LAWYERS FOR CIVIL JUSTICE

COMMENT to the
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

IN SUPPORT OF PROPOSED RULE 37(e) AND THE DUKE PACKAGE OF AMENDMENTS

May 22, 2014

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment in support of the proposals to amend the Federal Rules of Civil Procedure contained in the May 2, 2014 report submitted by the Advisory Committee on Civil Rules (the "Advisory Committee"). The proposed amendments provide practical and much-needed reforms to the Federal Rules of Civil Procedure ("FRCP") that address the enormous burdens to the U.S. civil justice system caused by massive increases in the volume and complexity of electronic information.[2] We appreciate the thoughtful, thorough and transparent process by which the Advisory Committee developed these proposals, beginning with the Duke Conference in 2010 and continuing through the public comment period, which included over 120 live witnesses and nearly 2,350 written submissions.

LCJ urges the Standing Committee to approve the proposed amendments, subject only to the suggestions contained in this Comment, including those for the recently released Advisory Committee Note.[3] We believe the suggestions are within the intent of the Advisory Committee and therefore would not require republication.

[1] Lawyers for Civil Justice is a national coalition of defense trial lawyer organizations, law firms and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 25 years, LCJ has been closely engaged in supporting federal civil rules reform in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] The proposals before the Standing Committee represent material progress toward the three pillars of discovery reform: (1) a national and uniform approach to spoliation sanctions; (2) a revised scope of discovery that is fair and practical; and (3) incentive-based cost default rules.

[3] The draft Committee Note became available for the first time upon release of the Agenda Book for the Standing Committee Meeting, namely, on Friday, May 9, 2014.

I. The Need for Reform

The need for FRCP reform is clear: there is solid agreement among a diverse spectrum of stakeholders that the high costs and burdens of discovery are skewing the U.S. civil justice system. Data from the American College of Trial Lawyers[4] and the American Bar Association[5] demonstrate that large majorities of both the plaintiffs' and defense bars think that discovery is too expensive, that costs rather than merits force settlements, and that e-discovery is abused. Similarly, a survey of the Association of Corporate Counsel administered by the Institute for the Advancement of the American Legal System[6] found that 80 percent of chief legal officers or general counsel disagree with the statement that "outcomes are driven more by the merits of the case than by litigation costs."

The high costs and burdens of discovery – especially electronic discovery – create a barrier to entry into our courts. It forces litigants to opt out of the U.S. courts in favor of other forms of dispute resolution or, unfortunately, to settle cases without regard to the merits in an effort to avoid the expense of discovery. If adopted, the proposed amendments will help lower the costs and burdens of discovery while protecting the ability of parties to access the information they need to bring or defend against legal claims.

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

The Advisory Committee's proposal for replacement of current Rule 37(e) is greatly improved from the version published for public comment. In addition, the recently released Advisory Committee Note (the "Committee Note") has been simplified and is focused on the practical issues facing courts and parties.

A. Proposed Rule 37(e) Is Properly Restricted to ESI.

The Advisory Committee presented a prescient question at the outset of the public comment period: would it be best to confine the revision of Rule 37(e) to losses of electronically stored information ("ESI")? As it turned out, the answer was "yes," given the difficulties created by the problematic formulation meant to address *Silvestri*-type cases concerning losses of case-critical physical evidence.[7] The Advisory Committee appropriately revised its approach to focus solely on ESI, where a uniform standard is most needed. However, while the existing case law

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[4] Rebecca Love Kourlis, Jordan M. Singer, & Paul C. Saunders, *Survey of experienced litigators finds serious cracks in U.S. civil justice system*, 92 JUDICATURE 78 (Sept. -Oct. 2008), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Survey_Experienced_Litigators_Finds_Serious_Cracks_In_US_CJS2008.pdf.

[5] AMERICAN BAR ASSOC. SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT (Dec. 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Section%20of%20Litigation,%20Survey%20on%20Civil%20Practice.pdf.

[6] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYST., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL (2010), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Civil_Litigation_Survey2010.pdf .

[7] In *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), a product liability case, the car in which Plaintiff claimed the airbag failed to deploy during an accident was sold and repaired before Defendant's experts could inspect it. In light of the substantial prejudice to Defendant caused by the loss of this "central piece of evidence," Plaintiff's case was dismissed.

concerning claims of spoliation of documents and tangible property is well-developed, it would be appropriate for the Committee Note to express the expectation that the case law governing those forms of discoverable information should evolve in harmony with the new Rule 37(e)).

