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cc
Subject Proposed Rule Changes on E-Discovery

Please see attached comments.

Respectfully submitted,

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January 19, 2005

The Honorable Peter McCabe
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544
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Re: Proposed Rule Changes on E-Discovery

To the Honorable Members of the Advisory Committee:

I am a practicing attorney in New Orleans, Louisiana. I have co-authored two book chapters on spoliation of evidence, and have delivered various speeches and papers on spoliation, electronic evidence, and discovery in complex litigation. My resume is attached hereto.

First, I would like to commend the Committee on the proposed changes to Rule 16 and Rule 26(f), as well as Rule 34(a). While the decisions have been fairly uniform regarding the discoverability of electronic data as a "document," the express recognition that electronically stored information falls squarely within the scope of Rule 34 will likely eliminate the needless back-and-forth that occurs with respect to this threshold issue in some cases. In addition, it has been our experience that early discussions with opposing counsel and active superintendence by the court are important in avoiding spoliation issues and other preservation and discovery efforts which may become misdirected, unduly expensive, or overbroad.

At the same time, I am deeply concerned about the "safe harbor" provisions contained within the proposed amendments to Rule 37. The most troubling aspect of this proposal is the inevitable effect that such a procedural rule would have upon substantive law. While the proposed Rule, on its face, is limited to "sanctions under these rules," parties would undoubtably cite the proposed Rule, if enacted, for the proposition that no affirmative duty to preserve evidence arises until a civil action has been filed and the party is placed on notice of its discoverability. Predictably, some courts (likely both State and Federal) would agree with this proposition, recognizing the Rule as persuasive, if not controlling, authority. This would present conflicts under the RULES ENABLING ACT,[1] as well as the *Erie* Doctrine in diversity cases.

[1] 28 U.S.C. §2072(b) (the Rules "shall not abridge, enlarge, or modify any substantive right").

In many jurisdictions, the law imposes a duty to preserve evidence with respect to anticipated litigation, even before a civil action is formally commenced.[2] While the violation of such a duty may have various ramifications, the most common remedy is an adverse inference or presumption that such evidence would have been damaging to the spoliator's case.[3] Although derived from the Common Law doctrine, *omnia praesumuntur contra spoliatorem*,[4] the remedy is often described as a "sanction."[5] Unavoidably, therefore, application of the proposed "safe harbor" provisions would abridge and modify the substantive rights of the parties.

The second problem with the contemplated Rule is that sanctions appear to be limited to the violation of an order "in the action." It has been our experience that parties frequently rely upon preservation or other discovery orders that are issued in previous, companion, or other related cases. If a party is under a court order to preserve evidence that is discoverable in more than one case, and violates such order, that party should be subject to sanctions in any case to which the evidence is discoverable.

Finally, the proposed Rule changes would seem to encourage parties to implement "routine" procedures for the deletion or other modification of electronic data in order to fall within the "safe harbor" provisions. This seems contrary to public policy. Various statutes and regulations, (both State and Federal), require the preservation of evidence, including electronic data, even in the

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[2] *See, e.g.*, Tracy v. Cottrell, 524 S.E.2d 879, 887 (W.Va. 1999); Wal-Mart Stores v. Johnson, 106 S.W.3d 718, 722 (Tex. 2003); Mount Olive Tabernacle Church v. Edwin L. Wiegand Division, 781 A.2d 1263, 1270 (Pa. Super. 2001); Brandt v. Rokeby Realty Co., 2004 WL 2050519, at 11 (Del. Super. 2004), *citing*, In re: Wechsler, 121 F.Supp.2d 404, 415 (D.Del. 2000); Fire Insurance Exchange v. Zenith Radio Corp., 747 P.2d 911, 913-914 (Nev. 1987); Bethea v. Modern Biomedical Services, 704 So.2d 1227 (La. App. 3rd Cir. 1997), *writ denied*, 709 So.2d 760 (La. 2/13/98); Capellupo v. FMC, 126 F.R.D. 545, 550-553 (D. Minn. 1989); Nat'l Ass'n Radiation Survivors v. Turnage, 115 F.R.D. 543, 556-557 (N.D. Cal. 1987); Wm. T. Thompson Co. v. General Nutrition Corp., 593 F.Supp. 1443, 1455 (C.D. Cal. 1984); U.S. v. ACB Sales & Serv., 95 F.R.D. 316, 318 (D.Ariz. 1982); Alliance to End Repression v. Rochford, 75 F.R.D. 438, 440-441 (N.D.Ill. 1976); Lewy v. Remington Arms Co., 836 F.2d 1104, 1112 (8th Cir. 1988); Kronsich v. United States, 150 F.3d 112, 126 (2nd Cir. 1998).

