PRESERVATION/SANCTIONS ISSUES

Since the March meeting, the Discovery Subcommittee has spent considerable time refining the draft it brought before the Committee as a new Rule 37(g). After extended discussion during numerous conference calls, it has refined the rule-amendment proposal as set forth below. Having so refined the proposal, it concluded that it should replace existing Rule 37(e) rather than become a new Rule 37(g), as previously denominated. The reasons for that conclusion are explained below.

Although there are still a few questions on which the Subcommittee was not able to reach consensus, it believes that the full Committee should be able to resolve those questions and therefore hopes that the rule proposal can be forwarded to the Standing Committee with an Advisory Committee recommendation that it be published for public comment. The Subcommittee recognizes that the timing of that recommendation could be influenced to some extent by the Advisory Committee's consideration of the Duke Subcommittee initiatives.

Besides this memorandum, the agenda book should include the following additional items related to this topic:

Notes of Sept. 27 conference call

Notes of Sept. 6 conference call

Notes of Aug. 27 conference call

Notes of Aug. 7 conference call

Notes of July 23 conference call

Notes of July 13 conference call

Notes of July 5 conference call

Memorandum dated Sept. 6, 2012, from John Barkett, on instances in which courts have addressed sanctions for loss of discoverable information not involving willfulness or bad faith

Memorandum dated Aug. 24, 2012, from Andrea Kuperman on Rule 37(e) case law

Memorandum from Judge Grimm's Law Clerks on Local Rules regarding preservation and sanctions

General Background

As should be apparent, the Subcommittee has spent a lot of time and energy discussing these issues; some background may

provide a useful context for the rest of the Advisory Committee.

The Committee's focus on preservation and sanctions was sparked by the E-Discovery panel at the Duke Conference in May, 2010. That panel discussion emphasized the large and growing burden of litigation holds in particular and preservation more generally. The panelists unanimously urged that the Committee attempt to develop a rule to deal with these problems. Rule 37(e), adopted in 2006 to provide some solace about preservation sanction risks, had not been sufficiently effective.

The Discovery Subcommittee began work during the summer of 2010 to evaluate and develop methods of addressing these difficulties, reporting back on its progress during full Committee meetings. Much of this work was done by conference call, and eventually it led to the conclusion that the Subcommittee would be greatly aided by a mini-conference addressing preservation issues.

In September, 2011, the Subcommittee held a mini-conference attended by about 30 participants with extensive background in dealing with these issues. Various participants and organizations also submitted extremely helpful written reports. It would be putting it mildly to say that their views were diverse; some urged immediate pursuit of a rule containing detailed preservation specifics, while others argued that no action at all was indicated.

During 2011, the Subcommittee developed three general models of possible rule-amendment approaches which it presented to the participants in its mini-conference and summarized as follows at the time:

> Category 1: Preservation proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision. Submissions the Committee received from various interested parties provide a starting point in drafting some such specifics. A basic question is whether a single rule with very specific preservation provisions could reasonably apply to the wide variety of civil cases filed in federal court. A related issue is whether changing technology would render such a rule obsolete by the time it became effective, or soon thereafter. Even worse, it might be counter-productive. For example, a rule that triggers a duty to preserve when a prospective party demands that another prospective party begin preservation measures (among the triggers suggested) could lead to overreaching demands, counter-demands, and produce an impasse that could not be resolved by a court because no action had yet been filed.

Category 2: A more general preservation rule could address a variety of preservation concerns, but only in more general terms. It would, nonetheless, be a "front end" proposal that would attempt to establish reasonableness and proportionality as touchstones for assessing preservation obligations. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Would it be too general to be helpful?

Category 3: This approach would address only sanctions, and would in that sense be a "back end" rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information acted reasonably. In form, however, this approach would not contain any specific directives about when a preservation obligation arises or the scope of the obligation. By articulating what would be "reasonable," it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering "carrots" to those who act reasonably, rather than relying mainly on "sticks," as a sanctions regime might be seen to do.

