



February 4, 2014

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

Dear Honorable Committee Members:

I write to express the Arizona Chamber of Commerce and Industry's support for the proposed changes to Rule 26(b)(1) and 37(e), concerning the scope of discovery and sanctions for failure to preserve discoverable information.

The Arizona Chamber of Commerce and Industry is a nonpartisan, nonprofit organization that is the leading statewide advocate for the Arizona business community. Our diverse membership employs 250,000 Arizonans in all business sectors from manufacturing to services and includes small, medium, and large employers. We are committed to advancing Arizona's competitive position in the global economy by advocating free-market policies that stimulate economic growth, and protecting businesses from unnecessary and cumbersome legal and regulatory burdens.

Among these are the rapidly increasing costs of litigation. A recent survey by the Lawyers for Civil Justice, the Civil Justice Reform Group and the U.S. Chamber Institute for Legal Reform found that, "the average outside litigation cost per respondent was nearly \$115 million in 2008, up 73 percent from \$66 million in 2000."<sup>1</sup> The impact of these costs frequently results in "unjust" outcomes, where claims are settled based on a business decision to contain costs, rather than on the merits of the claim.

The primary driver of these excessive costs is the broad scope of discovery. Under the current rule, vast information is discoverable and yet, "[t]he ratio of pages discovered to pages entered as exhibits is as high as 1000/1."<sup>2</sup> It appears that "whatever marginal utility may exist in undertaking such broad discovery pales in light of the costs."<sup>3</sup> The proposed changes to Rule 26(b)(1) address this concern by establishing a narrower scope of discovery focused strictly on the claims and defenses of the case, instead of any information that might lead to the discovery of admissible evidence.

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<sup>1</sup> LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES at 2 (2010), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf>.

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.*

Another component of this rapid increase in cost is the lack of a clear national standard to prohibit sanctions for loss of information unless that failure was in bad faith. Corporations currently spend an enormous amount of resources preserving every conceivable record out of fear of potential spoliation sanctions. By permitting these only where willful conduct was carried out, the Committee's recommended changes to rule 37(e) allows companies some certainty as they balance protecting themselves from litigation with addressing the needs of the market they serve. We urge the committee to further strengthen this protection by limiting spoliation sanctions only where conduct was committed in "bad faith."

As a percent of revenue, multi-national companies report spending a disproportionate amount on litigation in the United States relative to their expenditures in foreign jurisdictions.<sup>4</sup> Depending on the year, relative U.S. costs were between four and nine times higher than non-U.S. costs.<sup>5</sup> As we work to make Arizona businesses more competitive in an increasingly global economy, it is critical that we reduce the cost of doing business in the United States by tightening the scope of discovery and clarifying that only companies who act in bad faith may be punished for discarding information.

Therefore, on behalf of Arizona businesses, I respectfully request the Committee adopt the proposed changes to Rule 26(b)(1) and 37(e).

Respectfully,

A handwritten signature in black ink, appearing to read "Glenn Hamer". The signature is stylized and somewhat cursive, with a large loop at the beginning and a long tail extending to the left.

Glenn Hamer  
President and CEO

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<sup>4</sup> LITIGATION COST SURVEY OF MAJOR COMPANIES at 2.

<sup>5</sup> *Id.*