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Re: *Comment on Proposed Amendments to Rule 37(e)*

Dear Advisory Committee on the Civil Rules:

I write to comment formally on the proposed amendments to Rule 37(e). Under the amended Rule, a court may impose a "curative measure," if it concludes that a "party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation." Neither the Rule text nor the Committee Note expressly requires any showing that the lost information results in prejudice as a condition for imposing a curative measure.

Spoliation sanctions traditionally have been imposed only after a showing of culpability and prejudice. The proposed amendments helpfully carve out "curative measures" from what have been sanctions, but in so doing, they fail to retain a showing of prejudice as a prerequisite before imposing the curative measure. Presumably, a party must still make a showing that the lost information is "relevant," because the Rule is triggered only if the court concludes that "discoverable information," defined as information relevant to any party's claims or defenses, has been lost. But because curative measures may have consequences comparable to the severest sanctions, omitting the prerequisite prejudice showing may cause problems.

Recommendation

The Note should be amended to adopt a statement along the following lines: "Although a party need not make a showing that the opposing party is culpable in losing discoverable information, the party should typically make a showing of the actual degree of prejudice resulting from the lost information before a curative measure is imposed."

Curative Measures Can Be Severe

The illustrative curative measures expressly mentioned in the Committee Note can have substantial practical consequences comparable to severe "sanctions." In particular, a court may require a party to restore backup tapes or deleted ESI, even though retrieval of the lost information does not meet the proportionality test under Rule 26(b)(1) and (2)(C). As significant, a court may permit a party to introduce evidence at trial about the loss of the information, allowing the jury to make its own determination about the lost information ─ a measure similar in nature to the type of adverse inference instruction imposed by Judge Rosenthal in *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d 598, 646 (S.D. Tex. 2010) ("Given this record, it is appropriate to allow the jury to hear evidence about the deletion of emails and attachments and about discovery responses that concealed and delayed

revealing the deletions…. [T]he jury will be instructed that it may, but is not required to, infer that the content of the deleted lost emails would have been unfavorable to the defendants."

Proposed Amendments' Potential Adverse Consequences

Under the proposed amendments, the court is provided the discretion to impose a curative measure, so in most cases the judge will likely use good sense and require a showing of prejudice. On the other hand, history has taught that outlier decisions can have profound impact on ESI discovery jurisprudence, which often is not subject, as a practical matter, to appellate review.

I can envision close cases when a party negligently destroys ESI from a single custodian who played a minor role in the action. The opposing party can argue that the Rule does not require any showing of prejudice as a prerequisite for a court order requiring the opposing party to restore the deleted information at great expense. Indeed, the party could argue that a court *may not consider prejudice* because the Committee Note expressly states that a court may impose a curative measure to restore lost ESI even though it would otherwise be precluded under the proportionality test of Rule 26(b)(2)(C). Cumulative and duplicative ESI under Rule 26(b)(2)(C), by definition, has little value and would cause little, if any, prejudice if not disclosed. The argument is stronger in light of the fact that the Rule specifically requires "substantial prejudice" to impose a sanction and specifically requires a "higher level of prejudice" under the exception in subdivision (e)(1)(B)(ii), undermining any counter-argument that the failure to expressly refer to prejudice when imposing a curative measure was unintentional. In any event, it seems a bit odd not to refer to a prejudice standard for a curative measure.

Traditional Culpability and Prejudice Criteria

Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90 (D. Col. 1996), is a bit long in tooth as far ESI cases go, but its analytical framework on spoliation has stood the test of time well. It provides timely useful guidance that is spot on. It starts by setting out the well-recognized elements for imposing a discovery spoliation sanction, including a party: (1) destroys (2) discoverable matter (3) which the party knew or should have known (4) was relevant to pending, imminent, or reasonably foreseeable litigation.

It next lists the factors that a court should consider in determining whether the elements of spoliation are satisfied: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the litigant's culpability; and (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance. The judge notes that these factors do not constitute a rigid test, instead they represent criteria to consider before imposing spoliation sanctions. He also notes that the culpability and prejudice factors have taken on more importance in the case law.

These criteria, including a party's culpability and prejudice to the opposing party, are incorporated in the proposed "sanction" provisions and are typically mentioned in cases in which the court is determining whether to impose the severest sanctions of dismissal or an adverse inference jury instruction. *See Wong v. Thomas*, 2008 U.S. Dist. LEXIS 71246 (D. N.J. Sept. 10, 2008) (adverse inference instruction); *Frey v. Gainey Transp. Servs.,* 2006 U.S. Dist. LEXIS 59316 (N.D. Ga. Aug. 22, 2006)(adverse inference instruction). There are cases, however, that apply the same criteria (culpability and prejudice) for lesser sanctions, like attorney fee sanctions, or undisclosed sanctions. *See Phillips v. Potter*, 2009 U.S. Dist. LEXIS 40550 (W.D. Pa. May 14, 2009)(attorney fees); *Petcou v. C.H. Robinson Worldwide, Inc*., 2008 U.S. Dist. LEXIS 13723 (N.D. Ga. Feb. 25, 2008)(undisclosed sanctions).

Again *Gates Rubber* provides useful guidance. The plaintiff argued that the criteria (culpability and prejudice) apply *only* in cases involving "sanctions which are dispositive of the case or the particular claims in the case ─ sanctions such as default judgment or dismissal." The court rejected the argument, noting there is nothing in the caselaw restricting trial courts to consideration of the factors in a limited number of cases. The court went on to consider the factors in determining whether to impose lesser sanctions. Perhaps more compelling to demonstrate that reliance on prejudice in imposing lesser sanctions is appropriate was *Rimkus's* consideration of culpability and prejudice when ultimately ruling that the jury should consider the loss of discoverable information. Though the court characterized the sanction as a type of adverse inference instruction, it is similar in nature to the curative measure mentioned in the Committee Note. Merely changing the classification from "sanction" to "curative measure" should not work to dispense with the prerequisites that courts have traditionally relied on before imposing such measures.

It is a small point and one that most courts will assuredly handle on their own with little difficulty especially in light of the jurisprudence, but an ounce of prevention may be warranted.

Thank you.

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