After the mini-conference, the Subcommittee decided to focus on the Category 3 approach, embodied at the time in a proposed Rule 37(g) dealing with sanctions for failure to preserve information. There were many questions about how to refine this proposal. Many of those questions remained when the same proposal was presented to the full Committee and discussed during the March 2012 meeting in Ann Arbor.

Since the March meeting, as the listing of conference calls above suggests, the Subcommittee has worked its way through the various language choices and questions raised in the drafts that the Committee has seen in the past. In the process, it has identified a number of additional issues that were not fully apparent before the detailed drafting process began. Full details of the evaluation of those issues are presented in the notes on the various conference calls.

The Subcommittee believes that the proposal below holds promise to provide significant benefits in dealing with the many problems that were identified during the Duke Conference and since, and also that it creates minimal risks of causing problems of the sort that some worried might result from rule amendment.

During the Committee's meeting, the Subcommittee would be happy to try to explain the drafting choices made. But it seems useful at least to outline some topics that have received considerable Subcommittee attention.

Replacing Rule 37(e)

In 2006, Rule 37(e) was added to provide some protection against sanctions for failure to preserve. At the time, some objected that it would not provide a significant amount of protection. Since then, as explored in Andrea Kuperman's memorandum (which should be in this agenda book), the rule has been invoked only rarely. Some say it has provided almost no relief from preservation burdens. The question whether this rule provision would serve any ongoing purpose if a better provision could be devised has been in the background since the beginning of the Subcommittee's efforts.

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 Corp. v. DeGeorge Finan. Corp., 306 F.3d 99 (2d Cir. 2002), which authorized sanctions for negligence. Not only is the amendment designed to raise the threshold for sanctions, it is also meant to provide a uniform standard for federal courts nationwide and thereby to address the 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 Subcommittee has been unable to identify any activity that would be protected by the current Rule 37(e) but not protected under the proposed rule. 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.

The Subcommittee therefore recommends that current Rule 37(e) be replaced with amended Rule 37(e). It reached this conclusion only after completing the long process of refining its amendment proposal, then called Rule 37(g). Having completed that refinement, it reflected on whether current 37(e) provides any useful protection beyond its proposed amendment and concluded that the current rule does not. The Subcommittee discussed abrogating current Rule 37(e) and also adopting its new proposal as 37(g), but that seems unnecessary and potentially confusing. If useful, the invitation for public comment could call attention to the question whether existing Rule 37(e) would have any ongoing value after adoption of the proposed amendment.

The Committee Note below addresses the replacement of current 37(e), but due to the press of time the full Subcommittee did not get a chance to review those portions of the Note before

preparation of these agenda materials.

Grant of authority to sanction;
limitation on that authority to
situations involving willfulness or bad faith

The proposed amendment (in 37(e)(2)) says that if a party fails to preserve information that should be preserved, "the court may impose any of the sanctions listed in Rule 37(g)(2)(A) or give an adverse-inference only if the court finds" that the loss was willful or in bad faith. This formulation differs from the formulation in current Rule 37(e) in that it is a grant of authority to impose sanctions of the sort listed in Rule 37(b)(2)(A). There is accordingly no need to worry (as the language of Rule 37(b) might suggest if the sanction were imposed directly under that rule) about whether failure to preserve violated a court order. The new rule provision is not limited (as is current Rule 37(e)) to "sanctions under these rules," so that the grant of authority should make it unnecessary for courts to rely on inherent authority to support sanctions for failure to preserve. At the same time, the limitation to situations involving willfulness or bad faith should correspond to what is normally said to be necessary to support inherent power sanctions. It is important to ensure that looser notions of inherent power are not invoked to circumvent the protections established by new Rule 37(e).

The limitation to situations in which the party to be sanctioned has acted willfully or in bad faith should provide significantly more protection than current Rule 37(e), as well as providing a uniform national standard.

