
State Farm
Corporate Headquarters
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Bloomington, IL 61710-0001

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Proposed Amendments to the Federal Rules of Civil Procedure

Dear Judicial Conference Advisory Committee on the Civil Rules:

State Farm commends the Advisory Committee for its work on these Proposed Amendments and appreciates the opportunity to comment.

I. Introduction and Summary

State Farm strongly supports the position of Lawyers for Civil Justice (“LCJ”) as articulated in its February 3, 2014 Supplemental Submission and in its original submission of August 31, 2013. State Farm’s experience is that current discovery practices too often result in wasteful defensive preservation of information that does little, if anything, to advance the litigation to a conclusion based upon the merits. Implementation of the Proposed Amendments to the Federal Rules of Civil Procedure, as modified in the LCJ’s Supplemental Submission, will reduce the cost and burden of litigation and still preserve the ability of litigants to fully and fairly litigate their disputes.

II. Background on State Farm

State Farm has been an active participant in civil justice reform conversations for years, including participation in the Duke Conference and the Sedona Conference. State Farm is also an active participant in civil litigation across this country, both as a plaintiff and a defendant. While the current debate over the Proposed Amendments often is framed as one that is strictly polarized along party lines (Plaintiffs’ versus Defendants’), our experience tells us that the focus should be upon what information is truly needed in order to resolve each and every case on its merits. State Farm faces the same burdens of defensive preservation of information, excessive discovery requests and over production of information regardless of whether it is the plaintiff or defendant. We offer

the following as examples of the burdens created by modern discovery practices and the need for meaningful reform.

A. Excessive Discovery

Information that is preserved, and even the small percentage of the preserved information that is later produced in discovery, is often never used.

In a recent wage and hour collective and class action, plaintiffs requested that State Farm search the email of its managers for emails regarding employees' right to opt-in to the collective action. The request was prompted by the low percentage of employees who elected to opt-in to the collective action. State Farm's objections were overruled and the mailboxes of approximately 4,700 management employees were searched. More than 23,000,000 *potentially relevant* files consisting of more than 550 gigabytes of information (the equivalent of 40 million pages) were identified. State Farm hired an outside vendor who used predictive coding to conduct the search and the search yielded approximately 500 emails that met the Court's criteria. These emails did not substantiate the plaintiffs' suspicions that State Farm improperly communicated with its employees and none of the emails was ever used in a subsequent hearing or briefing.

There is no value to the judicial system in forcing corporations, like State Farm, to engage in fishing expeditions that are justified by the language of the current civil rules and the cases interpreting those rules.

B. Over Production/Proportionality

In State Farm's experience, the Court rarely injects the concept of proportionality in the discovery process and even more rarely considers it in the early stages of discovery.

In a recently concluded matter in which State Farm was the Plaintiff in a case brought to combat alleged fraud in the delivery of medical care, the court initially permitted the defendants to conduct, over State Farm's objections, expansive discovery directed to State Farm. Later, after recognizing the extent to which the requests created unreasonable burdens and produced unnecessary information, the Court modified its rulings to permit phased, interim discovery. The phased, interim discovery plan called for State Farm to first produce a sample of responsive information so that the defendants could determine whether the information was necessary to their defense before the Court would require an exhaustive production of all responsive documents.

Earlier recognition and enforcement of the concept of proportionality by the Court would have avoided the needless burden and expense of complying with initial overbroad discovery requests, in our opinion.

III. Rule 37(e): Preservation and Sanctions

State Farm supports a new preservation rule but believes the Proposed Amendment to Rule 37(e) must be improved if it is to be effective and practical. State Farm prefers a sanction rule with an intentional culpability standard.

The proposed Rule 37(e) standard for the imposition of sanctions is substantial prejudice and conduct that is “willful or in bad faith” (emphasis added). The meaning of “willful” is uncertain and it does not provide State Farm or any other party with a single standard by which it can govern itself. The risk that mere negligent conduct, without culpable intent, could serve as a basis for sanctions is not hypothetical, as demonstrated in the recent *Sekisui v. Hart*, 945 F. Supp.2d 494 (S.D.N.Y. 2013) decision that stated,

“The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently.”

The Proposed Rule does not provide State Farm, or any other large holder of electronically stored information, with enough certainty to permit it to consider altering its current preservation practices. We are not suggesting, however, that if the rule were written to require conduct that is willful *and* in bad faith, that State Farm would immediately cease its defensive preservation of electronically stored information. Rather, as noted above, a change that focuses on bad faith *and* willfulness would enable us to undertake a good faith analysis of options to reduce over-preservation without fear of being second-guessed by tort-based standards that are inappropriate.

IV. Rule 26(b)(1): Scope of Discovery/Proportionality

Although proportionality is not a new concept and it is already found in Rule 26(b)(2)(C)(iii), the implementation of proportionality is not invoked often enough or early enough, in our experience, to avoid the unnecessary burden and expense of overbroad discovery requests. In the example in which State Farm was the plaintiff, the Court eventually implemented a more measured approach to compliance, but that was only after substantial time and money had been spent producing information that had little, if any, utility to the defendants. Moving the proportionality consideration to Rule 26(b)(1) will force requesting and responding parties to address proportionality at the outset of discovery and will aid the Court in shaping a discovery plan that achieves the objective of permitting the parties a full and fair opportunity to litigate their case on its merits, rather than letting the cost of complying with disproportionate discovery become a weapon that drives the resolution of the cases. We also believe that Advisory Committee’s other proposed changes to Rule 26(b) are warranted and support their adoption without reservation.

V. Conclusion

State Farm is grateful to the Advisory Committee for proposing amendments that thoughtfully address the unfortunate realities of modern discovery practice in the information age. Your work, with modest revisions supported by State Farm and Lawyers for Civil Justice, will restore balance in our civil justice system and confidence that our courts are capable of letting the parties, large and small, litigate their disputes on their merits.

Very truly yours,

A handwritten signature in cursive script that reads "Robert H. Shultz, Jr." followed by a period.

Robert H. Shultz, Jr.
Vice President-Counsel