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January 3, 2014

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

Re:

To Whom It May Concern:

I am writing in support of the proposed amendments to the Federal Rules of Civil Procedure that are currently before the Committee. Although I generally support all of the proposed changes to be considered by the Committee, I am specifically concerned with the amendments included in Rules 26(b)(1) and 37(e), and I hope that you will give special consideration to these particular changes.

The proposed amendment to Rule 26(b)(1) would re-define the scope of discovery to "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . ." This proposed change would make clear that discovery is defined by the claims and defenses identified in the pleadings, as opposed to the current, much broader definition of "subject matter involved in the action." By more specifically tailoring the scope of discovery to the specific allegations and defenses involved in a specific matter, the proposed change would reduce the unnecessarily high costs and burdens of modern discovery.

The proposed amendment would also strike the phrase, "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This language is often erroneously used to establish an overly broad and costly scope of discovery even though it was intended only to clarify that inadmissible evidence such as hearsay could still be within the scope of discovery as long as it is relevant. The proposed amendment would preserve this notion without extending the scope of discovery beyond that which is appropriate and practical for each particular case.

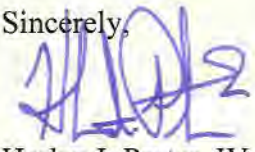
The proposed new Rule 37(e), meanwhile, would prohibit sanctions for failure to preserve discoverable information unless the failure was "willful or in bad faith" and causes "substantial prejudice." Such a limitation would establish a much-needed uniform national standard that would curtail costly over-preservation. Nonetheless, the current wording of the

proposed change would authorize sanctions for "willful *or* bad faith" conduct, which I could foresee as problematic because some courts define "willfulness" as intentional or deliberate conduct without any showing of a culpable state of mind. In other words, the current reading leaves open the possibility of a court authorizing sanctions for an act done intentionally, even if not done in bad faith. For this reason, I request that the Committee consider substituting the conjunctive "and" for the disjunctive "or" to make clear that sanctions only apply to conduct that is both willful *and* in bad faith.

I am also somewhat concerned with the "anticipation of litigation" standard incorporated into the proposed rule. This standard requires preservation decisions to be made prior to the receipt of a scope-defining complaint, the appearance of an opposing lawyer with whom to negotiate, or the assignment of a judge available to resolve preparation issues. Currently, wasteful over-preservation is driven by a fear of sanctions, and judicial decisions have imposed great affirmative burdens to preserve all relevant material. Thus, the new rule needs a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered, such as a "commencement of litigation" standard, balanced with a prohibition against willful and bad faith destruction of material that causes substantial prejudice to a potential adversary. This approach would greatly reduce unnecessary costs of over preservation without materially damaging any party's ability to prove or defend a claim.

I hope that this letter provides you with information useful in considering the changes currently before the Committee. Should you have any questions or wish to discuss these issues further, do not hesitate to let me know.

Sincerely,



Harlan I. Prater, IV

HIP:afh