Rule 37(e): The Report from Portland

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I. Introduction

On Friday, April 11, 2014, the Civil Rules Advisory Committee (the "Rules Committee") approved a revised version of proposed Rule 37(e), limited to ESI, as part of its "Package" of proposed Civil Rule Amendments. (The full text appears below) The final rule grants broad discretion to trial judges to deal with ESI lost due to breach of a duty to preserve, coupled with a "rifle shot" aimed at *Residential Funding Corp. v. DeGeorge*[2] in order to "take some very severe measures of[f] the table."[3]

The final form emerged only *after* LCJ had submitted a pointed series of recommendations on April 4.[4] (The LCJ proposal is Exhibit A to this Memorandum). The Subcommittee met on the evening of April 10 and the morning of April 11 and the revised text was given to the Rules Committee shortly before discussion began. It is anticipated that the revised Committee Note will embody and explain the differences.

The Committee seems to have been primarily motivated by a conviction that its original proposal was "too restrictive" of trial court discretion. A related conclusion was that the original proposal was unlikely to significantly reduce "over-preservation."[5] In a number of side-bar comments at Portland, it became clear that many Committee members have concluded that over-preservation is caused by state law, business needs and other regulatory requirements, not preservation requirements of the Federal courts.

The Committee also decided (subject to review by the Standing committee) against requiring republication of the Rule, given that the public had had 'fair notice' of the issues on the table and that the Committee did not believe that further comment was needed.[6]

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[2] 306 F.3d 99 (2d Cir. Sept. 26, 2002).
[3] Notes, March 4, 2014 Meeting, AGENDA BOOK, at 438.
[4] The April 4, 2014 LCJ Comment, including proposed modifications, is at http://www.lfcj.com/documents/LCJ%20Comment%20for%20April%202014%20Rules%20Committee%20Meeting.pdf.
[5] Notes, February 20, 2014 Meeting, AGENDA BOOK, at 419 ("[over-preservation] does not seem to be something we can affect very much"); *accord*, at 424 ("the tradeoff in lost judicial latitude is too costly").
[6] The Subcommittee had earlier opined that its post-comment changes were well within the "ambit of what can be done without any need to republish." Notes, February 8, 2014 Meeting, AGENDA BOOK at 14 (citing the fact that the five questions raised for public comment identified "many" of the issues).

II. The Changes

The final version differs both from the original version released for Public Comment in August, 2013 and from the Subcommittee revised recommendation of March, 2014, which was included in the Agenda Book for the Rules Committee meeting of April 10-11, 2014 in Portland, Oregon.[7]

The Committee believes that the amended introductory language is much improved. The LCJ suggestion of a focus on the role of "discovery" measures apparently prompted addition of language to that effect to the introductory paragraph.[8] The Committee also added the additional (and problematic) threshold consideration that the information must have been "lost because a party failed to take reasonable steps to preserve the information."[9]

According to the Chair of the Discovery Subcommittee, the "reasonable steps" language rejects the notion that strict liability could be imposed without some showing of culpability. It is also designed to encourage reasonable behavior.[10]

The Chair also explained that the list of "factors" had been deleted from the text of the rule because they were incomplete (although some mention may be made in the Committee note, presumably of the revised and shortened factors). Several Committee members indirectly noted the absence of proportionality considerations, and in a side-bar, the author was told they were implicit in the "reasonableness" test, and would be alluded to in the Note.

The final version of the text of Subparagraph (1) simplifies the first two operative paragraphs by merging them into a single paragraph in a manner similar to that suggested by LCJ.

The Subcommittee did not adopt the LCJ suggestion that (now) Subsection (2) list other measures which would affect the admission of trial evidence and should require a bad faith showing. According to a side-bar conversation with the Chair of the Standing Committee (who participated in all the drafting discussions), the list is sufficient "as is," since the unifying test is whether the sanctions are "outcome determinative."

LCJ had argued that the limited list in what is now Subparagraph (2) risked pre-empting the use of a bad faith requirement in those instances – such as the striking of pleadings[11] – where

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[7] A copy of the "AGENDA BOOK" is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.

[8] Which now, somewhat awkwardly, predicates authority on lost information not being able to be "restored or replaced through additional discovery."

[9] One Committee Member reminded the Committee before the vote that information is sometimes lost "despite" parties having taken reasonable steps.

[10] *See also* Subcommittee Notes, February 25, 2014 Meeting, AGENDA BOOK, at 428 ("some SDNY judges have moved close to a strict liability attitude in which failure to retain, without more, establishes negligence [and] is the source of much over-preservation"); *Cf* Henry Kelston, Milberg, February 16, 2014, at 5 (the formulation "could easily be misinterpreted as requiring some level of fault," citing to Champions World v. US Soccer, 276 F.R.D. 577, 583 (N.D. Ill. 2011).

Circuits already employ such a requirement.[12] There is even authority in some Circuits, for example, to the effect that imposing monetary awards of attorney's fee to punish spoliation must meet a heightened culpability standard.[13]

The Subcommittee opted to use a functional definition of "bad faith" consistent the *Rimkus* case as a unifying factor for severe measures covered by Subsection (3) rather than the term itself.[14]

The Subcommittee also ignored the LCJ suggestion to add an exemptions for losses due to "routine, good faith" operations of information systems and refused to add a cross-reference to the amended scope of discovery incorporating proportionality factors. It also refused the suggestion that prejudice be explicitly required to award the listed sanctions in Subsection (2).

