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

Re: Question No. 1: Should Proposed Rule 37(e) Be Limited to Sanctions for loss of ESI?

Dear Committee:

I would like to take this opportunity to supplement and clarify my remarks at the Hearing on November 7, 2013 on the topic of whether the objections to retaining Subsection (B)(ii) in the Rule warrant confining the Rule to ESI only.

I see the primary advantage of (B)(i) as providing certainty for preservation planning by providing a single, uniform standard which will incentivize reasonable conduct while also addressing the unavoidable fact that pre-litigation decisions cannot and will not be subject to court-managed early review. Rule 37(e)(1)(B)(i) does so by assuring parties that in the absence of showings of enhanced culpability and prejudice, the failure to preserve discoverable information will not be sanctioned - although curative measures (including ones that serve many of the same functions as sanctions) will be.

As I explained in my testimony, Subsection (B)(ii), as restyled, risks suggesting an unwarranted equivalence to Subsection (B)(i) and undercuts the certainty captured by it, given that the existence of "irreparable" harm is routinely (and understandably) argued to occur in all instances of loss of discoverable information. In my view, this equivalence needs to be addressed.

<u>Alternatives to Inclusion of (B)(ii)</u>

I noted at the Hearing on November 7 that the Committee could employ the same device used in the 2006 Amendments, namely, to introduce the primary rule by the phrase "absent exceptional circumstances" (or, as earlier drafts had it, "absent extraordinary circumstances"). A Committee Note could cite *Silvestri* and describe the unique nature of the irreparable prejudice which is its *sine qui non* while explaining that the clause is not intended to authorize affirmative relief, such as a default judgment, because of the risk of converting the doctrine into the functional equivalent of a spoliation tort.

I was asked if implementation of this alternative would not risk creating even greater uncertainty by leaving an open-end exception. I believe it would not. The uncertainty would, in my view, be less of a problem if (B)(ii) was dropped and the introduction to (B)(i) added, making the alternative a true rare exception, not, as currently drafted, an equivalent alternative.

Focus on "Discoverable Information"

My primary point, however, was that there was yet another alternative, namely, to drop (B)(ii) and focus on the implicit distinction already in the Proposed Rule dealing with discoverable "information." That phrase could be defined in parallel to the current Rule 34(a) under which a party may serve requests for production of:

(A) any designated documents or electronically stored information (defined); or

(B) any designated tangible things

It is clear that the focus of the Proposed Rule is appropriately on "information" which is conveyed in hard copy and ephemeral (digital) form, not on the tangible objects which are the focus of disputes over insurance coverage, the efficacy of products and the like. In short, the focus is not on the printers or servers, but on the information manifested in documents and digital form and the software which permits or creates that information.

Thus, to answer a rephrased Question 1 ("Should the Rule be limited to sanctions for loss of [**documents and**] electronically stored information"), the answer would be a conditional "yes," (*ie*, if the Committee is unwilling to add the suggested introductory phrase to (B)(i)), *provided* that "discoverable information" is clearly defined to include both documents and ESI, perhaps by cross reference to Rule 34(a)(1)(A).

Impact

In my ongoing study of current spoliation cases - a subject to which I will return with a Paper at the end of the Comment period - fully 90 to 95% of the reported cases deal only with documents and electronically stored information, not tangible things. While the impact of spoliation of tangible property would be governed by the common law under either of these proposals, the cabining of the power to sanction for losses of "discoverable information" - as redefined[1] - would apply to and govern most spoliation disputes because the rules will be "up to the task" under *Chambers v. NASCO*.[2] It would also help bring certainty to pre-litigation planning for the great bulk of instances where over-preservation is now a major problem.

Respectfully submitted,

/s/ TYA

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cc: Hon. David G. Campbell, Hon. Paul W. Grimm, Hon. John G. Koeltl, Hon. Jeffrey S. Sutton and Professor Richard L. Marcus

[1] 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").
[2] 501 U.S. 32, 50 (1991).