Some thought was given to whether it would be helpful to try in the Note to define willfulness or bad faith, but the conclusion was that it would not be useful. The courts have considerable experience dealing with these concepts, and efforts to capture that experience in Note language seemed more likely to produce problems than provide help.

Sanctions in 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. It functions as something of a safety valve for the general directive that sanctions can only be imposed on one who has acted willfully or in bad faith. The point is that the prejudice is not only irreparable, but also exceptionally severe. Rule 37(e)(2)(B) comports with cases such as Silvestri v. General Motors Corp., 273 F.3d 583 (4th Cir. 2001), which have recognized

the need for consequences when one side loses information or evidence that is clearly essential to the other side's case. The Subcommittee spent considerable time refining and discussing the proper way to phrase this authority and ultimately arrived at the recommended formulation.

Precise preservation rules

As mentioned above, the Subcommittee began its analysis of these problems with two possible amendment approaches that sought to provide guidance on when a preservation obligation arises and the scope of that obligation. The amendment recommended below does not contain such a provision.

But Rule 37(e)(3) attempts nonetheless to provide general guidance for parties contemplating their preservation obligations. It lists a variety of considerations that a court should take into account in making a determination both about whether the party failed to preserve information "that reasonably should be preserved" and also whether that failure was willful or in bad faith.

The Subcommittee has carefully reviewed the catalog of considerations, and not reached consensus on whether it should be shortened. In particular, as noted in a footnote, it has discussed whether paragraphs (C) and (D) could be omitted. Some feel that these considerations are adequately covered by others on the list. Other members of the Subcommittee feel that a more complete listing in the rule is useful for parties looking for guidance.

At the same time, the rule does not attempt to prescribe new or different rules on what must be preserved. As the Note states, the question whether given information "reasonably should be preserved" is governed by the common law. Given the wide variety of cases brought in federal court, the Subcommittee concluded that it was not possible to write a single rule that would specify the materials to be preserved in every case. The decision is necessarily case-specific.

In the same vein, 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

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~~**(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 fails to preserve discoverable information that reasonably should be 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, including the use of a litigation hold and the scope of the preservation efforts;

(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;[1]

(D) the party's resources and sophistication in litigation;

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

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

DRAFT COMMITTEE NOTE

In 2006, Rule 37(e) was added to provide protection against sanctions for loss of electronically stored information under certain limited circumstances, but preservation problems have nonetheless increased. The Committee has been repeatedly informed of growing concern about the increasing burden of preserving information for litigation, particularly with regard to electronically stored information. Many litigants and prospective litigants have emphasized their uncertainty about the obligation to preserve information, particularly before litigation has actually begun. The remarkable growth in the amount of information that might be preserved has heightened these concerns. Significant divergences among federal courts across the country have meant that potential parties cannot determine what preservation standards they will have to satisfy to avoid sanctions. Extremely expensive overpreservation may

[1] The Subcommittee has discussed at some length whether it is useful to include paragraph C and paragraph D, but has not reached consensus on that question.

seem necessary due to the risk that very serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some information later sought in discovery.

This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of guidelines for federal courts, and applying them to all discoverable information, not just electronically stored information. It is not limited, as the current rule, to information lost due to "the routine, good-faith operation of an electronic information system." The amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts. It does not provide "bright line" preservation directives because bright lines seem unsuited to a set of problems that is intensely context-specific. Instead, the rule focuses on a variety of considerations that the court should weigh in calibrating its response to the loss of information.

Amended Rule 37(e) applies to loss of discoverable information "that reasonably should be preserved in the anticipation or conduct of litigation." This preservation obligation arises from the common law, and may in some instances be triggered by a court order in the case. Rule 37(e)(3) identifies many of the factors that should be considered in determining, in the circumstances of a particular case, when a duty to preserve arose and what information should be preserved.

Except in very rare cases in which the loss of information irreparably deprived a party of any meaningful opportunity to present a claim or defense, sanctions for loss of discoverable information may only be imposed on a finding of willfulness or bad faith.

