EXCERPTS FROM REPORT OF THE CIVIL RULES ADVISORY COMMITTEE
To

STANDING COMMITTEE – JANUARY 2013 MEETING

Part I of this Report presents for action a proposal recommending publication for comment of a revised Rule 37(e). The revisions provide both remedies and sanctions for failure to preserve discoverable information that reasonably should have been preserved. In addition, they describe factors to be considered both in determining whether information reasonably should have been preserved and also in determining whether a failure was willful or in bad faith.

Part II presents several matters on the Duke Subcommittee Committee agenda for information and possible discussion.

PART I. ACTION ITEM: RULE 37(e)

At the Nov. 2 meeting, the full Advisory Committee voted to recommend approval of a new Rule 37(e) for publication for public comment at the Standing Committee's January, 2013, meeting with actual publication not to occur until August, 2013.

The Advisory Committee continues to work on additional case-management amendment ideas with the help of its Duke Subcommittee, and those may be presented to the Standing Committee at its June, 2013 meeting when it is hoped that they would form a broad package of amendment ideas with new Rule 37(e)[for publication in August].

A central objective of the proposed new Rule 37(e) is to replace the disparate treatment of preservation/sanctions issues in different circuits with a single standard. In addition, the amended rule makes it clear that -- in all but very exceptional cases in which failure to preserve "irreparably deprived a party of any meaningful opportunity to present a claim or defense" -- sanctions (as opposed to curative measures) could be employed only if the court finds that the failure was willful or in bad faith, and that it caused substantial prejudice in the litigation. The proposed rule therefore rejects *Residential Funding*….

All members except the Department of Justice voted in favor of submitting the proposed rule to the Standing Committee at its January meeting.

Additional Committee Note language was added to address Erie Doctrine concerns and to make clear that the rule would have no effect on the cognizability in federal court of a tort claim for spoliation, which is recognized in a few states.

Replacing Rule 37(e)

The proposed amendment is designed to provide more significant protection against inappropriate sanctions, and also to reassure those who might in its absence be inclined to over- preserve to guard against the risk that they would confront serious sanctions. Thus, Rule 37(e)(2)(A) permits sanctions only if the court finds that the failure to preserve was willful or in bad faith. One goal of this requirement is to overturn the decision of the Second Circuit in *Residential Funding*,… 306 F.3d 99 (2d Cir. 2002), which authorized sanctions for negligence and has continued to apply despite the adoption in 2006 of current Rule 37(e). * * *

Not only is the amendment designed to raise the threshold for sanctions above negligence, it is also meant to provide a uniform standard for federal courts nationwide and thereby to replace this divergent case law cacophony that many have reported causes difficulty for those trying to make preservation decisions.

Amended Rule 37(e), in short, provides better protection than current Rule 37(e). * * * The proposed rule is significantly broader than the current rule, providing more guidance to those who must make preservation and sanctions decisions. It also applies to all discoverable information, not just electronically stored information. * * *

It is important to ensure that looser notions of inherent power are not invoked to circumvent the protections established by new Rule 37(e).

Sanctions in the absence of willfulness or bad faith

Rule 37(e)(2)(B) does permit sanctions in the absence of willfulness or bad faith when the loss of the information "irreparably deprived a party of any meaningful opportunity to present a claim or defense." The Subcommittee means this authority to be limited to the truly exceptional case. * * * The point is that the prejudice is not only irreparable, but also exceptionally severe. * * *

The rule does not attempt to prescribe new or different rules on what must be preserved. * * * The Subcommittee considered whether providing specifics in the Note on what might trigger a duty to preserve would be desirable. Some versions of proposed rules contained very specific specifications of this sort. The Subcommittee's eventual conclusion, however, was that no single rule could be written that would apply fairly and effectively to the wide variety of

cases in federal court.

Rule 37.Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

~~(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION. If a party failed to preserve discoverable information that reasonably should have been preserved in the anticipation or conduct of litigation,

(1) The court may permit additional discovery, order the party to undertake curative measures, or require the party to pay the reasonable expenses, including attorney's fees, caused by the failure.

(2) The court may impose any of the sanctions listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction only if the court finds:

(A) that the failure was willful or in bad faith, and caused substantial prejudice in the litigation; or

(B) that the failure irreparably deprived a party of any meaningful opportunity to present a claim or defense.

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court should consider all relevant factors, including:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request that information be preserved, the clarity and reasonableness of the request, and whether the

person who made the request and the party engaged in good-faith consultation regarding the scope of preservation;

(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E) whether the party sought timely guidance from the court regarding any unresolved disputes concerning the preservation of discoverable information.

PART II: DISCUSSION ITEMS DUKE

CONFERENCE RULES DRAFTS

The rules sketches shown here are presented for discussion to guide further development looking toward a package that may be ready to advance at the June meeting with a recommendation for publication [in August].* * * The proposals presently being considered are grouped in three roughly defined sets. * * *

The first topics look directly to the early stages of establishing case management. These changes would shorten the time for making service after filing an action; reduce the time for issuing a scheduling order; and emphasize the value of holding an actual conference of court and parties before issuing a scheduling order. They also would look toward encouraging an informal conference with the court before making a discovery motion. The last item in this set would modify the Rule 26(d) discovery moratorium by allowing Rule 34 requests to be served at some interval after the action is begun, but setting the time to respond to start at the Rule 26(f) conference.

The next set of changes begin with shifting the Rule 26(b)(2)(C)(iii) proportionality factors into Rule 26(b)(1). Rule 26(b)(1) is further changed by limiting the scope of discovery to matter relevant to any party's claim or defense and by modifying the provision for discovery of information not admissible in evidence.

The current sketches of Rule 26(b)(1) and 26(b)(2)(C)(iii) look like this:

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the amount in controversy, the importance of the issues at

stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

Other revisions would be made in Rule 26(b)(2)(C):

(C) When required. On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

More specific means of encouraging proportionality are illustrated by models that reduce the presumptive number of depositions and interrogatories, and for the first time incorporate presumptive limitations on the number of requests to produce and requests for admissions. Another approach is a set of provisions to improve the quality of discovery objections and the clarity of responses. Finally, modest changes would serve as reminders of the need to consider preservation of electronically stored information and the value of considering agreements under Evidence Rule 502 by adding these topics to Rules 16(b)(3)(B)(iii) and (iv) as well as 26(f)(3)(C) and (D).

The last proposal would revise Rule 1 to direct that the rules be employed by the court and parties to secure the canonical goals of Rule 1.

Other topics considered by the Subcommittee have been deferred for possible future work. * * * And a major topic, cost sharing in discovery, is addressed only by a sketch that

revises Rule 26(c) to make explicit the authority to provide for cost sharing by a protective order. Broader cost- sharing issues have been referred to the Discovery Subcommittee. Cost sharing is so important as to require in-depth study that would unduly delay the other proposals in the package.