specifically, that the information sought during discovery is "proportional to the needs of the case." Proportionality is designed to eliminate overly burdensome requests — "fishing

The likely "proportionality" requirements will reward litigators who engage in advanced planning.... Early data analysis technology can help you identify responsive data early in the discovery process.



Date & Time	Fact Text	Source(s)	Material	Status	Linked Issues	Eval.
12/02/02	William Lang meets Philip Hawkins while touring Comensa Chemical Labs plant in Tukwila/Wash.	Deposition of William Lang, 25-14	Yes	Disputed	Us	
01/27/2003	William Lang invites Philip Hawkins to visit Anstar Biotech Industries facilities in Irvine	Interview/Notes	No	Prospective	Wrongful Termination	
01/27/2003	William Lang offers Philip Hawkins Sales Manager position at Anstar Biotech Industries	Interview/Notes, Email from Phil Hawkins at Anstar Biotech Industries	Yes	Undisputed	Retaliation	
Mon 01/13/2003	Philip Hawkins joins Anstar Biotech Industries as a Sales Manager	Interview/Notes	Yes	Undisputed	Wrongful Termination	
Mon 12/01/2003	Philip Hawkins promoted to Anstar Biotech Industries VP of Sales	Interview/Notes	Yes	Undisputed	Retaliation	
Fri 01/09/2004 to Wed 01/21/2004	Philip Hawkins negotiates and signs Hawkins Employment Agreement with William Lang	Hawkins Employment Agreement, Deposition of William Lang	Yes	Undisputed	Wrongful Termination	
02/17/2004	William Lang tells Philip Hawkins that he has changed his mind regarding the Hawkins Employment Agreement	Philip Hawkins, Deposition of William Lang	Yes	Disputed by Opposition	Wrongful Termination	
03/17/2004	Susan Sheridan has dinner with Linda Collins and complains about Anstar Biotech Industries management	Deposition of Linda Collins, 33-15	Unsure	Disputed by Opposition		
Wed 05/19/2005	Philip Hawkins receives Hawkins Performance Review from William Lang. It is rated a 1 "Outstanding"	Hawkins Performance Review	Yes	Undisputed	Wrongful Termination, Deserved Termination	
06/17/2005	William Lang makes decision to reduce size of staff	Deposition of Karen Thomas, 43-10	Yes	Disputed by Us	Hawkins Specific	
07/17/2005	Susan Sheridan is terminated	Deposition of Philip Hawkins	Yes	Undisputed	Pattern & Practice	
Mon 01/04/2005	Philip Hawkins allegedly makes derogatory remarks about Linda Collins to Karen Thomas during Anstar	Interview/Notes	Yes	Disputed by Opposition	Deserved Termination	
Tue 07/12/2005	Anstar Biotech Industries second quarter sales announced. Sales have dropped by 9%	Unsure	Unsure	Undisputed	Demotion, Deserved Termination	
Sat 07/30/2005	Philip Hawkins demoted to sales manager	Deposition of Philip Hawkins, 24-18	Yes	Undisputed	Demotion	
Tue 08/02/2005 #1	Philip Hawkins and William Lang meet	????	Unsure	Undisputed	Hawkins Specific	
Tue 08/02/2005 #2	Philip Hawkins alleges that William Lang tells him "The old word must be trimmed back here"	Complaint, p. 8, Deposition of Philip Hawkins, p. 43, 118	Yes	Disputed by Us	Hawkins Specific, Demotion	
Thu 08/11/2005	Philip Hawkins transferred to Anstar Biotech Industries office in Fresno	Deposition of Philip Hawkins, p. 43, 118	Yes	Undisputed	Transfer, Deserved Termination	
Fri 08/12/2005	Frank Varano has lunch with Philip Hawkins	Deposition of Philip Hawkins, 62-1-14	No	Undisputed		
Mon 09/19/2005	Philip Hawkins writes letter to William Lang complaining about the way he's being treated and stating plan to	Hawkins Letter of 9/19/2005	Yes	Undisputed	Wrongful Termination, Hawkins Specific	

CaseMap case analysis software can help streamline discovery.

expeditions" — which can cause a party with limited resources to throw in the towel.

The proposed amendments also seek to undo the increase in discovery scope that resulted in 2000 when Rule 26 was amended to allow courts to extend discovery to "any matter relevant to the subject matter involved in the action." The Committee believes this was too broad an expansion of discovery, and now seeks to tighten this litmus test ("many lawyers and judges read the 'reasonably calculated' phrase to obliterate all limits of the scope of discovery").

