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THE COMMITTEE ON PRETRIAL PRACTICE & DISCOVERY
American Bar Association Section of Litigation
Volume 13, Number 2 Spring 2005

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Do Not Delete: Sanctions for Spoliation of Electronic Evidence

By Steven A. Weiss, Schopf & Weiss LLP, Chicago

The proportion of evidence that is produced in electronic form has increased exponentially during the last several years. Almost all cases now involve the production of e-mails, and most cases involve significantly greater productions of documents and data in electronic form. Because of the prevalence of electronic documents, and the ease with which they can be deleted, it is not surprising that most of the recent sanctions cases for spoliation of evidence have been in the electronic arena. While much has been written on the standards for retention of electronic evidence, the methods by which spoliation is detected, and the consequences of spoliation, this article seeks to categorize the types of sanctions that have been awarded for electronic spoliation, and the circumstances in which they are awarded.

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Sanctions 2005

By Gregory P. Joseph, Gregory P. Joseph Law Offices LLC, New York

This article highlights important sanctions decisions in the 18 months since the topic was addressed in the *National Law Journal*, June 23-30, 2003, at 30.

Unsafe Harbors

The safe harbor provision of Rule 11(c)(1)(A) requires that any Rule 11 motion be served at least 21 days before the motion is filed with the court, to afford the offender the opportunity to withdraw the challenged paper. Once judgment is rendered or an action dismissed, it is too late for a party to move for Rule 11 sanctions because it is impossible to comply with the safe harbor. *See, e.g., Brickwood Contractors, Inc. v. Datanet Engr'g, Inc.*, 369 F.3d 385, 397-99 (4th Cir. 2004) (en banc).

In expedited proceedings that are promptly dismissed or adjudicated, it may be impossible as a matter of fact for the injured party to comply with the 21-day requirement. What if a Rule 11 motion has been made but the case is dismissed or adjudicated prior to the expiration of the safe harbor? May the court act on the motion, even though 21 days have not in fact been afforded the target? The court in *Joseph Giganti Veritas Media Group, Inc. v. Gen-X Strategies, Inc.*, 222 F.R.D. 299 (E.D. Va. 2004) imposed Rule 11 sanctions where the motion had been filed concurrently with a dismissal motion 20 days before the offending papers were dismissed. The court reasoned that, by not requesting any additional time at the argument on the dismissal motion (and, instead, vigorously urging the sanctionable positions), the offender had forfeited the remaining few hours of the 21-day period.

The absence of a predismissal motion raises problems illustrated by the Seventh Circuit's decision in *Methode Elecs., Inc. v. Adam Techs., Inc.*, 371 F.3d 923 (7th Cir. 2004), in

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Gregory P. Joseph, of Gregory P. Joseph Law Offices LLC in New York, is a fellow of the American College of Trial Lawyers and former chair of the American Bar Association Section of Litigation.

Message from the Chairs

Providing topical material to our members in the formats that are most useful and easily accessible to our membership is our goal. The theme of this issue is the sometimes uncomfortable and thorny issues of sanctions and ethical issues. With articles ranging from sanctions for spoliation of electronic evidence—a topic on everyone's radar screen these days—to how to approach changes to a deponent's testimony, we hope this effort to provide articles on related topics will be a nice change of pace for our readers. We won't use this format all the time, but our newsletter editors would welcome ideas and articles for future theme issue.

By the time you receive this, a former mainstay of our newsletter, the description of recent case developments, will have migrated to our Web site. Making that change will allow us to provide you with more timely information on new cases, while freeing up space in the newsletter for more articles—and offers you a perfect opportunity for you to get involved as an author! We thank Brian Moffet for leading the charge of moving the case developments to the Web site. Please check the Web site at www.abanet.org/litigation/committee/pretrial/home.html on a regular basis for these developments and other Committee updates. If you have any ideas for the site, contact Stacey Gottlieb, our Web site coordinator.

On the programming front, you should receive this issue at or about the time of the Section of Litigation Annual Conference in New York City in April. We hope you will join us for our Committee Breakfast Meeting on April 21, where we will be discussing a mediation survey done recently with the assistance of PwC, and other mediation issues. We are the lead sponsor of a program entitled "The Daubert Dozen: Twelve Expert Witness Issues That Can Make (or Break) Your Day" to be held on April 21, from 3:45 to 5:00 p.m., and we are a cosponsor of several other programs. Finally, to give us a chance to get to know each other better, we are organizing a dinner, also on the 21st, at 8:00 p.m. at King's Carriage House, a great restaurant on the Upper East Side. The Section Annual Conference provides a great opportunity to combine CLE with networking, and we hope to see you there.

As always, we are looking for our members to participate in Committee projects. If you have articles, program ideas (either for a major meeting like the Annual Conference or for a CLE teleconference), or other projects (like the deposition conduct project undertaken by our Deposition Subcommittee), please contact us.♦

—Richard L. Horwitz and Kirk Ingebretsen

Message from the Editors

We are pleased to bring you the Spring 2005 edition of the *Pretrial Practice & Discovery Committee Newsletter*. This edition is a "theme issue"—all of the articles pertain to sanctions and attorneys' professional obligations. Although not always a pleasant topic, the threat of sanctions is necessary to police attorney and litigant behavior. In this edition, we present Steve Weiss's discussion about the spoliation of electronic evidence and the results that may follow if one fails to preserve such evidence. We also bring you Gregory Joseph's article on recent developments in appellate cases under Rule 11, and Victor Bolden's article on the practical and ethical issues an attorney must confront when it is necessary to change a deposition witness's testimony.

Looking to the future, we bring you Matthew Reinhard's editorial on a bill currently pending in Congress that would dramatically amend Rule 11. As Reinhard explains, the ABA opposes the amendment, which, if enacted, will affect almost every litigator's practice. On the back to basics front, we have Joseph Siprut's tips on handling uncooperative opposing counsel during written discovery and Ian Fisher's advice for young lawyers on effective and ethical responsive pleading.

We hope that you find this edition both useful and interesting. As always, we wish to hear your thoughts concerning this edition or your ideas for future articles. ♦

—Ian H. Fisher, Louis E. Kempinsky, and Don R. Sampen

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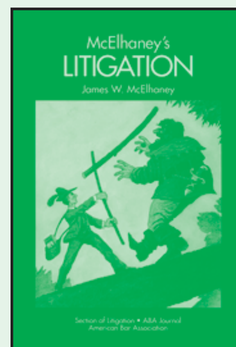

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Sanctions 2005
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which a complaint seeking emergency injunctive relief contained frivolous venue allegations. Three days after the action was filed, defense counsel sent a warning letter ostensibly "pursuant to Rule 11," but no written Rule 11 motion was served, then or later. Two days later, the parties were before the court on the plaintiff's motion for a temporary restraining order (TRO); the court indicated its displeasure with the venue allegations; and defense counsel orally moved for Rule 11 sanctions. The next day, the court issued a sua sponte order to show cause why Rule 11 sanctions were not appropriate. The plaintiff promptly dismissed the action without prejudice pursuant to Rule 41(a), precisely one week after filing it. Thereafter, the district court imposed a $10,000 fine payable to the court and $45,000 for the defendants' attorneys' fees and expenses.

The problem facing the Seventh Circuit was that an award of attorneys' fees is not permitted when sanctions issue sua sponte (*see* Rule 11(C)(2)). The *Methode* court observed that it "could" conclude that the defendant had "substantially complied" with Rule 11 by sending a letter alerting the plaintiff of the violation. The court declined to do so, however, and for good reason. Sending a letter does not comply with the motion requirement of the safe harbor. *See, e.g.*, *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 527-28 (6th Cir. 2002); *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001).

The *Methode* court also suggested that it "could determine that [plaintiff] waived its right to a 21-day safe harbor" by proceeding with its TRO application in the face of the Rule 11 letter. This, too, the Seventh Circuit properly declined to conclude. Rather than reflect any waiver of the protections of Rule 11, the plaintiff's proceeding with an expedited motion could equally be deemed to reflect its embrace of the protections of the safe harbor, i.e., the plaintiff knew that it could proceed without risk of a timely Rule 11 motion. Ultimately, the Seventh Circuit sustained the award of attorneys' fees pursuant to the inherent power of the court. *Id.* at 927-28.

Sufficiently Due Process

Sustaining a Rule 11 sanction under the inherent power of the court, as in *Methode*, is problematic. The plaintiff in *Methode* was not on notice that it was defending against a potential inherent power sanction. This raises a due process concern because targets of sanctions motions are generally entitled to notice of both the conduct that is challenged and the sanctions power that is being invoked. Different sanctions powers raise different issues. *See* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 17(D)(1) (Supp. 2005).

In affirming a Rule 11 sanction under the inherent power, however, *Methode* highlights a new wrinkle in due process analysis. The Seventh Circuit joined two other circuits that find no due process problem in the issuance of inherent power sanctions, even though the offender was on notice only of possible Rule 11 sanctions, where the following criteria are satisfied: (1) the offender is on notice of precisely what conduct is alleged to be sanctionable, (2) that conduct involves bad faith (a sine qua non of inherent power sanctions but not of Rule 11 sanctions), and (3) Rule 11 does not apply to that conduct. In addition to *Methode*, 371 F.3d at 927-28, *see Miller v. Cardinale (In re DeVille)*, 361 F.3d 539, 549 (9th Cir. 2004) (Bankruptcy Rule 9011); *Fellheimer, Eichen & Braverman v. Charter Technologies*, 57 F.3d 1215, 1225 (3d Cir. 1995). In these circumstances, there is little point in a remand to determine whether inherent power sanctions are appropriate because the district court has already made the factual determination demonstrating that they

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Committee on Pretrial Practice & Discovery is published by ABA Publishing for the Section of Litigation. The opinions expressed do not necessarily represent those of the American Bar Association or the Section of Litigation.

