

Thomas Y. Allman

November 28, 2023

The Hon. Robin L. Rosenberg  
Paul G. Rogers Federal Building and Courthouse  
West Palm Beach, Florida 33401

Re: Lawyers for Civil Justice Suggestion (23-CV-W) Regarding Proposed Rulemaking on Privacy Rights and Cyber Security Risk

Dear Judge Rosenberg:

I write to support the suggestions in the September 19, 2023 LCJ Proposal (23-CV-W) for rulemaking regarding privacy rights and cyber security risks and to urge that you give consideration to sponsoring a Mini-Conference with a sufficiently broad invited participation to adequately evaluate the topic.<sup>1</sup> As was the case with the motivation for the 2010 Duke Litigation Conference, a “more comprehensive and holistic approach” is called for because the “existing rules and practices” are inadequate to achieve the promise of Rule 1.”<sup>2</sup> I am personally convinced, for example, that enshrining the common law duty to take reasonable steps to protect privacy and to minimize cyber security risks in the Federal Rules is just as important as was incorporating the common law duty to preserve in what ultimately became Revised Rule 37(e) in the 2015 Amendments.

Those of us on the E-Discovery Panel at the 2010 Duke Conference (consisting of District Judge Shira A. Scheindlin and Magistrate Judge John M. Facciola, with four practitioners, including John Barkett and myself) were of the unanimous opinion that the time had come for the Federal Rules to comprehensively deal with litigation preservation (sanction) issues,<sup>3</sup> just as it is now seems clear that such an approach is needed relating to privacy rights and cyber security risks.

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<sup>1</sup> The Author is Chair Emeritus of WG1 Sedona Conf. Working. Grp. and a former General Counsel and advocated for the discovery Amendments which became effective in 2015. His most recent publication is Allman, *Informing Juries About Spoliation of Electronic Evidence After Amended Rule 37(e): An Assessment*, 13 Fed. Cts. L. Rev. 81 (2021).

<sup>2</sup> *Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation*, September 2010, submitted by the Judicial Conference Advisory Committee and the Committee on Rules of Practice and Procedure, [https://www.uscourts.gov/sites/default/files/report\\_to\\_the\\_chief\\_justice.pdf](https://www.uscourts.gov/sites/default/files/report_to_the_chief_justice.pdf)

<sup>3</sup> Hon. John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 Duke L.J. 537, 544 (2010)(the Panel, chaired by Gregory Joseph, “reached a consensus that a rule addressing ‘preservation(spoliation)’ rule would be a valuable addition to the Federal Rules of Civil Procedure”).

However, as LCJ has suggested in its September 19, 2023 submittal, which I support, much more is needed. I have reviewed the LCJ suggestions and have taken the opportunity to enquire of its proponents as to the need for and the anticipated benefits of those provisions. While I do not necessarily agree with all the suggestions, and by no means do I claim to fully understand all the details, the articulated explanations are persuasive. It would appear to be well worth the time and effort for the Advisory Committee to arrange for an appropriate and informed discussion of those specific suggestions.

I am not advocating a two-day, live streamed, 200 attendee extravaganza like the 2010 Duke Conference. That was a unique reaction at a point in time when the very fundamentals of the litigation process were being challenged. A better model is that of the Mini-Conference subsequently held by the Discovery Subcommittee on September 9, 2011 at the Dallas Airport to evaluate the rulemaking alternatives regarding preservation and sanctions.<sup>4</sup> It helped lay the groundwork for what became Amended Rule 37(e), which has proven to be an effective national standard which has met with wide acceptance by resolved the existing Circuit split on authority for severe measures and obviating the need for reliance on inherent authority, a long time goal of Rule 37.<sup>5</sup>

I greatly appreciate your willingness and that of the Committee to listen to these suggestions.

Sincerely,

/s/ TYA

Thomas Y. Allman

Cc: Richard L. Marcus

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<sup>4</sup> Memorandum, *Proposed Amendments to the Federal Rules of Civil Procedure*, from Judge David G. Campbell, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Judge Jeffrey Sutton, Chair, Standing Committee on Rules of Practice and Procedure, June 14, 2014, 305 F.R.D. 457, 512, at 526 (2015)(the Subcommittee held a “mini-conference in Dallas with 25 invited judges, lawyers and academics to discuss possible approaches to an ESI-preservation rule”).

<sup>5</sup> Thomas Y. Allman, *Amended Rule 37(e): Case Summaries, 1 (2023)*(summarizing 820 decisions applying the Amended Rules as of November 27, 2023)(copy available on request).