New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 245—NO. 21
TUESDAY, FEBRUARY 1, 2011

FEDERAL E-DISCOVERY

State Bar Panel Tackles Issues Of Preservation, Cooperation


By **H. Christopher Boehning** And **Daniel J. Toal**

As regular riders on the e-discovery lecture circuit, we took a busman's holiday last week to attend an all-star panel hosted by the Commercial and Federal Litigation Section during the New York State Bar Association's annual meeting.

Titled "Bridging the E-Discovery Gap Between Bench and Bar," the panel of nine included five sitting judges: state Supreme Court Justices Leonard Austin and Ira Warshawsky; Southern District Judge Shira A. Scheindlin; and Southern District Magistrate Judges Andrew Peck and James Francis.[1] The panelists focused their attention on the two hot topics of the day: preservation and cooperation.

Last year saw a number of judges take on the topic of preservation. So it was no surprise that preservation challenges dominated the discussion. Indeed, the focus was on the possible addition to the Federal Rules of Civil Procedure of a true preservation rule.[2]

Judge Scheindlin spoke in detail about the debate surrounding such a rule that took place during the 2010 Duke Conference on Civil Litigation. During that conference, she participated on an e-discovery panel convened to deliberate over whether the addition of such a preservation rule is feasible and necessary.

On the subject of feasibility, the key issue concerns whether the Federal Rules of Civil Procedure, which govern conduct during a litigation, can be amended to reach pre-litigation conduct. Assuming that possible hurdle could be overcome—such as by drafting a rule to influence pre-litigation conduct by providing bright lines and standards during litigation for those deemed to have complied with the rule—the Duke panel agreed that a preservation rule would be a valuable addition.

According to Judge Scheindlin's report to the state bar, the Duke panel identified a number of topics that such a rule should address.

First, of course, is the so-called "trigger" giving rise to the preservation obligation. Although it is easy to list possible triggers—such as a complaint, regulatory notice, statute, regulation or contractual obligation—the trick is deciding precisely when the preservation obligation begins in the absence of such obvious triggers.

Second, and much more complicated, is the subject of the scope of the preservation obligation. Interestingly, Judge Scheindlin indicated that the Duke panel discussed presumptive limits like those now in place in Fed. R. Civ. P. 30(a)(2)(A)(i) for depositions on the number of custodians whose data must be preserved.

The practitioners on the state bar panel doubted that presumptive limits would be effective, especially in large cases. The judges on the panel responded that 90 percent to 95 percent of all federal cases are small cases and presumptive limits are a possible way of ensuring that discovery does not price litigants out of court.

Third, and a topic that vexes many lawyers and clients, is the duration of the preservation obligation including what ongoing steps should be required to ensure continued compliance with the duty to preserve.

Fourth, the Duke panel considered a bright-line or safe-harbor provision that would provide certainty to those issuing written legal hold instructions.

In a subtle nod to the debate that has followed Judge Scheindlin's ruling in *Pension Committee*[3] that the absence of a written legal hold was gross negligence per se—including the criticism leveled by her co-panelist, Magistrate Judge Francis, in his *Orbit One*[4] ruling—Judge Scheindlin drew laughs when she noted that her views had not changed. She sees a written litigation hold as at a minimum evidence of due care.

Fifth, a rule should address whether and to what extent a written litigation hold and preservation steps taken are protected by the work product doctrine or privilege.


Magistrate Judge Francis


Judge Scheindlin


Magistrate Judge Peck

NYLJ / RICK KOPSTEIN (3)

Sixth, a rule should specify what sanctions are available. The Duke panel recommended different sanctions depending on the spoliator's state of mind, and considered whether certain types of conduct should be taken as indicative of certain states of mind. The sanction rule should contain a model adverse inference instruction, and should preclude sanctions if a party fully complies with the rule. The rule should require the innocent party to (1) raise promptly any spoliation concerns, (2) identify what information was relevant, and (3) explain how the loss of data is prejudicial.

Finally, the preservation rule should specify who has the burden of proof with respect to spoliation.

Just walking through the topics that such a rule should address is itself enough to explain the current confused state of the law on preservation and sanctions.

H. CHRISTOPHER BOEHNING *and* DANIEL J. TOAL *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison LLP.* AARON GARDNER, *a discovery process manager at the firm, assisted in the preparation of this article.*

Disagreements Highlighted

During last week's panel, the discussion highlighted disagreement on many of these issues, including the feasibility of presumptive limits on custodians subject to preservation and whether a rule should specify the sanctions available to judges. If a small sample of judges and practitioners from the same judicial district cannot agree, it is no surprise that judges around the country have come to very different conclusions. That debate also suggests that no one should expect such a rule to be adopted anytime soon.

While the Duke panel was debating what should be in such a proposed rule, A. Benjamin Spencer, a professor at Washington & Lee University School of Law, was busy sketching out a revised rule 37(e) that he believes may address the preservation debate. Judge Scheindlin, who presented Mr. Spencer's proposal, seemed intrigued by the idea. The primary innovation of the proposal is to permit an ex parte preservation order prior to the commencement of an action.

The rule permits a prospective party to petition the court for a preservation order. The petition must state the subject matter of the potential action, the petitioner's interest in it, the facts that the petitioner seeks to establish, and the expected adverse parties. The court must issue the order if it is "satisfied that preserving the material may prevent a failure or delay of justice."[5]

Once the order is issued, identified adverse parties may appear and move to dissolve or modify the order upon two-days notice to the party that obtained the order. The court must then "hear and decide the motion as promptly as justice requires."

