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MEMORANDUM

To: Hon. John G. Koeltl

cc: Hon. Lee H. Rosenthal, Hon. Mark R. Kravitz

From: Gregory P. Joseph

Date: May 11, 2010

Re: Executive Summary: E-Discovery Panel, Duke Conference on Civil Litigation, May 11, 2010

Further to your request, this will summarize the views of the E-Discovery Panel (*E-Discovery: Discussion of the Cost Benefit Analysis of E-Discovery and the Degree to Which the New Rules Are Working*) at the Duke Conference on Civil Litigation.

The panel's consensus views are reflected in its attached work product, *Elements of a Preservation Rule*, which urges that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure and identifies potential elements of such a rule for the consideration of the Advisory Committee on Civil Rules.

A summary of remarks of the panelists at the Conference follows:

United States District Judge Shira A. Scheindlin expressed the view that the 2006 Electronic Discovery Rules are working well; the bar has become familiar with electronic discovery; and staged discovery (accessible data first and not-reasonably-accessible data only if, as and when needed) is operating as intended. In her opinion, the two

areas in which further guidance would be appropriate, by rule or otherwise, are preservation and sanctions. Judge Scheindlin observed that Rule 37(e) has not proved to be much of a safe harbor. Further, there is a need for uniform standards. She noted that while judicial supervision is clearly necessary, there are two alternate visions: proactive and reactive. She employs the latter, but there has been little discussion of these competing alternatives. Judge Scheindlin also discussed the fact that the Southern District of New York uses form interrogatories in prisoner cases, and expressed the belief that this sort of form discovery may be appropriate in other areas. Finally, she commented that she now believes that a separate set of rules in complex cases would be wise (a consensus recommendation of the panel), acknowledging that some years ago she held the opposite opinion.

United States Magistrate Judge John M. Facciola focused on imminent changes in the way data are stored — specifically, the demise of the hard drive in favor of cloud computing. He described how data are being stored on the web (*e.g.*, Google docs) and on server farms. This, he remarked, is relegating the *Zubulake/Pension Committee/Rimkus* hard-drive-based paradigm obsolete. It is also generating new problems, such as the literal inability to preserve certain electronic data stored on the web and the bankruptcy of some web farms that has the effect of making data inaccessible or irretrievable.

Thomas Y. Allman, Esq., stated that while, years ago, he had opposed a preservation rule, he has come to the conclusion that, in light of the developing case law, such a rule would is now both timely and necessary. He also observed that the Electronic Discovery Rules do not, but should, require that the scheduling order issued by the Court

address preservation issues. He also advocated that Rule 26(c) protective orders should be available for preservation disputes, even prior to the commencement of litigation.

John M. Barkett, Esq., described case law developments under the Electronic Discovery Rules and found that they reflected no problems that required amendment, vividly and memorably illustrating his remarks.

Joseph D. Garrison, Esq., discussed the utility of early pattern discovery in employment cases. He suggested that this might be accomplished by uniform local rule; he recommended a pilot program; and he offered to find able employment lawyers — both plaintiff and defendant — to assist the Advisory Committee should it seek to proceed with this suggestion.

Dan Willoughby, Jr. discussed a dramatic increase in electronic discovery sanctions decisions, providing year-by-year statistics. Judge Scheindlin noted that while the year-over-year percentage increase may appear significant, the total number of sanctions decisions as compared to the total number of civil filings is minute.

I walked through the attached Elements on Power Point. I noted that the Advisory Committee has already crossed the bridge of addressing preservation and spoliation sanctions in Rule 37(e), which directly, if ineffectually, address the subject. I pointed out that numerous other Rules of Civil Procedure address the procedural consequences of pre-litigation conduct, including in the areas of work product (Rule 26(b)(3)(A)); witness statements (Rule 26(b)(3)(C)); experts (Rules 26(a)(2)(B) and (b)(4)); perpetuation of testimony (Rule 27); and the *American Pipe* class action context (Rule 23). I also mentioned that several bar associations support the inclusion of a preservation rule, including the

Section of Litigation of the American Bar Association; the Association of the Bar of the City of New York; and the New York State Bar Association.

The panel's consensus regarding the inclusion of a preservation rule in the Federal Rules of Civil Procedure follows.

Regards.

