Comment from Andy Osterbrock, Dow Corning Corporation

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My practice has been focused on litigation for 28 years in both private practice and as an in-house counsel. Problems, inefficiencies and out of control costs with discovery under current rules and practice are well documented. I support the proposed amendments and request they be formally approved, especially those concerning Rule 26 and Rule 37. I also endorse a revision to Rule 37(e) - it should be clairified to state that an award of sanction requires a showing of specific intent to deprive another party of discoverable information. It should also allow sanctions if conduct is willful AND in bad faith, rather than willful or in bad faith. The list of "factors to be considered in assessing a party's conduct" in subsection (2) of the proposed rule should be deleted or, at most, included in the Committee Note rather than the Rule text. Also, Rule 37(e) should not be limited to electronically stored information. Further, the threshold for "curative measures" should require a showing of significant prejudice to a party to the litigation.

It is particularly important that the proposed revision to Rule 26(b) include the deletion of the confusing phrase "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The phrase has been misused by parties and stretched the scope of discovery well beyond the reasonable intention of its original drafters.