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Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle N.E., #7-240
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Civil Procedure

Dear Members of the Committee:

On behalf of the civil rights law firm Relman, Dane & Colfax PLLC, we write today to offer comments detailing our firm's grave concerns about some of the proposed amendments to the Federal Rules of Civil Procedure ("Rules"). As attorneys that routinely litigate fair housing, fair lending, employment discrimination, and public accomodations claims, we know first-hand that the liberal discovery tradition embodied by the Rules is crucial to enforcing our nation's civil rights laws. Civil rights plaintiffs are often pitted against large institutional actors who control the most significant evidence in a case. We strongly believe that plaintiffs' access to that evidence is most threatened by the proposed amendments which would (1) reduce the amount of discovery presumptively allowed under the Rules, (2) insert proportionality and cost-shifting provisions that will unfairly burden civil rights plaintiffs, and (3) create ill-advised restrictions on a court's inherent authority to issue sanctions and remedies when a party destroys evidence they were under a duty to preserve. We therefore respectfully ask the Committee to reconsider and reject those amendments.

Robust discovery safeguards the search for truth and the equality of the parties before the law—principles of central importance in our system of civil justice. Nowhere are these principles more important than in civil rights cases. Discrimination in housing, lending, employment and places of public accomodation has a powerful impact on American society. Where civil rights cases are able to proceed on a full evidentiary record, the public's interest in ascertaining the truth about discrimination can be vindicated. Because defendants in civil rights cases often control evidence crucial to plaintiffs' claims, including the circumstantial and comparative evidence often necessary to showing discrimination, a level playing field is not possible without robust discovery. Finally, the limited financial resources of most

civil rights plaintiffs, together with the relatively small financial (though not societal) stakes of many discrimination claims, make civil rights cases particularly vulnerable to measures which would impose

additional costs on plaintiffs. These structural inequalities in civil rights cases mean that the proposed amendments will disproportionately harm civil rights plaintiffs.

1. **Reducing discovery through the proposed presumptive limits on depositions, interrogatories, and requests for admission will disproportionately harm civil rights plaintiffs.**

Discrimination cases today are rarely proven by a "smoking gun"; rather, plaintiffs must construct circumstantial evidence that would support an inference that the challenged action was taken because of their membership in a protected class. To prove pretext, plaintiffs must be able to test the purported reasons proffered by the defendant, expose contradictory or shifting explanations, and explore the treatment of similarly situated individuals so that excuses given may be shown to be false. Defendants, in contrast, are likely to have unfettered access to the bulk of the documentary evidence in the case and can conduct informal discovery by talking to their employees without restriction. In light of this information asymmetry, and as plaintiffs bear the burden of proof, defendants have everything to gain from blocking plaintiffs' access to discovery.

This asymmetry in the parties' need for discovery means that constricting discovery by lowering presumptive limits in the Rules will dramatically tip the balance in favor of large companies and institutional defendants and against individual civil rights plaintiffs.

A. <u>The presumptive limit on the number of depositions should not be reduced.</u>

Reducing the number of depositions—often plaintiffs' only access to witness—will make it more difficult for civil rights plaintiffs to marshal evidence to support their claims. Under state counterparts to the ABA Rule of Professional Conduct 4.2, plaintiffs' attorneys are often barred from speaking informally with defendants' employees and even former employees. Where those employees were involved in the decision-making process that resulted in the discriminatory action, their knowledge and motivations will inevitably be at the core of the dispute. Where those employees witnessed incidents, conversations, and practices relevant to the treatment of plaintiff and other similarly situated individuals, obtaining a record of their testimony may be necessary for a discrimination claim based on circumstantial evidence to survive summary judgment. While plaintiffs often need to use their allocation of depositions to garner evidence from employees and former employees, defendants do not because the ethical restriction provides no equivalent limitation. Therefore, the limitation on depositions inures to the detriment of plaintiffs and to the benefit of defendants.

In our experience, five depositions simply will not afford most civil rights plaintiffs sufficient opportunity to develop necessary evidence. In contrast, a limit of five depositions will not hurt defendants, who in the individual civil rights cases we litigate typically choose only to depose the plaintiff

and at most one or two other witnesses, enjoying unfettered access to the other relevant witnesses (who are almost universally their own employees).

