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Civil Rules Advisory Committee
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C 20544

Re: Comment on Proposed Rule 37(e)

Dear Committee:

As a former General Counsel and a Member of the 2010 E-Discovery Panel at the Duke Litigation Review Conference, I welcome this opportunity to express my general support of the Proposed Amendments to the Civil Rules, especially Proposed Rule 37(e).

In general, it is my view that it is time to address spoliation in the Civil Rules by a uniform national rule. The Proposed Rule, with appropriate “tweaks,” provides a useful foundation for that purposes. Accordingly, this letter focuses on the key suggestions along those lines, while the accompanying Paper (Proposed Rule 37(e)) provides a more general analysis, with citations.

Superiority of the Proposed Rule

Although originally a proponent of targeted amendments to the current Rule 37(e),¹ I have come to agree that the Proposed Rule presents a superior formulation to support a “fresh start” on a meaningful national rule. It comprehensively occupies the spoliation sanction field to the exclusion of inherent sanctioning power. This provides a significant advantage over the current Rule. As recently noted by the current Chair of the Standing Committee, a judge may not use inherent power to end-run a cabined power,² when rules are “up to the task” under *Chambers v. NASCO*.³

The Duty to Preserve

Perhaps the greatest advantage of the Proposed Rule is that it will incentivize reasonable and proportional preservation conduct without equating mere failures to preserve with sanctionable conduct. Simply failing to institute a litigation hold or to fully preserve every conceivable type of discoverable will not be sufficient to justify sanctions under the Proposed Rule. Both a showing of elevated culpability - “willful” or “bad faith” conduct - and

¹ Thomas Y. Allman, Change in the FRCP: A Fourth Way, September 9, 2011 (copy submitted to September 2011 Dallas Mini-Conference on Preservation and Spoliation).

² *United State v. Aleo*, 681 F.3d 290, 310 (6th Cir. May 15, 2012)(“a judge may not use inherent power to end-run a cabined power”)(Sutton, J., concurring in result).

³ 501 U.S. 32, 50 (1991).

“substantial prejudice” are required under Rule 37(e)(1)(B)(i). In short, a failure to adhere to what some courts view as “reasonable” conduct, conforming to “preservation standards,” will no longer provides a per se basis for the imposition of sanctions.⁴ Although some may regard this as incentivizing “sloppy behavior,” that same argument – which ignores the ethical and practical reasons for diligence and best efforts – was made in 2006 and no evidence, anecdotal or otherwise - has emerged to show that this is a rational prediction. Moreover, it ignores the ample curative or remedial measures available under (e)(1)(A).

Successful implementation will require courts to ignore or distinguish the case law interpreting the Committee Note to existing Rule 37(e) as mandating various affirmative court-declared preservation steps. There remains a risk that some courts, unsympathetic to the new Rule or unaware of its intended impact, might treat the descriptions of the Rule 37(e)(2) “factors” in the Committee Notes as a condition precedent to the protection of the rule, as opposed to approved practices. This risk should be addressed.

This may require dropping the factors into the Committee Note or, perhaps, eliminating them from the Proposed Rule.

Rejecting *Residential Funding*

Closely allied with the preceding observation is the necessity to clarify that the rejection of *Residential Funding*⁵ extends to all aspects of the role of gross negligence under the Proposed Rule. The underlying premise of Subsection (B)(i) – that “willful” misconduct differs in kind from “gross negligence” – risks being undermined by decisions which hold that merely intentional conduct is “willful.”⁶ The Rule or Committee Note should specify that a showing of more than merely intentional activity is required to established “willfulness” - for example, that the action was undertaken “for the purpose of hiding adverse information.”

Similarly, the argument that a finding of gross negligence excuses a party from the burden of showing prejudice does not apply in meeting the requirements of (B)(i).⁷ This point deserves mention in the Committee Notes.

Dealing with *Silvestri*

As written, the no-fault exception in (B)(ii)⁸ risks undercutting the certainty captured in (B)(i), given that the existence of “irreparable” harm is routinely (and understandably) argued to occur all losses of discoverable information. It would be better to delete the exception, and introduce the primary rule can be introduced by the same phrase now in use in current Rule 37(e) to deal with those circumstances (“absent exceptional circumstances”).

⁴ Rules Comm. Minutes, November, 2010, Ins. 694-704 (contrasting cases “that seem to suggest there is a real exposure to sanctions for failing to do what a judge says a litigant should be doing”).

⁵ *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2nd Cir. Sept. 26, 2002).

⁶ *Sekisui American v. Hart*, __ F. Supp. __, 2013 WL 4116322, at *5 (S.D. N.Y. Aug. 15, 2013)(intentional destruction of relevant information after a duty to preserve has attached is “willful,” citing to *Pension Comm. v. Banc of America*, 685 F. Supp. 2d 456, 465 (S.D. N.Y. May 28, 2010)).

⁷ *Id.* (presuming existence of prejudice by characterizing failures as grossly negligent conduct).

⁸ *See Silvestri v. General Motors*, 271 F.3d 683, 593 (4th Cir. Nov. 14, 2001)(the “effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim”).

The Committee Note can then describe the unique nature of the irreparable prejudice which is its *sine qui non* and the fact that it is not intended to authorize entry of affirmative relief, such as a default judgment.

Restricting the Rule to ESI

If the Committee is unwilling to eliminate the (B)(ii) exception, serious consideration should be given to making the Proposed Rule applicable to only ESI and documents, thus leaving *Silvestri* outside the rule, as it involves the loss of tangible property. Indeed, the Proposed Rule already seems pointed in that direction by focusing on discoverable “information,” which is awkward terminology in the *Silvestri* context.

This would be an unfortunate result - since it would permit two contrasting views to continue to exist – but losing the advantage of certainty in the planning for compliance outweighs the benefit of explicitly describing the role of irreparable prejudice in that exceptional circumstance.

Need to Act Now

In any event, it is time for an address the need for a national rule to alleviate the understandable confusion on the topic of spoliation among the Circuits.⁹ The explosion in reported decisions - with results varying according to the location of the court - is a strong indication that disputes about spoliation are taking an increasing toll on primary conduct of parties in costly ancillary proceedings.¹⁰

The Committee is to be congratulated on its decisive and excellent Proposal.

Respectfully submitted,

/s/ TYA

Thomas Y. Allman

Attachment: Public Comment, Proposed Rule 37(e)(2013), October 25, 2013

⁹ Judge Posner observed in *Nightingale Home Healthcare v. Anodyne Therapy*, 626 F.3d 958, 962 (7th Cir. Nov. 23, 2010) that “the heavy caseloads and large accumulations of precedent in each circuit” induce courts of appeals “to rely on their own ‘circuit law’ as if each circuit were a separate jurisdiction rather than all being part of a single national judiciary enforcing a uniform body of federal law”).

¹⁰ The author’s ongoing request for decisions involving “spoliation w/20 sanctions” in the ALLFEDS database of WESTLAW returns one or more case on average each day. This is a dramatic acceleration from the already elevated levels of spoliation decisions as reported at the 2010 Duke Conference. See Dan H. Willoughby, Jr. et. al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L. J. 789 (2010).