LAWYERS FOR CIVIL JUSTICE

COMMENT to the
ADVISORY COMMITTEE ON CIVIL RULES

AT THE FINISH LINE: THE FINAL MODIFICATIONS NECESSARY TO BRING THE COMMITTEE'S WORK TO FRUITION AND ENSURE MEANINGFUL RESULTS FROM THE PROPOSED AMENDMENTS

April 4, 2014

Lawyers for Civil Justice ("LCJ") respectfully submits this Comment to the Advisory Committee on Civil Rules ("Advisory Committee" or "Committee") concerning the Proposed Amendments to the Federal Rules of Civil Procedure ("proposed amendments").

We urge the Committee to move forward with revised proposed amendments to address the enormous challenge that the information age is posing to the U.S. civil justice system. Proposed Rule 37(e) will provide a uniform national standard which has the potential to encourage a more rational approach to preservation planning. In addition, Proposed Rule 26(b)(1), by moving the existing proportionality standard into the scope of discovery, will help focus on production of discoverable information bearing on the claims and defenses – while still ensuring access to the information needed for the case.

These are important and meaningful reforms which justify the tremendous efforts the Committee has made to advance them to the finish line. We appreciate the thoughtful consideration both the Discovery and Duke Subcommittees have given to the voluminous public comments, and we support the subcommittees' recommendations, except as stated in this Comment. The modifications described below we believe will achieve the goals of the Subcommittees as expressed in their reports and will avoid the potential for unintended consequences that might result based on the text of the current proposed amendments.

I. Preservation and Sanctions: Proposed Rule 37(e)

The Discovery Subcommittee proposes that Rule 37(e) focus only on ESI and be accompanied by an expanded Committee Note. LCJ views these changes as consistent with the goal of providing a uniform and predictable national standard that helps address the underlying causes of costly over-preservation. Moreover, the proposal avoids a problematic formulation meant to address the *Silvestri*-type cases, deftly steers away from the complicated definitions of

"willfulness" and "bad faith," and establishes the appropriate intent standard for the most severe sanctions. Some corporate representatives stated during the public hearings that they would be able to significantly reduce over-preservation provided that these types of clarifications were made.[1]

However, the revised proposal still lacks sufficient clarity and omits several key concepts. Without further revisions, the proposal could have serious unintended consequences. Accordingly, we urge adoption of the modifications discussed in this Comment.

A. Proposed Rule 37(e): Our Proposed Refinements in Redline

LCJ's recommendations for the revised Rule 37(e) are reflected in the following redline version of suggested changes to the Subcommittee's proposal. An explanation for each change follows below.

(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 findings that the party acted with the intent to deprive another party of the information's

[1] Transcript of the Proceedings, 2013 EDI Leadership Summit, *At the Crossroads of Bad Faith & Negligence: How Sekisui Shows We Need New Rule 37(e),* at 13 (Oct, 2013) (quoting Jon Palmer, Assistant General Counsel, Microsoft, stating "I would no longer put entire organizations under a hold when I know that there are three or four key players within the organization that are going to have all of the relevant material")*available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-1680.

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.

B. Rule 37(e) Should Apply Only to ESI Within the Scope of Discovery.

Under the revised proposal for Rule 37(e), a predicate showing to its applicability remains that a party failed to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation.

The reference is to a "preservation obligation [that is] recognized by many court decisions" and not to "a new duty to preserve."[2] This leaves the task of determining when a party has "failed to preserve [ESI] that should have been preserved" to the case law in the various Circuits, despite the fact that strict liability is applied in some Circuits and not in others.[3] Some have argued, however, that a finding that a party "should have" preserved discoverable information implies a finding of some degree of fault.[4]

LCJ suggests that, in light of Proposed Rule 26(b)(1), this predicate showing should be modified so that the failure to preserve ESI must be shown to be relevant to the claims or defenses in the litigation and also proportional to the needs of the case. This emphasis on proportionality is also the subject of a proposed "factor" listed in Subsection (4) of Proposed Rule 37(e). Accordingly, LCJ recommends that the introductory sentence to Rule 37(e) be modified (as many public comments suggested) to include a reference to Rule 26(b)(1).

C. The Distinction Between Subsections (1) and (2) Must Be Clarified To Avoid Confusion and Redundancy.

LCJ agrees with the Subcommittee's decision to avoid the ambiguity inherent in using the terms "curative measures" and "sanctions." However, in doing so, the revised proposal creates confusion between curative measures which are designed to cure "loss" and those designed to cure "prejudice." We urge that the two subsections be clearly distinguished.

Subsection (1)

Subsection (1) concerns discovery measures that will "cure the loss" by replacing the lost ESI with information from another source. In other words, its goal is to repair, or to avoid, a loss of information. It does so by providing courts the flexibility to order further discovery measures – in particular, further discovery that would not otherwise be allowed. To clarify this, it should permit a court to "[o]rder *discovery* measures…."

