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February 12, 2014

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Building, Room 7-240
One Columbus Circle
Washington, D.C. 20544

Re: Supplement to remarks at Dallas hearing on February 7, 2014 concerning Rule 37(e) and the use of the term reckless

Dear Members of the Committee:

This comment is intended to amplify my remarks at the public hearing in Dallas concerning proposed Rule 37(e). I will explain why the possible use of a "reckless" standard, either in defining the term "willful" or as an inference of bad faith, should be avoided. It is also critical for the Committee to define common-law terms such as "willful" or "reckless," to the extent they are used in the Rule or accompanying Note, to avoid the possible incorporation of common-law meanings into the Rule. The failure to address these issues would create uncertainty in the development of a uniform, national standard in Rule 37(e).

The inconsistent sanction standards that have developed in various circuits is one of the factors that have contributed to conservative preservation practices, which in turn has exacerbated the cost and burden of electronic discovery. With the ever-growing popularity of mobile devices and text messaging, as well as the proliferation of BYOD ("bring your own device") policies, the complexity and difficulty of preserving potentially relevant ESI is increasing. Therefore, any steps the Committee can take to clarify those standards and lessen the burden of ESI preservation is a welcomed benefit.

Perhaps the most important thing the Committee can do to achieve national uniformity is to precisely define any common-law terms to prevent negligence concepts from working their way into interpretations of Rule 37(e)'s provisions. Accordingly, to

obtain the goal of national uniformity the Committee seeks, I suggest that whenever terms such as "reckless," "willful," or "bad faith" are used, the Committee define those terms so as to avoid any suggestion that their common-law meanings can be employed in defining their meaning or parameters.

The Term "Willful" Should Be Deleted or Defined in (B)(i).

The Supreme Court in *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007), recognized that the term "'willfully' is a 'word of many meanings whose construction is often dependent on the context in which it appears.'" *Id.* at 57. The Court explained that "where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, *but reckless ones as well.*" *Id.* (emphasis added). *Safeco* further observed that when the term "willfully" is used "in a civil penalty provision," it includes "conduct marked by *careless disregard* whether or not one has the right so to act." *Id.* (emphasis added).

Accordingly, it is appropriate to consider whether the term "willful" should be deleted entirely from the proposed Rule 37(e)(1)(B)(i), or alternatively, to define the term in such a way to avoid any suggestion that it encompasses a negligence or quasi-negligence standard, as is implicated when recklessness enters the equation.

If the Committee believes the better approach is to retain the term "willful" and define it, there are several excellent options available. The Sedona Conference® Working Group and Lawyers for Civil Justice ("LCJ") have suggested virtually identical definitions for the term "willful," in which the conduct is seen as "acting with a specific intent to deprive the opposing party of material evidence relevant to the claims or defenses." Such a definition of "willful" would provide needed clarity to (B)(i).

However, if the term is retained in (B)(i), the Committee should also clarify that establishing willfulness is not itself sufficient to establish the relevancy or materiality of the missing information, in contrast to the approach adopted in *Sekisui American Corp. v. Hart*, 945 F.Supp.2d 494, 504 (S.D.N.Y. 2013) (noting the intentional destruction of relevant information qualifies as willful conduct, and can itself be sufficient to support a finding the lost information was unfavorable which satisfies the relevance factor).

The Impact of (B)(i) in Federal Circuits That Employ a Bad Faith Standard.

The phrase "willful or in bad faith" will lower the bar to obtain "sanctions" in those circuits that require a showing of bad faith. In circuits like the one where my office is located, a court must find that a party "intentionally destroyed the documents in bad faith" to obtain an adverse inference instruction. *Faas v. Sears, Roebuck & Co.*, 532

F.3d 633, 644 (7th Cir. 2008); *accord, Bracey v. Grodin*, 712 F.3d 1012, 1020-21 (7th Cir. 2013). In the Seventh Circuit's view, "[t]he crucial element is not that evidence was destroyed but rather the reason for the destruction." *Faas*, 532 F.3d at 644. To establish bad faith in the Seventh Circuit requires a showing that a document was destroyed "for the purpose of hiding adverse information." *Id.*

Thus, the inclusion of the disjunctive "or" in the phrase "willful or bad faith" in (B)(i) will make it easier to obtain the type sanctions identified in the proposed Rule than it currently is in those circuits, like the Seventh, that employ a bad faith standard.[1]

Avoiding "Recklessness" in Either Rule 37(e) or the Accompanying Note.

