Litigation

Amending the Federal Rules (Again): Finding the Best Path to an Effective Duty to Preserve

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Implementing a "duty to preserve" can be a complicated and expensive task in a world dominated by discovery of electronically-stored information ("ESI"). As pointed out in one of the papers submitted at the recent 2010 Civil Litigation Conference held at the Duke Law School by the Civil Rules Advisory Committee,[1] "[l]itigants and their lawyers [facing demands for e-discovery] must immediately identify, promptly preserve, comprehensively collect, fairly filter, properly process, rigorously review, and produce ESI in appropriate format[s] without sluggishness, purposeful or otherwise."[2]

Because the sheer volume of information can be staggering, lapses in execution—even with the best of intentions—are inevitable. As a result, the common law historically requires that a potential producing party take timely and reasonable steps to preserve relevant evidence which may be sought in discovery in pending or reasonably-foreseeable litigation.[3]

Currently, litigants are compelled to carry out these tasks while guided by a series of conflicting and potentially inconsistent ad hoc decisions without the guidance of court rules. Sanctions involving e-discovery, predominantly imposed for failures to preserve, but intimately related to production issues as well, can include adverse inference jury instructions, monetary sanctions, or dispositive rulings, often imposed with devastating impact.

This situation persists despite earlier efforts to amend the Federal Rules to incorporate resolution of e-discovery issues. At the 2010 Civil Litigation Conference, a panel of experienced jurists and practitioners (the "Duke E-Discovery Panel")[4] was charged with assessing the efficacy of the e-discovery 2006 Amendments. That panel, including the author, unanimously concluded that amending the Federal Rules to deal with preservation was imperative. This view was supported by statements and surveys demonstrating why the burdens and costs of e-discovery (and preservation) are sapping the competitiveness of our country.

As noted in one paper, "[t]he U.S. Litigation system imposes a much greater cost burden on companies than systems outside the United States [and] [c]lear standards must be included governing the preservation of information even prior to commencement of litigation in order to counteract inconsistent case law on the subject."[5]

I. A Possible Approach

Drafting an appropriate array of rules to provide meaningful improvement is a challenge. However, the consensus *Elements of a Preservation Rule*[6] as developed by the Panel provides a starting point, as do the preservation guidelines used in the Seventh Circuit E-Discovery Project[7] and the specific proposals submitted by, among others, Lawyers for Civil Justice.[8] The recommendations and conclusions which follow, however, are those of the author alone.

An effective preservation rule should anchor its obligations—whether arising before or after commencement of litigation—to the potential need for relevant evidence in discovery. Doing so should resolve any lingering doubts about the validity of a rule applicable to pre-commencement activity.[9] The focus should be on "reasonableness."[10] Thus, Rule 26 (or Rule 34) could be amended to provide that:

> Parties with actual or constructive notice of the likelihood that relevant and discoverable evidence is or will be sought in discovery shall undertake reasonable and good faith efforts to preserve any such evidence within its possession, custody or control subject to the considerations of Rule 26(b)(2)(C) and Rule 37(e).[11]

In addition, as a subpart of the Rule[12]—or by Committee Note, local rules, or Standing orders—provision should be made to presumptively exempt categories of electronic information or excessive numbers of custodians from the initial preservation scope.

This approach would give "teeth" to early discussion of preservation by forcing requesting parties to surface any unique discovery requirements and thus mitigate the risk of "sandbagging." Many Duke participants also echoed the comment from the ACC General Counsel Survey that "greater court involvement in 'crafting an e-discovery plan [including preservation implications] prior to a dispute would improve the process.'"[13] To date, the early discussion process has been anemic.[14]

In addition, Rule 37 should be amended to supply the necessary guidance for sanctioning preservation failures. The 2006 Amendments began this process in what is now Rule 37(e), at least as to ESI lost as the result of routine, good-faith operations. Thus, Rule 37(b)(2)(a)[15] and Rule 37(c)(1)[16] could be amended to clearly indicate their application to allegations of preservation failure.

