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Advisory Committee on Civil Rules
c/o Peter G. McCabe, Secretary
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Comments on Federal Rules of Civil Procedure

This comment is a refinement of the testimony which I provided in the Dallas, Texas hearing on the proposed rule changes on February 7, 2014. In addition, it responds much more completely to two questions raised during my testimony (one by the Honorable Paul W. Grimm and one by Professor Richard L. Marcus).

Endorse proposed changes

Because my practice focuses heavily on class action defense,[1] I concentrate on the proposed changes to Rule 37 – which I believe will have the largest impact on class actions. First, I want to compliment the Committee for its work on Rule 37. The costs to litigate class actions have escalated significantly. Many of those costs – though not all of them – grow out of ESI discovery, including preservation. While some asymmetry of discovery costs may be unavoidable in the normal case, the asymmetry is significantly amplified in a putative class action context.

Beyond the costs imposed by ESI in a class action, is the risk imposed by ESI, including a spoliation motion. Such a motion is more likely if the merits of the class action turn out to be weak. The court system should favor determinations on the merits, not ancillary disputes which arise when the merits are weak.

[1] The comments and testimony are mine alone and do not reflect the views of my firm, my clients or any organization with which I am affiliated. I am Chair of the Financial Services Litigation Practice Group at Balch & Bingham LLP (a regional firm based in the Southeast) where I have practiced since 1991. I am currently Chair of the Business Torts and Antitrust Section of the Alabama State Bar and served for three years as Co-Chair of the ABA's Section of Litigation's Class Action & Derivative Suits Committee. My practice is primarily complex commercial litigation with a concentration in class action work, and I have handled over 60 class actions. While much of my practice has been from a defense perspective, I also handle some plaintiff's cases (including class actions), particularly those involving some commercial element. I have written and spoken on class actions repeatedly and recently served as the editor of a new book for the American Bar Association on class actions, entitled *The Class Action Fairness Act: Law and Strategy, 2013*.

With this in mind, I believe that this Committee's proposed change to Rule 37(e) to require that any failure be "willful", in "bad faith" and cause "substantial prejudice" is a much needed clear, objective standard. This should promote a uniform national standard and hopefully curtail ancillary litigation over allegations of spoliation. As Rule 1 states, "Just, speedy and inexpensive determination" should be the goal – not perfect discovery.

Litigation should be about the merits, not about the litigation hold or the discovery itself: ESI discovery should parallel discovery concepts from the paper world -- a world where I would argue discovery was effective. Absent a showing of "bad faith" conduct – with "substantial prejudice" – the litigation should be about the merits – not about the litigation hold or the discovery itself. Discovery is not an end – it is a means.

The risk of losing truly important information is normally low because (1) there are generally many copies of ESI, (2) only a tiny fraction of ESI is ever truly useful in trial, and (3) parties have incentive to retain ESI because it can be helpful: Even in the paper discovery world of 1991, wrongdoers would fear deleting evidence. As my civil procedure teacher – Arthur Miller – told us in 1989, "the greatest lie detector ever invented was the Xerox machine" – because nobody could be sure if every copy had been deleted. The same principle is even more true today with e-discovery. Nobody can ever have any confidence that every copy of an email or text message or spreadsheet has been deleted – and they should assume the opposite.

In addition, as speaker after speaker have confirmed, the vast majority of ESI is never used in trial or even deposition (Microsoft provided an average of less than 1/1000 of 1% in comments).

Finally, parties have incentives to retain ESI because the evidence can be used to support their case.

Suggested improvements

Now that I have endorsed the changes in Rule 37 by this Committee, I have a few suggestions to improve it:

Change "or" to "and": First, I believe this Committee intends the term "willful" to mean that the action was intended to delete information known to be relevant– not that it was merely an intentional act. Therefore I would suggest that the word "or" be replaced with "and" to clearly indicate that the conduct must have been taken with the knowing intent to delete valuable information – not merely that that physical act was voluntional. Thus, it would read "willful and bad faith".

Eliminate "irreparably deprived" provision or limit it to physical evidence: Second, I am concerned with the exception in subsection (1)(B)(ii) regarding loss of information which "irreparably deprived" a party of an ability to present their case. This exception threatens to swallow the new bad faith rule in (1)(B)(i) and I suggest that it be deleted.

In the alternative, I suggest that it be limited to physical evidence, where the risk of depriving a party of truly critical, central evidence is substantially higher than with ESI.

Eliminate factors or revise: Finally, I want to suggest removing the factors in (B)(2). These factors endanger the clear "bad faith" standard set forth in (B)(1) and are vague. In other words, the factors could be converted into mandates whose violation is seen as justifying sanctions despite the culpability and prejudice requirements of the Rule. I discuss other options for revising the factors below in responding to Judge Grimm's question.

Responses to questions raised during testimony

I received two thoughtful questions during my testimony and I would like to provide more depth to my original answers:

Factors: Judge Grimm asked about my suggestions to eliminate the factors. In particular, he asked what factors I would suggest be included in the rule. He also indicated concern about not providing any factors for Courts to make the determinations.