Unlike the 2006 version of the rule, amended Rule 37(e) is not limited to "sanctions under these rules." It provides rule-based authority for sanctions for loss of all kinds of discoverable information, and therefore makes unnecessary resort to inherent authority.

Subdivision (e)(1) When the court concludes that a party failed to preserve information it should have preserved, it may adopt a variety of measures that are not sanctions. One is to permit additional discovery that would not have been allowed had

the party preserved information as it should have. For example, discovery might be ordered under Rule 26(b)(2)(B) from sources of electronically stored information that are not reasonably accessible. More generally, the fact that a party has failed to preserve information may justify discovery that otherwise would be precluded under the proportionality analysis of Rule 26(b)(2)(C).

In addition to, or instead of, ordering further discovery, the court may order the party that failed to preserve information to take curative measures to restore or obtain the lost information, or to develop substitute information that the court would not have ordered the party to create but for the failure to preserve. The court may also require the party that failed to preserve information to pay another party's reasonable expenses, including attorney fees, caused by the failure to preserve. Such expenses might include, for example, discovery efforts caused by the failure to preserve information.

Subdivision (e)(2)(A). This subdivision authorizes imposition of the sanctions listed in Rule 37(b)(2)(A) for failure to preserve information, whether or not there was a court order requiring such preservation. Rule 37(e)(2)(A) is designed to provide a uniform standard in federal court for sanctions for failure to preserve. It rejects decisions that have authorized the imposition of sanctions -- as opposed to measures authorized by Rule 37(e)(1) -- for negligence or gross negligence.

This subdivision protects a party that has made reasonable preservation decisions in light of the factors identified in Rule 37(e)(3), which emphasize both reasonableness and proportionality. Despite reasonable efforts to preserve, some discoverable information may be lost. Although loss of information may affect other decisions about discovery, such as those under Rule 26(b)(2)(B) and 26(b)(2)(C), sanctions may be imposed only for willful or bad faith actions, except in the exceptional circumstances described in Rule 37(e)(2)(B).

The threshold under Rule 37(e)(2)(A) is that the court find that lost information should have been preserved; if so, the court may impose sanctions only if it can make two further findings. First, it must be established that the party that failed to preserve did so willfully or in bad faith. This determination should be made with reference to the factors identified in Rule 37(e)(3).

Second, the court must also find that the loss of information caused substantial prejudice in the litigation. Because digital data often duplicate other data, substitute evidence is often available. Although it is impossible to demonstrate with certainty what lost information would prove, the party seeking sanctions must show that it has been substantially prejudiced by the loss. Among other things, the court may consider the measures identified in Rule 37(e)(1) in making this determination; if these measures can sufficiently reduce the prejudice, sanctions would be inappropriate even when the court finds willfulness or bad faith. Rule 37(e)(2)(A) authorizes imposition of Rule 37(b)(2) sanctions in the expectation that the court will employ the least severe sanction needed to repair the prejudice resulting from loss of the information.

[There may be cases in which a party's extreme bad faith does not in fact impose substantial prejudice on the opposing party, as for example an unsuccessful attempt to destroy crucial evidence. Because the rule applies only to sanctions for failure to preserve discoverable information, it does not address such situations.][2]

Subdivision (e)(2)(B). Rule 37(e)(2)(B) permits the court to impose sanctions without making a finding of either bad faith or willfulness. As under Rule 37(e)(2)(A), the threshold for sanctions is that the court find that lost information should have been preserved by the party to be sanctioned.

Even if bad faith or willfulness is shown, sanctions may only be imposed under Rule 37(e)(2)(A) when the loss of information caused substantial prejudice in the litigation. Rule 37(e)(2)(B) permits sanctions in the absence of a showing of bad faith or willfulness only if that loss of information deprived a party of any meaningful opportunity to present a claim or defense. Examples might include cases in which the alleged injury-causing instrumentality has been lost before the parties may inspect it, or cases in which the only evidence of a critically important event has been lost. Such situations are extremely rare.

