U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

September 7, 2011

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

Dear Judge Campbell:

The Department of Justice (the Department) respectfully submits its preliminary views regarding the potential changes to the Federal Rules of Civil Procedure. The changes under consideration, first raised at the 2010 Civil Litigation Review Conference (Duke Conference) in May 2010 and subsequently modified and circulated by the Discovery Subcommittee (Subcommittee),[1] prescribe new rules for the preservation of information and seek to define the sanctions that would result from the failure to preserve. Three different versions of a potential "rule" (two versions focusing on amendments to both Rule 26 and Rule 37 and one version focusing solely on amendments to Rule 37) have been circulated for comment. Each version is intended to address a perceived need for clarity and uniformity in preservation obligations.

The Department understands that the Subcommittee is still at the information gathering stage. The Department welcomes this opportunity to provide its views to the Subcommittee. The Department is uniquely situated to assess how new preservation and/or sanctions rules would impact a wide range of litigants, as approximately one-third of all federal civil cases involve the United States as either a plaintiff or a defendant.

The Department's preliminary investigation suggests that a rule may not be needed, that further analysis is required before any rule changes should be made, and that the potential changes present substantial legal, policy, and operational concerns, particularly for the federal government. A number of federal agencies have significant reservations about the potential rule language circulated and question whether the proposals alleviate the perceived preservation problems. Accordingly, the Department respectfully urges the Subcommittee not to propose any changes to the Federal Rules of Civil Procedure regarding preservation or related sanctions at this time.

Lack of Empirical Evidence

The Department has significant concerns that a rule is being considered without adequate empirical evidence that a rule change is, in fact, needed.

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[1] *See* Memorandum to Participants in September 9, 2011 Mini-Conference on Preservation and Sanctions, Honorable David Campbell and Professor Richard Marcus, June 29, 2011.

The 2011 Federal Judicial Center (FJC) report raises questions about whether a rule is needed to address perceived preservation issues in civil discovery. In particular, the data suggests that sanctions are sought by parties and imposed by the court in only a small percentage of cases. Furthermore, the majority of the cases in which the courts imposed sanctions did not involve pre-litigation preservation conduct. The FJC analysis (based on data from 19 districts and the 131,992 cases filed in 2007 and 2008 in those districts) shows that requests for spoliation sanctions were relatively rare (in just 0.15% of cases in the study districts), and sanctions were granted even more rarely (in only 18% of the 0.15% cases).[2] When the court granted sanctions, only 25% of those sanctions cases involved pre-litigation preservation conduct.[3] Thus, sanctions were imposed based on pre-litigation preservation conduct in only 0.00675% (25% of 18% of 0.15%) of the cases studied.

Further, a 2009 FJC survey reported that of the approximately 250,000 civil cases filed each year in federal courts, approximately 90,000 of those cases involved requests for electronically stored information (ESI cases).[4] In examining how frequently sanctions were imposed, one study found that sanctions were awarded in 46 out of the 90,000 ESI cases.[5] Another recent nationwide review showed that by mid-year 2011, sanctions were sought in 68 instances and awarded in 38 cases.[6] In light of these findings, the Department believes that several questions remain unanswered, including:

- What is the problem that a new potential rule would seek to solve?
    - Is the problem an increase in preservation issues in litigation?
    - Is the problem an inconsistency in the standards for spoliation sanctions across different jurisdictions?
    - Is the problem the cost of preservation? And if so, does sufficient evidence support that preservation costs are due to litigation retention obligations rather than other retention requirements arising under statute or regulation, or inadequate data management and record-keeping?
- Has the Rules Committee examined whether litigants are effectively using the existing rules and litigation tools?[7]
- Should the case law and technology be left to continue to develop and mature before a new rule is proposed?
- What, if anything, has changed since 2006 when the Rules Committee confronted a similar issue and decided not to develop a specific preservation rule?

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[2] *See* Motion for Sanctions Based Upon Spoliation of Evidence in Civil Cases, Report to the Judicial Conference Advisory Committee on Civil Rules, Emery G. Lee III, 2011.

[3] *See* Spoliation Motions, Presentation to the Civil Rules Committee by Federal Judicial Center Research Division, Emery G. Lee III, November 2010.

[4] Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *National, Case-Based Civil Rules Survey* (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

[5] Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 (2010).

[6] Gibson Dunn, *2011 Mid-Year E-discovery Update* (July 22, 2011).

[7] While 82% of respondents in a recent ABA survey stated that discovery is too expensive, "61% of respondents believe that counsel do not typically request limitations on discovery under available mechanisms." Further, "while the cost of discovery was identified as a problem, amending the Rules was not among the possible solutions in which the ABA survey found general agreement." Milberg and Hausfeld, *E-Discovery Today: The Fault Lies Not In Our Rules*, 4 FED. CTS. L. REV. 2, 15-16 (2011) (citing ABA Section of Litigation, Member Survey on Civil Practice: Full Report (American Bar Ass'n. 2009), http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf).