At the Dallas hearing, Judge Grimm asked several witnesses if they would support the definition of "willful" proposed by the American College of Trial Attorneys ("ACTA"). The ACTA's December 19, 2013 comment proposed a definition in which actions taken in "reckless disregard of the consequences" would be sufficient to show the existence of "bad faith." I explained my concerns over the use of the term "reckless" in that definition and why the Committee should avoid its use. The following reasons outline my concerns.

At the Dallas hearing, I expressed the view that recklessness does not go to, or address, the "purpose" or "the reason for the destruction" of the information, which the Seventh Circuit in *Fass* explained is the "crucial element" in assessing whether a threshold showing of culpability sufficient to find "bad faith" exists. *Fass*, 532 F.3d at 644. In the Seventh Circuit's view, "bad faith" requires a "purpose of hiding adverse information." *Id.*

Additionally, as the Supreme Court recognized in *Safeco*, the term recklessness "is not self-defining." 551 U.S. at 68. The Court explained that common-law usage has "treated actions in 'reckless disregard' of the law as 'willful' violations.'" *Id.* at 57. The Court in *Safeco* further acknowledged "although efforts have been made to distinguish" the terms "willful," "wanton," and "reckless," "such distinctions consistently have been ignored and the three terms have been treated as meaning the same thing, or at least as coming out of the same legal exit." *Id.*, quoting PROSSER & KEETON ON LAW OF TORTS, § 34, p. 212 (5th Ed., 1984).

[1] The Fifth, Eighth, Tenth, and Eleventh Circuits also employ a bad faith standard. See, *Clayton v. Columbia Cas. Co.*, 2013 WL 6172649 (5th Cir. Nov. 26, 2013); *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 461-62 (8th Cir. 2013); *Oldenkamp v. United Am. Ins. Co.*, 703 F.3d 12243, 1250-51 (10th Cir. 2010); *S.E.C. v. Goble*, 682 F.3d 934, 947-48 (11th Cir. 2012).

Thus, in a spoliation context, I submit that recklessness is simply a proxy for "willfulness," and therefore, adds nothing to any proposed definition of "willful" in (B)(i). If on the other hand, willfulness is viewed as raising an inference of bad faith, there was no need for the Committee to originally propose the current standard of "willful or in bad faith" in (B)(i) – which many comments have suggest be revised as "willful *and* in bad faith."

On this point, I agree with the ABA Section of Litigation's ("ABA") February 3, 2014 comment, which explained that if the term "willful" is intended to be synonymous with "bad faith," it is not needed, and "if it is not intended to be synonymous, we do not want it." The same can be said of recklessness. I support the ABA's view that sanctions under (B)(i) should not be imposed "because the trial court interpreted 'willful' to mean something less than bad faith."

Recklessness as a Quasi-Negligence Standard.

During my Dallas remarks, I raised a concern that recklessness essentially involves a quasi-negligence standard, and Judge Grimm requested authority that would support my position.

The leading case on this issue is the Supreme Court's decision in *Farmer v. Brennan*, 511 U.S. 825 (1994). The Court in *Farmer* observed "the civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* at 836. *Farmer* further commented that a "gross negligence" standard "is a 'nebulous' one, in practice typically meaning little different from recklessness as generally understood in the civil law." *Id.* at 837 n.5.

Thus the Committee should avoid reliance on the term "reckless" altogether, or define it in a way to avoid it being viewed as a quasi-negligence standard. As Judge Easterbrook explained in *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988):

> Gross negligence blends into negligence, there is an indistinct and unusually invisible line between the benefits exceeding the costs of precautions (negligence) and benefits substantially exceeding the costs (gross negligence). The malleable quality of these terms has produced scoffing among many, who see gross negligence as simply negligence 'with the addition of a vituperative epithet.' A line cannot be policed is not a line worth drawing .... The line ought not be drawn even if it could be patrolled.

Id. at 1219 (citations omitted).

Additionally, terms such as "willful" and "reckless" enjoy a rich common-law heritage, with various common-law definitions. Turning to one common-law meaning of "reckless," the Illinois Supreme Court has defined a reckless disregard for the safety of others as a "failure after knowledge of an impending harm to prevent that danger through the exercise of ordinary care." *American Bank & Trust Co. v. City of Chicago*, 735 N.E.2d 551, 557 (Ill. 2000).

The Supreme Court in *Safeco* recognized "the general rule that a common-law term [used] in a statute comes with a common-law meaning, absent anything pointing another way." 551 U.S. at 58. Accordingly, if the Committee chooses to employ terms such as "willful," "reckless," or "bad faith," it is critical that those terms be defined, or we run the risk of courts employing their common-law meanings, which in turn runs the potential risk of losing a uniform, national standard.[2]

Curative Measures Under Rule 37(e)(1).