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[2] This paragraph is in brackets because it is unclear whether it is helpful. The Subcommittee discussed the problem of wicked but unsuccessful efforts to destroy evidence, and did not want to appear to limit the court's authority in responding to such conduct. But the rule only applies if information is lost, and would not then apply. Whether it is useful to make that point in the Note is uncertain.

Before resorting to sanctions, a court would ordinarily consider lesser measures, including those listed in Rule 37(e)(1), to avoid or minimize the prejudice. If such measures substantially cure the prejudice, Rule 37(e)(2)(B) does not apply. Even if such prejudice persists, the court should employ the least severe sanction.

Subdivision (e)(3). These factors guide the court when asked to adopt measures under Rule 37(e)(1) due to loss of information or to impose sanctions under Rule 37(e)(2). The listing of factors is not exclusive; other considerations may bear on these decisions, such as whether the information not retained reasonably appeared to be cumulative with materials that were retained. With regard to all these matters, the court's focus should be on the reasonableness of the parties' conduct.

The first factor is the extent to which the party was on notice that litigation was likely and that the information lost would be discoverable in that litigation. A variety of events may alert a party to the prospect of litigation. But often these events provide only limited information about that prospective litigation, so that the scope of discoverable information may remain uncertain.

The second factor focuses on what the party did to preserve information after the prospect of litigation arose. The party's issuance of a litigation hold is often important on this point. But it is only one consideration, and no specific feature of the litigation hold -- for example, a written rather than an oral hold notice -- is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized. One focus would be on the extent to which a party should appreciate that certain types of information might be discoverable in the litigation, and also what it knew, or should have known, about the likelihood of losing information if it did not take steps to preserve. The fact that some information was lost does not itself prove that the efforts to preserve were not reasonable.

The third factor looks to whether the party received a request to preserve information. Although such a request may bring home the need to preserve information, this factor is not meant to compel compliance with all such demands. To the contrary, reasonableness and good faith may not require any special preservation efforts despite the request. In addition, the proportionality concern means that a party need not honor an unreasonably broad preservation demand, but instead should make

its own determination about what is appropriate preservation in light of what it knows about the litigation. The request itself, or communication with the person who made the request, may provide insights about what information should be preserved. One important matter may be whether the person making the preservation request is willing to engage in good faith consultation about the scope of the desired preservation.

The fourth factor looks to the party's resources and sophistication in relation to litigation. Prospective litigants may have very different levels of sophistication regarding what litigation entails, and about their electronic information systems and what electronically stored information they have created. Ignorance alone does not excuse a party that fails to preserve important information, but a party's sophistication may bear on whether failure to do so was either willful or in bad faith. A possibly related consideration may be whether the party has a realistic ability to control or preserve some electronically stored information.

The fifth factor emphasizes a central concern -- proportionality. The focus should be on the information needs of the litigation at hand. That may be only a single case, or multiple cases. Rule 26(b)(2)(C) provides guidance particularly applicable to calibrating a reasonable preservation regime. Rule 37(e)(3)(E) explains that this calculation should be made with regard to "any anticipated or ongoing litigation." Prospective litigants who call for preservation efforts by others (the third factor) should keep those proportionality principles in mind.

Making a proportionality determination often depends in part on specifics about various types of information involved, and the costs of various forms of preservation. A party may act reasonably by choosing the least costly form of information preservation, if it is substantially similar to more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

Finally, the sixth factor looks to whether the party alleged to have failed to preserve as required sought guidance from the court if agreement could not be reached with the other parties. Until litigation commences, reference to the court may not be possible. In any event, this is not meant to encourage premature

resort to the court; Rule 26(f) directs the parties to discuss and to attempt to resolve issues concerning preservation before presenting them to the court. Ordinarily the parties' arrangements are to be preferred to those imposed by the court. But if the parties cannot reach agreement, they should not forgo available opportunities to obtain prompt resolution of the differences from the court.