Like many other plaintiffs' attorneys who represent clients of modest means, our firm fronts the costs of bringing civil rights suits and, when successful, seeks fees from defendants under the cost shifting statutes enacted by Congress to promote the litigation of civil rights claims. Attuned to the cost of litigation, we have every reason to avoid unnecessary depositions and focus our efforts on material witnesses and core factual disputes. In short, our incentive is to *not* take unnecessary depositions. Because our colleagues throughout the civil rights community share these constraints, the risk of abuse or overuse of depositions under the current rules is essentially nonexistent.

In our cases, where there is almost always a disparity in the parties' need for depositions, we have found that defendants will fight to prevent *any* depositions beyond the presumptive limit. For example, we just recently had a defendant aggressively oppose a motion for additional depositions only to rely on the testimony of those same witnesses at trial. Fortunately, the present limit of ten depositions is generous enough that these disputes are currently relatively few. The proposed amendment to Rule 30, however, would make such disputes much more common—and much more detrimental to the enforcement of our civil rights laws. Moreover, in our experience, given that requests for additional depositions almost never garner consent from the defendant, they delay discovery and consume judicial resources when they are inevitably litigated.

While we strongly believe that the current rule is not broken, and that the presumptive limit of ten depositions of seven hours each should be maintained, if the Committee is inclined to make a change, we suggest a more modest alternative. If change is a must, we respectfully suggest the Committee consider reducing the total number of deposition ***hours*** each party is allowed under the rule while allowing parties to choose how to allocate that time between witnesses. The proposed amendment to Rule 30 contemplates five depositions of six hours each, yielding a total of thirty hours. If the Rule allowed parties to allocate a total of fifty hours of depositions, for example, among ten witnesses, we believe this would reduce the perceived burden of depositions while preserving plaintiffs' access to material witnesses. Additionally, this formulation would preserve attorneys' ability to adapt to the evidentiary needs of each case, which may include many small witnesses requiring short depositions or fewer important witnesses requiring a longer examination.

B. <u>Amendments limiting interrogatories and requests for admission will increase rather than reduce discovery costs</u>

The proposed amendments reducing to fifteen the number of interrogatories presumptively allowed under Rule 33 and creating a new presumptive limit of twenty five requests for admission allowable under Rule 36 will also be damaging to civil rights plaintiffs. As cost-effective tools, these written discovery methods are particularly important for parties of modest means and plaintiffs' firms, like ours, that work on a fee-shifting basis.

We have also found that by narrowing and clarifying the issues in dispute, interrogatories and requests for admission help us to avoid needless depositions and litigation on ancillary issues. As efficient means of gaining basic information early in the case, interrogatories help to streamline the rest of the discovery process, including by focusing depositions so that they take less time. (In addition, reducing the number of interrogatories allowed will not only undermine this streamlining function, it will also inevitably produce more compound interrogatories, prompting additional discovery disputes and collateral litigation.) Requests for admission narrow the factual issues that need to be presented at trial. Due to their value in promoting judicial efficiency and preventing a waste of the jury's time, requests for admission should be encouraged, rather than limited.

C. Requesting additional discovery is not an adequate solution to the problems created by lower presumptive limits.

The option to request leave of court for additional discovery will not adequately address these concerns. We have observed time and time again that numerical limits in the Rules have a normative effect; opposing parties use the presumptive limits to make additional requests look like overreach, when this is not what is intended by the Committee. Indeed, some courts have adopted the rule that "a party seeking to exceed the presumptive limit bears the burden of making a 'particularized showing' of the need for additional depositions." *See, e.g.*, ***Thykkuttathil*** *v. Keese*, 294 F.R.D. 601, 603 (W.D. Wash. 2013). Litigation over whether plaintiffs seeking additional discovery have met their burden will not reduce costs or streamline discovery; instead, it will increase costs and delay, creating a significant barrier to the search for truth in civil rights cases.

2. Proposed amendments to Rule 26 regarding the scope and cost of discovery will unduly burden civil rights plaintiffs.

We also have grave concerns about the proposed amendments that would insert proportionality language into the scope of discovery set out in Rule 26(b)(1) and provide explicit authority for cost-shifting in protective orders under subsection (c)(1)(B). Both amendments will send an unmistakable message to courts and parties that the tradition of robust discovery is now disfavored, particularly in individual cases with low financial damages. As defendants in civil rights cases capitalize on the changes to oppose discovery of otherwise relevant and often critical evidence, the truth seeking function of litigation will inevitably be weakened. Because civil rights plaintiffs will disproportionately bear this harm, we ask that the Committee reject these proposed amendments.

