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October 10, 2013

Honorable Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Suite 7-240
Washington, DC, 20544

Re: **Proposed Changes to the Federal Rules of Civil Procedure**

Dear Judge Sutton:

On behalf of the American Health Information Management Association (AHIMA), I am pleased to comment on the proposed changes to the Federal Rules of Civil Procedure (FRCP) currently under consideration by the Civil Rules Advisory Committee.

AHIMA is the national non-profit association of health information management (HIM) professionals. AHIMA has state associations in all 50 states including the District of Columbia and Puerto Rico. There are more than 67,000 members nationally who are dedicated to effective health information management. HIM professionals work for more than 40 different employer types in 120 different job functions, including hospitals, physician offices, long term care organizations, clinics, health information technology vendors and developers, consulting firms, life science companies, and government and education systems. AHIMA's members can be found in numerous and diverse roles with a wide range of responsibilities. Individual members are hospital administrators; deans of universities; lawyers; privacy and compliance officers; government officials; coders and data analysts; and consultants and industry professionals.

Our members typically manage electronic health record (EHR) systems and oversee increasingly complex and vital health information management principles and processes in various care delivery settings. AHIMA and its members help assure quality, cost effective, and efficient health and healthcare through data and information governance and stewardship. As the custodians of healthcare organizations' health records (whether paper or electronic) and leaders in the effective management of health information, AHIMA members play a key role in e-discovery.

Today's US healthcare delivery system is facing unprecedented changes, which are propelled by federal initiatives that we believe will foster an increase in the number of e-discovery requests. These

changes include the widespread adoption of EHR systems[1] and the establishment of the Nationwide Health Information Network Exchange[2], a public and private partnership aimed toward increasing health information exchange (HIE) innovation and the secure transfer of health information.

The American Recovery and Reinvestment Act (ARRA), Patient Protection and Affordable Care Act (PPACA), Health Insurance Portability and Accountability Act (HIPAA), Health Information Technology for Clinical and Economic Clinical Health (HITECH), American Health Benefit Exchange (AHBE), and the December 2010 report from the President's Council of Advisors on Science and Technology (PCAST), "Realizing the Full Potential of Health Information Technology to Improve Healthcare for Americans: The Path Forward[3]," are all converging and overlapping with the FRCP to create an entangled environment ripe for e-discovery requests. ARRA and PPACA call on providers to leverage EHR systems for improved outcomes, while PCAST's report encourages an increased exchange of those records. Together, these laws, rules and recommendations will work collectively to establish the regulations that govern the privacy, security, and legal standing of electronic health information and HIEs.

Although there has been rapid growth in the installation of EHR systems, information and data governance and e-discovery in healthcare are still in the early stages. The healthcare industry is still primarily focused on the implementation of EHRs and their use in providing clinical care, rather than establishing new systems, processes, and policies to respond to litigation and regulatory investigations.

The discussion below focuses on proposed FRCP amendments that are of specific relevance and interest to our members. While AHIMA supports the proposed FRCP amendments, we offer the following additional comments and suggestions for consideration.

I. FRCP Rule 16(b)(3) and FRCP Rule 16(b)(3)(v): Pretrial Conferences; Scheduling; Management – Scheduling

AHIMA believes that the perception held by many individuals today that the "the early stages of litigation often take far too long"[i] is an accurate one, based upon our members' experiences with litigation and regulatory investigations.

To improve the case management process and reduce litigation costs in the future while helping to ensure all potentially relevant information involving healthcare litigation or regulatory investigations is preserved, AHIMA recommends that the court ensure that qualified and credentialed HIM professionals are actively involved early on in any/all matters involving healthcare litigation or regulatory investigations. The purpose of this approach is to assist the court and parties in ensuring that litigation is just and speedy and all forms, formats, and locations of information are preserved.

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[1] http://www.healthit.gov/

[2] http://www.healthit.gov/policy-researchers-implementers/nationwide-health-information-network-nwhin

[3] http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-health-it-report.pdf

II. FRCP Rule 26(f)(3)(C): Conference of the Parties; Planning for Discovery

The proposed amendment to FRCP 26(f)(3)(C) requires that beyond the current requirement that the parties meet and establish their discovery plan, parties must also be prepared to discuss "any issues about disclosure, or discovery, or preservation of electronically stored information, including the form or forms in which it should be produced."[ii]

AHIMA supports this proposed amendment, as it is reasonable and prudent in the context of healthcare litigation. The 26(f) Conference is critically important and should not only involve legal counsel but also a qualified and credentialed HIM professional who can assist in development and establishment of the discovery plan as well as address early on in the litigation process or in a regulatory investigation any matters related to establishment of legal holds and the preservation of relevant information.