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are, and has done so in a proceeding in which the offender was on notice of the precise factual basis rendering inherent power sanctions apt.

Conflicting Messages: Leave to Amend with Warnings

The grant of leave to replead may create an ambiguity in a district court warning as to the potential sanctionability of repleading a dismissed claim. In *Anderson v. Smithfield Foods, Inc.*, 353 F.3d 912 (11th Cir. 2003), the Eleventh Circuit reversed a $128,000 sanction awarded for the filing of a second amended RICO complaint because (1) the law in the area was unclear; and (2) "the district court's order dismissing the claims in the First Amended Complaint did not give such a clear warning not to refile under RICO that only an unreasonable lawyer would have repleaded RICO claims." The district court had warned the plaintiffs that, in the court's view, "RICO is not the proper remedy for Plaintiffs to vindicate their rights," which were primarily environmental and health in orientation. The Eleventh Circuit stressed, however, "[T]he order also points out the pleading defects in the Plaintiffs' RICO claims and gives the Plaintiffs leave to file a Second Amended Complaint. This approach created an ambiguity. Based on this ambiguity, a reasonable lawyer could interpret the order as inviting better-pleaded RICO claims."

Ill-Motivated Meritorious Positions

The Fifth Circuit upheld an improper-purpose sanction even though it assumed (but did not really seem convinced) that the underlying position was not frivolous, in *Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796, 805 (5th Cir. 2003) (en banc). In affirming the improper purpose sanction, the Fifth Circuit held:

> It is true that, generally, district courts do not sanction attorneys who make nonfrivolous representations. A district court may do so, however, where it is objectively ascertainable that an attorney submitted a paper to the court for an improper purpose. … To conclude otherwise would render the improper purpose portion of the opinion superfluous.

Whitehead was the product of a divided court, and can be read as at odds with the jurisprudence in other circuits, which appear generally reluctant to approve improper-purpose sanctions where the underlying position is not frivolous. *See, e.g.*, *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 393 (2d Cir. 2003) (reversing improper-purpose sanction after finding factual and legal contentions to be nonfrivolous: "Without objectively unreasonable statements, economic disparity and a greater litigiousness do not alone amount to improper purpose"); *Reed v. Great Lakes Cos.*, 330 F.3d 931, 936-37 (7th Cir. 2003) (reversing improper-purpose sanctions where the underlying claim was not found to be frivolous and, therefore, the determination of improper purpose was, in the circumstances, speculative: "[T]he district judge's basis for imposing the sanctions ... was that in the past 15 years [plaintiff] had worked for 25 different employers, often (as in this case) for a month or less, and had filed 13 employment discrimination suits. … He had won a partial victory in one of the suits but had lost all the rest, some of them through abandonment. … Yet, odd as it may seem, none of [plaintiff's] previous cases has been adjudged frivolous. Nor did the district judge find that any of them had been frivolous. The sanctions order thus appears to rest on nothing more solid than the judge's speculation that [plaintiff] is an extortionist. The speculation is too thin to sustain that order").

The Second and Seventh Circuit's reluctance to impose improper-purpose sanctions for asserting nonfrivolous positions is sound. Rarely do plaintiffs sue because they feel warmly toward the defendants. However, these cases are perhaps less disparate than they appear. As suggested above, the Fifth Circuit in *Whitehead* did not seem to believe that the sanctioned counsel's legal position really was nonfrivolous. In contrast, the Second Circuit in *Storey* concluded that the factual and legal positions before it were not frivolous, and the Seventh Circuit in *Reed* intimated that there may have been other, extenuating circumstances for the peculiar behavior of the plaintiff before it. All of these decisions are consistent with the general proposition that courts should be, and are, circumspect about imposing improper-purpose sanctions for presentation of a nonfrivolous position. This reflects the strong judicial predisposition to decide matters on the merits and avoid needless excursions into the subjective states of litigants or their counsel.

Adverse Inference Instructions: Electronic Discovery

Several courts, having found spoliation of electronic discovery, have fashioned adverse inference instructions for use at trial. *See, e.g.*, *Zubulake v. UBS Warburg LLC*, 2004 U.S. Dist. LEXIS 13574, at *61-*62 (S.D.N.Y. July 20, 2004); *Network Computing Servs. v. Cisco Sys., Inc.*, 2004 U.S. Dist. LEXIS 26610, at *29-30 (D.S.C. Aug. 3, 2004); *Mosaid Technologies, Inc. v. Samsung Electronics Co.*, 2004 U.S. Dist. LEXIS 25286, at *4-5, 19 (D.N.J. Dec. 7, 2004). All of these are sobering. The *Mosaid* model, which draws on *Zubulake*, is worth bearing in mind (in much the same way as a Cotton Mather sermon):

> You have heard that defendants failed to produce virtually all technical and other e-mails in this case. Plaintiff has argued that these e-mails were in defendants' control and would have proven facts relevant to the issues in this case.
>
> If you find that defendants could have produced these e-mails, and that the evidence was within their control, and that the e-mails would have been relevant in deciding disputed facts in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to defendants.
>
> In deciding whether to draw this inference you may consider whether these e-mails would merely have duplicated other evidence already before you. [*5] You may also consider whether you are satisfied that defendants' failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all the facts and circumstances of this case. 2004 U.S. Dist. LEXIS 25286, at *4-5. ♦

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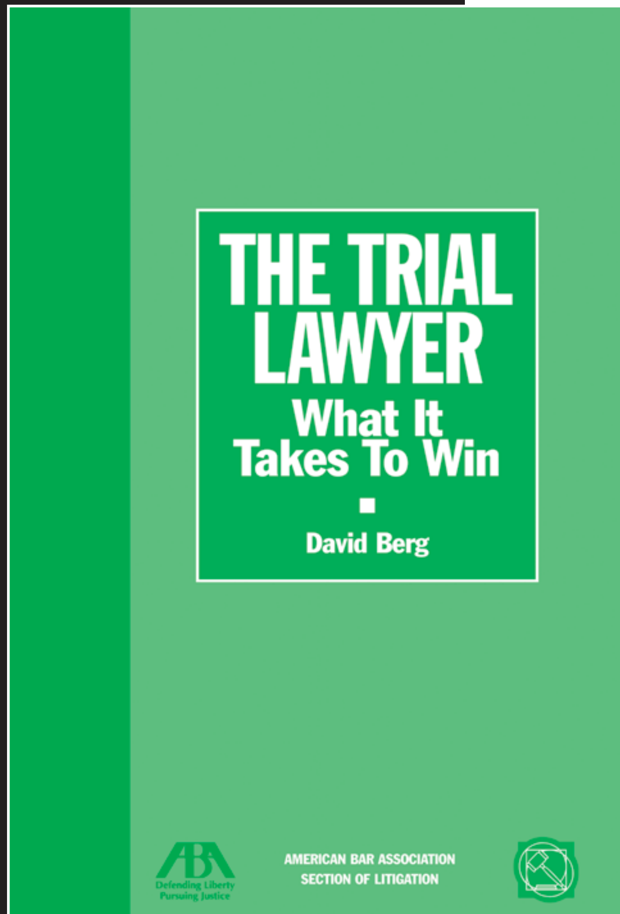

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Oct. 2003 328 pages 6 x 9 hard cover w/dust jacket
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What Is Spoliation?

"Spoliation of evidence occurs when one party destroys evidence relevant to an issue in the case." *Smith v. United States*, 293 F.3d 984, 988 (7th Cir. 2002). When determining whether spoliation has occurred, "courts tend to look for evidence of bad faith on the part of the accused party." *In re Bridgestone/Firestone, Inc.*, 287 F. Supp. 2d 938, 940 (S.D. Ind. 2003). "'Bad faith' means destruction for the purpose of hiding adverse information." *Mathis v. John Morden Buick Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998). Willful, unreasonable or grossly negligent conduct in the handling or preservation of evidence can also give rise to spoliation of evidence. *Diersen v. Walker*, No. 00 C 2437, 2003 WL 21317276, at *3 (N.D. Ill. June 6, 2003) (collecting cases).

Courts' Power to Impose Sanctions for Spoliation

When a party intentionally breaches a duty to preserve relevant evidence within its control, the district court may impose sanctions under Rule 37 of the Federal Rules of Civil Procedure or the inherent authority of the court. *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1020 (8th Cir. 1999); *Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756 n.7 (7th Cir. 1994). For sanctions pursuant to Rule 37, there must be an order compelling discovery and a willful violation of that order. *Chrysler Corp.*, 186 F.3d at 1019. However, even absent an order compelling production, sanctions are available pursuant to the court's inherent power to manage its own affairs. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106-07 (2d Cir. 2002).

Obligation to Preserve Electronic Evidence

Much of the uncertainty about electronic evidence relates to the obligation of a party or potential party to preserve electronic data, particularly in the face of electronic document retention policies that often include automatic deletion of certain data after a set period of time (particularly for e-mail). While some spoliation and sanction cases are clearly the result of intentional, bad faith conduct, other cases involve inadvertent destruction or the failure to discontinue an ongoing destruction process. One of the most vociferous speakers on this issue is Judge Scheindlin of the Southern District of New York. Her opinions in a case titled *Zubulake v. UBS Warburg* have set out standards for analyzing what electronic documents must be produced, and when cost shifting is appropriate. In one of her most recent decisions in the case, Judge Scheindlin addressed lawyers' and parties' obligations to preserve electronic documents.