Finally, Rule 37(e) could be amended to clarify that losses are sanctionable only if they result from efforts to avoid known preservation obligations and broadened to apply to all forms of routine losses:

> Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide

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electronically stored information or tangible things lost as a result of the routine, good-faith operation of a system or process in the absence of a showing of intentional or reckless actions designed to avoid known preservation obligations.[17]

Under this approach, Rule 37 would become the principal source of sanctioning authority for all forms of discovery disputes,[18] including preservation failures resulting from pre-litigation conduct. There would rarely be a need to rely on inherent powers since the Rules would be "up to the task."[19]

II. Additional Background & Supporting Remarks

Despite early suggestions by the author[20] and some initial consideration by the Committee of drafting alternatives,[21] there has been a marked reluctance to include preservation obligations in the 2006 Amendments. Instead, the Committee limited itself to enlarging the topics for discussion at the Rule 26(f) conference to include preservation and the addition of (now) Rule 37(e) limiting sanctions for inadvertent loss of ESI due to routine, good faith operations. Committee Notes which "explain[ed] or define[d] a preservation obligation" were withdrawn before the final issuance of the Rules.[22]

Unfortunately, many preservation issues are neither ripe for discussion at the time of the Rule 26(f) conference,[23] nor are counsel prepared or willing to deal with them at that time, for whatever reason. The topic of "retention" was discussed in only about seventeen percent of the cases surveyed in the *FJC National, Case-Based Civil Rules Survey* prepared for the Duke Conference.[24] As a result, potential producing parties often must undertake preservation decisions based solely on assessing the impact of idiosyncratic decisions.

A. Pre-Litigation Conduct

An ongoing concern of the Advisory Committee and the Standing Committee has been the propriety of rulemaking involving conduct prior to the formal institution of litigation.

However, this concern is misplaced. The preservation of evidence for purposes of discovery and trial in distinctly identifiable proceedings is sufficiently "procedural" to pass muster under the Enabling Act.[25] In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*,[26] the Supreme Court upheld Rule 11 over challenge because it had only an incidental impact on substantive rights given its "main objective" to "deter baseless filings and curb abuses."[27] As the Court recently noted in *Shady Grove v. Allstate*,[28] a challenge to a Federal Rule will be rejected when the rule has "regulated only the process for enforcing [parties] rights" and not "the available remedies, or the rules of decision by which the court adjudicated."[29]

Moreover, as Rule 27 demonstrates,[30] and despite dicta to the contrary,[31] activity prior to commencement of an action can be regulated by rulemaking when sufficiently linked to foreseeable litigation. Courts historically and routinely examine (and sanction) pre-litigation conduct which impacts discovery proceedings. In *Silvestri v. General Motors*[32] and in *Goodman v. Praxair Services*,[33] for example, the loss of discoverable evidence at issue occurred long before the lawsuit was filed.

The Supreme Court has acknowledged the force of this logic. In *Chambers v. NASCO,*[34] the majority approved sanctions relating to pre-commencement conduct intimately related to the case.[35]

Finally, the Enabling Act itself provides an opportunity for congressional action which trumps any concerns about the appropriateness or wisdom of such rules. This has already been demonstrated in the pre-litigation context by the limits placed on sanctions in the Private Securities Litigation Act (the "PSLRA").[36]

B. Crafting The Rule-Based Duty to Preserve

An effective rule should articulate a duty to exercise reasonable care under the circumstances, i.e., a "reasonableness standard."[37] This is the strong recommendation of experienced trial practitioners[38] and neutral observers alike. Thus, Principle 5 of The Sedona Principles (2d Ed. 2007) provides that "[t]he obligation to preserve . . . requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation." Some courts prefer to skip this step and simply describe the preservation obligation in mechanistic terms, such as imposing a written litigation hold.[39] Moreover, these "ad hoc judicially created 'litigation hold' procedures [are] created District Court by District Court [and] lack uniformity."[40]

Elevating a written litigation hold to a pre-condition of compliance is inconsistent with a reasonableness standard.[41] A litigation hold is a useful, but not the exclusive, method of compliance.[42] In *Kinnally v. Rogers Corporation,* for example, the "absence of a written litigation hold" was not determinative since the party had taken "appropriate actions to preserve evidence."[43] A better approach would be to provide that if a litigation hold process *is* employed, that fact should be treated as prima facie evidence that reasonable steps were undertaken to notify relevant custodians of preservation obligations.[44]

The rule should also emphasize that intervention in routine operations is unnecessary unless the failure to do so is intended to deprive another of the use of relevant evidence. This could be accomplished by a cross-reference to an amended Rule 37(e) to clarify that point.

