UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
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CHAMBERS OF
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Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Building
One Columbus Circle, Room 7-240
Washington, D.C. 20544

Dear Committee Members:

I appreciate the opportunity to comment on the amendments to the Federal Rules of Civil Procedure proposed by the Committee on Rules of Practice and Procedure. Although many of the suggested changes would have a profound impact on the nature of discovery in federal civil litigation, I will confine my comments to proposed Rule 37(e) because it would directly affect the integrity of the judicial process. I offer my views as someone who has served as a United States Magistrate Judge for 28 years and who has particular experience in electronic discovery, an area that generates many of the disputes involving spoliation and sanctions.

I. Introduction

Proposed Rule 37(e) would radically alter the standards for remedying spoliation. In the process, it would curtail the ability of innocent parties to obtain relief when they are prejudiced by the destruction of information potentially relevant to litigation. The proposed Rule does not solve the problems it purports to address. Instead, by focusing on the state of mind of the spoliator, it introduces additional uncertainty and arbitrariness. Perhaps most importantly, it would undermine public perception of the fairness of the justice system.

Accordingly, I urge the committee to withdraw proposed Rule 37(e) in its current form or adopt it only with substantial modifications.

II. The Rule Will Not Solve Perceived Problems

There are three concerns that the proposed Rule appears to address: overzealous imposition of sanctions by the courts, lack of uniformity in the standards for sanctions, and overpreservation of data. There is no evidence that the first of these is, in fact, a problem, and the proposed Rule would do little to alleviate the other two.

A. There is no need to limit judicial authority

The concern that the courts have routinely imposed harsh spoliation sanctions in response to innocent conduct is not explicitly addressed in the May 8, 2013 Report of the Advisory Committee on Civil Rules (the "Advisory Committee Report"), and so perhaps it is not viewed as a basis for the proposed Rule. In any event, there is no evidence that courts have, in fact, imposed disproportionately serious sanctions. To the contrary, default, dismissal, and the imposition of an adverse inference instruction have generally been ordered only in response to the most egregious conduct by the party responsible for the destruction of evidence. See, e.g., Sekisui American Corp. v. Hart, 945 F. Supp. 2d 494, 509 (S.D.N.Y. 2013) (issuing adverse inference where information was destroyed as consequence of plaintiff's failure to institute litigation hold for fifteen months after plaintiff issued notice of claim); Micron Technology, Inc. v. Rambus Inc., 255 F.R.D. 135 (D. Del. 2009) (declaring patent unenforceable where patentee selectively destroyed unfavorable documents while anticipating litigation), aff'd in part, vacated in part, and remanded, 645 F.3d 1311 (Fed. Cir. 2011); cf. Qualcomm Inc. v. Broadcom Corp., 2008 WL 66932, at *17-18 (S.D. Cal. Jan. 7, 2008) (imposing monetary penalty and referring counsel to disciplinary committee for withholding 46,000 plainly relevant documents and misleading court).

B. The proposed Rule will not create uniformity

The Advisory Committee suggests that "the amendment provides a uniform national standard for culpability findings to support imposition of sanctions." Advisory Committee Report at 35. In particular, the Rule would reject the principle set forth in Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002), that sanctions may be imposed in response to negligent conduct. Advisory Committee Report at 35. The concern, apparently, is that because circuits have different sanctions regimens, entities engaged in nationwide activities must adopt the most conservative preservation practices in case they ultimately have to litigate in the circuit with the harshest penalties.

But a single federal procedural rule does not equate with uniformity. Any entity engaged in nationwide activity faces not only variation among the circuits, but also differences among the preservation and spoliation rules of the fifty states. The proposed Rule does not, and cannot, override these state schemes. Consequently, an entity that alters its behavior in light of potential sanctions would still have to take into account the most rigorous state sanctions rules that it

might encounter. See, e.g., Mills v. Hankla, 297 P.3d 158, 164 n.5 (Alaska 2013) (holding adverse inference available for intentional or negligent spoliation); Building Materials Corp. of America v. Allstate Insurance Co., 424 N.J. Super. 448, 472-73, 38 A.3d 644, 658 (App. Div. 2012) (finding adverse inference charge appropriate for negligent spoliation); Squitieri v. City of New York, 248 A.D.2d 201, 203, 669 N.Y.S.2d 589, 590 (1st Dep't 1998) ("Spoliation sanctions such as [dismissal and preclusion] are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense.").