III. FRCP 37(e): Failure to Preserve Discoverable Information

The proposed amendments to Rule 37(e) will limit imposition of sanctions and adverse inferences for the spoliation of evidence when the moving party can show that the responding party's acts to destroy evidence based upon the circumstances if the court finds that the party's actions: "(i) caused substantial prejudice in the litigation and were willful or in bad faith; or (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation."[iii]

While AHIMA applauds the Committee's efforts to establish uniform guidelines across federal courts and apply them to all discoverable information (not just electronically stored information), we are concerned that the proposed amendments to Rule 37(e) will not resolve the issues surrounding divergent preservation standards and the perceived need for "over preservation." Provisions of the proposed amendments to Rule 37(e) are still subject to considerable interpretation, thereby bringing into question whether these amendments will achieve the goal of uniformity. For example, the lack of definitions for "willful," "bad faith," and "substantial prejudice" may cause variable interpretations of these terms by the courts. AHIMA suggests that the Committee may wish to consider further clarification and definition of these terms as part of the amendments.

AHIMA is also concerned that the proposed amendments to Rule 37(e) shift the burden to prove the need for missing information to an innocent party, therefore begging the question, "How can (or should) a moving party prove the necessity of information that no longer exists?" In *Sekisui American Corporation v. Hart* (S.D.N.Y. August 15, 2013) Judge Shira Scheindlin stated:

"To shift the burden to the innocent party to describe or produce what has been lost as a result of the opposing party's willful or grossly negligent conduct is inappropriate because it incentivizes bad behavior on the part of would-be spoliators. That is it would allow parties who have destroyed evidence to profit from that destruction."

For all of the reasons noted above, AHIMA recommends that the Committee retain the principle of uniformity, but further modify the proposed amendments to minimize the potential for differing interpretations by the courts and to avoid shifting the burden of proof to innocent parties. If the

proposed amendments are adopted in their current form, we request that explanatory comments be provided.

Conclusion

AHIMA notes that in the context of the healthcare industry and the discovery of electronically stored information needed for litigation, a regulatory investigation or an administrative proceeding, the electronic and/or paper medical record alone will not provide the whole story as to what happened in a case. Medical malpractice cases are very complex litigation matters and will become even more so as the unintended consequences[4] related to the widespread adoption of EHRs and establishment of our nation's new health information infrastructure increase.

As both the Advisory and Standing Committees works now to define and establish new FRCP rules that will have an important impact our nation's health information infrastructure of tomorrow, it is important that the FRCP rules be designed and established in such a way to achieve the following two goals:

- To make a positive difference in the lives of all Americans by helping to ensure every American is granted fair and equal access to the justice system;
- To assist in helping to "secure the just, speeding and inexpensive determination of every action and proceeding."[iv]

AHIMA thanks you for the opportunity to provide comments. If we can provide any further information, or if there are any questions regarding our feedback, please feel free to contact me or Meryl Bloomrosen, Vice President, Thought Leadership, Practice Excellence, and Public Policy at Meryl.bloomrosen@ahima.org. Please let us know if we can be of further assistance to you in your efforts.

Sincerely,

Lynne Thomas Gordon, MBA, RHIA, FACHE, CAE
CEO, AHIMA

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[4] See: ***Genesis Burkett vs. Advocate Lutheran Medical Center***: One year to the day the lawsuit was filed, Advocate Lutheran General in Park Ridge, IL agreed to pay $8.25 million in the wrongful death of baby Genesis Burkett who was born prematurely at this facility in September 2010. The unintended consequences related to EHR adoption and possible causes that contributed to this infant's death include the activation of automated alerts on the IV compounding machine (which were not activated at the time baby Burkett was hospitalized), as well as a communication gaps between the hospital's electronic ordering system and the machine that prepared his IV fluids.

Notes

i Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 261 (August 2013). http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf .

ii Duke Rules Package: Proposed Amendments to Federal Rules of Civil Procedure, accessed 9/30/13 http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf Page 295.

iii Duke Rules Package: Proposed Amendments to Federal Rules of Civil Procedure, accessed 9/30/13 http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf Page 315.

iv FRCP 1 – Cornell University Law School, Federal Rules of Civil Procedure, accessed 9/29/13 http://www.law.cornell.edu/rules/frcp/rule_1.