The role of proportionality, embodied in Rule 26(b)(2)(C), should also be acknowledged. In *Rimkus Consulting v. Cammarata,*[45] the court noted that "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable,* and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards." Accordingly, a cross-reference to Rule 26(b)(2)(C) would be appropriate.

C. Bright-Line Guidance

Articulation of a standard of care ("reasonableness") is not enough, although it is essential. The Rule itself, an accompanying Committee Note, or authorization for local rules or Standing Order must also provide presumptive limits on the scope of the duty to preserve along the lines suggested by the Seventh Circuit E-Discovery Project.[46] This would reinforce the need for early discussion and agreement on preservation issues, a key feature of the 2006 Amendments.[47]

Thus, the necessity of preservation of the following categories would not be required absent identification of the need and early agreement among the parties:

(1) Deleted, slack, fragmented or unallocated data on hard drives;

(2) Random access memory (RAM) or other ephemeral data;

(3) On-line access data such as temporary internet files;

(4) Data in metadata fields that are frequently updated; such as last opened dates;

(5) Backup data that is substantially duplicative of more accessible data available elsewhere; and

(6) Other forms of ESI which require extraordinary affirmative measures not utilized in the ordinary course of business.

Providing specific requirements would elevate the effectiveness of the early discussion of preservation in the "meet and confer" process. It would also be useful to amend Rules 16(b) and 26(f) to provide access to a judicial officer following a meet and confer to resolve any remaining preservation issues. Currently, the discovery plan for which counsel are jointly responsible under Rule 26(f) does not require a description of disputed preservation issues and the list of topics for discussion at the Rule 16(b) do not include preservation topics.

Yet another approach, analogous to the quantitative limits on discovery,[48] would be to place presumptive limitations on the total number of "key custodians" and information systems whose relevant information must be preserved.[49]

D. Increased Reliance on Rule 37

Spoliation sanctions in Federal Courts are traditionally imposed through the exercise of inherent court powers.[50] For a variety of reasons, including doubts about the authority to use inherent sanctioning power in the absence of bad faith,[51] it is time to more fully engage rule-based sanctions. As noted above, both Rules 37(b) and (c) could easily be amended to clarify their applicability to failures to preserve.

In addition, experience with Rule 37(e) suggests the need for clarification and, perhaps, a broadened scope. The Rule was intended to provide a uniform culpability standard for routine, good-faith losses of ESI which are not the result of intentional acts. This had been a perennial and well-known problem due to differing Circuit views on the sufficiency of mere negligence to sustain spoliation sanctions.

However, despite Rule 37(e), some have concluded that "it can't be routine and good-faith not to suspend your process once you know there is litigation."[52] Under this view, the presence of a duty to preserve excuses courts from consideration of the level of culpability involved. This misinterpretation of Rule 37(e) could be easily corrected by specifying that there must be "intentional or reckless actions designed to avoid known preservation obligations" to avoid the impact of the Rule.

In addition, Rule 37(e) could be broadened to apply to all forms of routine, good faith losses, a proposal which was originally made by the American College at the time of the 2006 Amendments.[53] This would reinforce the need for and efficacy of records management and other neutral policies and practices which enhance predictability and encourage access to information needed in litigation.

III. Conclusion

Now that the Duke Conference has fully aired the continuing burdens of modern litigation, especially e-discovery, it is time for the Advisory Committee to address the preservation issue (again). There is an understandable reluctance on their part, of course, to act so quickly after the 2006 Amendments. However, it is time to move from ad hoc and conflicting preservation decisions to clear-cut, rule-based standards. Only in this way can we begin the "bending of the curve" away from the disproportionate role preservation issues have assumed in litigation planning and judicial management.

Endnotes

1 Papers submitted in connection with the Duke Conference are available at http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Toc/B896CCD29A7DE0C88525764100492D17/?OpenDocument (navigate to Empirical and Panel sections) (hereinafter "Duke Papers").