General Concerns About a Rule Imposing Preservation Obligations

The Department has a number of concerns about the prospect of enacting any broadly applicable rule that defines preservation obligations and/or related sanctions. Some of these concerns are applicable to all litigants, and others are unique to the federal government. First and foremost, the Department believes that further analysis of the Rules Enabling Act is warranted. Second, questions about the practical effect of a preservation and/or related sanctions rule should be more fully explored. Third, some examination of how the proposed rule would interact with existing statutory and regulatory requirements governing preservation obligations of the United States should be addressed. Finally, the unintended consequences a rule may have on civil investigations must be considered. Each of these issues, while reflecting just a subset of the Department's overall concerns, is described further below.

1. *Rules Enabling Act Issues*

The Department agrees with the observations of the Advisory Committee and others that the rule proposals may exceed the constraints of the Rules Enabling Act, 28 U.S.C. § 2072. Because at least some of the potential rules changes could be understood to regulate conduct significantly removed from litigation (including conduct related to documents that may never become the subject of litigation), the Department believes there is some risk that a court might conclude that they are not "rules of practice or procedure" or that they "abridge, enlarge or modify" substantive rights. *See* 28 U.S.C. § 2072(a) & (c). The Department encourages the Subcommittee and the Rules Committee to take up this analysis early in any rules evaluation process.

2. *Practical Questions Regarding How a New Rule Would be Applied*

The Department believes that additional focus and consideration should be given to the practical application of a new rule addressing preservation and/or related sanctions. The following questions reflect the potential implications of a rules change:

- Will a new rule supplant or supplement preservation and document retention requirements and practices governed by statute, case law, or party agreement? If not, how would uniformity be achieved?
- Will a new rule prevent a court from continuing to utilize its inherent authority to sanction a party for preservation errors?
- Has the Rules Committee determined whether statutes and regulations would need to be amended to accommodate a new preservation and/or sanction rule that affects document retention?
- How will a preservation and/or sanction rule reconcile with substantive tort law?[8]
- Will any proposed rule be drafted to accommodate future technological changes?[9]
- Has a study been conducted (or is one contemplated to be mandated or funded by Congress), to provide the Rules Committee with sufficient information about the costs to the federal government and taxpayers associated with a rules change?
- Has the Committee considered whether Congress should appropriate funds to federal agencies to respond to a rules change?

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[8] Many states have treated spoliation as a separate cause of action under state tort law, entitling the aggrieved party to compensatory damages. Some states have recognized causes of action for intentional spoliation of evidence; others have recognized causes of action for negligent spoliation of evidence.

[9] For example, the use of terms such as "ephemeral data" and "physically damaged media" in the potential rules is imprecise and subject to evolving technological debate.

These are just a few of the unanswered questions that the Department believes must be answered before the Subcommittee proceeds.

3. *Interaction with Regulatory and Statutory Rules Governing Document Preservation*

A rule imposing automatic, pre-litigation triggers before litigation is reasonably anticipated may be inconsistent with the Federal Records Act,[10] agency Touhy regulations,[11] and established procedures for numerous other administrative proceedings. Federal records are already being preserved pursuant to existing statutes. There are also established statutory and regulatory claims processes that have been legislatively approved for inquiries or disputes to be resolved without judicial involvement. A new rule may conflict with these policy decisions made by Congress.

4. *Unintended Consequences on Civil Investigations*

A preservation rule that would impose a standard trigger for preservation in civil investigations may have unintended consequences. Such a rule could create new and substantial burdens on the federal government, as well as confuse others about existing preservation obligations under regulation or statute.

It is neither legally required under the current case law, nor operationally feasible during this period of economic austerity, for the federal government to institute new preservation duties upon the mere opening of a civil investigation. As an initial matter, litigation is not always anticipated at the opening of an investigation. If a rule were to impose preservation duties at the opening of a civil investigation, the cost incurred by the federal government, particularly when litigation is not reasonably foreseeable, would likely be prohibitive and beyond existing budget capabilities. Funds needed for civil investigations to protect the American public and enforce the laws of the United States may well be diverted for unnecessary preservation.

Qui tam cases are an illustrative example. From 1987 to mid-2010, approximately 7,200 *qui tam* cases were filed pursuant to 31 U.S. C. § 3729 *et seq.*, alleging fraud against government agencies.[12] These are matters filed by private litigants, known as relators, on behalf of the United States. After investigation, the government may intervene and litigate the case or decline to do so and allow the relator to litigate. Since 1986, the United States has intervened in approximately twenty-two percent (22%) of the cases that were filed, government-wide.[13] In those cases where the federal government declined intervention, the relators frequently did not proceed to litigation, choosing to dismiss cases voluntarily or settle before litigation occurred. In short, the initial filing of a *qui tam* complaint by a relator does not necessarily result in litigation against the named defendants. In fact, a small percentage of the filed *qui tam* cases result in actual litigation.

Apart from resulting in additional burden, a preservation rule that applies to civil investigations may also confuse other parties as they attempt to adhere to existing retention obligations during government investigations. For example, 18 U.S.C. § 1519 addresses the destruction, alteration, or falsification of

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[10] *See, e.g.,* 44 U.S.C. §§ 2101 *et seq.*, 2501 *et seq.*, 2701 *et seq.*, 2901 *et seq.*, and 3101 *et seq.*

[11] The "head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301.

