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11-CV-009

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November 6, 2011

VIA E-MAIL TO RULES_COMMENTS@AO.USCOURTS.GOV

Honorable David G. Campbell
Chairman, Advisory Committee
on Civil Rules
United States District Court
623 Sandra Day O'Connor United States
Courthouse
401 West Washington Street
Phoenix, AZ 85003-2146

Re: Discovery Subcommittee's Consideration of Rule Changes Regarding Sanctions

Dear Judge Campbell:

As two of the plaintiffs' bar practitioners who appreciated the opportunity to actively participate at the recent mini-conference in Dallas, as well as the Duke conference in May 2010, we write to preliminarily respond to the recent flurry of letters submitted to the Advisory Committee on Civil Rules and the Discovery Subcommittee by those who seek comprehensive revisions to the civil rules regarding preservation and sanctions for spoliation. We also wish to reiterate the view we expressed in the paper we submitted for the Duke conference, entitled, *E-Discovery Today: The Fault Lies Not In Our Rules . . .*, which has since been published in the Federal Courts Law Review, and the substance of which we believe is directly relevant to the issues that the Advisory Committee is confronting today.[1] In that paper, we advocated that "it is far too early, and the current data too flawed, inconsistent, or inconclusive to begin efforts to

[1] Milberg LLP and Hausfeld LLP, "E-Discovery Today: The Fault Lies Not in Our Rules…," 2011 Fed. Cts. L. Rev. 4 (February 2011) available at http://www.fclr.org/fclr/articles/html/2010/Milberg-Hausfeld.pdf.

revise the Rules" and advocated that the system "give litigants, lawyers and judges time to catch up. Give the Rules a chance."[2]

After careful consideration of the most recent positions asserted by others who support significant rule changes, our views have not changed.[3] We do not deny that preservation in modern litigation is sometimes expensive. Similarly, we also recognize that on some occasions, there have been different standards imposed by courts regarding preservation and spoliation. Our observation of the Discovery Subcommittee's deliberations since we published our paper makes clear, however, that revising the rules to achieve bright-line guidance will inevitably lead to increased litigation about discovery rather than the merits, be extremely difficult to achieve, may (as pointed out by the Department of Justice and others) lead to unintended consequences,[4] and will almost certainly result in unfairness to some litigants in an effort to lower litigation costs for others - often in the very circumstances where the litigants who suffer the consequences are those that have been aggrieved by some alleged misconduct and are precluded from having their day in court by reason of the now nonexistence of evidence necessary to making their case.

Tellingly, some commentators, like Lawyers for Civil Justice ("LCJ"), have used this latest "crisis" as an opportunity to propose rule amendments that would go far beyond rule guidance on these topics and would, instead, scale back discovery in a way that would be unprecedented since the adoption of the Rules in 1938. However, the Federal Rules are not intended to serve the interests of any particular group or litigants of a particular size, but rather are to be "construed and administered to secure the just, speedy, and inexpensive determination of *every* action and proceeding."[5] Indeed, effective implementation and application of the Rules serves to ensure the *equitable* administration of justice.

Following the Duke Conference in May 2010, the Discovery Subcommittee was assigned to investigate possible changes to the rules governing preservation of discoverable information and sanctions for failing to preserve. For over a year, the Discovery Subcommittee has been studying possible rules amendments. The Subcommittee has reviewed submissions,

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[2] *Id*. at 2. ("Those who are educated about the rules and creative in their use will save themselves, their clients and the courts a great deal of time and money. Those who are not will continue to blame the rules, never realizing that 'the fault lies not in our rules, but in themselves.'" (citing, with apologies, to WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2)).

[3] *See also* Ariana J. Tadler and Henry J. Kelston, "Working Toward Normalcy in E-Discovery," New York Law Journal (October 3, 2011).

[4] *See* Letter to The Honorable David G. Campbell from Tony West, Assistant Attorney General, Department of Justice, dated September 7, 2011.

