LAWYERS FOR CIVIL JUSTICE

COMMENT to the
ADVISORY COMMITTEE ON CIVIL RULES
THOUGHTS ON THE NOTE TO PROPOSED RULE 37(e)

April 25, 2014

Lawyers for Civil Justice ("LCJ") respectfully submits the following suggestions concerning the contents of the Committee Note which will accompany amended Rule 37(e).

LCJ supports the innovative changes made in the final version of Rule 37(e) in light of their intended impact. However, the effectiveness of the guidance in that Rule will be materially enhanced by a candid and clear Committee Note that deals with the practical issues that will arise under the new rule. Accordingly, we confine our remarks to those issues.

I. Amended Rule 37(e): Invoking the Duty to Preserve

Rule 37(e) now applies when a party has failed to preserve electronically stored information (ESI) that "should have been preserved" in the anticipation or conduct of litigation. This wording is intended to invoke the common law duty to preserve relevant ESI, i.e., ESI within the scope of discovery[1], under circumstances that typically involve prejudice and some degree of fault.

However, in some jurisdictions, no showing of culpability is required[2] nor is the curative impact of alternative sources available through further discovery adequately acknowledged. The Committee has properly addressed both topics in the most recent changes to the rule. LCJ respectfully suggests, however, that the Committee Note be bolstered to clarify these two important additions to the amended rule.

---

[1] We suggest that the Committee Note clarify that amended Rule 26(b)(1) ("parties may obtain discovery that is relevant to any party's claim or defense and proportional to the needs of the case") is the appropriate benchmark in assessing the scope of any duty to preserve.

[2] *See, e.g.*, Notes, February 25, 2014 Subcommittee 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").

A. "[Failure] to take reasonable steps to preserve the information"

The Committee Note should clarify that the primary purpose of the reference to "reasonable steps" is to reject the concept of liability without fault in favor of a standard based on reasonable conduct in undertaking preservation of ESI.[3]

The intent is to encourage – and reward – reasonable behavior, not make it a condition of the application of Subsections (1) and (2). Even if reasonable steps are undertaken, information may be lost; however, the way the Rule reads now none of its carefully crafted provisions would apply if ESI were lost despite a party's having taken "reasonable steps to preserve the information." We do not understand that the Committee intends to expose a party to onerous sanctions or penalties when ESI is lost despite having taking reasonable steps. As Judge Francis noted in an earlier context, "a party's preservation efforts are expected to be proportional and reasonable, not perfect."[4]

During the discussion of the amended rule in Portland, several Committee Members made the point during the discussion of the amended rule in Portland that reasonable steps do not always prevent losses. The original proposed Committee Note (August 2013) also captured the point by its observation that "[d]espite reasonable efforts to preserve, some discoverable information may be lost."[5]

This point needs to be made absolutely clear.[6] Only if this is made clear will litigants be discouraged from engaging in "gotcha" practices intended to catch opposing counsel in inadvertent missteps rather than employing discovery as it was intended, to prepare the case for a merits decision.

B. "Additional Discovery"

The amended Rule now includes a reference to the role of "additional discovery" undertaken to restore or replace lost ESI. The Committee presumably intends that courts should turn first to management measures (such as those authorized by Rule 26(b)(2)(B)) before turning to the measures cabined by Subsections (1) and (2).

The Committee Note should emphasize the desirability of pragmatic substitutes for lost ESI that allow the case to proceed, and should discourage hyper-technical focus on finding exactly what is missing. It would defeat the purpose of the rule, for example, if a court could order excessive and disproportional reconstruction of legacy data or obscure backup media the cost of which would require a party to settle a case rather than comply. Likewise, the availability of

---

[3] *Cf.* Zubulake v. UBS Warburg, 220 F.R.D. 212, 220 (S.D. N.Y. Oct. 22, 2003)("[o]nce the duty preserve attaches, any destruction of documents is, at a minimum, negligent").

[4] James C. Francis IV Comment, January 10, 2014, at 6.

[5] Committee Note, Rule 37(e), Request for Comment, August 2013, at 322.

[6] The argument is consistent with the existing language in Rule 37(e), to which reference could be made in the Committee Note since it is intended to be subsumed by the new Rule.

information substantially similar to what was lost, even if not identical, should preclude the imposition of additional measures under the proposed rule.

Any such "additional discovery" must be "proportional to the needs of the case," and should only be undertaken where the loss is important to the case.

II. Subsection (1): Dealing with Prejudice

Subsection (1) authorizes use of appropriate measures to remediate prejudice that are "no greater than necessary to cure the prejudice." The rule both acknowledges the availability of judicial discretion - including the power to ignore non-material losses – and authorizes only a proportional response. Properly applied, this should help discourage unnecessary ancillary litigation and overuse of sanction motions, and retain the focus on the merits of the case. These points should be clearly made in the Committee Note.

The subsection's lack of an express culpability requirement is problematic, as it may be misinterpreted as permitting harsh measures short of Subsection (2)'s case-dispositive measures without the restraining influence provided by that requirement. The Committee Note should clarify, for example, that even remedial actions may become excessive and are precluded when they are so onerous that they force the producing party to forgo claims or defenses, rather than move the case forward.

III. Subsection (2): Rejecting *Residential Funding* by a Uniform Rule

Subsection (2) rejects the low culpability threshold authorized by the 2002 decision in *Residential Funding Corp. v. DeGeorge Fin. Corp.*[7] for certain specific types of case-dispositive measures. It does so by requiring that a party seeking such sanctions show that the actions were undertaken by the party sought to be charged "with the intent to deprive another party" of the use of the ESI in the litigation.