In *Zubulake v. UBS Warburg*, 2004 U.S. Dist. LEXIS 13574, No. 02 Civ. 1243 (S.D.N.Y. July 20, 2004) (*Zubulake V*), defendant UBS had deleted e-mails after the lawsuit commenced. The court imposed an adverse inference instruction, awarded reimbursement of costs of redeposing individuals, and awarded attorneys' fees for the sanctions motion. Judge Scheindlin also articulated that counsel had a duty "to effectively communicate" discovery obligations to their client, and "once the duty to preserve attaches, counsel must identify sources of discoverable information." Counsel "must put in place a litigation hold, and make that known to all relevant employees by communicating with them directly." According to Judge Scheindlin, this includes stopping any routine recycling of backup tapes as well as routine e-mail deletion. Judge Scheindlin imposed obligations to preserve data on the attorneys as well as the parties.

Other courts have also imposed duties on parties and their attorneys as soon as they become aware that litigation is likely. *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D. N.Y. 2004) (party facing litigation must take active steps to halt automatic deletion process, but sanctions not warranted unless intentional destruction of evidence that destroyed data would have been unfavorable); *Madden v. Wyeth*, 2003 U.S. Dist. LEXIS 6427 (N.D. Tex. April 16, 2003) (attorneys' obligation to advise client of requirement to preserve relevant evidence); *GTFM, Inc. v. Wal-Mart Stores, Inc.*, No. 98 Civ. 7724, 2000 WL 335558 (S.D. N.Y. March 30, 2000) (counsel's duty to determine client's computer capabilities); *New York State Nat'l Org. for Women v. Cuomo*, 93 Civ. 7146, 1998 WL 395320 (S.D.N.Y. July 14, 1998) (counsel's duty to advise client of preservation responsibility).

Types of Sanctions Available for Spoliation

Courts have considerable discretion with respect to what sanction is appropriate for destruction of electronic data. *Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 267 (2d Cir. 1999). As discussed below, sanctions can range from civil contempt and purely monetary sanctions, to dismissal of a claim or defense. FRCP 37(b)(2) provides that a court may impose any sanction that is "just," including attorneys' fees and (B) excluding witnesses or testimony on specific subjects; (C) granting a default judgment or dismissing claims; or (D) contempt of court including monetary sanctions. The most common sanctions are listed below along with a few examples of each.

Civil Contempt or Monetary Sanctions

Monetary penalties are a frequent sanction for spoliation of electronic evidence. The penalty can be related to the other party's attorneys' fees and costs, as specifically authorized by FRCP 37(b)(2), or can be an arbitrary amount. *U.S. v. Philip Morris USA*, 327 F. Supp. 2d 21 (D.D.C. 2004) ($2.75 million fine against Philip Morris for destroying two years of e-mails after a preservation order was in place in the government tobacco cases); *Landmark Legal Foundation v. EPA*, 272 F. Supp. 2d 59 (D.D.C. 2003) (civil contempt in amount of plaintiffs' legal fees and costs for reformatting of computers after injunction entered against destruction); *Danis v. USN Communications, Inc.*, 2000 U.S. Dist. LEXIS 16900 (N.D. Ill. October 20, 2003) (destruction of electronic data without showing of bad faith or damages, $10,000 sanction against CEO).

Exclusion of Testimony or Evidence

Another sanction is the exclusion of testimony or evidence relating to the topic on which evidence was destroyed. This sanction is authorized by FRCP 37(b)(2)(B) specifically. *U.S. v.*

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Philip Morris USA, 327 F. Supp. 2d 21 (D.D.C. 2004) (destruction of e-mails despite preservation order, 11 witnesses precluded from testifying); *Thompson v. U.S. Dep't of Housing & Urban Dev.*, 219 F.R.D. 93 (D. Md. 2003) (order that certain witnesses could not be called at trial unless there was proof that all responsive e-mails from that witness had been produced—order later revised to limit testimony).

Adverse Inference Instructions

Because it is impossible to know what was contained in the destroyed documents, another common penalty is an adverse inference instruction, explaining that documents were destroyed and informing the jury that it can infer that the documents contained adverse evidence. *Coates v. Johnson & Johnson*, 756 F.2d 524, 550 (7th Cir. 1985); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106-07 (2d Cir. 2002) (holding that FRCP 37(b)(2) allows broad discretion in imposing sanctions, adverse instruction appropriate if party had an obligation to preserve or produce, failed to do so with a "culpable state of mind," and evidence was relevant); *Shea v. Donohoe Construction Co.*, 795 F.2d 1071, 1074 (D.C. Cir. 1986); *Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998); *Minnesota Mining & Manufacturing Co. v. Pribyl*, 259 F.3d 587, 606 (7th Cir. 2001) (electronic files destroyed by overwriting with music files); *Zubulake v. UBS Warburg*, No. 02 Civ. 1243 (S.D.N.Y. July 20, 2004) (setting forth standard for when adverse inference instruction is appropriate).

Dismissal of Claims or Defenses

The most extreme sanction for spoliation is dismissal of claims or defenses. Dismissal and default are specifically authorized by FRCP 37(b)(2)(C). As discussed below, this sanction is normally reserved for intentional destruction of electronic evidence after entry of a preservation order or other order compelling production. *QZO, Inc. v. Moyer*, 594 S.E.2d 541 (S.C. Ct. App. 2004) (defendant reformatted computer after being ordered to turn it over to plaintiff; default judgment entered); *Kucala Enterprises v. Auto Wax Co.*, 2003 U.S. Dist. LEXIS 8833 (N.D. Ill. May 23, 2003) (plaintiff produced computer after having used "Evidence Eliminator" software to delete 14,000 files, case dismissed with prejudice and attorneys' fees awarded); *Proctor & Gamble Co. v. Haugen*, No. 1:95 CV 94, 2003 WL 22080734 (D. Utah August 19, 2003) (dismissal after plaintiff destroyed e-mails of five key employees after demanding that defendant preserve its electronic evidence); *Metropolitan Opera Ass'n, Inc. v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003) (judgment against defendant on liability after repeated failure to preserve electronic evidence). However, in a similar situation, *Anderson v. Crossroads Capital Partners, LLC*, No. Civ. 01-2000, 2004 WL 256512 (D. Minn. February 10, 2004), the court refused to dismiss a case where the plaintiff replaced a hard drive and used a file-wiping software called "CyberScrub." Instead, the court gave an adverse inference instruction.

There is disagreement in the courts as to whether dismissal is appropriate when destruction occurred pursuant to the failure to stop a routine recycling practice. *Compare Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 747-49 (8th Cir. 2004) (summary judgment appropriate sanction where party destroyed voice recording pursuant to routine recycling policy) with *Advantacare Health Partners, LP v. Access IV*, No. C03-04496, 2004 WL 1837997 (N.D. Cal. August 17, 2004) (default judgment against an employee that set up a competing company was too severe a sanction for destruction of confidential information; instead, court imposed a $20,000 sanction and made a finding of fact that the employee had copied all the files on his employer's computers) and *MasterCard Int'l, Inc. v. Moulton and KTM Media, Inc.*, No. 03 Civ. 3613, 2004 WL 1393992 (S.D. N.Y. June 22, 2004) (adverse inference instruction rather than default judgment where defendant continued normal document retention practices in disregard of discovery obligations).

Civil Cause of Action for Spoliation

Some states recognize civil causes of action for the spoliation of evidence. Many courts have recognized the intentional spoliation of evidence as an action, *see, e.g., Broadnax v. ABF Freight Sys., Inc.*, No. 96 C 1674, 1998 WL 140884, *4 (N.D. Ill. March 26, 1998); *Foster v. Lawrence Mem. Hosp.*, 809 F. Supp. 831, 836 (D. Kan. 1992), and a few have extended the action to include negligent spoliation, *see, e.g., Viviano v. CBS, Inc.*, 597 A.2d 543, 550 (N.J. Super. Ct. App. Div. 1991). Although actions for spoliation have generally involved the destruction of physical evidence, no clear reasons exist as to why the doctrine would not also apply to electronic evidence.

Obstruction of Justice

In extreme circumstances where criminal penalties are involved, a court can also find obstruction of justice, as was recently the case in the Arthur Andersen trial. *U.S. v. Duncan*, 4:02-cr-00209 (S.D. Tex. 10/17/02), *affirmed*, *U.S. v. Arthur Andersen, LLP*, 374 F.3d 281 (5th Cir. 2004) (Arthur Andersen was convicted of obstruction of justice for destroying documents relating to the Enron investigation. Andersen was placed on five years' probation and given a $500,000 fine. The U.S. Supreme Court is hearing arguments on an appeal on April 27, 2005).

Situations in Which Sanctions Are Appropriate

Although FRCP 37 applies only after an order of some type, and therefore only after suit is filed, the court's inherent power can be invoked for destruction prior to a preservation order (or any order) being entered. The courts' willingness to enter sanctions depends on the total circumstances involved, and this sometimes relates to the stage of proceedings.

Destruction after Suit Filed

Many courts have held that the filing of a complaint puts the defendant on notice to preserve electronic evidence and stop routine destruction of evidence that could be relevant to the allegations of the complaint. In *Computer Assocs. Int'l, Inc. v. American Fundware, Inc.*, 133 F.R.D. 166 (D. Colo. 1990), the court issued a default judgment where defendant revised source code after being served with a complaint. In *Wiginton v. CB Richard Ellis*, 2003 U.S. Dist. LEXIS 19128 (N.D. Ill. October 27, 2003) the defendant followed its normal electronic document destruction policy after a lawsuit was filed. The Magistrate Judge found that defendant willfully and in bad faith did not preserve its documents. (However, since backup tapes allowed

the defendant to recreate most of what was lost, no sanctions were imposed unless and until plaintiff's expert could show some damage.) In *Danis v. USN Communications*, 2000 WL 1694325 (N.D. Ill. October 23, 2000), the court held that a duty to preserve arose on the date litigation commenced.