I am concerned about the implication that the ethical duties and professional obligations of the lawyer are of lesser concern when the relief sought is "curative measures" rather than a "sanction." To the contrary, the potential for a personal-interest conflict with a client under Rule 1.7 of the Model Rules of Professional Conduct is the same when either type of motion is brought.

Furthermore, the impact on our clients and our civil justice system is the same under either type of motion. Motions for "curative measures" or "sanctions" will certainly delay the resolution of the case, trigger potentially costly satellite litigation, and bring added expense to the litigants. Practically speaking, there is no principled distinction between the concepts of "curative measures" in subsection (1)(A) and "sanctions" in subsection (1)(B) of proposed Rule 37(e). To borrow a phrase, curative measures are nothing more than a sanction without the "vituperative epithet." *Archie*, 847 F.2d at 1219. The impact on all stakeholders in our civil justice system is the same.

My concern with the "curative measures" provision is that it will encourage motion practice, because as written, subsection (1)(A) contains no culpability standard, no threshold for any type of prejudice or harm, and fails to require any consideration of the relevance or materiality of the lost information. Absent a showing of any prejudice,

[2] To the extent the term "bad faith" is defined in the Rule or explained in the accompanying Note, I commend for the Committee's consideration, the Seventh Circuit's definition of "bad faith," which requires a "purpose" of hiding or disposing of "adverse information." *Fass*, 532 F.3d at 644.

"curative measures" could be imposed for the negligent loss of duplicative information, or for information that otherwise bears little or no relevance to the issues in the case.

Therefore, the Committee should consider requiring some threshold of prejudice or harm, but obviously something less than the substantial prejudice standard in (B)(i). The failure to include any culpability threshold will allow consideration of a party's negligence to enter the realm of "curative measures" following the loss of ESI. Absent any relevancy requirement, the loss of *any* ESI could trigger the filing of a motion seeking curative measures. The failure to include any culpability standard, any threshold for prejudice, and any consideration of the relevancy of the lost information will undermine the accepted principle that a party does not have an obligation to preserve every piece of information or email in its possession.

Factors Considered in Assessing a Party's Conduct.

I also note my concern with the listing of whether the parties consulted with one another after receiving a request to preserve information as a relevant factor for the imposition of sanctions or curative measures. This is tantamount to implicitly imposing a pre-suit obligation to meet and confer, which is unwarranted under the proposed Rule. It has been my experience that pre-suit letters demand that everything be preserved but the "kitchen sink," and nothing is gained by implicitly suggesting the parties meet and confer under those circumstances.

There are other factors that the Committee should consider including in its list of factors. For instance, a party's "good faith" in attempting to preserve information; the relevance and materiality of the lost information to the issues in the litigation; the degree of prejudice or harm suffered by the party bringing the motion; the timing of that motion in relation to when the loss was disclosed or discovered; and whether there was any intent to deprive a party of adverse information are all relevant considerations. Additionally, the steps a party takes to recreate the lost information, or obtain it from other reasonably assessable sources should be considered.

The Irreparably Depriving Standard in (B)(ii).

The Committee has received numerous other comments raising concerns that the (B)(ii) provision could "swallow" the bad faith provision in (B)(i). I mention this point only to indicate that I share that concern, but will not belabor others' comments on this issue. However, I do urge the Committee to consider limiting (B)(ii) to the loss of tangible objects such as in *Silvestri v. General Motors*, 271 F.3d 583 (4th Cir. 2001).

Moreover, I support the suggestion that the term "meaningful opportunity" be deleted from (B)(ii) if it is retained. The term "meaningful opportunity" is vague and ambiguous. Because the purpose of this provision is to address the truly extra-ordinary scenario, (B)(ii) should be available only when the information loss "irreparably deprives a party of the ability to present or defend against the claims in the litigation."

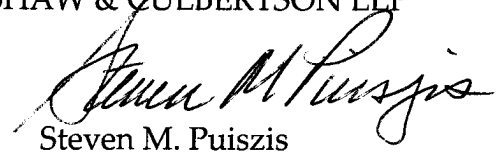
Concluding Remarks.

While these comments are my own, they are drawn on over 30 years of experience as a trial and appellate attorney, my experience as Deputy General Counsel of a national law firm with offices in 11 states, my experience as a member of the Seventh Circuit Electronic Discovery Pilot Program Committee, as well as my experience as a past president of the Illinois Association of Defense Trial Counsel and as the Secretary-Treasurer of DRI—The Voice of the Defense Bar.

I join with my colleagues in applauding the Committee for its efforts and express my best wishes for the successful conclusion of this important project.

Very truly yours,

HINSHAW & CULBERTSON LLP



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