A. Introducing a proportionality analysis into 26(b)(1) poses a risk of unduly restricting discovery in individual civil rights cases.

The proportionality factors the amendment would insert into 26(b)(1) are weighted against plaintiffs in individual civil rights cases. In a typical fair housing or employment discrimination case, the

plaintiff stands to recover only very modest damages in comparison to corporate disputes being heard in the same courts. In comparison to these modest damages, the ultimate benefit of discovery calculated to establish disparities in treatment of plaintiffs and comparators, test asserted motivations for veracity and consistency, and uncover evidence of pretext may easily appear "outweighed" by the burden and expense to the defendant of complying with such discovery requests. Yet such discovery is necessary to enable courts, litigants, and society to ascertain the truth where discrimination has been alleged.

Even under the current Rules, we have frequently found that defendants oppose necessary discovery as "disproportionate." We saw this in one recent employment discrimination case, where a minority employee with years of experience in his unit was appointed acting head of the unit only to be passed over for the permanent position in favor of an outside white candidate. Defendant consistently argued that because this was an individual case the stakes did not justify the discovery we requested regarding key witnesses and decision-makers. The court ordered defendant to produce the discovery sought, including a record of past selections made by one of the decision-makers which revealed that he had *never* promoted a minority candidate to a permanent position. Unfortunately, the proposed amendment will send a message that such discrimination victims' claims may not be worth imposing the "expense and burden" of full discovery on opposing parties.

Meting out the procedural rights of civil rights plaintiffs based on factors such as the amount in controversy and the burden and expense of discovery is directly contrary to Congressional intent that civil rights cases be fully and fairly litigated without regard to plaintiffs' financial resources or the modest monetary stakes of the case. Congress has long recognized that "civil rights laws depend heavily upon private enforcement" and has accordingly taken steps like awarding attorneys fees to successful plaintiffs precisely to protect plaintiffs' ability to "assert their civil rights." S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *quoted and discussed in Zarcone v. Perry*, 581 F.2d 1039, 1041-42 (2nd Cir. 1978). Both Congress and federal courts perceive society's interest in the enforcement of civil rights to be no less significant in cases with modest, nominal, or even nonexistent damages. *See, e.g., Lefemine v. Wideman*, 133 S.Ct. 9 (2012) (abortion protesters who were denied nominal damages due to qualified immunity were nonetheless entitled to award of attorneys fees); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("[b]y making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed"). The Federal Rules of Civil Procedure should not undercut that commitment to civil rights by constraining plaintiffs' ability to prove their claims.

Finally, the proposed amendment should be rejected as unnecessary. The current well-understood language of Rule 26(b)(1) implements a more appropriate proportionality principle by requiring that discovery be "reasonably calculated to lead to the discovery of admissible evidence." Where discovery requests raise legitimate concerns about abuse, parties can seek recourse under 26(b)(1)(2)(C), raising concerns under the same four factors identified in the proposed amendment. Because this tool is already available, the proposed amendment accomplishes little outside of sending a message that discovery in

certain cases should be discouraged; for all the reasons outlined above, we ask you that the Committee refrain from sending such a damaging message to the federal courts.

B. Shifting discovery costs to the requesting party through protective orders will have a chilling effect on civil rights plaintiffs.

The proposed amendment specifying that protective orders can shift the costs of discovery to the requesting party is equally disquieting. The possibility of being forced to pay their opponent's discovery costs will have a chilling effect on plaintiffs' efforts to access critical evidence where the opposing party resists on grounds of undue expense. The great majority of individual civil rights plaintiffs are simply unable to pay substantial discovery costs, and attorneys working on fee-shifting basis would often be unable to front such additional expenditures (since they are already fronting the plaintiff's litigation costs).