Some courts have held that the duty to preserve evidence arises even earlier, when a party first learns that litigation is likely. *See, e.g.*, *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001); *Telecom Int'l America, Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999).

Destruction after Discovery Request

Some courts have held that a more stringent duty to preserve and produce electronic documents arises after a discovery request has been served, since such a request necessarily puts the party on notice that the information is potentially relevant. In *Mosaid Technologies, Inc. v. Samsung Electronics Company*, 348 F. Supp. 2d 332 (D.N.J. 2004), the court imposed a $566,840 sanction and an adverse inference instruction on the defendant for not placing a litigation hold on its normal e-mail destruction policy after receiving a request for production (although the court said the hold should have been imposed even before the receipt of a formal discovery request). In *Lombardo v. Broadway Stores, Inc.*, No. G-026581, No. 3:00-CV-524, 2002 WL 86810 (Cal. Ct. App. January 22, 2002) the court held that a document request put a party on notice that documents were subject to production.

Destruction after Preservation Order or Court Order to Produce

Although the violation of a court order to produce or preserve evidence is not required for the court to impose sanctions for spoliation of evidence, *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1020 (8th Cir. 1999), courts are most likely to severely sanction a party where it has destroyed or failed to properly preserve evidence in contravention of a judicial order, and FRCP 37(b)(2) specifically applies after such an order. *See Marrocco v. General Motors Corp.*, 966 F.2d 220 (7th Cir. 1992) (upholding sanctions in two consolidated cases where the parties violated protective pretrial orders by willfully destroying evidence and conducting grossly negligent preservation efforts); *China Ocean Shipping (Group) Co. v. Simone Metals Inc.*, No. 97 C 2694, 1999 WL 966443, at *3 (N.D. Ill. Sept. 30, 1999) (sanctions appropriate where party was unreasonable in its decision to destroy evidence in violation of a discovery order); *In re Prudential Ins. Co. Sales Practices Litigation*, 169 F.R.D. 598, 615 (D.N.J. 1997) (entry of preservation order imposed obligation on senior management to initiate comprehensive document preservation plan).

As discussed above, in *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004), the government suit against the tobacco companies, one of the defendants deleted e-mails after a preservation order was in place. The court imposed a $2.75 million sanction ($250,000 for each employee). In addition, 11 corporate employees were precluded from testifying. A preservation order had been in effect for relevant documents, and subsequently two years of e-mails were mistakenly deleted pursuant to a 60-day e-mail destruction policy. However, the court refused to impose an adverse inference instruction. And, in *Inst. for Motivational Living v. Doulos Inst. for Strategic Consulting, Inc.*, 110 Fed. Appx. 283 (3d Cir. 2004), the district court found defendant in civil contempt and awarded costs and attorneys' fees for violating a preservation order the day before turning over a laptop. The Third Circuit upheld the award of attorneys' fees for violating the order.

Intentional and Willful Destruction

The most serious sanctions are generally reserved for intentional destruction of evidence. In *RKI, Inc. v. Grimes*, 177 F. Supp. 2d 859 (N.D. Ill. 2001), a former employee was sued for misappropriation of trade secrets and breach of a noncompete. After he was ordered to turn over his personal computer to the plaintiff's expert, the former employee defragmented his computer (three times) in an effort to hide his having taken and then deleted confidential information. The court ordered him to pay $100,000 in compensatory damages, $150,000 in punitive damages, and attorneys' fees and costs.

Similarly, in *Minnesota Mining & Manufacturing v. Pribyl*, 259 F.3d 587 (7th Cir. 2001), three former employees were ordered to turn over their personal computers to plaintiff in a misappropriation of trade secrets case. The night before, one of them downloaded voluminous music files onto his laptop, thereby covering many of the files sought by plaintiff. (The defendant claimed that his children did it.) The Seventh Circuit affirmed the district court's adverse inference jury instruction, and stated that a more severe sanction would also have been appropriate.

Sanctions for intentional spoliation can sometimes include the most severe sanctions, default judgment or dismissal. And, in *QZO, Inc. v. Moyer,* 594 S.E.2d 541 (S.C. Ct. App. 2004), a corporation alleged trade secret theft by a former officer that set up a competing business. The trial court ordered the defendant to submit his computer to the plaintiff or a neutral third party. The defendant did so a week later. However, when the company's computer expert examined the computer, he found that the hard drive had been reformatted the day before, erasing any potential evidence. The trial court entered a default judgment against the defendant and the appellate court affirmed. Similarly, in *Long Island Diagnostic Imaging P.C. v. Stony Brook Diagnostic Assocs.*, 286 A.D.2d 320 (N.Y. App. Div. 2001), the court dismissed defendants' counterclaims and third-party complaint as a sanction for purging a database and compromising backup tapes in violation of a court preservation order.

Negligent Destruction

In *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106-07 (2d Cir. 2002), the Second Circuit held that negligent delay in producing electronic documents was sufficient grounds for an adverse inference instruction (reversing a $96 million jury verdict). Other courts have also held that negligent destruction of e-mails or electronic evidence can lead to sanctions. For example, in *Mastercard Int'l, Inc. v. Moulton*, No. 03-C-3613, 2004 WL 1393992 (S.D.N.Y. June 22, 2004), a party negligently failed to preserve four months of e-mails in a copyright suit. The court granted an adverse inference instruction. Similarly, in *Mosaid Technologies, Inc. v. Samsung Electronics Company*, 348 F. Supp. 2d 332 (D.N.J. 2004), the court stated that negligent destruction of

evidence could be sufficient to justify an adverse inference instruction. Some courts are more reluctant to base sanctions on simply negligent failure to discontinue a document destruction policy. In *MasterCard Int'l, Inc. v. Moulton*, 2004 U.S. Dist. LEXIS 11376 (S.D.N.Y. June 16, 2004), all e-mails for the period three weeks prior to actual production had been destroyed, but there was no evidence of bad faith. The company had simply followed its normal destruction policy. The court limited its sanction to allowing the other side to argue that the jury should infer bad facts.

Which Sanctions Are Appropriate?

Sanctions are intended to place the aggrieved party in the position it would have been had the spoliation not occurred (and also have some deterrent effect). *Zubulake v. UBS Warburg*, 2004 U.S. Dist. LEXIS 13574, No. 02 Civ. 1243 (S.D.N.Y. July 20, 2004); *GTFM, Inc. v. Wal-Mart Stores, Inc.*, No. 98 Civ. 7724, 2000 WL 335558 (S.D.N.Y. March 30, 2000). As discussed above, dismissal or default is a sanction of last resort, appropriate only in the face of clearly intentional conduct affecting important evidence. The choice of sanctions is difficult, because by its very nature it is impossible to know the content of what was destroyed. For this reason, an adverse inference instruction is a very common sanction. Since the jury can no longer learn what was in the documents, the jury can infer that the documents were destroyed because the evidence was adverse to the party destroying it. Attorneys' fees and costs are also frequent sanctions because the party destroying the documents has made the motion or additional proceedings necessary.

When Are Sanctions Not Appropriate?

On the other hand, inadvertent destruction of e-mails or other electronic evidence does not always lead to sanctions. Some courts are more willing to forgive inadvertent destruction, particularly where there is insufficient evidence to suggest that there was any harm to the inadvertent destruction. In *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004), the court refused to grant sanctions in a patent infringement and trade secret theft case where there was no evidence of intentional deletion of e-mails and the plaintiffs failed to establish the circumstances under which the e-mails were deleted. *See also*, *Jones v. The Boeing Company*, 109 Fed. Appx. 821 (8th Cir. 2004) (adverse instruction not warranted because there was no evidence that the defendant had intentionally destroyed documents to suppress the truth and no evidence of prejudice); *Goll v. ABC, Inc.*, 10 A.D.3d 672 (N.Y. App. Div. 2004) (appellate court reversed sanctions for spoliation because there was no evidence that the defendants had intentionally attempted to hide or destroy evidence); *Aero Products International v. Intex Rec. Corp.*, 2004 U.S. Dist. LEXIS 1283 (N.D. Ill. January 30, 2004) (although defendant had been deleting e-mails after 30 days, plaintiff waited too long to seek sanctions and did not follow court's suggestion to seek a forensics specialist); *Lakewood Engineering & Mfg. Co. v. Lasko Products*, 2003 U.S. Dist. LEXIS 3867 (N.D. Ill. March 14, 2003) (party produced e-mails and other electronic data after close of discovery, but minimal cost incurred by other side as a result).

Recent Proposals on Electronic Evidence

Because of the uncertainty about what a party must do with respect to preservation of electronic evidence, various entities have created guidelines or proposals for how to deal with the issue. In January 2004, the Sedona Conference, a think tank for legal issues, published its Guidelines for Managing Information and Records in the Electronic Age, found at www.thesedonaconference.org/. The primary principles of those guidelines are that organizations must properly preserve electronic data and documents that can reasonably be anticipated to be relevant to litigation, and parties should confer early in discovery regarding the preservation and production of electronic data and documents. The Sedona Guidelines provide that:

> The obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.