Accordingly, courts will have less ability to order discovery not immediately relevant, which means you should begin thinking about how to obtain the evidence you need within these proposed constraints.

2. Use Early Data Analysis Technology

The likely "proportionality" requi-

rements will reward litigators who engage in advanced planning. Software can make this task easier. As its name implies, early data analysis technology can help you identify responsive data early in the discovery process.

Even if sanctions become less of a black box, your best bet is to eliminate any risk whatsoever. This is an additional benefit of using early data analysis tools.

These new tools save time and minimize the risk of missing potentially important evidence since you may not get a second chance. Furthermore, it never hurts to learn about both helpful and unhelpful evidence as early as possible so that you can prepare for how to handle it long before your adversary gets hold of it.

As discussed in greater detail below, the Committee has also proposed amendments to Rule 37(e) to make sanctions for spoliation more transparent and uniform. However, even if sanctions become less of a black box, your best bet is to eliminate any risk whatsoever. This is an additional benefit of using early data analysis tools.

3. Send Fewer Discovery Requests

As noted above, the proposed amendments greatly limit the number of discovery requests a party can make. For example, interrogatories will be reduced from 25 to 15, requests for admissions will be limited to 25 (exclusive of requests to admit to the genuineness of documents), depositions will be reduced from 10 to five and their length

reduced from seven to six hours. Of course, any of these limits may be increased by the court or stipulation of the parties.

This reduction in discovery requests encourages parties to think through the issues in their case before crafting discovery requests, hopefully resulting in more thoughtful and targeted requests. Rather than waiting until a case is well underway, use case analysis, chronology, and timeline software at the outset before discovery commences to better understand the key claims, issues, parties, and likely non-party witnesses. Ideally, this software should integrate with your early data analysis software.

4. Use the Rule 26(f) Conference More Effectively

Under the proposed amendments, you can issue discovery requests before the parties' Rule 26(f) "meet and confer" conference. The Committee believes most parties aren't aware of the current moratorium against serving discovery requests before the Rule 26(f) conference. More importantly, its view is that the Rule 26(f) and scheduling conference with the court will become more effective if the parties can "focus on actual discovery requests."

With this pending change in the works, it may prove wise to consider serving your discovery requests before the Rule 26(f) conference, and then use the conference to focus on the content of your requests more effectively. As an added bonus, honing your discovery requests will better enable you to comply with the proportionality requirements and reduction in discovery requests discussed above.

5. Advise Your Clients That the Path to Avoid Spoliation Sanctions Will Become Easier

Arguably most anticipated amendment is to Rule 37(e), which

concerns sanctions for failure to preserve discoverable information. That's because a significant disparity currently exists among courts as to the level of culpability required to justify sanctions for spoliation — and litigants have paid the price, often incurring unreasonable costs to preserve ESI as a defensive measure.

Addressing the reasonableness of preservation costs incurred by litigants to protect against spoliation claims, the Committee writes, "The amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts."

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Under the new rules, the offending party must act with willfulness or bad faith and the opposing party must be "irreparably deprived" of "any meaningful opportunity." However, under proposed Rule 37(e)(1)(B)(ii) the court could impose sanctions for negligence for "fault in the loss of the information" if "that loss of information deprived a party of any meaningful opportunity to present or defend against the claims in the action." The aggrieved party

must demonstrate the “substantial prejudice” required for sanctions under proposed Rule 37(e)(1)(B)(i).

Not all sanctions are created equal. The proposed amendments discourage severe sanctions, instead encouraging courts to impose lesser penalties such as ordering the production of not reasonably accessible data or production of data that falls outside the new proportionality rule. This should reduce the tension both corporate and outside counsel currently feel regarding the risks of spoliation charges.

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Anticipating a high level of public interest in the proposed amendments, the Committee plans to hold several days of public hearings in different cities around the U.S. before any of its proposals move forward. However, it seems inevitable that the proposed amendments to Rule 26 will narrow the scope of ediscovery along the lines discussed in this article.

By preparing now, you won’t have to turn on a dime later — and your clients will appreciate the improved efficiency with which you manage

their cases thanks to improved workflows fueled by state-of-the-art litigation technologies.



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Nadine Weiskopf is an attorney who has worked at LexisNexis since 2006. She currently serves as Director of Product Management. In this position, she develops and executes strategy and go-to-market plans for several of the company’s web, software and service product lines. Before joining LexisNexis, Nadine was an associate at various law firms, specializing in all aspects of complex litigation in state and federal courts. An expert on ediscovery, Nadine is a sought-after conference speaker, and has written about ediscovery for several publications. Nadine is a member of the California and Washington State Bars.

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