Routine cost-shifting in discovery orders would violate two bedrock traditions in our civil litigation system. First, it would undermine the liberal discovery regime that has long ensured that civil litigation need not be "carried on in the dark," by creating a real risk that parties of modest means will be unable to access needed and relevant discovery. *See Hickman v. Taylor*, 329 U.S. 495, 501 (1947). Second, the proposed amendment would represent a significant departure from the "American rule" whereby each party pays its own costs. Law and procedure depart from this rule only to promote values of exceptional importance—such as encouraging the enforcement of civil rights cases through a private attorney general schema, or protecting the integrity and authority of our courts by sanctioning misconduct.

For these reasons, we strongly oppose these proposed amendments to Rule 26. However, if these changes are adopted in some form, we respectfully ask that the text of the amendment or the comments clearly state that the rule should not apply to civil rights cases.

3. Proposed Rule 37(e) will interfere with courts' ability to protect the integrity of litigation before them to the detriment of civil rights plaintiffs

Proposed Rule 37(e) would dramatically restrict a court's ability to issue remedial measures sanctions when spoliation occurs, requiring that the requesting show the spoliation caused "substantial prejudice to the litigation" *and* was willful or in bad faith. The proposed rule wrongly focuses on protecting parties who have failed to preserve documents after the duty to preserve had attached and fails to account for a court's need for effective tools to safeguard the search for truth. Not only are these the wrong priorities, if implemented the proposed rule will go beyond the proper scope of the Federal Rules of Civil Procedure to change the substantive law of multiple circuits and undermine an existing EEOC regulation disproportionately hurting civil rights plaintiffs in the process.

A. In setting inappropriately demanding standards of culpability, Proposed Rule 37(e) will undermine the search for truth

The value and purpose of the discovery process is to bring to light the evidence and arguments that will assist the factfinder in the search for truth and the just resolution of the case. In civil rights cases, the truth seeking function also serves a broader social purpose of uncovering discriminatory behavior and vindicating society's interest in securing equal treatment on the basis of race, religion, gender, disability, and other protected classes. Because the spoliation of evidence directly threatens the integrity of discovery, courts need effective tools to safeguard their truth seeking mandate.

Spoliation sanctions and remedies, currently available to courts as an element of their inherent authority, provide those tools. The threat of sanctions deters the destruction of documents a party knows to be relevant to pending or likely litigation. If the party unreasonably allows the documents to be destroyed, spoliation remedies allow courts to repair the damage done to the requesting party's case.

As the D.C. Circuit has recognized, "where the evidence is relevant to a material issue, the need arises for an inference to remedy the damage spoliation has inflicted on a party's capacity to pursue a claim *whether or not the spoliator acted in bad faith*." *Grosdidier v. Broadcasting Bd. of Governors*, 709 F.3d 19, 28 (D.C. Cir. 2013) (emphasis added). For this reason, the D.C. Circuit and at least three others hold that spoliation sanctions may be ordered on a showing a negligence. *Id.*; *Buckley v. Mukasey*, 538 F.3d 306, 322-23 (5th Cir. 2008); *Byrnie v. Town of Cromwell, B.d of Educ.*, 243 F.3d 93, 109 (2nd Cir. 2001); *Adkins v. Wolever*, 692 F.3d 499 (6th Cir. 2012). The proposed amendment unwisely departs from this precedent and overturns the well-considered decisions of federal Circuit judges.

The Advisory Committee's comments to the proposed amendment state that it is intended to protect "potential litigants who make reasonable efforts to satisfy their preservation responsibilities." The Committee's reasoning is mismatched to the proposed change. A "potential litigant[] who makes reasonable efforts to satisfy their preservation responsibilities" has, *by definition*, not acted negligently or grossly negligently, but instead reasonably. Therefore, a negligence or gross negligence standard would be a more appropriate means of accomplishing the Committee's stated goal. Under a negligence standard, the destruction of evidence will only lead to a sanction or an adverse inference if it is *unreasonable*—and then only if the party was on notice that the documents may be relevant to litigation. Given that, by definition, a party who acts reasonably would not be sanctioned under a negligence or gross negligence standard, the change assumes that federal judges cannot be left to determine when a party has acted reasonably and when they have not. Of course, federal judges are eminently capable of making such a determination.