In addition, Subsection (1) should apply only to *material* losses. The point of a "cure" is to repair something, not to punish an inconsequential occurrence. There is no need to order more discovery where the lost ESI is cumulative, duplicative or has no bearing on the case for other reasons. Materiality is the measure of whether there is any point to a cure. The rule should not enable parties to seek to impose additional costs or burdens on their adversaries when the "loss" to be cured is immaterial to the underlying merits of the matter.

Finally, as drafted, Subsection (1) is made unnecessarily complicated by a listing of some of the various pretrial options available. Provided there is a showing of a pre-requisite common-law

---

[2] Advisory Committee on Civil Rules, *Agenda Materials, Portland, OR, April 10-11, 2014*, at 385, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.

[3] 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").

[4] *See* Henry Kelston, Milberg, February 16, 2014, at 5 (raising the possibility that the clause could be interpreted as "requiring some level of fault," citing to Champions World v. US Soccer, 276 F.R.D. 577, 583 (N.D. Ill. 2011).

failure to preserve under circumstances contemplated by the rule, courts traditionally have wide latitude under the provision, and non-exclusive examples are unnecessary. Instead, the subsection should focus on the core concept that the discovery measures employed should be no greater than necessary to cure the loss of the ESI at issue.

Subsection (2)

Subsection (2), on the other hand, is premised on the failure of measures such as those available under Subsection (1) to cure the loss. It should say so. Subsection (2) applies only if there is also a showing of prejudice, and the measures imposed under its authority are limited to those needed to cure the prejudice identified. This limitation helps clarify the important role played by prejudice in matters akin to spoliation sanctions, which this subsection may include. Otherwise, a party could seek measures under Subsection (2) when Subsection (1) is more appropriate.

Moreover, no explicit showing of culpability is required. Unfortunately, this risks lowering the standard for imposition of sanctions in Circuits which do not follow the culpability approach found in *Residential Funding Corp. v. DeGeorge Fin. Corp.*[5] A classic example is the striking of pleadings.[6] There may be others as well.[7]

Accordingly, it is appropriate to expand the list of covered measures in Subsection (3) to more accurately reflect the need for bad faith showings, thereby enhancing the uniformity and effectiveness of the rule. The impact of a lowered standard outside the Second Circuit (and others) was not a topic on which the Committee sought public comment in its five questions,[8] nor one which was foreshadowed by the original Proposal or the draft Committee Note. The "record does not contain the views" of the public on this topic,[9] and the Committee may wish to condition its approval of the proposal on a solution to this problem.

D. Subsection (3) Should Include All Measures that Directly Affect Matters Before the Trier of Fact at Trial.

LCJ agrees with the Subcommittee's approach to address the most severe sanctions for spoliation of evidence in Subsection (3) and to provide explicit guidance by way of example. We also agree that imposition of those measures requires a finding of specific intent to deprive opposing

---

[5] *Compare* Bracey v. Grondin, 712 F.3d 1012, 1020-1021 (7th Cir. Mar. 15, 2013) (a showing of "destruction for the purpose of hiding adverse information" is required), *with* Residential Funding Corp. v. DeGeorge Fin. Corp, 306 F.3d 99 (2d Cir. 2002) (need only show that evidence was destroyed "knowingly, even if without intent [to breach a duty to preserve it], or *negligently*") (emphasis in original).

[6] Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010)("[i]n this Circuit, the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of bad faith").

[7] Batson v. Neal Spelce Assocs., 765 F.2d 511, 516 (5th Cir. 1985) ("like [a] dismissal action, the assessment of attorney's fees is penal in nature" and may not be assessed in the absence of a finding that the party acted in bad faith). The example of attorney's fees currently in Subsection (1) may well fit better in Subsection (3).

[8] Notes, February 8, 2014 Meeting, AGENDA BOOK at 14 (implying that the test for republication is whether the changes are "within the ambit" of the five questions raised for public comment).

[9] Wagner Electric v. Volpe, 466 F.2d 1013, 1019-20 (3d Cir. 1972) (ordering republication for further public comment under analogous provisions of APA where groups of advocates' silence on the topics in earlier period "may well be because the notice of proposed rulemaking never advised of this subject or issue").

litigants of the use of the ESI in the litigation[10] in addition to requiring a showing of prejudice (which is not clear in the current proposal).

These requirements should, at a minimum, apply to all measures, regardless of their form, which directly affect the trial itself and which add or subtract from the body of relevant evidence admissible at trial. Such measures have due process implications. For example, striking claims or defenses has the same effect as entering default judgments. Similarly, a permissive or mandatory adverse inference jury instruction is a well-known sanction for spoliation that involves the jury charge.

Moreover, other mandatory rulings, grounded in a finding of spoliation and imposed to punish or deter, should also have as its prerequisite a similar finding of specific intent. Court orders involving a shift in the burden of proof due to spoliation also belong in Subsection (3) because they typically require a showing of bad faith or similarly culpable conduct, combined with prejudice to the opposing party.[11]

LCJ thus recommends that the Committee include additional examples of measures that affect the conduct of trial or otherwise require an elevated showing of culpability in Subsection (3). The Committee Note should also be substantially simplified to state more clearly the relationship between the Subsections.