[3] *See, e.g.*, Beers v. Bayliner Marine Corp, 675 A.2d 829 (Conn. 1996); Battochi v. Washington Hospital, 581 A.2d 759, 767 (D.C. 1990); DeLaughter v. Lawrence County Hospital, 601 So.2d 818, 821-822 (Miss. 1992); Watson v. Brazos Electric Power Coop, 918 S.W.2d 639 (Tex. App. - Waco 1996, writ denied); Salone v. Jefferson Parish Dept. of Water, No. 94-212 (La. App. 5th Cir. 10/12/94), 645 So.2d 747, 750; Boh Brothers Construction v. Luber-Finer, 612 So.2d 270, 274 (La. App. 4th Cir. 1992).

[4] *See, e.g.*, Wal-Mart, supra, 106 S.W.3d at 721.

[5] *See, e.g.*, Tracy, supra, 524 S.E.2d at 887.; Mt. Olivet, supra, 781 A.2d at 1273; Brandt, supra, 2004 WL 2050519, at 11; Fire Ins. Exchange, supra, 747 P.2d at 914; MCGLYNN, Spoliation in the Product Liability Context, 27 U. Mem. L. Rev. 663, 672 (Spring 1997).

absence of pending or anticipated litigation.[6] Particularly given the recent examples of both the importance of electronic evidence as well as the flagrant attempts by parties to avoid civil, criminal, or regulatory liability,[7] it seems counterproductive to implement Rule changes that might actually provide "safe harbor" for such conduct, as long as it is done prior to the formal commencement of litigation and on a "routine" basis.

As noted by Mr. Withers, with the Federal Judicial Center, the proposed Rule, on its face, appears to accomplish "little or nothing that its proponents wanted," yet, nevertheless, "could have a powerful effect." When coupled with the proposed two-tier approach to the discovery of electronic data, under which "inaccessible" data is *presumptively* not subject to discovery, "absent a court order to preserve such information, or notice that 'inaccessible' electronically stored information will be requested, or reasonable anticipation that it will be requested and that the requesting party will be able to show good cause, 'inaccessible' data may be routinely destroyed while litigation is pending without incurring sanctions under Rule 37."[8]

The minority proposal, which requires a finding that "the party intentionally or recklessly failed to preserve the information" before imposing sanctions is, again, contrary to the substantive law of many jurisdictions. It was, moreover, apparently recognized by many of the members that such a provision would undermine "the primary purpose behind Rule 37, which is to focus on the effective management of the litigation rather than the trial and punishment of discovery malefactors. Under that guiding philosophy, judges have been afforded broad discretion in imposing sanctions under Rule 37, and litigants' state of mind has seldom been a controlling factor."[9]

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[6] *See, e.g.*, 49 C.F.R. §395.8(k)(1) (duty to maintain driver's logs); 12 C.F.R. §344.4 (duty to preserve records of securities transactions); 14 C.F.R. §43.12, §61.51, §91.407(a)(2), and §91.417 (duty to maintain aircraft maintenance records and pilots' logs); 17 C.F.R. §240.17a-4 (duty of brokers to maintain e-mails and other communications); PROFESSIONAL RULE 1.15(a) (duty to preserve files relating to legal services); LA. REV. STAT. 40:1299.96(A)(3) (duty to maintain medical records).

[7] *See, e.g.*, FESTA, "Coming Back to Haunt Them" C-NET News.com (March 24, 2004) (discussing importance of old e-mails as evidence in the government's antitrust case against Microsoft); KELLY, "For Spitzer Interns, Hours of Drudgery, Moments of 'Gotcha!'" *Wall Street Journal*, (Oct. 27, 2004) (old e-mail provides "smoking gun" in Marsh investigation); ASSOCIATED PRESS, "IPO Banker Quattrone Found Guilty" (May 3, 2004) (conviction of investment banker using e-mail to encourage destruction of evidence); "Panel Cites Widespread Destruction of Documents" CNN.com (Jan. 25, 2002) (discussing widespread efforts at Arthur Anderson to destroy Enron-related documents); U.S. v. Philip Morris, No. 99-2496 (D.D.C. July 21, 2004) (imposing $2.75 million sanction for routine destruction of e-mail communications despite entry of preservation order); Zubulake v. UBS Warburg, 2004 U.S.Dist.LEXIS 13574 (S.D.N.Y. July 20, 2004) ("*Zublake V*") (imposing monetary sanctions and adverse inference due to the destruction of e-mail communications).