The Guidelines put the burden on the requesting party to show that the responding party's actions were unreasonable and inadequate. Good faith preservation does not have to capture every possibly relevant document, as long as the approach is in good faith. And, sanctions, including spoliation findings, should only be considered by the court if, upon a showing of a clear duty to preserve, the court finds that there was an intentional or reckless failure to preserve and produce relevant electronic data, and that there is a reasonable probability that the loss of evidence materially prejudiced the adverse party.

Not surprisingly, the federal courts have begun addressing the issue as well. The Advisory Committee on the Federal Rules of Civil Procedure has proposed changes to the Federal Rules to address electronic discovery. The proposed changes are out for public comment and include a "safe harbor" in Rule 37(f) for preservation efforts. The proposed safe harbor provides that unless a party violates a preservation order, a court may not impose sanctions for failure to produce electronic evidence if: (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable; and (2) the destruction resulted from the routine operation of the party's electronic information system. The proposed rule changes can be found at www.uscourts.gov/rules/comment 2005/CompleteBrochure.pdf, but will not be effective until at least December 2006.

Conclusion

Electronic evidence is a boon and a bane to litigators. In many situations, the availability of contemporaneous e-mails or other electronic data can make or break a case. Electronic evidence can usually be searched and sorted much more easily than hard copy evidence. In these ways, electronic data can make a litigator's job easier and strengthen a case.

On the other hand, there are significant dangers involved with electronic evidence. It is sometimes more difficult to control, and destruction frequently leaves a trail. The sheer volume can lead to significant costs, and inadvertent destruction can place a party at a severe disadvantage.

Rules and cases involving sanctions for electronic spoliation vary significantly and are evolving rapidly. In order to avoid sanctions, a lawyer and party must be careful and vigilant.♦

Congressional Rulemaking: "Lawsuit Abuse Reduction Act" Proposes Sweeping Changes to Rule 11

By Matt Reinhard, Miller and Chevalier, Washington, D.C.

On January 26, Rep. Lamar Smith (R-Tex.) introduced H.R. 420, titled the "Lawsuit Abuse Reduction Act," in the House of Representatives.[1] If enacted, H.R. 420 would dramatically alter the pretrial practice landscape by amending Federal Rule of Civil Procedure 11 and altering rules of jurisdiction and venue over personal injury cases. The proposed amendments to Rule 11 would likely lead to the return of time-consuming and expensive "satellite" Rule 11 litigation, and many of the bill's other provisions are of dubious Constitutionality. The American Bar Association opposes enactment of the bill and, at the association's Midyear Meeting in Salt Lake City this past February, both the House of Delegates and the Assembly of the Young Lawyers Division passed resolutions formally opposing the measure.

As styled, the bill amends Rule 11 to remove the current "safe harbor" provision and divests judges of discretion to determine whether and what type of sanctions is proper. Moreover, the bill, in flat contradiction of the simplest notions of federalism, seeks to make Rule 11 applicable in state court proceedings affecting interstate commerce and further attempts to dictate state and federal jurisdiction and venue in "personal injury" cases.

Removal of the "Safe Harbor" and Mandatory Sanctions

In response to the growing amount of satellite Rule 11 litigation in the 1980s and 1990s, Rule 11 was amended in 1993 to provide a so-called "safe harbor" provision. *See* Fed. R. Civ. P. 11(c)(1)(A). This safe-harbor provision gives a filing attorney 21 days to withdraw her filing when challenged before a rule 11 motion is filed with the court. The Judicial Conference noted a marked decline in satellite Rule 11 litigation after the safe harbor provision was inserted into the rule. *See American Bar Association Tort Trial and Insurance Practice Section, Section of Litigation Report to the House of Delegates Regarding H.R. 4571.*

The proposed amendments to Rule 11 remove the safe harbor provision and make sanctions mandatory for any violation of the rule. While the current version of Rule 11 limits sanctions "to what is sufficient to deter repetition of such conduct," Fed. R. Civ. P. 11(c)(2), and contemplates that nonmonetary sanctions may be appropriate, the amended version removes such limitations and specifically requires that sanctions "compensate the parties that were injured by such conduct." H.R. 420 § 2. Under the amended rule, sanctions "may" consist of "the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is subject of the violation, including a reasonable attorney's fee." *Id.*

Combining the loss of the safe harbor provision with the mandatory nature of sanctions under the amended rule will very possibly have a chilling effect on the development of the common law if attorneys can no longer risk staking out new and novel causes of actions or defenses without risking mandatory sanctions. Congress purports to provide a "savings" clause in H.R. 420, section 5. However, this provision is toothless—providing only that the amendments to Rule 11 shall not "be construed to bar or impede the assertion of development of new claims or remedies under Federal, State, or local *civil rights* law." H.R. 420 § 5 (Emphasis added). By limiting the rules of construction only to civil rights law, the bill excludes all other areas of law, suggesting that attempts to develop new causes of actions or defenses in any arena other than civil rights may result in Rule 11 sanctions.

Federalism Concerns

From a constitutional perspective, sections three and four of H.R. 420 present significant federalism issues. Under the bill, in any civil action in *state* court either litigant can move the court to determine whether the suit "affects interstate commerce." H.R. 420 § 3. The court must then rule within 30 days of the filing of such motion as to whether interstate commerce is affected "based on an assessment of the costs to the interstate economy, including the loss of jobs, were the relief requested granted." *Id.* If the court determines that the matter does "affect" interstate commerce, Rule 11 is made applicable to the proceeding.

This decision to wade into state civil procedure and foist upon state court proceedings a single federal rule of civil procedure violates fundamental concepts of federalism. *See, e.g., Felder v. Casey*, 487 U.S. 131, 138 (1988) ("States may establish the rules of procedure governing litigation in their own courts"). And, as the *TIPS/Section of Litigation Report* on H.R. 4571(the predecessor to H.R. 420) points out, "[e]ven with separate rulemaking authority between the federal and state systems, and even among the states themselves, there is no empirical evidence to suggest that the procedures for moving civil cases through the courts are not working efficiently and effectively." To impose upon state courts a federal rule of civil procedure, and only in a certain category of cases, will only serve to confuse and muddle the bifurcated system of justice between state and federal courts, creating conflict where none previously existed. Indeed, H.R. 420 is accompanied by no congressional findings

(Continued on page 18)

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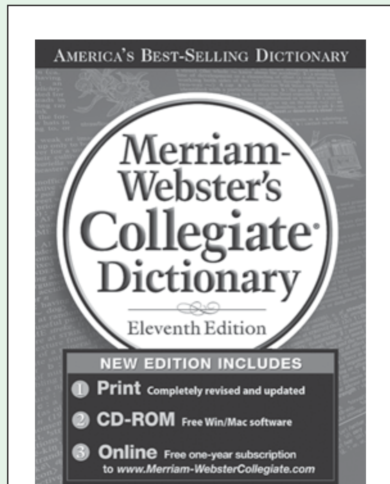

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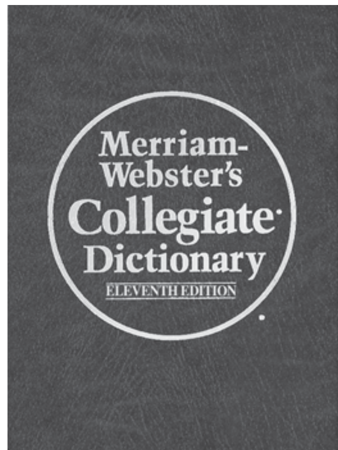

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PRACTICAL TIPS

It Takes Two to Cooperate

By Joseph Siprut, Novack and Macey LLP, Chicago

Suppose a young junior associate issues a set of document requests to opposing counsel during discovery. The deadline to respond to the requests comes and goes, and the associate receives no documents, no response, and no indication from opposing counsel that the response is forthcoming. The associate attempts to call opposing counsel, but his calls are not returned. A week later, the associate writes a letter to opposing counsel, reminding him of his obligation to respond to the document requests. More silence. Finally, several weeks past the deadline, the associate sends another letter, this time stating that if no response is received in a timely manner, the associate will have no alternative but to file a motion to compel. One week later, still having heard nothing, the associate files the motion and notices it for hearing.

The morning of the hearing, the opposing lawyer approaches the associate in court and hands him the documents. When the case is called, the judge is annoyed to waste her time on a moot motion and she treats both lawyers to a lecture on the importance of cooperation and the scarcity of judicial resources.

Sound familiar? Judges are impatient with lawyers who file, or oppose, discovery motions that could have been avoided if the lawyers had communicated with one another. But as we saw in the above hypothetical, the problem is that it takes two to cooperate.

No doubt many lawyers have had the unenviable experience of dealing with opposing counsel who proves to be downright uncooperative with, and even hostile to, attempts to address discovery concerns without the court's involvement. Because it takes two to cooperate, however, it only takes one uncooperative lawyer to forestall the efforts of the other lawyer to try and work out discovery disputes without the court's involvement. And when this occurs, it can make both lawyers look bad.