The proposed language would also draw within its sweep adverse inference instructions, which the D.C. Circuit has described as "fundamentally remedial rather than punitive" and counseled that they

may be properly imposed when the destruction of evidence has "tainted the evidentiary resolution of the issue." *Shepherd v. American Broadcasting Companies*, 62 F.3d 1469, 1478 (D.C. Cir. 1995). The proposed amendment loses sight of the remedial purpose of sanctions and lesser remedial measures like adverse inferences, focusing only on "protecting" spoliating parties, rather than safeguarding the ability of the requesting party to prove his or her claim or defense.

The proposed amendment would tie courts' hands to remedy unreasonable and even reckless conduct that has led to the destruction of evidence needed to determine the truth of a matter in issue. Because the bad faith and willfulness standards are so difficult to prove, the proposed amendment will ensure that the destruction of evidence will often go unchecked. With the threat of sanctions so dramatically blunted, negligence will become perversely advantageous. Additionally, it is necessary to recognize that there are some unscrupulous litigants who intentionally destroy evidence. Where the opposing party is unable to prove, to the satisfaction of a court, that the destruction was intentional and for the purpose of hiding adverse evidence, those unscrupulous litigants will be rewarded for their misconduct.

B. Proposed Rule 37(e) exceeds the proper scope of the Federal Rules of Civil Procedure by effecting a substantive rather than procedural change in the law

Proposed Rule 37(e) is not a modest change to the Federal Rules of Civil Procedure. The Advisory Committee itself recognizes in its comments that the duty to preserve evidence relevant to anticipated or pending litigation was not created by the Rules. Yet the amendment nonetheless takes on the task of regulating how that duty is to be enforced—overturning in its wake the settled and considered precedent of multiple federal circuits that sanctions may be imposed on a lesser showing of negligence.

The comments expressly state that the amendment "forecloses reliance on inherent authority or state law to impose litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B)." In so doing, the proposed language improperly intrudes on the role of judges who must be given adequate tools and sufficiently broad discretion to discipline misconduct by parties appearing before them. As the D.C. Circuit has explained, "the inherent power enables courts to protect their institutional integrity and to guard against abuses of the judicial process." *Shepherd*, 62 F.3d at 1472. Such dramatic intrusion on the trial court's role in protecting the integrity of its proceedings and the truth-seeking function of litigation should not be undertaken lightly.

Not mentioned in the comments or the text, though equally troubling, is the prospect that the rule will undermine substantive federal regulations. The EEOC has promulgated regulations requiring employers to preserve certain personnel documents that are routinely used in employment discrimination cases. *See, e.g.*, 29 C.F.R. § 1602.14. Numerous circuits have recognized that violation of such a regulation can support an inference of spoliation and corresponding remedial measures or sanctions by a court. *Talavera v. Shah*, 638 F.3d 303, 311-12 (D.C. Cir. 2011); *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 108-09 (2nd Cir. 2001); *Favors v. Fisher*, 13 F.3d 1235, 1239 (8th Cir. 1994); *Hick v.*

Gates Rubber Co., 833 F.2d 1406, 1419 (10th Cir. 1987). Rule 37(e) would prevent courts from enforcing employers' regulatory obligations where willfulness or bad faith could not be proven. A proposed rule of procedure should not be enacted if it would so directly limit the enforcement of federal regulation.

C. The proposed rule raises grave fairness concerns, especially for civil rights plaintiffs

As discussed above, the documents that can substantiate discrimination in a civil rights case are largely in the control of the defendant rather than the plaintiff. If the defendant who has an obligation to preserve the evidence instead destroys it, the plaintiff, court, and jury will be unable to determine the truth of what Congress has recognized to be a vitally important social issue: does the defendant treat individuals equally on the basis of race, gender, religion, and disability? In the words of Judge Lamberth, former Chief Judge of the D.C. District Court, "plaintiffs alleging discrimination should not be forced to prove their cases based on the defendants' choice of files and records" due to spoliation. *Webb v. District of Columbia*, 189 F.R.D. 180, 187 (D.D.C. 1999).