[5] Fed. R. Civ. P. 1 (emphasis added).

studies and surveys, and at least six different rules proposals.[6] The Subcommittee also convened a mini-conference in September 2011 "to educate the Discovery Subcommittee and assist it in developing possible recommendations for the full committee on preservation and sanctions issues."

In advance of the November 7-8 Advisory Committee meeting, the Discovery Subcommittee published a 31-page Memorandum (the "Subcommittee Memorandum") detailing the work it has done and describing the "difficulties and promises of rulemaking to address the widespread concerns" about preservation and sanctions. The Subcommittee Memorandum clearly conveys the Subcommittee's conclusion that revisions to the rules governing preservation should *not* be considered at this time:

- "In sum, the Subcommittee has reached a consensus that the difficulties that would attend trying to devise a preservation rule outweigh its likely usefulness."[7]
- "The Subcommittee's current thinking has reached a consensus on the proposition that it should continue work, but focusing on a sanctions rule rather than a preservation rule."[8]
- "The focus of the discussion at the [November 7-8 meeting of the Advisory Committee] will largely be *whether* the Subcommittee should pursue the general approach it has identified as presenting the most promise and the fewest difficulties -- some change to Rule 37 designed to guide use of sanctions rather than a rule explicitly addressing the specifics of preservation obligations. Beyond that, the November discussion could address the sort of approach to sanctions that seems most promising."[9]

The Subcommittee has outlined the intended path of pursuit at this time. There can be no doubt that exercised focus on that path - regardless of whether those who wish to comment agree or disagree with this path - will be most productive at this point.

Regarding a possible amendment on the subject of sanctions, the Subcommittee's "initial consensus [is] that work should continue to design a sanctions 'back end' rule."[10] However, the Subcommittee Memorandum also acknowledges that a considerable range of issues will confront

[6] Notes of Conference Call, Discovery Subcommittee, Advisory Committee on Civil Rules, Sept. 13, 2011 at 1.

[7] Subcommittee Memorandum at 14.

[8] Subcommittee Memorandum at 1.

[9] Subcommittee Memorandum at 3-4 (emphasis added).

[10] Subcommittee Memorandum at 14.

the Subcommittee if it proceeds to attempt to draft a sanctions rule, including uncertainty as to what the word "sanction" even means. The Memorandum presents four versions of potential amendments on sanctions, along with dozens of footnotes identifying "preliminary questions that have already emerged." Answers to those questions and issues attendant to the pros and cons of such a proposed rule change must be treated as the task at hand.

In stark contrast to the careful consideration of the Discovery Subcommittee, the recent submissions to the Advisory Committee by several corporations and members of the corporate defense bar continue to urge immediate and sweeping rule amendments that focus on preservation and would go so far as to reduce the scope of discovery and largely extirpate the longstanding prohibition against spoliation of evidence. The retrogressive amendments proposed in these submissions go far beyond anything the Discovery Subcommittee has recommended or, indeed, even considered. In particular, submissions by Microsoft, Robert Owens, LCJ and others advocate for rule amendments that would, among other things:

(a) allow discovery of ESI only where the material is "necessary to the case; the outcome of the litigation must depend on it;"[11]
(b) jettison fundamental principles of fairness and justice that have been embodied in law of spoliation since well before the age of ESI;[12] and
(c) permit the destruction of relevant evidence -- even intentional destruction -- unless the party prejudiced by the destruction can prove (i) that the *outcome* of the litigation *depended* on the evidence that no longer exists, AND (ii) the state of mind of the spoliating party, specifically, that the evidence was destroyed with the "intent to prevent use of the information in litigation."[13]

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[11] Lawyers for Civil Justice et al., "The Time is Now: The Urgent Need for Discovery Rule Reforms," submitted to Civil Rules Advisory Committee on October 31, 2011 at 6.

