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Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
Suite 7-240  
Washington, D.C. 20544

Re: Comment to Proposed Change to Rule 37 of the Federal Rule of Civil Procedure Related to  
Electronic Discovery

To the Committee:

I am General Counsel for BlueCross BlueShield of Tennessee, Inc. ("BCBST"), including legal oversight of its subsidiaries. In my role, I am ultimately responsible for litigation against the enterprise and the costs associated with that litigation. The discovery rules and the duty to maintain information due to litigation that is pending or has been filed can be incredibly expensive in light of all the information stored in various mediums throughout the company.

In past litigation, BCBST has incurred substantial costs producing data that was never used by opposing counsel. In a particularly large class action case, while BCBST believed it had done nothing wrong, we chose to settle the case for millions of dollars because the settlement amount was significantly less than the expected costs of retaining and producing information for the case. Practically speaking, BCBST was deprived of its day in court due to the extreme costs of discovery.

The proposed changes to the Rules of Civil Procedure are a significant step forward in addressing the problem faced by companies that are attempting to defend a case from the extreme costs of unnecessary retention or production of information. The proposed rules apply a balancing test by the court that takes into account the need to preserve or produce large volumes of information in a company.

These changes are helpful in providing certainty regarding preservation obligations. However, I believe there could be some confusion in the application of the new rule. Therefore, I urge the committee to consider the following two edits to the proposed rule: 1. Substitute the word "and" in place of the word "or" in 37(e)(1)(B)(i); and 2. Delete the irreparably deprived exception as it has the possibility to undermine the intent of the amendment, depending on how it is interpreted by courts.

I appreciate the efforts of this Committee and fully support the adoption of the proposed changes, and would suggest the change recommended above.

Yours very truly,

Tony Hullender  
Senior Vice President and  
General Counsel