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Committee on Rules of Practice and
Procedure
Administrative Office of the U.S. Courts
One Columbus Cir., NE, Ste. 7-240
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Civil Procedure
Docket ID: USC-RULES-CV-2013-0002

Ladies/Gentlemen:

I am writing to comment on the proposed amendments to the Federal Rules of Civil Procedure. In summary, my position is:

- I support most of the revisions to Rule 37, with the exception of the sanctions and anticipation of litigation provisions. While well-intended, those provisions as now drafted open the door for additional collateral motion practice and contain an exception which could swallow the rule.

- I support the revisions to Rule 26, but believe they do not go far enough.

- I oppose the revisions to Rule 1. In my experience, Rule 1 is used mostly by District Judges to justify the imposition of arbitrary, burdensome or petty obligations on counsel. If anything, Rule 1 should be clarified to make clear that it is not authorization for Judges to impose arbitrary obligations on parties and counsel.

- I support the revisions to Rules 30, 31, 33 and 36.

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I've been handling civil cases in federal court for the past 30 years, starting as an admiralty lawyer and gradually transitioning into a practice that primarily involves insurance coverage disputes on behalf of insurers. During that time, I've been lead trial counsel in a number of federal matters, both as a plaintiff and a defendant. I'm admitted and practice regularly in two states, which between them contain five different judicial districts and have handled matters pro hac vice in several other states, generally in federal court.

As a general rule, I don't ask for sanctions before any court, state or federal unless no other remedy is available. I find my clients' interests are better advanced by addressing cases on their merits, not allowing them to degenerate into a finger pointing battle between counsel. While I applaud many of the proposed changes, I fear that several of them will give attorneys an incentive to bring sanctions motions and to engage in greater finger pointing, to the detriment of deciding matters on their substantive merits.

1. Concerns Regarding Rule 37

My first concern about Rule 37 is the exception to the safe harbor provision under which sanctions could be awarded where the loss of information "irreparably deprives" a party of the ability to present or defend the action. While it's well intentioned, this is an invitation to sanctions motions, only with a focus on the consequences of what may be unintentional and good faith conduct. Just as damages don't prove liability, the irreparable loss of evidence should not convert otherwise unsanctionable acts or omissions into sanctionable ones.

As attorneys, we are advocates for our clients. That leads all of us, on both sides of the "v." to use the tools given us under the rules. If there is an irreparable deprivation exception to the safe harbor provisions of Rule 37, lawyers will use it, and not as the Advisory Committee may contemplate. It takes but one published decision expanding the scope of the irreparable deprivation exception to encourage yet more sanctions motions and more litigation of collateral issues, instead of litigating disputes on their merits.

My second concern about the proposed amendments to Rule 37 turns on the use of the disjunctive "or" in the phrase "willful or bad faith conduct." Conduct can often be willful without there being any intent to cause the resulting harm, or even any situation in which the actor could reasonably foresee the resulting harm. Conduct which is willful *and* in bad faith should not be tolerated. Good faith conduct that is "willful" in a strict meaning of the term, should not be sanctionable.

Finally, I deal routinely with litigation holds. My clients don't knowingly destroy relevant evidence and I will not counsel them to do so. But often, the advent of litigation is foreseen far earlier well down the corporate organizational structure than it may be at the level where the individuals with the training, background and authority to initiate litigation holds are located. The amount of data created, received and retained by corporate America grows exponentially every year. Storing all of that data for years and years is prohibitively expensive. Corporate America needs to have the freedom to exercise prudence once the need to retain and preserve data is known to those who have the authority and power to preserve it. Unfortunately, the "anticipation of litigation" standard is subjective and fails to recognize fundamental traits of human nature: humans are slow to recognize we may have erred, humans react slowly to unforeseen events, and humans do not like to deliver bad news to our bosses. For these reasons, I urge you to replace the "anticipation with litigation" standard with a two part either/or standard under which the duty to preserve evidence begins when notice of the suit is received, or when the party receives a written request from the other party to preserve relevant information.

2. Concerns Regarding Rule 26

The proposed amendments to Rule 26 do not go far enough. It could be improved substantially by adding a materiality component to the definition of what is and is not discoverable. Evidence which is immaterial should not be discoverable. While I recognize that materiality is traditionally an element of relevance, that's not how far too many courts interpret it.

3. Rule 1 is Bad Enough As Is; You Don't Need to Make it Worse

My reaction to seeing a Judge cite Rule 1 is very similar to how I feel when confronted by a sales professional – I grab on tight to my wallet and reach for analgesics. In my experience, the Judges who cite Rule 1 do so to justify some unfair personal modification to the generally understood mores of practice in a particular district. I have seen Judges who use it to justify deadlines that ignore the practical realities of multiparty litigation (such as the exponential increase in difficulty of scheduling anything requiring a personal appearance by counsel that results from the appearance of each additional lawyer), or the need to balance civility towards opposing counsel with court-adopted deadlines. Rule 1 has become a safe harbor for those members of the judiciary who believe cases are best resolved by having the court run roughshod over all counsel. I'd like to see it repealed in its entirety. I'm aware that it won't be repealed, but please don't make it worse.

4. Rules 30, 31, 33 and 36: Less is More

I've long felt that if I had dictatorial power over judicial procedure, both state and federal, the first thing I'd do is outlaw interrogatories. As a general proposition, interrogatories are useless. The asking party receives evasive and opaque responses which do little to pin down the opponent and nothing to advance the resolution of the case. They do provide job security for legions of junior "litigators" who learn to draft cumbersome questions and jello-like responses. Interrogatories are a waste of the talent of our younger lawyers. If we cannot eliminate them, reducing the number is a significant positive step.

The same holds true for requests for admissions and many production requests. Now and again, we need more than the allowed number. But, if as lawyers we are not good enough advocates to explain to our opponents and the court why we need more, we should not be practicing in federal court.

While I often take more than five depositions in my cases, I can justify the additional depositions I do take. And, if I can't justify them, no court should permit me waste my clients' and opponents' money by taking them.

Thank you for your consideration of these remarks.

Very truly yours,

Andrew B. Downs

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