The proposed rule improperly places the burden of proof as to spoliation on the innocent requesting party as opposed to the spoliating party; this is unfair and impractical. Fairness requires that the party who has been injured by the destruction of evidence should not also bear a heavy burden of proof to demonstrate (i) the content of the destroyed documents and (ii) that the documents were destroyed in bad faith. As to the first, it is difficult to demonstrate prejudice, much less substantial prejudice, without evidence of what information or comments the destroyed records contained. For this reason, many courts require a less onerous showing that the documents would have been relevant to a contested issue. Even then, courts have warned against requiring "too specific a level of proof" of relevance, because "in the absence of the destroyed evidence, [a court] can only venture guesses with varying degrees of confidence as to what the missing evidence may have revealed." *Gerlich v. U.S. Dept. of Justice*, 711 F.3d 161 (D.C. Cir. 2013); *See also Kronisch v. United States*, 150 F.3d 112, 127-28) (2nd Cir. 1998); *Ritchie v. United States*, 451 F.3d 1019, 1025 (9th Cir. 2006). Similarly, showing the *mens rea* of the spoliating party is almost impossible because the party who requested documents has no direct knowledge of what was or was not done to preserve documents, and any evidence of the reasons for the destruction is likewise in the hands of the spoliating party.

The proposed rule thus sets a standard that will be hard for any requesting party to meet. However, due to the disparity in access to evidence that characterizes civil rights cases, the burden will fall especially hard on civil rights plaintiffs.

D. The exception set out in proposed rule 37(e)(1)(B)(2) does not address any of these concerns

Although the proposed rule provides an exception to the bad faith or willfulness requirement where the spoliation has "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation," this exception is far too narrow to provide any realistic protections to

parties that have been harmed by spoliation. *See* Proposed Rule 37(e)(1)(B)(ii). As an initial matter, it is almost impossible to prove that a party would have had a successful case but for the destruction of documents. The Advisory Committee comments, moreover, acknowledge that this exception will apply only in "narrowly limited circumstances" and suggest application may be limited to examples such as where tangible evidence, like an allegedly damaged vehicle, is lost. *See* Advisory Committee note, *discussing Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001). If the provision is applied in that starkly limited manner, it will reach only a tiny portion of cases in which spoliation has dramatically prejudiced the requesting party. Most cases rely on documentary evidence, and where documents have been destroyed their contents will be difficult if not impossible to discover, and harder yet to prove to the satisfaction of a court. Additionally, if a party has *any* evidence, even if that evidence is not as persuasive or complete as the evidence that has been destroyed, the party has not been "irreparably deprived" of "any meaningful opportunity to present or defend against the claims in litigation," and thus will not benefit from the exception and thus the substantial harm to the search for the truth will be in no way cured by the exception.

E. Proposed rule 37(e) should not apply to paper documents

While we oppose the proposed amendment to Rule 37 altogether, we strongly suggest that if adopted, it should apply only to electronically stored information, or ESI. The concerns about the burden of preservation expressed by the committee relate only to the cost of storing ESI. Preserving paper documents does not require anywhere near the level of technological sophistication and expense that preservation of ESI requires. Paper documents have, if anything, become fewer and thus easier to preserve as more and more information is created, communicated, and stored digitally.

The Advisory Committee further argues "[b]ecause digital data often duplicate other data, substitute evidence is often available" to replace any evidence that may be destroyed. Paper documents, however, are often both irreplaceable and important to proving discrimination. For example handwritten interview notes, meeting notes, application forms, or comments on applications can be crucial to proving a host of issues that arise in employment discrimination cases, such as the employer's assessment of the plaintiff and other candidates, the decision points in hiring and promotions, and—ultimately—discriminatory intent. *See*, *e.g.*, *Talavera*, 638 F.3d at 312 (a strong spoliation inference was warranted because the destroyed interview notes "represented Talavera's best chance to present direct evidence that Streufert's proffered reason for the selection was pretextual").

Where the destroyed documents are irreplaceable, allowing more discovery or shifting attorneys' fees is simply not a solution. Once the documents have been destroyed, additional discovery many times over will not be able to recreate evidence which no longer exists. Likewise, shifting fees cannot undo the harm to the requesting party's ability to prove its case.

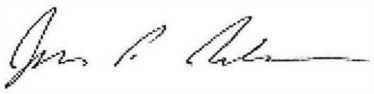
In sum, we strongly oppose the adoption of proposed Rule 37(e) and believe that spoliation law should be left as it has been decided by our able federal courts. If some version of the amendment is

adopted, it should reflect a negligence standard or a gross negligence standard rather than bad faith or willfulness, and the rule should be restricted to ESI.

* * *

Thank you for the opportunity to submit these comments.

Sincerely,



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