

# Comment from Richard McCormack, NA

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Rule 37(e): I think it is extremely important that these changes be made in order to ensure fairness to all sides in the litigation. The proposed change to Rule 37(e) should establish a much-needed uniform national standard that would lessen the cost of over-preservation and additional litigation over allegations of spoliation. I think the Committee should remove the exception in subsection (1)(B)(ii) as courts are likely to use the exception to avoid the primary rule. Further, the Committee should also make clear that sanctions apply only to conduct that is both willful and in bad faith. Also, the Committee should remove the list of "factors to be considered in assessing a party's conduct" in subsection (2) of the proposed rule. None of the factors goes to the central point of the proposed rule. Finally, Rule 37(e) needs a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. The Committee should adopt a clear "commencement of litigation" trigger for when a party must take affirmative preservation steps, balanced with a prohibition against willful and bad faith destruction of material that actually causes substantial prejudice to a potential or actual adversary.

Rule 26(b)(1) - Scope of Discovery: The change will aid in making it clear that discovery is defined by the claims and defenses identified in the pleadings, a welcome improvement that will help rein in the high costs and burdens of modern discovery. The Committee should also add a materiality requirement to the scope of discovery, defining it as "any non-privileged matter that is relevant and material to any party's claim or defense. . . ." in order to strengthen Rule 26(b)(1).

Rule 1 - Cooperation: Please add "parties" to Rule 1 with an exhortation by the Committee for parties to cooperate with one another.

Rules 30, 31, 33 and 36 - Presumptive Numerical Limits: It's about time this was done. Costs of litigation are out of control and force parties to settle claims that don't have merit but are expensive to defend. Proportionality is the key.