B. Proposed Rule 37(e) Should Refer to Rule 26(b)(1).

Proposed Rule 37(e) concerns ESI that "should have been preserved," but neither the text of the rule nor the Committee Note provides specific guidance about the relationship of the scope of preservation to the scope of discovery as defined by Rule 26(b)(1). Courts and parties would benefit from guidance on that topic, particularly because parties must decide what "should [be] preserved" early in a case, often well in advance of litigation.[8]

However, it is obvious that there is no duty to preserve ESI that will not be sought in the case. Accordingly, LCJ recommends that either the introductory sentence to Rule 37(e) or the Committee Note clarify that the rule applies only to ESI "*within the scope of discovery as defined by Rule 26(b)(1).*"

C. Subsection (1) Should Clearly Exclude Strict Liability.

The proposed rule appropriately rejects the negligence standard in *Residential Funding Corp. v. DeGeorge Fin. Corp.*[9] by requiring that a party must have "acted with the intent to deprive another party of the information's use in the litigation." However, that requirement is confined to measures listed in Subsection (2). This leaves Subsection (1) susceptible to a broader interpretation that would not clearly exclude losses of ESI whose prejudicial impact results from mere carelessness or unintentional fault, amounting to *per se* or strict liability.[10]

If Subsection (1) were interpreted to establish that ESI "should have been preserved" merely because the loss of ESI occurs after a duty to preserve attaches,[11] it would also have the effect of *lowering* the standard in Circuits which now require an explicit showing of culpability. This clearly is not the intent of the proposal. As the proposed Committee Note correctly states, the rule "does not call for perfection." Accordingly, the Committee Note should emphasize that the predicate requirement of a failure to take "reasonable steps" does not invoke a strict liability standard, since "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established applicable standards."[12]

One possibility is to acknowledge, as The Sedona Conference® has done in Principle 6, that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored

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[8] Typically, as the case progresses, the scope of preservation is adjusted to fit the expanded (or contracted) issues involved.

[9] 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).

[10] Fortunately, under Subsection (1), the broad discretion of trial courts will be limited to measures which are not greater than needed to cure prejudice resulting from a failure to preserve.

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

[12] *Rimkus Consulting Grp. Inc. v. Cammarata,* 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (emphasis in original).

information."[13] Another approach would be to emphasize that only "intentional" conduct (which could include a willful omission), directed at achieving a lack of preservation, is within the scope of conduct that could trigger an application of the rule.

These clarifications to the Committee Note will help to ensure that proposed Rule 37(e) does not lower the threshold for sanctions and to reduce the types of motion practice and "gotcha" games that needlessly drive up discovery costs.

D. The Conjunction Between Subsections (1) and (2) Should Be "but" Rather Than "or."

The Committee Note correctly states that Subsection (2), authorizing very severe measures to address or deter failures to preserve, are available "only" upon a finding of specific intent. Unfortunately, the use of the conjunctive phrase "or" (which was added after the Advisory Committee approved the proposed rule) between subsections (1) and (2) creates the misimpression that Subsection (1) is independent and therefore *is not* limited by Subsection (2).

We believe that Subsection (2) should serve as a limitation on the measures authorized by Subsection (1), not a stand-alone alternative to it. Therefore, the use of the conjunction "but" would be a better choice and more consistent with that intent. An alternative clarifying change would be to amend Subsection (2) to read, "Only upon a *further* finding . . . ."

E. Subsection (2) Should Include an Explicit Prejudice Requirement.

As currently written, Subsection (2) can be read to authorize severe sanctions even where a loss of ESI (with the requisite intent) has not prejudiced any party. However, the Committee Note seems to confirm that the Advisory Committee did not intend to reject the requirement of prejudice, which is uniformly assessed in dealing with harsh sanctions under current case law.

The Committee Note explains that an explicit requirement of prejudice is unnecessary because a finding of specific intent "suggests that the opposing party was prejudiced." The Committee Note also gives a second reason: prejudice is not required for "rare" cases involving "reprehensible" conduct.