Furthermore, the proposed Rule's requirement of willfulness introduces a further element of variability. Although the concept of willfulness is well-known in the common law, its definition varies depending on the context in which it appears. See, e.g., State v. Hanson, 808 N.W.2d 390, 406 (Wis. 2012) (noting "multitude" of definitions of willful, depending on context); Bernstein Management Corp. v. District of Columbia Rental Housing Commission, 952 A.2d 190, 199 (D.C. 2008) (noting "[w]illfulness has been variously defined"); Hammond v. Miller, 54 Conn. L. Rptr. 629 (Conn. Super. Ct. 2012) (finding definition varies, "ranging from voluntary; knowingly; deliberate . . . [i]ntending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary to premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences") (internal quotation marks and alteration omitted). Consequently, under the proposed Rule, there would likely continue to be a lack of uniformity even within the federal courts.

C. The proposed Rule will not alleviate overpreservation

The Advisory Committee explicitly states that "[t]he fundamental thrust of the proposal is . . . to amend the rule to address the overbroad preservation many litigants and potential litigants felt they had to undertake to ensure they would not later face sanctions." Advisory Committee Report at 35. This is indeed a worthwhile goal, and the Advisory Committee initially attempted to address it directly by providing a clearer definition of the preservation obligation. If parties better understand when and to what extent they must preserve information in connection with filed or anticipated litigation, they would be able to calibrate litigation holds accordingly, neither overpreserving nor allowing the destruction of evidence.

Unfortunately, efforts to reach consensus on a more precise definition of the obligation did not succeed, and, instead, "[t]he proposed amendment focuses on sanctions rather than attempting directly to regulate the details of preservation." Advisory Committee Report at 35. This approach will not cure overpreservation and, as discussed below, is likely to create other potentially significant problems.

1. Overpreservation has multiple causes

There is no doubt that the volume of information, particularly electronically stored information, is substantial. But much of that information is retained -- and associated costs incurred -- for reasons that have nothing to do with litigation. In part, it is because business needs or regulatory obligations require entities to retain information. In part, it is because entities do not have rational information disposition policies. A recent study found that 9% of the organizations surveyed had no records retention policy whatsoever, and of those that did, 21% had policies that did not cover electronically stored information. Cohasset/ARMA International 2011-2012 Survey Results, "Records Management and Governance of Electronically Stored Information (ESI)," 18-19. In any event, although any marginal reduction in cost is desirable, there is no evidence of the magnitude of cost savings that would be engendered by the proposed amendment.

2. The Rule assumes conduct is driven by sanctions

The implicit assumption underlying the proposed Rule -- indeed, the rationale upon which it depends -- is that lawyers think like criminals: they would adjust their behavior based on the penalty they might face for violating an obligation rather than on the obligation itself, so that a reduction in sanctions would, by itself, yield a reduction in preservation. This is a dim view of attorneys, and one for which there is no empirical evidence.

Business entities have presented statistics regarding the number of litigation holds they have in place and the costs of preservation. They have not, however, proffered any estimate of the savings that would accrue if the proposed Rule were enacted. In other words, they have not suggested that, in the absence of any change in their substantive preservation obligations, they would alter their behavior in any appreciable way merely because the consequences of violating that obligation have diminished.

