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Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans without Access to Justice?

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Introduction

Mr. Chairman and Members of the Subcommittee, thank you for accepting my written comments concerning the proposed amendments to the Federal Rules of Civil Procedure. I am grateful for the Subcommittee's careful attention to the dramatic amendments now under consideration.

Relman, Dane & Colfax, PLLC is a civil rights firm that litigates fair housing, fair lending, and employment discrimination cases around the country. In many of the cases handled by our firm, we represent individual plaintiffs who have suffered discrimination by a corporate or government employer, a housing provider, or a lender. In many of these cases the great majority of the evidence on which our clients' claims depend is within the control of the defendant. The rules governing discovery are thus crucially important to our ability to vindicate the civil rights of our clients. For this reason, my firm and our colleagues throughout the civil rights community are deeply concerned about the dramatic restrictions on discovery contemplated in the current proposed amendments.

Our reservations about many of these amendments are well expressed by the thoughtful testimony and written comments submitted by Sherrilyn Ifill on behalf of the NAACP Legal Defense Fund. The comments below focus on the proposed Rule 37(e), which would dramatically restrict a court's power to issue sanctions or remedial evidentiary remedies when a party spoliates evidence—that is, when a party destroys documents or other evidence that the party was under a duty to preserve.

I have four principal concerns about the proposed rule: first, that it will impede the search for truth; second, that it goes beyond the proper scope of the Federal Rules of Civil Procedure to change the substantive law of multiple circuits; third, that it will disproportionately hurt civil rights plaintiffs; and fourth, that it appears to extend beyond the context of electronically stored information ("ESI"), the costs of which are provided as the primary justification for the change.

1. The proposed rule wrongly focuses on protecting parties who destroy evidence rather than safeguarding the integrity of the judicial 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 of litigation 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. Spoliation sanctions are an important tool courts use to safeguard their truth-seeking mandate. 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 sanctions allow courts to remedy the damage done to the requesting party's case.

The proposed rule fails to account for a court's need for effective tools to safeguard the search for truth, and focuses instead on protecting parties whose conduct, while negligent or even reckless, does not rise to the level of willful or in bad faith. These are the wrong priorities, and, I fear, will have the effect of impeding the search for truth.

This is not only my perspective as a civil rights attorney. The D.C. Circuit has repeatedly held—as have at least three other Circuits—that the evidentiary harm from spoliation requires that a court be able to remedy that harm upon a showing of negligence.[1] As the D.C. Circuit explained earlier this year, where the evidence that has been destroyed "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).

For a related reason, I believe that the proposed rule improperly includes adverse inference instructions within the definition of "sanctions." The D.C. Circuit has held that issue-related remedial

[1] *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).

measures, like adverse inference instructions, are "fundamentally remedial rather than punitive," and are 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 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." A negligence standard, or gross negligence standard, is a more appropriate means of accomplishing this goal.

A willfulness or bad faith standard is not necessary to protect those "who make reasonable efforts." Parties "who make reasonable efforts" are, of course, not negligent or grossly negligent. Under a negligence standard, the destruction of evidence will only lead to a sanction or an adverse inference if it is unreasonable—and only if the party was on notice that the documents may be relevant to litigation. Additionally, the current version of Rule 37(e) already accounts for concerns particular to ESI evidence by preventing sanctions where evidence is lost "as a result of the routine, good-faith operation of an electronic information system." All that is required of a party under current law—in any Circuit—is to take reasonable steps to preserve relevant documents once the party is on notice that the documents may be needed in litigation.

The proposed amendment, however, 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 removed, 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.

The Federal Rules of Civil Procedure should be a vehicle for protecting the integrity of civil litigation and advancing the search for truth. The proposed amendment to Rule 37(e), unfortunately, runs contrary to that purpose.

2. The proposed amendment exceeds the proper scope of the federal rules 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 Federal 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. Further, the comments to the amendment expressly stated 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)." This should not be the role of the Federal Rules of Civil Procedure.

The restriction improperly intrudes on the role of judges who must be given adequate tools and sufficiently broad discretion to manage the litigation 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. Rule 37(e) would dramatically restrict courts' discretion to use address spoliation, foreclosing reliance on inherent authority altogether. Such dramatic intrusion on the trial court's role in protecting the integrity of the process should not be undertaken lightly.

Additionally, proposed Rule 37(e) would 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 by a court.[2] 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.

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

In civil rights cases, the documents that can substantiate discrimination are largely in the control of the defendant rather than the plaintiff. In an employment discrimination case, for example, hiring and personnel documents, or the files containing information about comparable candidates, are controlled by the employer. If the employer destroys that evidence, 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 employer treat employees and applicants 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).

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 that content of the destroyed documents and that the documents were destroyed in bad faith. The proposed rule sets a standard that will be hard for civil rights plaintiffs—or any requesting party—to meet.

The proposed rule appears to place the burden on the requesting party to show both (1) substantial prejudice to the case and (2) the bad faith or willfulness of the spoliating party. 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

[2] *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).

destroyed evidence, a court can only venture guesses with varying degrees of confidence as to what the missing evidence would 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 difficult 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.

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 too narrow to be of any comfort. *See* Proposed Rule 37(e)(1)(B)(ii). 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 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 manner, it will reach only a tiny portion of cases in which spoliation has dramatically prejudiced the requesting party.

4. The proposed rule should not apply to paper documents

While I oppose the rule change altogether, I strongly suggest that if adopted, it should apply only to ESI. The concerns about the burden of preservation expressed by the committee relate only to the cost of storing ESI. *See* Advisory Committee note to Proposed Rule 37(e). Similarly, the testimony of Andrew Pincus before this Subcommittee rationalized this rule as a means of addressing the increasing costs associated with data storage. These concerns do not apply equally to the preservation of hard copy documents.

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. *See* Advisory

Committee note to Proposed Rule 37(e). 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, I strongly believe that the proposed Rule 37(e) should not be adopted and 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.