FEDERAL LITIGATION SECTION

MEMORANDUM

TO: COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

FROM: FEDERAL LITIGATION SECTION OF THE FEDERAL BAR ASSOCIATION

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RE: PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

DATE: FEBRUARY 13, 2014

On behalf of the Federal Bar Association, we respectfully offer comments concerning proposed amendments to the Federal Rules of Civil Procedure.

The proposed amendment concerning spoliation of evidence is sound, and should be adopted.

The Federal Bar Association supports the proposed amendment of Rule 37(e). The proposal would specify available sanctions for failure to preserve discoverable information; it would clarify that certain sanctions should be imposed only in cases of willfulness, bad faith or irreparable deprivation of an opponent's meaningful opportunity to present or defend against the claims in litigation; and it would identify factors to be considered in assessing a party's conduct.

By making clear the relevant standards, the proposal simplifies the job of litigating and deciding a spoliation sanctions motion. This may also lead to more compromises to resolve spoliation issues by agreement, rather than by seeking court intervention to resolve the issues. By providing that whether a party timely sought the court's guidance on any unresolved disputes about preserving discoverable information is relevant to the possible later imposition of sanctions, the proposed amendment may also

lead to earlier and more economical case management to resolve preservation issues.

The proposal to reduce the presumed duration and number of depositions is unsound.

The Federal Bar Association opposes reducing the presumptive number and duration of depositions, from 10 depositions to five depositions and from seven hours to six hours.

Time spent in a deposition is typically not the most significant source of cost or burden. Rather, the most significant costs and burdens associated with depositions typically arise from disputes over the calendaring and the conduct of the depositions. Thus, a one-hour reduction in the length of a deposition would not be likely to cause a significant reduction in the overall burden and expense.

On the other hand, shortening the (presumed) length of the deposition *would* be likely to increase the perceived effectiveness of evasive witness behaviors and disruptive conduct by counsel that aim to run out the clock. Lengthy objections by counsel; coaching of witnesses to answer "only if you know" the answer (followed predictably by the witness professing forgetfulness or lack of sufficient knowledge to answer "specifically" the question being asked); and verbal jousting of all sorts are already used commonly to consume the available time in depositions. Making such tactics seem more effective, by shortening the time on the clock, would be likely to make them even more common.

In similar fashion, reducing the (presumed) number of depositions would be likely to increase the perceived effectiveness of evasive "buck passing" by one witness to another. Passing the buck to another potential witness is a common occurrence already. Doing so will seem even more likely to be effective when a party witness who seeks to evade a topic of examination anticipates that only a small number of additional witness

depositions will be available to the examining party, absent a motion to lift the presumed numerical limit.

Apart from the risk that the examination may be impeded by clock wasting and buck passing, all parties share incentives to reduce the number and duration of depositions. In fact, a deposition is usually more burdensome for the party who takes the deposition than it is for the other side. This is because, unless otherwise ordered or agreed, the party who takes the deposition typically bears additional expenses like the court reporter's fee and the costs of any audio/video recording. And all parties may incur comparable attorney's fees in taking or defending a deposition. Some data suggest that most cases are already being litigated with fewer than five depositions. Under Rule 26(f)(3)(E), the parties are already required to state their views and proposals to the court on "what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed." We believe that the existing rules are working.

The proposals to limit the number of written interrogatories and requests for admissions are unsound.

The Federal Bar Association opposes reducing the presumptive number of interrogatories from 25 to 15 interrogatories and imposing a new limit of 25 requests for admissions other than admissions concerning genuineness of documents.

The burden of responding to a request for admission is not a great burden. Typically, the responding party serves objections together with a statement that the request is admitted or denied, wholly or in part. The burden of responding to an interrogatory is greater, but we see no reason to believe that the existing presumed limit of 25 interrogatories imposes a substantial burden. Without significant burden, a responding party may object and refuse to answer any interrogatories that seek irrelevant or privileged information, and may limit the answer to include only information that can be obtained by reasonable inquiry.

Additionally, answering a relevant interrogatory provides benefits to the responding party, even in cases where 25 such interrogatories (or more) may have been issued. Making the inquiry needed to prepare an answer to a relevant interrogatory helps to develop the factual basis for the responding party's own position. That is why courts currently presume that a responding party should pay its own discovery costs. *See Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 358 (1978) (noting that a responding party's "own case" may "be advanced by his having performed the tasks" required in responding to discovery). In practice, many parties simply do not understand their own positions until they are required to disclose their positions – and the factual bases for those positions – in answering written discovery requests.

Still, under the existing rules, nothing prevents the parties and the court from anticipating at the outset that fewer than 25 interrogatories may be needed, or that a limitation on the number of requests for admissions may be appropriate. The court's Rule 16 review of the parties' initial discovery planning report under Rule 26(f)(3)(E) already provides a sound way of

addressing any such limitations that may be warranted at the outset in particular cases. To the extent that currently courts are not using orders under Rule 16 to impose additional numerical limits, under the existing rules, it is reasonable to infer that the parties and the courts are not currently seeing sound reasons for doing that at the planning stages. We do not believe that sound reasons exist for amending the rules' presumed limits in all civil cases across-the-board.

Conclusion

The Federal Bar Association supports the proposed amendment of Rule 37(e) concerning preservation of evidence and opposes adding new presumed limits on depositions, interrogatories and requests for admissions. Allowing for adequate discovery of relevant information before trial reduces the danger of unfairness in a potential trial by ambush. Disclosure of relevant information before trial also makes settlement and compromise more likely, by allowing each side to understand the strengths of the other side's case. Without settlements, the courts would encounter the burden of

conducting additional trials and other proceedings to resolve many more cases – which would also mean additional legal expenses for the parties in those cases.

The judiciary's role under the Rules Enabling Act is vitally important in maintaining the independence of the federal courts under the Constitution. We sincerely appreciate the opportunity to contribute comments to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States in considering proposed amendments.

Thank you.