A. The Demarcation Line Barring Excessive Evidentiary Discretion

Some courts authorize admission of evidence about ESI loss and the drawing of inferences about their contents without requiring preliminary findings on culpability or prejudice, an approach that was alluded to in the original[8] and revised Committee Note.[9]

The risks of an exaggerated jury response to such evidence are amply demonstrated, however, by the recent *Actos* litigation.[10] In that case, after hearing a week of testimony about data loss, the

[7] 306 F.3d 99 (2nd 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).

[8] [Original August, 2013] Committee Note, Subdivision (e)(1)(A)(permitting introduction of evidence about losses before the jury).

[9] [Revised March 2014] Committee Note, Subdivision (e)(3)(the rule does not prohibit a court from allowing the parties "to present evidence and argument to the jury concerning the loss of information"), AGENDA BOOK, at 390.

[10] *See* In re Actos, 2014 WL 308909, at *38 (W.D. La. Jan. 27, 2014)("this court finds it wholly reasonable to allow the jury to hear all evidence and argument establishing and bearing on the good or bad faith of Takeda's conduct and

jury was permitted to infer that the missing information was unfavorable and promptly reached a jury verdict, in less than two hours, which included an award of $9 billion in punitive damages.[11]

The Committee Note needs to draw a clear, practical demarcation line between the court's discretion to permit evidence about losses of ESI and instances where such evidence should not be admitted or an inference permitted in the absence of findings of intent to deprive a party of the evidence. Subsection (2)(B) appropriately states that absent such a finding, a court may not "instruct a jury that it may or must presume the information was unfavorable to the party" .

As a minimum, the Committee Note should require a court to make the requisite factual findings under Subsection (2) before any inferences are authorized based on evidence and argument about the circumstances and impact of the missing ESI. The Note should reject decisions holding that merely labeling an instruction allowing such inferences as "permissive" is sufficient.[12]

B. The Importance of Showings of Prejudice

Section (2) does not, on its face, require a preliminary finding of actual prejudice before case dispositive measures are imposed. Accordingly, given the potential confusion from that omission, it is important that the Committee Note explain the reasons for - and the limits implied by – that omission.

As we understand it, the reason for the omission is to allow courts to punish the "incompetent spoliator" who acts with the intent to deprive another party of information but fails to do so.[13] Without explanation of this limited and arguable irrelevant focus (other means are available)[14] there is a risk that courts will deem the Committee to have concluded that prejudice is not relevant or required.

While our preference would have been to include prejudice in the rule, we believe that a clearly worded Committee 'Note explaining the implicit requirement of prejudice in most cases would be helpful.

---

after hearing all such evidence, the instruction to be given the jury [will be given] in a manner congruent with that evidence").

[11] After the jury heard the testimony, it was instructed that the court had concluded that "spoliation occurred in this case" because Tekeda was obligated to "retain all" information related to its product and some had been destroyed, leaving the jury "free to infer" that the missing evidence "would have been helpful to plaintiffs." (Trial transcript, 6277-6279). The verdict was returned April 7.

[12] *Cf.* Mali v. Federal Insur. Co., 720 F.3d 387, 392 -93 (2nd Cir. June 13, 2013)(distinguishing adverse inference instructions issued as "a sanction, or in other words, a punishment for misconduct" and a "fundamentally different" type of adverse inference that "simply explains to the jury" that is not a punishment but "simply an explanation to the jury of its fact-findings powers"); *see also* Herrman v. Rain Link, 2013 WL 4028759, at *6 (D. Kan. Aug. 7, 2013)("[a]part from sanctions, the judge [could] find that admission of some evidence concerning spoliation of evidence might be helpful for determining the probative value of the documents [which may be placed in evidence]").

[13] Punishing the "incompetent spoliator" with a permissive or mandatory adverse inference is a very blunt tool, and risks polluting the jury's sacred fact finding mission all out of proportion to the effects of the spoliation.

[14] It was pointed out at Portland, for example, that to the extent that counsel conduct is involved, there are measures available under Professional Codes, including those applied by the District Court.

C. The Listed Measures Are Non-Exclusive

We also recommend that the Committee Note emphasize that the listed measures in Section (2) are not intended to be exclusive of others that may have the same harsh impact. A classic example is the striking of pleadings.[15] Others may include a shift in the burden of proof,[16] the entry of partial summary judgment, or imposing a disproportionate award of attorney's fees as sanctions as punishment.[17]

The risk is that without further clarification, the listing of the three measures may be read as demonstrating the Committee's "pre-emptive intent" to allow other measures that might have a similar impact on the case without requiring the Rule's higher level of culpability.

Accordingly, without rejecting the intent to provide a single, national rule on the topic, the Committee Note should clarify that the list is non-exclusive. Courts should have the discretion to apply the Subsection (2) specific intent requirement to other mandatory rulings which have the same impact. The Note should state that Proposed Rule 37(e) is not meant to authorize disproportionate curative measures intended to deter or punish, as opposed to cure, and which have such an impact.

Conclusion

The concise language of Proposed Rule 37(e) is commendable. It advances a national standard that will provide important guidance to litigants and courts. However, the accompanying Advisory Committee Note should be crafted to address open issues which are subject to misinterpretation.

[15] Rimkus 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").

[16] 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").

[17] Joseph v. LineHaul Logistics, 2013 WL 6406323, at *1 (9th Cir. Dec. 9, 2013)("[b]ad faith must be found before a federal court can award attorneys' fees as a sanction under its inherent powers"); Batson v. Neal Spelce Associates, 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).