ELEMENTS OF A PRESERVATION RULE

Introductory Note: The E-Discovery Panel, composed of Judges Scheindlin and Facciola, and Messrs. Allman, Barkett, Garrison, Joseph and Willoughby, holds the consensus view that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure. All members of the Panel agree that such a rule should apply once an action has been commenced. (Panel members disagree as to whether such a rule can or should apply, along the lines of Rule 27, prior to the commencement of an action.)

The Panel members also agree that the rules in general, and a preservation rule in particular, should treat differently huge cases, with enormous discovery, and all others.

While not every member of the Panel concurs in every word that follows, the Panel members are in general agreement that it would behoove the Advisory Committee on Civil Rules to draft a preservation rule that takes into account the following elements.

1. Trigger. The rule should specify the point in time when the obligation to preserve information, including electronically stored information, accrues. Potential triggers:

a. A general trigger restating the common law (pending or reasonably foreseeable litigation) standard and/or

b. Specific triggers (which could appear in the text or Advisory Committee Note):

i. Written request or notice to preserve delivered to that person (perhaps in a prescribed form).

ii. Service on, or delivery to, that person of a

A. Complaint or other pleading,

B. Notice of claim,

C. Subpoena, CID or similar instrument.

iii. Actual notice of complaint or other pleading, or a notice of claim, asserting a claim against, or defense involving that person or an affiliate of that person.

iv. Statutory, regulatory, contractual duty to preserve.

v. Steps taken in anticipation of asserting or defending a potential claim (*e.g.*, preparation of incident report, hiring expert, drafting/filing claim with regulator, drafting/sending prelitigation notice, drafting complaint, hiring counsel, destructive testing).

2. **<u>Scope</u>. The rule should specify with as much precision as possible the scope of the duty to preserve, including, *e.g.*:**

   a. **Subject matter of the information to be preserved.**

   b. **Relevant time frame.**

   c. **That a person whose duty has been triggered must act reasonably in the circumstances.**

   d. **Types of data or tangible things to be preserved.**

   e. **Sources on which data are stored or found.**

   f. **Specify the form in which the information should be preserved (*e.g.*, native).**

   g. **Consider whether to impose presumptive limits on the types of data or sources that must be searched.**

   h. **Consider whether to impose presumptive limits on the number of key custodians whose information must be preserved.**

   i. **Consider whether the duty should be different for parties (or prospective parties) and non-parties.**

3. **<u>Duration</u>. The rule should specify how long the information or tangible things must be preserved, but should explicitly provide that the rule does not supersede any statute or regulation.**

4. **<u>Ongoing Duty</u>. The rule should specify whether the duty to preserve extends to information generated after the duty has accrued.**

5. **<u>Litigation Hold</u>. The rule should provide that if an organization whose duty has been triggered prepares and disseminates a litigation hold notice, that is evidence of due care on the part of the organization. If the rule requires issuance of a litigation hold, it should include an out like that in Rule 37(c)(1) excusing (for sanctions purposes) a failure that was substantially justified or is harmless.**

6. **<u>Work Product</u>. The rule should specify whether, or to what extent, actions taken in furtherance of the preservation duty are protected by work product (or privilege).**

7. **<u>Consequences/Procedures</u>. The rule should set forth the consequences of failing to fulfill the responsibilities it mandates, and the obligations of the complainant/failing party.**

a. Sanctions for noncompliance resulting in prejudice to the requesting party should be specified (*e.g.*, Fed.R.Civ.P. 37).

i. The rule should apply different sanctions depending on the state of mind of the offender. (The state of mind necessary to warrant each identified sanction should be specified.)

ii. Certain conduct that presumptively satisfies the requisite state of mind should be specified (*e.g.*, failure to issue a litigation hold = negligence or gross negligence)

b. A model jury instruction for adverse inference or other jury-specific sanctions should be drafted.

c. Compliance with the rule should insulate a responding party from sanctions for failure to preserve.

d. The complainant should be obliged to raise the failure with a judicial officer promptly after it has learned of the alleged spoliation and has assessed the prejudice it has suffered as a result.

e. Identify the elements that the complainant must specify, such as:

i. The information or tangible things lost.

ii. Its relevance (specifying the standard (*e.g.*, 401, 26(b)(1), admissibility, discoverability)).

iii. The prejudice suffered.

f. The rule should address burden of proof issues.

8. <u>Judicial Determination</u>. It should provide access to a judicial officer, following a meet and confer, to

a. Resolve disputes

b. Apply Rule 26(c)/proportionality

c. Consider the potential for cost allocation

d. Impose sanctions (*e.g.*, of the sort provided for by Rule 37).