[12] *See* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

[13] In many of the intervened cases, intervention was contemporaneous with dismissal of the *qui tam* action in order to complete settlement with the defendant and litigation did not commence.

records in federal investigations and bankruptcy.[14] It is not immediately clear how parties would navigate a new preservation rule and this statute. Moreover, entities and individuals under investigation may reasonably anticipate litigation at a point earlier than a preservation rule may contemplate, or they may be obligated to preserve documents at an earlier time as a result of the receipt of a subpoena or civil investigative demand.

Concerns Regarding the Potential Preservation Rule Language

The Department has concerns regarding the specific language currently being considered and would request more evaluation before the Subcommittee proceeds in making any rule amendment recommendations. In particular, several of the enumerated triggers would create new and unworkable burdens on the federal government, and the sanctions language under consideration would not result in the consistency or predictability sought.

1. Trigger Issues

There are several, specific triggers in the potential rule language that cause the Department great concern. An agency would expend unnecessary resources, for example, if it were required to preserve information as to every "claim," regardless of its merit or credibility. Potential Rules 26.1(b)(1) and (b)(2) include triggers when there is a "document asserting a claim" and when there is "receipt of a notice of claim or other communication – whether formal or informal – indicating an intention to assert a claim." Communications are often sent to agencies that do not represent a reasonable threat of potential litigation. The mere receipt of a communication, without a requirement that it relay a reasonable or credible threat of litigation, could potentially drain resources and distract the government from its core missions.

Potential Rule 26.1(b)(4) would also add a new trigger and possibly chill the necessary use and retention of experts and attorneys. Experts and attorneys are often employed to analyze issues, and to develop or determine remedies outside the realm of litigation, regardless of whether or not litigation is reasonably anticipated. Potential Rule 26.1(b)(6) would add a new trigger of "knowledge of an event that calls for preservation under a person's own retention program." This trigger may cause the narrowing or elimination of retention programs.

Similarly, the Department is concerned about the "discussion of possible compromise of a claim" as a triggering event. In order to further settlement negotiations, these discussions should not trigger an obligation to preserve. In many situations, the United States is required to pursue settlement or alternative dispute resolution prior to bringing a suit, so as to lessen the burden and cost of litigation for all parties. A preservation rule including this pre-litigation trigger could undermine these valuable policy decisions.

2. Sanctions Issues

In regard to sanctions, the prospect of sanctions – both against a party and its lawyer – may encourage meritless claims and lead to wasteful ancillary litigation. As discussed earlier, sanctions are not frequently sought by litigants or awarded by the courts. A new rule may increase the frequency of

[14] *See* 18 USC § 1519 ("Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.").

sanctions motions as litigants consider new tactics available that may or may not advance the merits of a case.

Under potential Rule 37(g)(2), the requirement for "irreparable" or "substantial" prejudice may set too high of a burden of proof. It may be very difficult to show how information that is no longer available would have affected a case. With respect to potential Rule 37(g)(3)(D), the United States may often be presumed to have great resources in matters of litigation – even though this may not always be the case. The Department believes that proportionality and costs should be a consideration when determining sanctions. It is critical, however, that the actual resources of an agency that are designated for litigation be considered separate and apart from other governmental resources to avoid the misperception that an agency has all federal resources at its disposal.

Further, the rules currently allow parties and the court wide latitude for addressing whether and when sanctions are appropriate on a case-by-case basis. The Department is not aware of a greater need to codify or standardize sanctions rules for preservation conduct as opposed to sanctions, for example, for improper deposition conduct.

Finally, the Department questions whether a rule addressing only sanctions will achieve the goal of uniformity in the way sanctions are imposed. Even with a new sanctions rule, courts would likely maintain their inherent authority to sanction a party for preservation conduct,[15] thus continuing the development of case law involving spoliation sanctions – potentially with inconsistent results. Further, it is unclear how a new sanctions rule would interact with preservation and document retention requirements governed by statute, current case law, or party agreement. If a new rule merely supplements existing law, the conflicts between those sources of law may lead to additional, costly ancillary litigation. Given these uncertainties, a new sanctions rule may actually create more confusion and unpredictability for litigants.

Conclusion

In conclusion, the Department's preliminary view is that a Federal Civil Rule of Procedure addressing preservation of information and related sanctions may not be needed, that further analysis is required before any rule changes are suggested, and that the suggestions currently under consideration present substantial legal, policy, and operational concerns, particularly for the federal government. The Department, therefore, respectfully requests that the Subcommittee make no rule change recommendation to the Rules Committee at this time.

The Department looks forward to continuing to assist the Subcommittee and Rules Committee in conducting this important legal and factual analysis.

Respectfully submitted,

Tony West
Assistant Attorney General

[15] *See Chambers v. Nasco, Inc.*, 501 U.S. 32, 49-50 & n.14 (1991) (discussing the inherent authority of federal court to sanction a litigant for bad-faith conduct and explaining that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct.").