2 Willoughby and Jones, *Sanctions for E-discovery Violations: By the Numbers* 1, Duke Papers.

3 West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (1999).

4 The Panel consisted of two federal judges (a district judge and a magistrate judge), a plaintiff's employment counsel, two defense counsel, and one former general counsel and was moderated by the President Elect of the American College of Trial Lawyers.

5 Civil Justice Reform Group, Lawyers for Civil Justice, U.S. Chamber Inst. for Legal Reform, *Litigation Cost Survey of Major Companies* 3, 7, Duke Papers.

6 *See Elements of a Preservation Rule*, Duke Papers (hereinafter "*Elements*").

7 Seventh Circuit Pilot Program On E-Discovery, Principle 2.04 (Scope of Preservation) (2009), *available at* http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf.

8 Lawyers for Civil Justice, *White Paper: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure,* Duke Papers (hereinafter "*White Paper*").

9 *See infra* Section IIA ("Pre-Litigation Conduct").

10 *See infra* Section IIB ("Crafting the Rule-Based Duty to Preserve").

11 Lawyers for Civil Justice suggests a proposed rule (Rule 26(h)(1) Duty to Preserve) that limits preservation to matters that "would enable a party to prove or disprove a claim or defense" which "must comport with the proportionality assessment required by Rule 26(b)(2)(C). *White Paper*, *supra* note 8, at 36.

12 *Id*. at 36-37 (Rule 26(h) Specific Limitations on Electronically Stored Information).

13 Association of Corporate Counsel, *Civil Litigation Survey of Chief Legal Officers and General Counsel* 3, Duke Papers.

14 *See infra* Section IIIC ("Bright-Line Guidance").

15 Rule 37(b)(2)(A): "[If a party] fails to obey an order to *preserve evidence or* provide or permit discovery."

16 Rule 37(c)(1): "[If a party] fails to *preserve or* provide information as required by these rules or identify a witness as required by rule 26(a) or (e). . ."

17 Lawyers for Civil Justice would simply modify Rule 37(e) to apply to ban sanctions "[a]bsent willful destruction." *White Paper, supra* note 8, at 38.

18 Thoughtful jurists acknowledge that remedies for "failing to preserve" are

best understood as efforts to seek "discovery sanctions." *See, e.g.,* Casale v. Kelly, 2010 WL 1685582, at *10 (S.D.N.Y. April 26, 2010) (Scheindlin, J).

19 Chambers v. NASCO, 501 U.S. 32, 50 (1991).

20 Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery,* 68 Def. Couns. J. 206, 209 (2001).

21 *See* Fordham E-Discovery Conference Participant Memo 35 (2004) ("Upon [notice of] commencement of an action, all parties must preserve documents and tangible things that may be required to be produced pursuant to Rule [26(a)(1)and] Rule 26(b)(1), [except that materials described by Rule 26(h)(2) need not be preserved unless so ordered by the court or good cause]."), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/E-Discovery_Conf_Agenda_Materials.pdf.

22 *See* Report Of The Civil Rules Advisory Committee 44 (2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf.

23 Kenneth J. Withers, *"Ephemeral Data" and the Duty To Preserve Discoverable Electronically Stored Information*, 37 U. Balt. L. Rev. 349, 377 (Spring 2008) ("By the time the parties sit down at the Rule 26(f) conference, the preservation issues surrounding ephemeral data may be moot and the fate of the responding party may already be sealed, if sanctions are later found to be warranted.").

24 Retention was listed as discussed in only thirty-five percent of the cases where ESI was discussed, which constituted about fifty percent of the cases surveyed. *See FJC Civil Rules Survey* 15-24, Duke Papers.

25 28 U.S.C. § 2072 (a-b) (The Supreme Court shall have the power to prescribe "general rules of practice and procedure" provided they do not modify "substantive" rights).

26 498 U.S. 533 (1991).

27 *Id*. at 553.

28 130 S. Ct. 1431 (2010).

29 *Id.* at 1442-1443.

30 Rule 27 ("Depositions to Perpetuate Testimony") provides for limited discovery "before an action is filed" to "prevent a failure or delay of justice."

31 Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546 (6th Cir. 1994) ("Rule 37 does not, nor does any procedural rule, apply to actions that occurred prior to the lawsuit.").

32 271 F.3d 583, 590 (4th Cir. 2001).