As LCJ proposed to the Advisory Committee, it would be preferable to add an explicit reference to a "finding of prejudice to another party" to the text of Subsection (2) or to the relevant portion of the Committee Note. (The substitution of "but" for "or," as noted in the preceding section,

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[13] *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* at 38 (2d ed. June 2007). *See also Kleen Prods. LLC v. Packaging Corp. of Am.*, No. 10 C 5711, 2012 WL 4498465, at *5 (N.D. Ill. Sept. 28, 2012) (observing that under Sedona Principle 6 "[r]esponding parties are best situated to evaluate the procedures, methodologies, and techniques appropriate for preserving and producing their own electronically stored information."); *Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 427 (D.N.J. 2009) ("The Sedona Principles wisely state that it is, in fact, the producing party who is the best position to determine the method by which they will collect documents. . . . absent an agreement or timely objection, the choice is clearly within the producing party's sound discretion."); *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 628 (D. Colo. 2007) ("in the typical case, '[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data and documents.'").

would help clarify this point, and the insertion of "further" in Subsection (2) would make the point definitively.) We understand the Advisory Committee's desire to reserve the ability to punish "incompetent spoliators" but respectfully suggest that opening a loophole in the general rule for that exceptional circumstance is not worth the risk that the intent of the rule could be misconstrued. The lack of an explicit prejudice requirement may encourage measures solely to punish or deter – measures that will affect or even direct the outcome of civil cases that have not been impacted by the bad behavior.

F. The "Intent to Deprive" Standard in Subsection (2) Should Apply to Measures That Are the Functional Equivalent of Those Specified in Subsection (2).

The Committee Note properly admonishes courts not to impose measures under Subsection (1) that "have the effect" of the measures specified under Subsection (2). In our view, the Committee Note should list more examples of such measures (*i.e.*, those that "have the effect" of the measures specified in Subsection (2)) including shifts in the burden of proof,[14] that would have a material impact on the evidentiary burdens or outcome of the trial itself. For example, striking claims or defenses has the same effect as entering default judgments. By doing so, the Committee Note will help avoid the risk that individual courts could fashion evidentiary-related instructions or remedies in the absence of a demonstrated intent to deprive. Alternatively, the Standing Committee could simply add a Subsection (D) to Subsection (2) that states, "(D) or other actions or orders having similar effect."

III. The Duke Rules Package

We urge the Standing Committee to approve the Duke Subcommittee proposals together with proposed Rule 37(e).

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

The proposed amendment to Rule 26(b)(1) to better describe the scope of discovery by incorporation of proportionality factors is a measured and important change. The broad scope of discovery under current Rule 26(b)(1) is a fundamental cause of the discovery problems addressed in LCJ's prior Comments.[15] Studies have shown that the perceived value of wide-open discovery as a tool for justice is mistaken, and that the percentage of information ultimately relied upon by parties to litigation is a mere fraction of what is exchanged. Thus, a rule change that encourages proportionality will help to mitigate the unjustifiable expense and burden of unnecessary preservation and discovery.

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[14] *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).

[15] LAWYERS FOR CIVIL JUSTICE ET AL., RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE, AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE (May 2, 2010), *available at* http://www.lfcj.com/articles.cfm?articleid=40.

B. The Note Should Not Discourage Courts From Using the Cost-Shifting Authority in Rule 26(c)(1)(B).

The proposal to modify Rule 26(c)(1)(B) 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."[16]

The importance of this provision could be undermined, however, by the comments in the Committee Note that "[r]ecognizing the authority does not imply that cost-shifting should become a common practice" and that "[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding."[17] There is no need for the Note to caution courts against using this authority too frequently. These statements go against the purpose of the rule amendment, which is to clarify that judges have the discretion to craft an appropriate response to the specific issues presented in individual cases, including the allocation of expenses.

Conclusion

The proposed FRCP amendments involve important and meaningful reforms which reflect the tremendous efforts the Advisory Committee has made to craft them carefully and with fairness to all parties. Proposed Rule 37(e) holds the promise of providing a uniform national standard that will clarify a complicated area of law and, in doing so, allow a more rational approach to data management and discovery. Meanwhile, Proposed Rule 26(b)(1), by moving the existing proportionality standard into the scope of discovery, will help courts and parties focus on the information that matters to claims and defenses. We urge the Standing Committee to adopt proposed Rule 37(e) and the Duke Package of amendments with the improvements recommended in this Comment.

[16] 2014 Report of the Subcommittee, AGENDA BOOK, at 87.
[17] *Id*. at 104.