However unfair this may be, it is a situation unlikely to change anytime soon. But there are steps any lawyer can and should take to counteract the effects of an uncooperative and hostile opposing lawyer:

- For starters, document the history of your attempts to communicate in letters to opposing counsel. For example, if your phone calls are not returned and you write a follow-up letter several days later, make sure you reference the previous phone call, and the fact that it was not returned. If the letter was not returned, then your next letter should reference the previous letter as well as the phone call, and so forth.
- Similarly, when drafting the motion itself, lay out the history of your attempts to communicate. Be sure to append the correspondence to your motion to compel to substantiate and evidence your attempts to resolve the dispute before the motion was filed.
- If you find yourself in a situation such as the one described in the hypothetical above, stick to the facts. Calmly point out to the judge that you made every effort to cooperate with opposing counsel, but that these attempts were not well received. Refer her to your motion, which, if drafted properly, will set forth the history of these communications.
- Finally, wear the white hat, particularly as a young lawyer. Resist the temptation to denigrate the opposing attorney or engage in ad hominem attacks, and ignore any attacks directed at you. Such discussions do not advance what should be your agenda before the judge: procuring an order that the documents be produced (if they have not already been produced), and making the judge aware of your attempts to communicate in good faith with opposing counsel.♦

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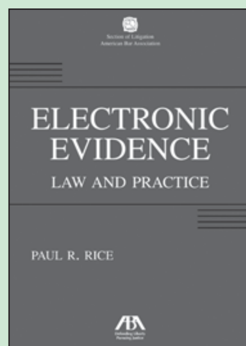

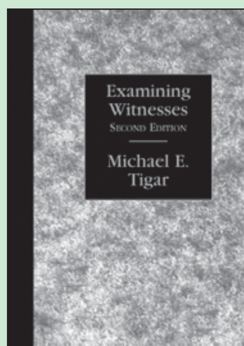

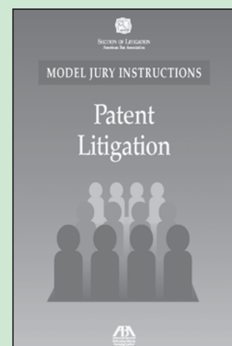

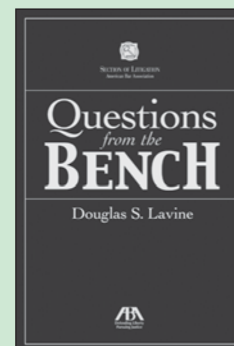

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For the Defendant: Tips Before Your First Pleading

By Ian H. Fisher, Schopf & Weiss LLP, Chicago

A partner at your firm walks into your office, and asks you to work with her on a new case for the firm's largest client. She drops a complaint on your desk, which has the client's receipt stamp on it from three weeks earlier. The partner tells you that she wishes to review anything you plan to file. You see an opportunity to impress her and to run your first case. But, how do you get started? Here are five things to consider before you even begin to draft your first pleading:

1. Determine your deadlines.

As a first step, determine what deadlines you face and prioritize your decision process to deal with the most time-sensitive issues first. Otherwise, your client may inadvertently waive a right. For example, how much time do you have to answer or otherwise plead? Likewise, can you remove the case to federal court? If you are in state court, you only have 30 days from having reason to know of diversity jurisdiction to remove the case. This does not necessarily run from the same date as service of the complaint. In fact, in this example, you have less than 10 days left to remove the case for diversity. When are your initial disclosures due? Docket the deadlines, both in your personal calendar and with your docket clerk. Be sure to make decisions with enough time to meet the deadlines and give your client and the partner time to approve them.

2. Consider whether you should go to a different court or judge.

If the action was filed in state court, the parties are of diverse citizenship, and the plaintiff seeks more than $75,000, you may remove the action to federal court on diversity grounds. Other bases for federal jurisdiction also exist, such as where a federal statute subsumes state law or where the state case is "related to" a bankruptcy. Consider whether removal is the best strategic decision for your client. Also, bear in mind that removal must be made based upon a good faith belief, after a reasonable inquiry, that federal jurisdiction exists. Not only might a removal made in bad faith violate Rule 11, the remand statute also authorizes the court to award costs and actual expenses, including attorneys' fees, to the plaintiff for an improvident removal.

Consider whether the plaintiff brought the action in the right location. A motion to transfer under 28 U.S.C. § 1404, or a Rule 12(b)(6)(3) motion to dismiss for improper venue, may be an appropriate way to get into a more favorable courtroom.

Similarly, many states have rules that permit a party to seek a change of judge as a matter of right. This right, however, often must be invoked before the judge makes a substantive decision or expresses a view on the case. If you have extreme concerns about a judge's impartiality, you may even want to consider a motion for recusal.

Finally, is the dispute subject to arbitration? This generally requires a specific agreement of the parties to arbitrate, which may be found in many places, including a commercial contract between the parties, a form warranty included with a product, or an employment agreement signed years earlier. Moving forward with a case in court instead of moving to compel arbitration may waive your client's right to arbitration.

3. Always read the local rules.

The local rules will often create deadlines or impose requirements beyond the state or federal rules of procedure. In addition, most courts require that defense counsel file an appearance with the defendant's first paper. If you are not admitted before the court where the case is pending, you must get admitted (either pro hac vice—for this time only—or as a regular member of the court's bar) before filing an appearance. The local rules may also require that at least one attorney have a local office, requiring you to retain local counsel. Regardless, affiliating with local counsel to learn about the judge's predilections, variations in local practice, and opposing counsel's "M.O." is often advisable.

Local rules may require that jury demands are made separately from the answer, that briefs are filed in a specific form, or that motions are fully briefed before they are actually filed. Local rules may also give direction on the local implementation of the mandatory Rule 26(a) disclosures or require that parties file statements of interest with their first pleading. The variations are endless and an understanding of the rules is basic to the professional practice of law. With most local rules available for free on the Internet, there is no excuse for not getting a current copy and reading them.

4. Be strategic and realistic.

Every decision you make should be aimed at advancing your client's interests. Consider the facts and the law in your case and think about the best outcome you can realistically obtain to avoid (or limit) your client's exposure. Don't forget that everything you do has its own transaction costs, including your bills and your client's time. Develop a plan for getting to the most desirable and realistic outcome, be it a win on the motions, a verdict at trial, or settlement. Once you have developed your plan, confer with your client to make sure that you agree on the definition of success. Be sure to explain what it will take to implement the plan, and the setbacks that pose the greatest risks. A fully informed client will be much happier with you, whatever the outcome of the case.

Tender your defense?

Consider whether there may be an insurance policy or some other agreement in place by which an insurer or other nonparty has agreed

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to provide a defense to your client. Consider whether your client is required to give notice to such a thirdparty and whether your client should tender the defense of the action to that third party.

Answer or file a motion?

Consider whether to file a Rule 12 motion in lieu of answering. The most common one comes under Rule 12(b)(6) for failure to state a claim. Its premise is, "even assuming everything the plaintiff says is true, it still cannot win because …" Motions for a more definite statement under Rule 12(e) (where the complaint is too vague) or to strike under Rule 12(f) (where the complaint contains irrelevant or scandalous allegations) are also available, but a success on these motions tends to result in a more clearly pled complaint, rather than a substantive victory for a defendant.

Do not forget the "disfavored" Rule 12(b) motions—such as insufficient process or service of process, improper venue, or lack of personal jurisdiction—which must be made with your first pleading or are waived. When considering a motion instead of an answer, reread Rules 8, 9 and 12 in their entirety; it will only take a few minutes and could give you a great idea.

Just because Rule 12(b) exists does not mean you have to use it.

Often filing an answer is the better option; it usually does your client little good for you to spend your time briefing an unsuccessful motion to dismiss. If and when you answer, the answer must fairly meet the complaint's allegations and, as with any paper filed with the court, must to the best of your knowledge after a reasonable inquiry have factual and legal basis. This does not mean that you must accept the plaintiff's characterization of facts or shy away from novel arguments. Also, beware of Rule 9(c), which requires that denial of a condition precedent (i.e., an act or event that must occur before a party's obligation exists) be specific and particular. In fact, courts have held that a general denial of a condition precedent actually admits that the condition has been met.

Get a checklist of affirmative defenses.

When you answer, you should also assert any affirmative defenses available to your client or they may be waived. These are additional facts that, if true, would defeat all or part of the complaint, such as the expiration of a statute of limitation, full payment of the claim, or the preclusive effect of a prior judgment. Many firms develop a list of the various affirmative defenses that have been used in the past. This does not mean that all affirmative defenses should be asserted regardless of applicability—such a shotgun approach may violate Rule 11—but a checklist will ensure that you have considered everything.

After the complaint and any counterclaims are answered, consider whether a motion for judgment on the pleadings under Rule 12(c) is appropriate: If the plaintiff makes allegations that establish one of your defenses, you can win the case based on the other side's own words. An elegant win.

Don't forget the jury.

Is there a right to a jury under any of the claims? If so, it must be demanded to be effective. Unless the plaintiff has already made a jury demand, your client's jury demand should be made with the answer or, at least, within 10 days of the last pleading (which is often your answer). A good rule of thumb is that a defendant facing potential punitive damages or wishing to assert a technical defense will not want a jury. This, like most general rules, will vary depending on the situation. Under the professional rules, this decision belongs to your client, so always confer with your client about whether to demand a jury.

"The best defense is a good offense."

Consider whether your client has a valid counterclaim against the plaintiff or a third party claim against a nonparty. Often, the exposure of a counterclaim is enough to make a plaintiff think twice about pursuing its complaint. In addition, your client *must* assert any compulsory counterclaim (a claim against the plaintiff arising from the same transaction or occurrence that does not require another part) in the case or it will be waived. A counterclaim should be filed with the answer.

Preserve evidence.

Be mindful of your client's and your duties to preserve evidence relevant to the action and instruct your client appropriately. The failure to preserve evidence may not only violate the Federal Rules of Civil Procedure, it could also violate the Rules of Professional Conduct. In addition, in some jurisdictions, even the inadvertent spoliation of evidence can give rise to a counterclaim against your client. This concern takes on added importance with regard to electronic evidence and how easily such evidence might be modified or destroyed through automated processes, such as the overwriting of backup tapes. In short, determine what might be relevant to the dispute and make sure that you take reasonable steps to ensure its preservation.