If the petitioner fails to bring an action within 60 days of the order, "no court may sanction the prospective adverse party for not complying with the order," and the court may order the petitioner to pay the prospective adverse party's costs, expenses and attorney's fees incurred in complying with the preservation order.

The proposed rule also identifies conditions under which spoliation sanctions may be ordered and defines an exclusive list of circumstances that constitute reasonable anticipation.

Specifically, the proposed rule identifies the following triggers: (1) receipt of a preservation order, (2) receipt of a written notice from a party "raising the prospect of the action or requesting preservation," (3) "notice of an act, omission, transaction, or occurrence underlying a claim in the pending action and notice of resulting harm of sufficient magnitude to make related litigation probable," and (4) "steps in anticipation of asserting or defending against a claim in the pending action."

Finally, the proposed rule creates a rebuttable presumption of culpability in the event of spoliation. The producing party may demonstrate that the spoliation was harmless or that it was substantially justified. The substantially justified condition refers to the fact that under the proposed rule, a party may opt not to preserve certain electronically stored information (ESI) if it judges the costs of preservation not proportional to the stakes in the dispute.

The requesting party could then seek a court order to force the opposing party to preserve the ESI, and the court could grant the motion for good cause shown under Fed. R. Civ. P. 26(b)(1). However, if the issue is not addressed as part of the pre-action petition process, the party would still face a risk that the court could subsequently disagree with the preserving party's position that not preserving the ESI in question was substantially justified. The proposed rule leaves to the court's discretion the specific sanctions to be applied in the event of a spoliation finding.

Magistrate Judges Peck and Francis both supported the idea of a preservation rule, though with some reservations. Magistrate Judge Peck noted that dealing with pre-litigation petitions of the type envisioned by Mr. Spencer was something he was not inclined to favor as it would add to the already heavy judicial workload. He also observed that there may not be any authority for a rule to govern pre-litigation conduct.

The discussion highlighted disagreement on many of issues, including the feasibility of presumptive limits on custodians subject to preservation and whether a rule should specify the sanctions available to judges. If a small sample of judges and practitioners from the same judicial district cannot agree, it is no surprise that judges around the country have come to very different conclusions.

Addressing the Duke Conference ideas, Magistrate Judge Peck questioned whether a rule would truly improve on the current situation, considering that the court's judgment would still be applied after preservation decisions were made by the parties.

Magistrate Judge Francis endorsed Mr. Spencer's idea, noting that the pre-suit petition process provides for more careful tailoring than a blanket rule could. He also felt it was important not to match specific levels of culpability with specific sanctions in a rule. Rather, he felt it important for the court to be able to exercise discretion in this area.

Cooperation Is Key

All of the federal judges had strong words on the topic of cooperation that practitioners would do well to heed.

Noting that all of the judges on the panel had endorsed The Sedona Conference Cooperation Proclamation, Magistrate Judge Peck strongly condemned what he referred to as pro forma, or "drive-by" Rule 26(f) conferences.

He advocated the view that a proper, substantive meet-and-confer is an "insurance policy," that is, the "way to ensure that you won't get sanctioned." He noted that one aspect of conducting a meaningful meet-and-confer is to include negotiations over search techniques.

Judge Scheindlin noted that it is "very inefficient to not agree with your adversary" on e-discovery issues such as searching and the form of production. She advised lawyers who resist this approach to "get over it" because judges expect and demand cooperation. And, recognizing that the meet-and-confer process can prove frustrating for litigants faced with so-called "asymmetrical" cases—cases in which one party has no data and therefore little incentive to negotiate limits on discovery—Judge Scheindlin encouraged parties to engage the court early when the asymmetrical nature of the case was frustrating the objectives of the meet-and-confer rule.

Magistrate Judge Francis wondered whether it would be possible to impose a "systemic incentive" to cooperate. He cited as an example a pilot project in the United Kingdom where the judge and the parties agree on a discovery budget at the outset of a case.

Conclusion

The broad consensus in support of a preservation rule among the federal judges on the panel suggests that at some point in the future litigants may find preservation-related decisions easier to make.

The panelists recognized that preservation can be and often is an expensive exercise. They also recognized that one of the primary reasons for that expense is a need to preserve far more broadly than is perhaps strictly necessary in order to compensate for the large number of unknowns inherent in litigation, and that reducing the unknowns related to preservation would address much of the current problem.

1. The full panel also included Adam Cohen, senior managing director, FTI Consulting Inc.; Andrea Berner, vice president, The Miss Universe Organization; David Lender, partner, Weil, Gotshal & Manges; Mark Berman, partner, Ganfer & Shore, and a Law Journal columnist covering state e-discovery issues; and Paul Weiner, partner, Littler Mendelson. Before the panel discussion began, Judge Timothy Driscoll and Maura Grossman provided an update on the New York State Chief Administrative Judge's Working Group on E-Discovery.

2. Arguably, Fed. R. Civ. P. 37(e)'s "safe harbor" is a preservation rule. But, as many predicted, the rule has proven largely ineffective.

3. *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F.Supp. 2d 456 (S.D.N.Y. 2010).

4. *Orbit One Communications Inc. v. Numerex Corp.*, Nos. 08 Civ. 0905, 08 Civ. 6233, 08 Civ. 1195(LAK)(JCF), 2010 WL 4615547 (S.D.N.Y. Oct. 26, 2010)

5. A. Benjamin Spencer, "The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court" at 19, Washington & Lee University School of Law Legal Studies Research Paper No. 2010-15, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1696526 (last accessed 1/29/2011).