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By Electronic Mail

Mr. David E. Ciambuschini
Local Rules and Forms Committee
U.S. District Court for the District of Maryland
101 West Lombard Street
Baltimore, MD 21201
MDD_Localrules@mdd.uscourts.gov

Re: *Proposed Principles for the Discovery of Electronically Stored Information in Civil Cases.*

Dear Mr. Ciambuschini:

Thank you for the opportunity to present these comments regarding the proposed ESI principles. I am concerned by certain aspects of the principles and particularly the manner in which they diverge from proportionality considerations in the Federal Rules of Civil Procedure (FRCP). Without change, these principles may be read in a manner that might disadvantage certain individual litigants. I urge this Committee to revisit and revise the proposed language.

My firm represents individual employees in various matters, including civil litigation against employers in the District Court of Maryland. I know that our judges take seriously and apply attentively the guidance and rules enshrined in our Local Rules. As with many civil cases involving individual plaintiffs, employment cases typically involve a significant imbalance in both resources and in discoverable information, where employers customarily have disproportionate resources and possess most all relevant information concerning the job decisions at issue along with other relevant information. The need for robust discovery is essential to ensure that Maryland employees are able to work free from discrimination, with protections for reporting fraud and abuse, and with fair compensation for the work they perform.

Congress and states, including Maryland, have determined that certain issues such as civil rights, wage, and whistleblower matters are such of importance that they provide for fee-shifting to successful plaintiffs to serve as "private attorneys general" to enforce the public interest in eradicating discrimination and fraud, and to ensure that individuals are paid fairly for their work. *See, e.g., Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (When a plaintiff prevails in a civil rights action, "he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.")

In enacting modest changes to the FRCP to move the placement of proportionality considerations from Rule 26(b)(2) to Rule 26(b)(1), the Federal Rules Advisory Committee recognized the

value of these cases in serving the public interest, and made “the importance of the issues at stake in the action,” the primary consideration in application of proportionality standards. Fed. R. Civ. P. 26(b)(1).¹ The amendments also added new text to focus explicitly on “information asymmetry,” where certain parties possess the great majority of information, by including as its third factor for consideration “the parties’ relative access to relevant information.” *Id.* As the Rules Advisory Committee recognized: “In practice [relative access and “information asymmetry”] often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.” Fed. R. Civ. P. 26(b)(1) advisory committee’s note to 2015 amendments. Also included is consideration of “the parties’ resources,” and “the importance of the discovery in resolving the issues.” Fed. R. Civ. P. 26(b)(1).

Against, this backdrop the proposed Principles take a significant step away from the priorities set forth in the FRCP by reciting the following considerations for proportionality in Principle 1.03:

To assure reasonableness and proportionality in electronic discovery, parties should consider the burden and expense of the proposed discovery as compared to its likely benefit, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in adjudicating the merits of the case.

Principles for the Discovery of Electronically Stored Information in Civil Cases, Principle 1.03, April 4, 2016. The priorities in the proposed “Principles” depart from considerations in the Federal Rules in significant respects:

- The “burden and expense of the proposed discovery as compared to its likely benefit,” is elevated in the Principles to *the first* consideration, whereas in Rule 26(b)(1) that factor is *the very last* consideration in the proportionality calculus. *Compare* Principle 1.03 *with* Fed. R. Civ. P. 26(b)(1).
- The “importance of the issues at stake,” which is listed as the very first proportionality consideration in Rule 26(b)(1), has been relegated in the Principles to the fourth factor. *Compare* Principle 1.03 *with* Fed. R. Civ. P. 26(b)(1).
- “[T]he parties’ relative access to relevant information,” which was added to the FRCP specifically to address information asymmetry in cases involving individual litigants against corporate parties, has been *omitted* from the Principles entirely. *Compare* Principle 1.03 *with* Fed. R. Civ. P. 26(b)(1).

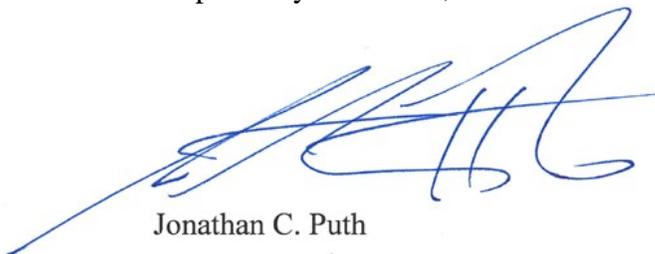
¹ As noted by the Committee, amendments to the FRCP, the proportionality considerations do not represent a significant change; rather they were simply moved from Rule 26(b)(2)(C)(iii), “slightly rearranged with one addition.” Fed. R. Civ. P. 26(b)(1) advisory committee’s note to 2015 amendments. The amendment “does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.” *Id.*

Other aspects of the Principles are of significant concern here.

- Principle 2.01 regarding preservation obligations repeats many of the same mistakes as Principle 1.03, and overemphasizes proportionality. Notably, Principle 2.01(b) directs parties not to agree to a scope of preservation that is “disproportionately broad, expensive, or burdensome,” but does not address the importance of the issues at stake, the parties’ relative access to information, the parties’ resources, or the importance of the discovery to the case. *Compare* Principle 2.01 with Fed. R. Civ. P. 26(b)(1). This runs the risk of compounding the errors in draft Principle 1.03, and elevating expense and burden considerations above the non-monetary factors listed in Rule 26(b)(1) of the FRCP.
- Principle 2.03 encourages parties to appoint an ESI liaison, and contemplates sanctions for failure to do so. This provision is potentially harmful to individual litigants who may lack resources to engage liaisons.
- Principle 2.04(e) presumes there may be cost-shifting, whereas the 2015 amendments to the FCRP had recognized that authority for cost shifting was already in the rules, and “[r]ecognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.” *Compare* Principle 2.04(e) with Fed. R. Civ. P. 26(c)(1)(B) advisory committee’s note to 2015 amendments. Principle 2.04(e) should be amended to eliminate all three references to cost-shifting.
- The Principles overemphasize the issue of proportionality, repeating the concept over and over when in fact the FRCP’s approach to proportionality represented only a modest change in the rules.

Thank you very much for the opportunity to provide this input, and thank you for your efforts.

Respectfully submitted,



Jonathan C. Puth