III. The Proposed Rule Would Create New Problems

A. The proposed Rule would curtail the ability to remedy spoliation

As currently drafted, the proposed Rule would forbid a court, absent willfulness or bad faith (Rule 37(e)(1)(B)(i)) or irreparable deprivation (Rule 37(e)(1)(B)(ii)), from giving an adverse inference instruction or from imposing "any sanction listed in Rule 37(b)(2)(A)." Rule 37(b)(2)(A) authorizes not only the case-ending sanctions of dismissal and default, but also the preclusion of evidence. Thus, in spoliation cases that fall short of warranting the most severe sanctions, the proposed Rule would prevent a court from issuing a preclusion order narrowly tailored to the specific information that has been destroyed. See, e.g., In re WRT Energy Securities Litigation, 246 F.R.D. 185, 200 (S.D.N.Y. 2007) (precluding party that allowed

spoliation from challenging representativeness of remaining evidence). Any new rule should enhance rather than limit the court's ability to address spoliation in a nuanced manner.

B. The focus on intent invites arbitrariness

Ascertaining a party's intent is one of the most difficult determinations that a judge makes. Imputing intent to an organization is doubly problematic. Because different inferences about state of mind can often be drawn from the same evidence, the proposed Rule's focus on willfulness and bad faith is likely to result in decisions that appear arbitrary, since the same facts may lead to a case-ending sanction in one instance but not in another.

C. The focus on intent favors unsophisticated plaintiffs

Ironically, the parties most likely to benefit from a requirement of willfulness or bad faith are unsophisticated plaintiffs. It will be easier for a court to infer that a savvy business defendant that failed to institute a litigation hold acted in bad faith than to infer that an individual plaintiff with no technological expertise wiped his hard drive or deleted material from his Facebook page in order to gain an advantage in litigation.

IV. The Rule Should Preserve Systemic Integrity

The principle underlying Residential Funding is that the party responsible for the loss of evidence, not the innocent party, should be responsible for the consequences that follow. The Advisory Committee has not addressed, let alone rebutted, that precept. Spoliation threatens the integrity of the justice system because it tips the balance among the parties for reasons that have nothing to do with the merits of a dispute. If a party is unable to restore that balance simply because it is unable to demonstrate the bad intent of the spoliator, the system will be viewed as unjust.

V. Positive Attributes of the Proposed Rule Should Be Retained

A. The concept of curative measures

There are two respects in which the proposed rule makes a positive contribution. First, it differentiates between curative measures and sanctions. Particularly because there are professional repercussions for attorneys who have been subject to sanctions, this is an important distinction.

As the proposed Rule is currently written, however, the boundary is misplaced: additional discovery and cost-shifting are characterized as curative, while dismissal, default, preclusion, and issuance of an adverse inference are deemed sanctions. However, each of the so-called "sanctions," including case-ending orders, may be curative if it is necessary to rectify a

substantial loss of evidence. Conversely, the term "sanction" implies a response to morally reprehensible conduct and should therefore be reserved for acts done in bad faith.

B. Factors for assessing a party's conduct

Perhaps the most beneficial aspect of the proposed Rule is the non-exclusive list of factors that courts are directed to use in assessing a party's conduct. This aspect of the proposed Rule makes clear that a party's preservation efforts are expected to be proportional and reasonable, not perfect. Further, the factors properly encourage the parties to engage with one another with respect to preservation and to bring disputes that cannot be resolved informally to the court for resolution.

VI. An Alternative Rule

If the Committee were to consider an alternative to the current proposed Rule, it should focus not on divining the intent of the spoliator, but on remedying the prejudice to the innocent party while ensuring that the remedy is not disproportionate to the harm caused. The following is such an alternative:

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(e) Failure to Preserve Discoverable Information

(1) Curative measures. If a party failed to preserve discoverable information that should have been preserved in anticipation or conduct of litigation, the court may impose a remedy no more severe than that necessary to cure any prejudice to the innocent party unless the court finds that the party that failed to preserve acted in bad faith.

(2) Factors to be considered in fashioning a remedy. The court should consider all relevant factors in determining the appropriate remedy where a party failed to preserve discoverable information that should have been preserved in anticipation or conduct of litigation. The factors include:

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

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

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;

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

(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

Again, I thank the Committee for its consideration of my comments.

Yours very truly,

James C. Francis IV
United States Magistrate Judge