5. Don't forget that you are a counselor as well as an advocate.

The attorneys should see the dispute more clearly than the parties involved. Is early settlement a possibility? Is alternative dispute resolution (ADR) appropriate? An attorney often provides a greater service for a client by creating an avenue for a quick settlement than by winning a hard-fought litigation.

In addition, early settlement offers can provide a strategic advantage later in a case, especially when the plaintiff seeks its attorneys' fees. A winning plaintiff will likely face a reduction in fees if it refused to accept an offer that included most of the relief ultimately recovered. Also, although it has limited application, a Rule 68 offer of judgment may create exposure for a plaintiff that expects to recover its fees "as costs" if it is successful. If the Rule 68 offer exceeds the plaintiff's ultimate recovery, the plaintiff will not receive its costs.

Although these considerations are not exhaustive, they will help you to look at the case as a whole and to avoid missing an opportunity. The partner will be impressed that you have not only determined the best first step for the defense, but that you have taken responsibility for the overall case strategy. ♦

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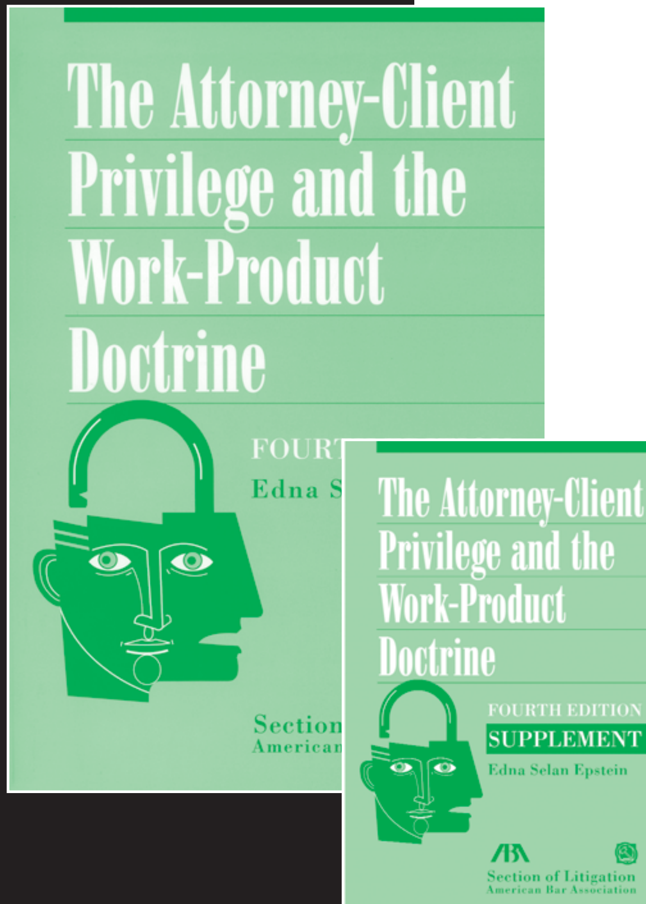

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Changing the Deposition Testimony of a Witness

By Victor A. Bolden, NAACP Legal Defense & Educational Fund, Inc., New York

Ideally, witnesses will testify completely and accurately (as well as truthfully) regarding their knowledge of the facts during their deposition. Effective witness preparation goes a long way towards ensuring this outcome. If, however, a witness's testimony has to be corrected after the deposition, the following should be considered: (1) compliance with Rule 30(e) of the Federal Rules of Civil Procedure; (2) the submission of subsequent testimony; and (3) the possibility of sanctions for submitting subsequent testimony.

The best time to address issues with your witness's deposition testimony is within the time frame provided in Rule 30(e) of the Federal Rules of Civil Procedure. Under Rule 30(e), a deponent has "30 days after being notified [that the deposition] is available in which to review the transcript or recording and, if there are changes *in form or substance*, to sign a statement reciting such changes and the reasons given by the deponent for making them."[1] After the 1993 amendments to the Federal Rules, a witness must request review of the transcript before completion of the deposition, in order to avail oneself of the right to amend or correct the deposition under Rule 30(e).[2]

Having failed to act within the 30-day time frame provided in Rule 30(e), the submission of a subsequent affidavit clarifying the witness's testimony on crucial facts may be necessary to avoid summary judgment. An affidavit, however, that inexplicably alters the substance of the witness's testimony, may be disregarded at the summary judgment stage, or worse, subject the attorney and/or her client to sanctions. As a general rule, witnesses may not create an issue of material fact by contradicting their deposition testimony in an affidavit submitted solely for the purpose of defeating a summary judgment motion.[3] As one court put it: "if testimony under oath could be 'abandoned many months later by the filing of an affidavit, probably no cases would be appropriate for summary judgment.'"[4] As a result, courts have deemed inadmissible or stricken an affidavit in conflict with a witness's deposition testimony.[5]

A telling example, indeed, and one that likely proves the need for the general rule, is the Sixth Circuit's ruling in *Penny v. United Parcel Service, Inc.*, 128 F.3d 408 (6th Cir. 1997). In *Penny*, a case brought under the American with Disabilities Act (ADA), plaintiff hardly testified in his deposition about his alleged difficulty walking, but then changed his story in a subsequent affidavit.[6] As the Sixth Circuit noted in its opinion:

> [T]he deposition indicates that the plaintiff led an active life during the relevant period of time despite his impairment. He testified that during 1993 and 1994 he was able to go fishing and hunt rabbits, squirrels, pheasant and deer. Perhaps realizing belatedly the import of these admissions, the plaintiff's attorney subsequently filed an affidavit claiming that plaintiff's hunting and fishing trips did not require him to walk.[7]

The court refused to "consider this affidavit," *id.*, citing the principle that "a party cannot create a genuine issue of material fact by filing an affidavit, after a motion for summary judgment has been made, that essentially contradicts his earlier deposition testimony."[8] The court further noted, "[A] reasonable jury would know that it is impossible to hunt rabbits, squirrels, pheasants and deer without walking."[9]

Notwithstanding this general rule, an affidavit should not be disregarded simply because of a conflict with a witness's earlier deposition.[10] Instead, as most courts have held, the court should determine whether the "contrary affidavit" is merely "an attempt to create a sham fact issue."[11] If the affidavit explains the deposition testimony or the prior testimony reflects confusion, there may be no conflict at all between the witness's earlier deposition and any later sworn testimony.[12] Rather, the affidavit or other subsequent testimony expands on areas not adequately explored by opposing counsel or not properly characterized in the opposing party's summary judgment motion.

Nevertheless, the submission of a subsequent affidavit following a witness's deposition may lead to the opposing party seeking monetary sanctions, even if the affidavit was not stricken or otherwise disregarded by the trial court. Rule 11 and Rule 56(g) of the Federal Rules of Civil Procedure as well as 28 U.S.C. § 1927 are all possible grounds.

The standard for determining whether monetary sanctions may be imposed under Rule 11 is "objective reasonableness."[13] In *Margo v. Weiss*, 213 F.3d 55 (2d Cir. 2000), the Second Circuit upheld the imposition of Rule 11 sanctions for the submission of an affidavit intended to correct "erroneous" deposition testimony. In this copyright case, the plaintiffs testified during their depositions that they had become aware of the existence of their claim at one point—after the relevant statute of limitations period—but then several months after their depositions, submitted affidavits and filed errata sheets for their deposition testimony and supplemental answers to their previous interrogatory responses.[14] This revised testimony sought to place their knowledge of the dispute within the applicable statute of limitations period.[15] The district court, in addition to granting the defendants' summary judgment motion, granted Rule 11 sanctions and awarded defendants' attorneys' fees. *Id.* The Second Circuit affirmed this ruling, finding it "objectively unreasonable for plaintiffs' counsel to file affidavits, delayed deposition errata sheets and supplemental interrogatory answers in which the plaintiffs contradicted their earlier deposition testimony and interrogatory answers." *Id.* at 65.

The Second Circuit's decision is not an anomaly. Indeed, the court in *Schilling v. Community Memorial Gen. Hosp.*, 110 F.R.D. 377 (N.D. Ill. 1986) awarded fees and expenses under Rule 11,

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even though the affidavit at odds with previous sworn statements—interrogatory responses—was not disregarded, but in fact prevented summary judgment from being entered. The court accepted defendant's argument for Rule 11 sanctions: that the summary judgment motion would not have been brought, but for defendant's understanding of the facts, an understanding induced by plaintiff's discovery responses.[16] Similarly, in *Barticheck v. Fidelity Union Bank/First Nat'l State*, 680 F.Supp. 144 (D.N.J. 1988), a plaintiff, who without explanation presented an affidavit contradicting the previous sworn testimony in an attempt to create material facts to defeat summary judgment, was liable for defendants' reasonable attorney expenses in responding to the affidavit.

If a party submits an affidavit in conflict with a witness's deposition testimony, the injured party may also seek sanctions under Rule 56(g) of the Federal Rules of Civil Procedure.[17] At least one Circuit Court has held that Rule 56(g) of the Federal Rules of Civil Procedure, not Rule 11, should be the preferred starting place when it appears the affidavit made in bad faith has been submitted in response to or in support of a summary judgment motion.[18] Rule 56(g) "allows a court to penalize disingenuousness without foreclosing a potentially meritorious claim."[19] Rule 56(g) also may permit a court to strike an affidavit if necessary.[20]

A third possibility is sanctions under 28 U.S.C. § 1927,[21] although it is not clear that the submission of an affidavit in conflict with a witness's deposition testimony falls within this statute's scope. In *Salovaara v. Eckert*, 222 F.3d 19 (2d Cir. 2000), the Second Circuit reversed a district court ruling imposing sanctions under both section 1927 and Rule 11, for, among other things, submitting an affidavit in conflict with a witness's deposition testimony. There, the district court failed to make specific findings regarding counsel's conduct to justify imposing sanctions under section 1927.22 As a result, section 1927 sanctions could not be justified.

