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CivilRules: Yes
Evidence: Yes
Miscellaneous: Yes
Comments:

I am very concerned, as primarily a lawyer representing small businesses, on both the Plaintiff's and Defendant's side, about the proposed Federal Rule changes regarding e-discovery, privilege and spoliation. In 2000-2002, I litigated a federal court case in the Southern District of Iowa, styled Tom Michel et al v. Mueller-Yurgae Associates et al, case no. 4:01-CV-10479. The case was based on the Defendants' wrongful termination of my clients, followed by deliberate and intentional tortious interference with my clients' subsequent efforts to operate their own business, tortious interference with my clients' contracts and business expectancies, and defamation associated with the interference. The Defendant company did almost all its correspondence and business dealings electronically, and by e-mail. So obviously electronic discovery was a huge issue in the case. The Defendants vehemently resisted all our legitimate efforts to obtain electronic documents, including alleging such things as they were not "reasonably accessible" or available, and "suggesting" that they may have been deleted or destroyed. At long lenghth, we were forced to file a motion to compel, which the judge sustained in every particular. The information requested was clearly relevant and material, even critical, and we were not over-reaching. At the time we prevailed on the motion to compel, the Defendant's summary judgment motion was pending. Had we not succeeded on the motion to compel, we would have lost summary judgment. There was no question in this case that the Defendants were guilty of the acts charged, and liable. Without the electronic information requested, however, we could not prove it. Immediately following the judge's decision in our favor, compelling production of the electronic discovery requested, the

Defendants' settled the case for well into 6 figures. There was no question that their actions were deliberate and wilful, and done in an effort to injure or destroy my client's business, which also would have justified punitive damages. Approval of these proposed rule changes would have lost this case for us, and the Defendants would have gotten away with committing very serious business torts against my clients. This was a traditional "David v. Goliath" business case, i.e.--big business interests v. small business interests. These proposed rule changes would be absolutely stifling to small businesses in litigation (to say nothing of the chilling affect they would have on the rights of consumers and individuals when faced with the daunting prospect of having their rights vindicated against large corporate interests who by far already have the upper hand, when consumers and individuals have been legally injured by them in any way), and as a result, this could severely damage the entire economy of this country which is being driven by small businesses, because they are currently allowed to compete on an "even-playing field" with larger business entities. These proposed rule changes would tilt that playing field substantially to the furhter advantage of the largest corporate and business interests. Back to my specific case, the proposed rule change pertaining to spoliation, essentially making it O.K., would have allowed the Defendants in my case to destroy the electronic information we were seeking, which was absolutely critical, without any sanction or consequence for their destruction of evidence, which is not only overwhelmingly prejudicial to the plaintiff in such cases, but is also contrary to hundreds of years of jurisprudence in this country wherein the courts maintain a level playing field for both sides in every dispute. Again, these proposed rule changes would completely eviscerate any semblance of a level playing field. Spoliation has always been spoliation, whether by electronic means or otherwise, and there is simply no reason to change those standards now to the advantage of the largest and most powerful corporate litigants. In our case, in response to the Defendants' "suggestion" that some of the eletronic information requested "may have been" deleted or destroyed, and was beyond their capability to obtain, the judge made crystal clear that a very strong spoliation instruction would be forthcoming. I'm sure this was no small factor in the Defendants' decision to settle. Had the proposed rule change been in effect, there would have been nothing wrong with the Defendants' deliberate spoliation they were apparently contemplating, and we certainly would not have been entitled to a spoliation instruction to the jury. Again, because of the rules the way the are, justice was done in my case, and the proposed changes would have prevented justice from being done. Finally, with respect to the proposed change to privilege rules, in my case, the Defendants also argued the documents we were seeking were privileged, because they had been advised by counsel throughout their tortious courses of action. Obviously, bad advice by counsel is not enough to shield subsequent actions and communications made by the Defendants in reliance on that advice privileged, and our judge was correct in so ruling. Had the

proposed rule changes been in effect, however, not only could the inculpatory, critical information we were requesting have been subject to a claim of privilege, but had it already been produced it later could have been claimed as privileged, resulting in a lack of admissible evidence, even though it existed, and had been previously in our possession. Whether the information over which privilege was claimed was excluded at the summary judgment stage, or from the consideration of the ultimate fact finder, the results are equally prejudicial to the plaintiff. Again, there is absolutely no reason to change hundreds of years of jurisprudence precedent concerning what is privileged, and what consitutes waiver of any privilege, simply for the purpose of providing an advantage to large and powerful corporate interests. In sum, these proposed rule changes would simply allow any litigant with the foresight and means to implement electronic records systems, to commit torts and other illegal acts without consequence, because with regular and systematic destruction of those records as part of their normal "business practices," those records could never be obtained for purposes of litigation. This is true whether the plaintiff is the United States Justice Department seeking to enforce securities laws, or the small business owner seeking to vindicate his rights against larger business interests that have tortiously injured him. Along those same lines, I have serious concerns that the proposed rule changes would be inconsistent with, and perhaps in direct violation of provisions of the Sarbanes-Oxley Act requiring greater corporate accountability in record keeping. The rules as they currently exist, as proven by my own experience in the case I have mentioned and hundreds of years of experience in American jurisprudence, are perfectly workable, and most nearly affect substantial justice to all parties to litigation, in an even handed manner. Thank you for your consideration of this most important matter.

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