E. The List of Factors Is Improved and Should Remain in the Rule.

LCJ notes that the Discovery Subcommittee has tentatively recommended that the Committee incorporate, as Subsection (4), an improved the list of factors reflecting substantial changes in light of the public comments.[12] In the alternative, the Subcommittee has asked the full Committee to decide whether to place the factors in the text, consign them to the Note, or delete them.

LCJ applauds the changes made and suggests that the simplified list of factors is now appropriate for inclusion in the text of the rule itself.

F. The Proposed Rule 37(e) Should Include the Existing Rule 37(e) Safe Harbor.

LCJ suggests including, as Subsection (5), the requirement that a court not order any relief under these rules for a party's failure to preserve ESI lost as a result of the "routine, good-faith operation of an electronic information system." Confining the revised rule to electronically stored information necessitates a re-examination of whether to delete the safe-harbor language currently in Rule 37(e). While the Subcommittee has apparently concluded that "[t]here is no

[10] Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp.2d 598, 618 (S.D. Tex. Feb. 19, 2010) (severe sanctions are justified by actions "to prevent [the evidence's] use in litigation").

[11] Akiona v. United States, 938 F.2d 158, 161 (9th Cir. 1991) (reversible error to shift burden of proof due to spoliation without establishing that the party "destroyed the [evidence] with the intent of covering up information"); *Cf.* Ahcom, Ltd. v. Smeding, No. 07-1139 SC, 2011 WL 3443499, at *8-9 (N.D. Cal. Aug. 8, 2011) ("troubling" disposal of computer did not warrant shifting burden of proof due to lack of prejudice).

[12] The factor referring to demands for preservation was quite appropriately dropped because it received negative commentary during the public comment period.

further use for present Rule 37(e)" because the rule is inapplicable once a duty to preserve attaches,[13] we respectfully suggest that this is not the only or even the correct interpretation of current Rule 37(e),[14] as affirmed by the case law on the topic.[15]

The DOJ suggested that the Proposed Rule published for comment "does not expressly provide a safe harbor or address the routine operation of a computer system" which helps organizations "move towards better electronic document and information management systems."[16] LCJ now agrees, based on the current version of Proposed Rule 37(e). Absent a safe harbor, a company with a routine backup system process who in good faith fails to preserve all backup media could face imposition of Proposed Rule 37(e)(1) and (2) measures despite a lack of culpability of any sort.

II. Proportionality and the Scope of Discovery

A. Proposed Rule 26(b)(1) Should Be Approved.

The Duke Subcommittee has affirmed the importance of moving forward with the proposed amendment to Rule 26(b)(1). This is an appropriate decision which LCJ supports.

B. The Committee Note Should Not Prejudge Use of the Cost Shifting Authority in Rule 26(c)(1)(B).

The proposal to modify Rule 26(c) to explicitly authorize "the allocation of expenses" in protective orders is important and sound. As the Report of the Duke Subcommittee points out, it is "useful to make the authority explicit on the face of the rule" so that courts and parties "will consider this choice as an alternative."[17]

The importance of this provision is confused and undermined by the proposed comment in the Committee Note that "courts and parties should continue to assume that a responding party ordinarily bears the costs of responding."[18] That statement goes against the purpose of the rule amendment, which is to allow judges to continue developing a common law on the subject. There is no need for the Committee to advise courts not to use this authority. It not only contradicts the rule text but also appears to predestine the Committee's future consideration of

---

[13] Notes, February 25, 2014 Meeting, AGENDA BOOK at 425.

[14] Thomas Y. Allman, *Inadvertent Spoliation of ESI After the 2006 Amendments: The Impact of Rule 37(e),* 3 FED. CTS. L. REV. 25, 26 (2009) (noting that some courts have completely ignored the clear implication that it applies after the duty to preserve has arisen, thereby rendering the rule largely superfluous).

[15] 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, No. 09-61166-CIV, 2011 WL 1456029 (S.D. Fla. Apr. 5, 2011) (refusing sanctions, citing Rule 37(e), in the absence of proof that failure to institute litigation hold was undertaken in bad faith).

[16] Letter from Department of Justice, Civil Division, to The Honorable David G. Campbell, Chair, Advisory Committee on Civil Rules, Re: Comment on Proposed Amendments to Civil Rules, at 19 (Jan. 28, 2014) (suggesting addition of a statement in (B)(ii) that it did not apply to information lost as the result of "routine, good faith" operations of such systems).

[17] Advisory Committee on Civil Rules, *Agenda Materials, Portland, OR, April 10-11, 2014,* at 87, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf.

[18] *Id.* at 104.

additional rules on this subject. At very least, as a process matter, the Committee Note should not convey the impression that it has already determined the result of the Subcommittee's future work on this topic.

III. Conclusion

The proposed amendments of August 2013, as revised by the Subcommittees since the public comment period, involve important and meaningful reforms which, if advanced, will justify the tremendous efforts the Committee has made to advance them to the finish line. While LCJ believes that its recommendations in this Comment are essential improvements, we are, on the whole, very supportive of the efforts of the Committee and its Subcommittees.