Conclusion

Effective witness preparation minimizes the problems with correcting deposition testimony after the fact. When deposition testimony has to be corrected, counsel should act promptly and understand the risks associated with contradicting earlier testimony, as opposed to simply correcting it. In addition to the issues discussed above, there are other ethical considerations.[23] ♦

Endnotes

1. FED.R.CIV.P. 30(e) (emphasis added).
2. *See* C. WRIGHT, A. MILLER & R. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2118 (2d ed. 1994); *see also* Rios v. Bigler, 67 F.3d 1543, 1552 (10th Cir. 1995) ("[T]he office conducting the deposition must denote the request on a certificate, which 'shall be in writing and accompany the record of the deposition.'") (quoting FED.R.CIV.P. 30(e)); Blackthroner v. Posner, 883 F.Supp. 1443, 1454 (D. Or. 1995) (rejecting corrections to deposition testimony because "no certificate on any of the depositions taken from Plaintiff indicates that Plaintiff requested review of the deposition before completion.").
3. *See* Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969); *see also* McCormack v. City of Fort Lauderdale. 333 F.3d 1234, 1240 n.7 (11th Cir. 2003); Gillen v. Fallon Ambulance Service, Inc., 283 F.3d 11, 26 (1st Cir. 2002); Peck v. Bridgeport Machines, Inc., 237 F.3d 614, 619 (6th Cir. 2001); S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 495-96 (5th Cir. 1996); Shockley v. City of Newport News, 997 F.2d 18, 23 (4th Cir. 1993); Martin v. Merrell Dow Pharms., Inc., 851 F.2d 703, 705-06 (3d Cir. 1988); Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986); Foster v. Arcata Assocs, Inc., 772 F.2d 1453, 1462 (9th Cir. 1985); Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1364-65 (8th Cir. 1983).
4. Herring v. Canada Life Assurance Co., 207 F.3d 1026, 1030 (8th Cir. 2000) (quoting *Camfield Tires, Inc.*, 719 F.2d at 1366).
5. This same general rule has been applied to proposed corrections to deposition testimony within Rule 30(e)'s 30-day rule. *See* Burns v. Bd. of County Com'rs of Jackson County, 330 F.3d 1275, 1282 (10th Cir. 2003) ("We see no reason to treat Rule 30(e) corrections differently than affidavits. …"); *see also* Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000).
6. *See Penny*, 128 F.3d at 415.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Franks*, 796 F.2d at 1237 (citing 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 2738, at 473-74 (2d ed. 1983); 6 (part 2) J. MOORE & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 56.22 [1], at 56-1325 to 56-1326 (1985 ed.)).
11. *Id.* (collecting cases).
12. *See Martin*, 851 F.2d at 705; *Camfield Tires, Inc.*, 719 F.2d at 1364-65; *see also Herring*, 207 F.3d at 1030-31 (same); *see also* Hernandez-Loring v. Universidad Metropolitana, 233 F.3d 49, 55 (1st Cir. 2000); Rule v. Brine, Inc., 85 F.3d 1002, 1011 (2d Cir. 1996); Langman Fabrics, a div. of Blocks Fashion Fabrics, Inc. v. Graff Californiawear, Inc., 160 F.3d 106, 112 (2d Cir. 1998); Webb v. Garelick Manufacturing Co., 94 F.3d 484, 488 (8th Cir. 1996).
13. FED. R. CIV. P. Rule 11 provides in pertinent part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances. …
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and]
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. … FED.R.CIV.P. 11(b).

14. *See id.* at 58-59.
15. *Id.* at 59.
16. *See id.* at 378.
17. FED.R.CIV.P. 56(g) provides:
Affidavits Made in Bad Faith: Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.
18. Klein v. Stahl GMBH & Co. Maschinefabrik, 185 F.3d 98, 110 (3d Cir. 1999) ("The Federal Rules present a district court encountering

bad faith with less severe sanctions, such as the remedial sanction set forth in Rule 56(g), which vests a court with authority to charge the misfeasant with expenses, including attorney's fees, attributable to the additional litigation generated by a bad faith affidavit, and, where appropriate, to adjudge the misfeasant guilty of contempt.").

19. *Id.* at 110; *see also* Rogers v. AC Humko Corp., 56 F. Supp. 2d 972, 981 (W.D. Tenn. 1999); *Barticheck*, 680 F. Supp. at 150.

20. *See* Bausman v. Interstate Brands Corp., 50 F. Supp. 2d 1028, 1030 (D. Kan. 1999) (Since "court may sanction a party who presents an affidavit in bad faith in a summary judgment proceeding … [i]t follows that a court has the discretion to strike sham affidavits submitted pursuant to Rule 56." (citing FED.R.CIV.P. 56(g)).

21. 28 U.S.C. 1927§ provides: Any attorney or other person admitted to conduct cases in any court of the United States or any other Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

22. *See id.* at 34 ("[T]he District Court made no findings with respect to the disputed question of whether [counsel] was aware of the conflict between [plaintiff's] affidavit and [plaintiff's] earlier deposition testimony in the other lawsuit (in which [plaintiff] was represented by a different attorney)."

23. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.3(a)(4) (1993) (A lawyer shall not knowingly "offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."); *see also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 376 (1993) (applying Model Rule 3.3 to deposition testimony).

Congressional Rulemaking

(Continued from page 10)

that state courts are incapable of controlling and disciplining attorneys responsible for filing frivolous pleadings in cases that "affect" interstate commerce.

The bill further purports to impose new forum selection provisions on state (and federal) courts hearing "personal injury" claims.[2] Under the proposed law, a personal injury claim may only be filed in the county of the state (or federal district) where (1) the person bringing the claim resides or resided at the time of the injury; (2) the alleged injury "or circumstances giving rise to the injury" occurred; or (3) the defendant's principal place of business is located. H.R. 420 § 4. If a plaintiff alleges that the injury occurred in more than one county (or federal district) the trial court shall determine "the most appropriate forum for the claim" and if that forum is other than the one where the claim is currently filed, dismiss the claim. *Id.* Notably, the law provides no guidance to the trial court as to what factors to consider in determining "the most appropriate forum" for a claim—a determination that likely differs depending on a party's posture in the matter.

As with its imposition of Rule 11 on state courts in certain instances, H.R. 420 again assaults basic notions of federalism by attempting to circumvent state long-arm statutes and dictate jurisdiction and venue to state courts. Again, there have been no meaningful congressional findings suggesting that the states' current systems of jurisdiction and venue are inadequate to afford litigants effective relief. Though it is true that litigants may often file in jurisdictions they deem more advantageous than others, due process, forum non conviens, and other methods of correcting inappropriate venue currently ensure that defendants are not hailed into inappropriate far-flung venues. At the federal level, a comprehensive system of jurisdiction and venue is, of course, already set forth in Title 28 of the United States Code. Indeed, H.R. 420 makes no attempt to reconcile the inconsistencies between its proposed jurisdiction and venue provisions for personal injury cases with the provisions already set forth in Title 28.

Finally, the proposed law provides the relatively draconian remedy of requiring a court (state or federal) to *dismiss* a personal injury matter filed in the wrong jurisdiction or venue. At the state level, the bill again extends into the state's rules regarding transfer of venue—dictating dismissal where state procedure may provide for less drastic solutions. And, at the federal level, at least there is no valid reason to mandate dismissal upon a finding of improper venue in personal injury cases when a court, pursuant to 28 U.S.C. § 1412, could transfer the matter to the appropriate venue.

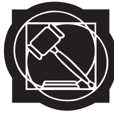
Regardless of the political purposes motivating Congress's sudden interest in Rule 11, H.R. 420 is an ill-conceived remedy. The removal of Rule 11's safe harbor provision will likely lead to the return of costly and time-consuming Rule 11 satellite litigation and, by legislating away individual judge's discretion regarding when and how to impose sanctions, the bill effectively lumps all Rule 11 violations into a single category and leaves the courts little room to differentiate degrees of sanctionable conduct. Finally, the savings clause in the bill is a paper tiger, applying to only a sliver of civil cases and potentially stunting the development of common-law remedies and defenses in arenas outside of civil rights cases.

These "reforms" of Rule 11 passed the House in the 108th Congress by a large margin, and the bill's sponsors appear primed to move the legislation rapidly through Congress again this year. Given the measure's broad sweep, the bar is well advised to monitor this legislation closely. ♦

Endnotes

1. Smith introduced a similar bill in the 108th Congress as H.R. 4571. H.R. 4571 passed the House on September 14, 2004, and was referred to the Senate where it remained in the Judiciary Committee until the conclusion of the Congress. In reintroducing the legislation at the beginning of the 109th Congress, Congressman Smith's office stated that Smith "is wasting no time in his mission to loosen the tightening grip of frivolous lawsuits over the American people and the nation's judicial system."

2. A "personal injury claim" is defined as "a civil action brought under State law by any person to recover for a person's personal injury, illness, disease, death, mental or emotional injury, risk of disease, or other injury or the costs of medical monitoring or surveillance (to the extent such claims are recognized under State law), including any derivative action brought on behalf of any person on whose injury or risk of injury the action is based by any representative party, including a spouse, parent, child, or other relative of such person, a guardian, or an estate; and (B) does not include a claim brought as a class action."



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