[12] Letter to The Honorable David G. Campbell from Robert D. Owens, October 24, 2011 at 2, 9 (asserting that the "radical … new assumption that affirmative steps to preserve [are] legally required" should be overturned); Letter to The Honorable David G. Campbell from Microsoft, August 31, 2011 at 2 (advocating a "bright-line rule that provides sanctions for spoliation only in the case of 'willful destruction' and prejudice to the requesting party.").

[13] "The Time is Now," *supra* n.11 at 24 ("Sanctions on a party for failing to preserve or produce relevant and material electronically stored information should be determined by intent to prevent use of the information in litigation.") and at 7 ("It is no longer enough that ESI might be relevant; it must also be material. Put another way, it is not enough for ESI to have a possible relationship to the issues of the litigation. The ESI must be necessary to the case; the outcome of the litigation must depend on it.").

Some of these submissions have been published only within the past week, effectively precluding a full response in advance of the November 7-8 meeting, and, in many instances, repeat points previously made and considered by the Subcommittee in reaching its *consensus* to focus on *whether* it should pursue some amendment to *Rule 37* to provide some guidance in the context of sanctions.

Although we continue to plow through the submissions and are determining whether to submit a more substantive response, in the interim, we feel bound to note that some of the arguments contained in the recent submissions are built on hyperbole, faulty premises, factual distortions, and misstatements of the history and present state of the law of spoliation.[14] For example, LCJ and Mr. Owens repeatedly suggest that the duty to take affirmative steps to preserve relevant evidence is the recent creation of a few misguided district court judges. Mr. Owens refers to a "radical … new assumption that affirmative steps to preserve [are] legally required," and opines that "[t]he regime of affirmative preservation and oversight that ***Zubulake*** and its progeny launched is overkill and ... should be overturned." The LCJ writes: "In the past decade, however, that rule somehow shifted into an affirmative duty to preserve material that may become relevant to a dispute." This is just not so. Spoliation has long been defined as "the destruction or material alteration of evidence or the *failure to preserve property* for another's use as evidence in pending or reasonably foreseeable litigation." *See West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999) (citing Black's Law Dictionary 1401 (6th ed.1990)) (emphasis added).

In sum, we urge the Advisory Committee and the Subcommittee to remain focused on the path they have now set based on its review and consideration of discussion and submissions made to date. We remain of the mind that any rule amendments regarding preservation and spoliation sanctions are premature for the reasons that we shared in our paper and at the mini-conference. And we continue to believe that the current Rules are more than adequate to address these issues, and given time, the courts will harmonize much of the common law on preservation and sanctions, just as they have done for other e-discovery issues.[15] We understand, however, that the Advisory Committee and Subcommittee are determined to address whether they should pursue some change to Rule 37 regarding the use of sanctions. Although we are not proponents of such a change, we welcome the opportunity to participate in the process for we are reminded of this admonition about amending the Rules:

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[14] The overheated rhetoric of certain participants in the process is often amplified to near-hysteria in the echo chamber of the blogosphere, a phenomenon that does not contribute to meaningful dialogue or constructive solutions. For example, a recent article on the "Inside Counsel" website contained this lead: "According to a cacophony of surveys, reports and anecdotal evidence, the American litigation system is teetering on the brink of collapse, due in large part to complex electronic discovery issues."

[15] *See* Ariana J. Tadler and Henry J. Kelston, "Working Toward Normalcy in E-Discovery," New York Law Journal (October 3, 2011).

> The pervasive and substantial impact of the [R]ules on the practice of law in the federal courts demands exacting and meticulous care in drafting [R]ule changes.[16]

These words are particularly apt here, and we respectfully urge the Advisory Committee and the Discovery Subcommittee to proceed with caution as they consider proposals that would have a far-reaching effect on how discovery is conducted and justice is achieved.

Respectfully submitted,

s/ Ariana J. Tadler

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Milberg LLP

s/ William P. Butterfield

William P. Butterfield
Hausfeld LLP

AJT:sm

[16] Thomas F. Hogan, Admin. Office of the U.S. Courts, Summary for the Bench and Bar (Oct. 2011), http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx .