

Time for a change?

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Six years after the Federal Rules of Civil Procedure (FRCP) were first amended to address electronic discovery, another round of amendments is now under consideration. Questions regarding contentious, complex and multifaceted issues such as the duty to preserve, Rule 37 sanctions and technology's role are among the primary challenges up for discussion. Amidst circuit splits, spiraling costs and ever-evolving technology, finding the right solution is no easy task.

During the federal rulemaking process, the Advisory Committee on Civil Rules holds conferences around the country to solicit viewpoints from the public. These conferences help the committee accurately scope competing interests and opinions on various key issues that need to be addressed by rulemaking efforts. In June 2011, the Discovery Subcommittee—tasked with addressing issues specific to the discovery process in the FRCP—released a number of questions in preparation for the Dallas mini-conference, held Sept. 9, 2011.

Undoubtedly, one of the most pervasive issues in e-discovery is the preservation of electronically stored information (ESI). This area of e-discovery has been governed almost entirely by common law, as the FRCP does not explicitly address the duty to preserve its many elements, such as scope and trigger. Furthermore, the FRCP does not currently provide sufficient guidance for courts regarding the imposition of sanctions for violations of preservation duty. The questions released for comment by the Discovery subcommittee sought to flesh out considerations for drafting a consistent set of rules to regulate pre-litigation preservation going forward, including the overarching question of whether FRCP amendments will really be of any assistance.

Several of the questions address concerns posed by preservation in the e-discovery process. The proposed rule amendments themselves include numerous elements including scope, trigger, duration, ongoing duty and the litigation hold. Further, the elements aim to define the “who, what, when and how” involved with preservation by proposing parameters to define key players and scope of the data universe that must be preserved, and limiting the time frame of litigation holds and preservation orders.

Surveying the questions further, the complexity of the dynamics the committee must balance becomes clear. While litigants may want specificity, the committee must be careful not to diminish the courts' ability to exercise judicial discretion. This is especially true in the context of e-discovery, where the law seeks to govern the rapidly evolving technology landscape. The unprecedented rise of social media, cloud computing and mobile technology demonstrates the difficulty in generating specific guidance that is both valuable and enduring.

The Sedona Conference issued a TSC survey to its Working Group 1 (Electronic Document Retention and Production) members requesting input on these questions for comment. These challenges are echoed in TSC survey results, where 95.1 percent of respondents indicated that preservation issues have become increasingly significant in civil litigation over the past five years.

Additionally, respondents indicated that significant preservation issues arose in 91 percent of \$1 million plus matters “sometimes,” “often” or “always,” and 80 percent of cases from the respondents needed

court intervention to resolve the preservation issue. However, 62 percent of the time the preservation issue did not adversely affect the arguments of the case.

Advents affecting ESI sources are not the only technological concerns that the committee must consider. Fueled by a demand for lower costs and greater accuracy, technology for storing, collecting, processing and reviewing ESI has dramatically improved. This brings tension to the debate over how broadly the duty to preserve should be defined, and whether certain acts of ESI mismanagement are reasonable or reprehensible.

In addition to the questions, the committee posed three different categories of rules soliciting comments on which would be most desirable. The first category is designed to be the most specific, establishing set presumptions regarding preservation requirements, including when the duty is triggered (selected by 36.8 percent in the TSC survey). The second category is designed to be more general, acknowledging that technology and its related concerns advance quickly, but still may address some specifics such as what triggers the duty to preserve (selected by 28.9 percent in the TSC survey). The third category is a "sanctions only" rule that would only address the sanctions component of the failure to properly preserve data (selected by 14.9 percent in the TSC survey). Interestingly, the remaining 19.3 percent in the TSC survey voted for no change in the rules.

The next step in this process is a committee meeting in November 2011. Regardless of the end result, the rulemaking process provides a valuable opportunity for discussion and advancement of e-discovery related issues. In an area of law riddled with uncertainty, there is much to be gained through an analysis of this process that has quickly become a national concern.

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