Standard should be bad faith -- not merely failing to act reasonably: As I mentioned above, my primary concern with these factors is with the potential that the failure to meet the factors would be equated with bad faith. The factors emphasize reasonableness. Reasonableness is a markedly less rigorous standard than bad faith. It is certainly true that when a party has acted in bad faith they have also acted unreasonably. However, the converse is not true.

Alternative – make factors apply to curative measures only: I suggested that an alternative (rather than eliminating the factors) to address some of this concern would be to make the factors applicable only to the curative measures rule provision (e)(1)(A) and not include the sanctions provision (e)(1)(B).

Alternative - include factors in Committee Notes rather than rule: Including the factors in the Committee Notes rather than the rule would substantially diminish the possibility that a court might convert the factors into mandates whose violation is seen as justifying sanctions despite the culpability and prejudice requirements of the Rule. Further, including the factors in the Committee Notes is more consistent with the treatment of guidance in other parts of the Rules of Civil Procedure.

Standards mix presuit and postsuit standards (especially subparts (C) and (E)): My second concern with the factors is that they attempt to cover both actions before the filing of the suit and actions after the filing of the suit.

Before the suit, there is normally no court (certainly no easily accessible) court to consult to narrow the requested preservation. Thus Rule 37(e)(1)(B)(2)(E) should not have any application to action before the action is filed.

Likewise, Rule 37(e)(1)(B)(2)(C) appears to require a person who receives a request to consult with the opposing party before the action is filed. Such an obligation, prior to filing suit, is not appropriate.

In addition, I believe the language referring to "anticipation ... of litigation" is problematic for class actions. Identifying ESI and placing a litigation hold can be very difficult in the early stages of a class action – when the scope of a putative class and even the alleged wrongdoing is not clear – but at least it has been pled. The preservation costs imposed by a single putative class action can reach six figures. Further, the untracked costs – the time of the employees, lawyers and IT to locate ESI on many diverse locations and devices and the daily time spent retaining ESI can be even more. The "anticipation ... of litigation" language might indicate that the threat of a single class action could trigger these costs. Further, the language would create risk and uncertainty for the defendant. Even most filed class actions are not ultimately certified – or are certified with a much smaller scope than originally pled.

Prior to the filing of the lawsuit, the preservation situation is fundamentally different than after filing of the suit. It is not even completely clear that the Rules Enabling Act provides authority to regulate such conduct prior to the filing of suits. Moreover, removing this "anticipation ... of litigation" does not give parties free ability to delete actual critical evidence to a case because many states have substantive law regarding spoliation. Further, prior to the suit, there will likely be far more varieties of factual circumstances which may make it more appropriate to allow caselaw to develop.

Proportionality: My third concern with the factors is that they do not include any discussion of proportionality of the request. Factor (B)(2)(D) concerns the proportionality of the preservation "efforts" – not the proportionality of the scope of the request or the scope of the preservation.

Prejudice: My fourth concern with the factors is that there is no reference to prejudice or severity of prejudice.

11th Circuit Standard and whether proposed Rule 37(e) would make any change

Professor Marcus noted the differing standards for ESI sanctions among the Circuits and asked if I could comment on whether I had seen a difference in ancillary litigation over

preservation issues in class actions in different Circuits. I indicated that I did not have sufficient personal experience to provide an answer.

Professor Marcus also asked specifically whether the proposed Rule 37(e) would make a difference in the Eleventh Circuit. The Eleventh Circuit has adopted "bad faith" as part of its standard for imposing such sanctions. *McLeod v. Wal-Mart Stores, Inc.*, 515 Fed.Appx. 806, 2013 WL 1316495 at *2 (11th Cir. April 3, 2013), *citing Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 943 (11th Cir. 2005).

There are four points to make about the Eleventh Circuit standard:

Eleventh Circuit has demonstrated usefulness of bad faith standard: First, the existence of this bad faith standard has not led to the problems listed by opponents of this rule change. In other words, we have served as a laboratory and the experiment is a success.

Without change of "or" to "and", some might try to change Eleventh Circuit standard: Second, if the word "or" is not eliminated in the proposed rule, some might try to argue that this is a change to this good law in the Eleventh Circuit.

Codifying standard will provide confidence to parties to act: Third, codifying the bad faith standard will further discourage ancillary litigation and will provide companies with the confidence to avoid over preservation because the standard will be uniform and codified.

Changes to "reasonably calculated" language in Rule 26 should provide more protection in the Eleventh Circuit for spoliation motions: Fourth, the proposed changes to Rule 26 (particularly the elimination of "reasonably calculated to lead to the discovery of admissible evidence") could provide relief from some spoliation motions in the Eleventh Circuit since presumably some ESI that may have been lost is no longer within the scope of "discoverable" material and therefore not within the sanctions provisions in Rule 37. This result is positive. The retention of ESI which was not relevant to the claims and defenses is a very good example of wasteful over preservation.

Thank you again for the opportunity to speak and comment and thank you especially for the hard work on Rule 37.

Sincerely,

Gregory C. Cook

GCC:jtm