

February 7, 2014

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

IN RE: Proposed Amendments to the Federal Rules of Civil Procedure

Ladies & Gentlemen:

I am writing in support of your proposals to amend the Federal Rules of Civil Procedure. However, I would like to take this opportunity to comment upon the proposed revisions to Rule 26(b)(1) covering the scope of discovery and Rule 37(e) dealing with a party's failure to preserve evidence.

With respect to Rule 26(b)(1), I support the provision which limits the scope of discovery as proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. This proposed limitation will allow parties to obtain and exchange information and documentation pertinent to the case, yet significantly reduce the temptation of one party to engage in unnecessary discovery for purposes of harassing the other party.

With respect to the revamping of Rule 37(e), I support inclusion of the requirement that before the court imposes any sanctions for a failure to preserve evidence, that the court find under Rule 37(e)(1)(B) that the party's actions "(i) caused substantial prejudice in the litigation and were willful or in bad faith . . ." I suggest, however, that you require the court to find that the party's actions not only caused substantial prejudice but were both willful **and** in bad faith, rather than just willful **or** in bad faith. Without requiring evidence of bad faith, and merely allowing evidence of willfulness, some parties may argue that willfulness only means enhanced negligence. To avoid that interpretation, I recommend the imposition of sanctions only in those situations where the court finds that the party was willful and acted in bad faith.

I also recommend deleting subsection (ii) from Rule 37(e)(1)(B) as such subsection would allow imposition of sanctions where a party is "irreparably deprived" of an opportunity to present or defend against the claims in litigation, even if the action which caused such deprivation was innocent, unintended and not in bad faith. Again, I recommend that sanctions only be imposed against a party who is found by the court to have conducted himself or herself willfully and in bad faith, and thus recommend the deletion of subsection (ii).



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Thank you for taking into consideration my comments to your proposed amendments to the Federal Rules of Civil Procedure.

Very truly yours,

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