33 632 F. Supp. 2d 494, 505 (D. Md. 2009).

34 501 U.S. 32 (1991). *See id.* at 74 (Kennedy, J., dissenting) ("By exercising inherent power to sanction pre-litigation conduct, the District Court exercised authority where Congress gave it none.").

35 *See* 501 U.S. at 55 n.17 ("Although the fraudulent transfer of assets took place before the suit was filed, it occurred after Chambers was given notice, pursuant to court rule, of the pending suit.").

36 Danis v. USN Commc'ns, 2000 WL 1694325, at *32 n.20 (N.D. Ill. Oct. 23, 2000) (noting that the PSLRA [15 U.S.C. §78u-4(b)(3)(C)(i)] requires a defendant in a securities action to preserve evidence, but "sanctions may be imposed under the PSLRA only for willful document destruction").

37 Chambers v. NASCO, 501 U.S. 32, 46 (1991).

38 *See, e.g.,* Letter from Robert L. Byman, American College of Trial Lawyer Lawyers, to Peter G. McCabe, Secretary, Rules Advisory Committee, Proposed Amendments to the Federal Rules of Civil Procedure (Jan. 25, 2005) ("It would enhance . . . the entire body of the Federal Rules" if the Rules were amended "to state a standard of care for production and preservation—which we think should be reasonableness.").

39 *See* Pension Comm. v. Bank of Am. Sec., LLC, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) (applying strict liability standard to parties who did not immediately impose written litigation holds).

40 *White Paper*, *supra* note 8, at 35.

41 *See also* Sedona Conference® Legal Hold Commentary, Guideline 6, comment, at 13 ("[T]here are circumstances where a notice may not be necessary[, such as situations when] the information can be immediately secured without requiring preservation actions by employees.").

42 The Committee Note to Rule 37(e) provides that "[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'"

43 2008 WL 4850116, at *7 (D. Ariz. Nov. 7, 2008).

44 *Elements, supra* note 6, para. 5 ("Litigation Hold").

45 2010 WL 645353, at *6 (S.D. Tex. Feb. 19, 2010).

46 Seventh Circuit Pilot Program On E-Discovery, *supra* note 7, Principle 2.04 (Scope of Preservation) ("[After listing categories of ESI which are 'generally' not discoverable], if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable.").

47 Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 Rich. J. L. & Tech. 9 (2007) (describing the requirement that "preservation issues" be discussed at the Rule 26(f) conference as a "widely supported change" in the 2006 Amendments).

48 Rule 30(a)(2)(A) (no more than ten depositions); Rule 33(a) (no more than twenty-five written interrogatories); *see also* Rule 30(d)(1) (deposition limited to one day of seven hours unless otherwise stipulated or ordered by the court).

49 Lawyers for Civil Justice adopts this approach as one of a number of possible limitations on the permissible scope of discovery requests under Rule 34. *See White Paper*, *supra* note 8, at 32 (amended Rule 34 (b)(1)(B)(iii) ("a reasonable number of custodial or other information sources for production, not to exceed 10")). Although not explicitly directed at preservation obligations, it would have implications for those duties.

50 Unigard Sec. Ins. v. Lakewood Eng'g, 982 F.2d 363, 367 (9th Cir. 1992) (rejecting lower court argument that Rule 37(b) extends to situations where orders "would be futile, because the evidence has been destroyed").

51 Rimkus Consulting v. Cammarta, 2010 WL 645353, at *5, *7 (S.D. Tex. Feb. 19, 2010) ("[T]he Supreme Court's decision in *Chambers*[, 501 U.S. 32, 43-46 (1991),] may also require a degree of culpability greater than negligence.").

52 Panel Discussion, *Sanctions in Electronic Discovery Cases: Views from the Judges*, 78 Fordham L. Rev. 1, 30-31 (October 2009)("[W]hat this toothless thing [Rule 37(e)] really tells you is the flip side of a safe harbor. It says if you don't put in a litigation hold when you should there's going to be no excuse if you lose information.").

53 *See* Letter from the American College of Trial Lawyers to Advisory Committee 4 (January 25, 2005) ("If a safe harbor is introduced into the Rules[, which the ACTL then supported in principle], it should extend to all types of information.").