As noted, the Subcommittee did not adopt the LCJ suggestion that the rule incorporate existing Rule 37(e) which limits the imposition of sanctions for ESI losses due to "routine, good faith" operation of information systems. This was apparently based on the assumption that the rule does not apply after a duty to preserve has attached.[15]

However, this assumption is not warranted and is contrary to emerging authority.[16]

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[11] Rimkus Consulting, 688 F. Supp.2d 598, 614 (S.D. Tex. Feb. 2010) ("in this circuit, the severe sanctions of . . . striking pleadings . . . may not be imposed unless there is evidence of 'bad faith'" [collecting cases]).

[12] The Subcommittee apparently dismissed this concern because "even in the Second Circuit" courts "recognize that high culpability is required for that sort of sanction." Note, February 25, 2014 Meeting, AGENDA BOOK, at 429. However, courts do not hesitate to exclude "bad faith" requirements from Rule 37 requirements if the Rules are not clear. *See, e.g.*, Design Strategy v. Davis, 469 F.3d 284, 296 (2nd Cir. Oct. 19, 2006)("[s]ince Rule 37(c)(1) by its terms does not require a showing of bad faith, we now hold that such a requirement should not be read into the Rule").

[13] Joseph v. LineHaul Logistics, 2013 WL 6406323, at 1 (9th Cir. Dec. 9, 2013)("[b]ad faith must be found before a federal court can award attorneys' fees as a sanction under its inherent authority"); Chambers v. NASCO, 501 U.S. 32, 45-46 (1991); *cf* Pension Committee v. Banc of America Securities, 685 F. Supp. 2d 456, 471 (S.D. N.Y. May 28, 2010)(implying that awarding monetary sanctions to punish and deter requires no showing of culpability).

[14] Notes, February 8, 2014 Meeting, AGENDA BOOK, at 416 (rule should not use the term ["bad faith"] but only the definition); Notes, March 4, 2014, AGENDA BOOK, at 438 (its "very similar to the one used by Judge Rosenthal in *Rimkus*); *see* Rimkus Consulting v. Cammarata, 688 F. Supp.2d 598, 618 (S.D. Tex. Feb. 19, 2010)(citing the destruction "of evidence to prevent its use in litigation" as justifying severe sanctions).

[15] Notes, February 25, 2014 Meeting, AGENDA BOOK, at 425 ("[t]hat rule ceases to apply once a duty to preserve arises").

[16] In the absence of a finding of bad faith - the "antithesis of good faith" – the rule bars sanctions where losses occurred after a duty to preserve attaches. Point Blank v. Toyobo America, 2011 WL 1456029 (S.D. Fla. April 5, 2011)(refusing sanctions, citing Rule 37(e), in the absence of proof that failure to institute litigation hold was undertaken in bad faith); *see also* Brown v. West Corporation, 2013 WL 6263632, at *2-3 (D. Neb. Dec. 4, 2013)(refusing to find spoliation because party used "good faith" in repurposing former employee computers after preserving relevant information).

III. The Text

FINAL VERSION ADOPTED (April 11, 2014)(new language underlined)

(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION.

If a party failed to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve the information, and the information cannot be restored or replaced through additional discovery, the court may:

(1) Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice;

(2) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation,

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

APPENDIX A

LCJ PROPOSED MODIFICATION (April 4, 2014)

(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION.

If a party failed to preserve electronically stored information that is within the scope of discovery as defined by Rule 26(b)(1) and that should have been preserved in the anticipation or conduct of litigation, the court may:

(1) Order discovery measures no greater than necessary to cure the loss of material electronically stored information~~, including permitting additional discovery; requiring the party to produce~~

~~information that would otherwise not be reasonably accessible; and ordering the party to pay the reasonable expenses caused by the loss, including attorney's fees.~~; or

(2) If additional measures such as those available under subsection (1) are insufficient to cure the loss of material electronically stored information, and ~~U~~upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice~~.~~, including ordering the party to pay the reasonable expenses caused by the loss, including attorney's fees; but in any event,

(3) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation and that the moving party has been prejudiced:

(A) presume that the lost information was unfavorable to the party;

(B) exclude or limit evidence otherwise admissible before the finder of fact or admit otherwise excludable evidence;

(C) ~~**(B)**~~ instruct the jury that it may or must presume the information was unfavorable to the party; ~~or~~

~~**(C)** dismiss the action or enter a default judgment.~~

(D) instruct the jury that a party lost or destroyed the information; or

(E)enter a default judgment, strike a pleading, dismiss any substantive claim or defense, or alter the burden of proof.

[**(4)** In applying Rule 37(e), the court should consider all relevant factors, including:

(A) the extent to which the party was on notice that litigation was likely and that the information would be relevant;

(B) the reasonableness of the party's efforts to preserve the information;

(C) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(D) whether, after commencement of the action, the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.]

(5) In any event, a court may not order any relief under these rules for a party's failure to preserve electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.