[8] WITHERS, K., "Two Tiers and a Safe Harbor: Federal Rulemakers Grapple with E-Discovery" *The Federal Lawyer*, (Sept. 2004), at p.40.

[9] WITHERS, *supra*, at 39. *See also, e.g.*, Blinzler v. Marriott International, 81 F.3d 1148 (1st Cir. 1996); Welsh v. United States, 844 F.2d 1239 (6th Cir. 1988).

Additional Concerns

Proposed Rule 26(b)(2) seems to invite stonewalling. While the distinction between "accessible" and "inaccessible" data may be well-defined in cases like *Zubulake,*[10] the producing (or non-producing) party does not appear to have any obligation to adhere to that or any other definition. Arguably, almost anything could be "identifie[d] as not reasonably accessible." Accordingly, a party who desired to delay the proceedings could resist discovery simply by identifying virtually all electronic data as "not reasonably accessible." This would require the opposing party to file a motion, which would have to be heard and resolved by the courts. It seems strange, in this regard, that the trend toward reducing discovery disputes in the courts is now proposed to be reversed with respect to electronic discovery, thereby taxing both the parties and the courts.

This issue, moreover, is complicated by the fact that technology is constantly changing what is and what is not reasonably accessible. What was "inaccessible" just a few years ago is now "accessible" and it is quite possible that this Rule could be in many ways obsolete before it even goes into effect.

While the proposed Rule appears to place the burden on the producing (or non-producing) party to demonstrate "inaccessibility", the Rule also seems to create a presumption that "inaccessible" data is non-discoverable. Much of the discussion in the caselaw has revolved around cost-sharing and -shifting.[11] This Rule, however, would seem to be grounds for denying discovery altogether. If, under a fair and reasonable cost-shifting or cost-sharing analysis, the requesting party is willing to spend the money to obtain otherwise discoverable evidence, (even if such evidence is "inaccessible"), that party should, at the very least, be given the choice.

At the same time, and in any event, there is no exception for non-electronic, otherwise discoverable information that might be considered "inaccessible." One wonders whether such an exception to existing Rule 26(b)(1) would "bleed" into areas of paper and other discovery?

Finally, I would respectfully suggest that proposed Rule 26(b)(5)(B) presents a clear conflict with the Rules Enabling Act. Particularly in an action for which jurisdiction is grounded upon diversity, it seems clear that the issue of waiver should be determined according to substantive State

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[10] Zubulake v. UBS Warburg, 217 F.R.D. 309, 316 (S.D.N.Y. 2003) ("*Zubulake I*"); *and, see also,* 2003 U.S.Dist.LEXIS 7940 (S.D.N.Y. May 13, 2003) ("*Zubulake II*") (addressing Zubulake's reporting obligations), *later proceeding,* 216 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake III*") (allocating back-up tape restoration costs), *later proceeding,* 220 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake IV*") (granting the right to re-depose employees at defendant's expense upon finding that defendant had lost or destroyed seven back-up tapes), *later proceeding,* 2004 U.S.Dist.LEXIS 13574 (S.D.N.Y. July 20, 2004) ("*Zubulake V*") (imposing monetary sanctions and adverse inference due to spoliation).

[11] *See, e.g,* Zublake, supra; Rowe Entertainment v. William Morris, 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

Law, and not a Federal Rule.[12] As a practical matter, moreover, it would create significant barriers to the effective sharing of information by litigants, which is often essential to the "just, speedy, and inexpensive determination of every action."[13]

I appreciate your time and consideration in this matter.

Respectfully submitted,

STEPHEN J. HERMAN, ESQ.

[12] *See* 28 U.S.C. §2072(b); FED. RULE EVID. 501 ("[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law").

[13] FED. R. CIV. P. 1; *see, e.g.*, Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 338-339, 100 S.Ct. 1166, 1174, 63 L.Ed.2d 427 (1980).