

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

To: Participants in Sept. 9 mini-conference on preservation and sanctions

From: Honorable David Campbell, Chair, Advisory Committee on Civil Rules
Professor Richard Marcus, Associate Reporter, Advisory Committee

Date: June 29, 2011

Re: Focus of discussion

Cc: Members of Discovery Subcommittee

Thank you again for agreeing to assist the Discovery Subcommittee of the Advisory Committee on Civil Rules in analyzing issues presented by preservation and sanctions. As you know, the mini-conference will be held on September 9, 2011, at a Dallas airport hotel. We are writing now to provide materials that will help you prepare for the mini-conference.

Along with this memorandum, you should also receive the following:

- (1) An outline of elements for a preservation/sanctions rule. The outline was prepared by a panel for a two-day conference the Advisory Committee held at Duke University Law School in May, 2010;
- (2) A study conducted by the Federal Judicial Center about motions for sanctions in 19 districts;
- (3) A research memorandum prepared by Andrea Kuperman, then rules law clerk to Judge Lee Rosenthal (Chair, Standing Committee on Rules of Practice and Procedure) about existing case law on certain preservation and sanctions issues; and
- (4) A memorandum entitled Preservation/Sanctions Issues, outlining and raising some questions about three possible rule-based approaches to issues of preservation and sanctions.

Following presentation of the Duke Panel recommendations, the Discovery Subcommittee was assigned to investigate a possible preservation/sanctions rule. The study conducted by the Federal Judicial Center and the research memorandum prepared by Andrea Kuperman were some of the steps taken by the subcommittee to evaluate the nature and scope of the preservation/sanctions issue. The memorandum outlining three possible approaches to such a rule was prepared as an investigative tool to consider possible ways to address the preservation/sanctions issue by rulemaking. The mini-conference is an additional step intended to educate the Discovery Subcommittee and assist it in developing possible recommendations for the full committee on preservation and sanctions issues.

Below are some questions that we expect to raise during the mini-conference; it seemed useful to put them before you in advance. It may be that some of you will want to solicit reactions from others about these issues; please feel free to share any of these materials with others as part of that process. Our goal is to get the most useful insights from the conference.

If it is of interest, we also attach as an Appendix a list of the Discovery Subcommittee members and the invited participants for the conference.

In the near future, you should be hearing from the Rules Committee Support Office with specifics about the hotel where the mini-conference will be held. We look forward to seeing you in Dallas. Please do not hesitate to contact us if you have questions.

Questions for discussion on Sept. 9

1. Nature and scope of the problem:

- To what extent are you finding that preservation of ESI is a problem in your organization or practice?
- What is the nature of the problem, and how are you addressing it?
- In what percentage of lawsuits or potential lawsuits is the problem arising?
- Are problems largely confined to very large, information-intensive cases, or do they arise in medium and small cases as well?
- What do the problems cost your organization and similar organizations on an annual basis?
- Where are the costs incurred -- in identifying and segregating relevant ESI, in storing ESI, in reviewing ESI before production in litigation, in litigating ESI issues in court, in other ways?

- Has Rule of Evidence 502 helped you reduce review costs? Why?
- Has technology helped you reduce review costs? How?
- Is the problem significantly different now than it was 5 years ago? Ten years ago? Why?
- Does the problem vary depending on the court where litigation is or may be brought -- various federal circuits? State courts? Why?
- Are preservation rules from other countries (e.g., EU rules) important to your preservation decisions? How do the rules of other countries compare to what you understand to be U.S. requirements? How do you cope with the differences?
- Has your client ever obtained, been denied, defeated, or been subjected to a serious sanction with regard to preservation? Do you think this decision was flawed for reasons that rule changes could solve?
- The FJC study suggests that spoliation of ESI is raised rarely in federal motions practice. Is that consistent with your experience?
- Are preservation issues for plaintiffs becoming prominent? Are the issues significantly different for individual plaintiffs and organizational defendants?
- Since 2006, Rule 26(f)(2) has directed that the parties discuss “any issues about preserving discoverable information” early in the case. Is that actually done in most federal-court cases? Does it help avoid or solve problems when it is done?

2. Technology issues:

- In the last few years we have seen an explosion of information potentially relevant to litigation. Will we see other explosions in the next few years? From what kinds of technology?
- How does the exploding use of social media affect litigation in general, and preservation in particular? For example, if employers monitor employee use of social media at work, or if producers of goods or services monitor social media discussions of their products, should that activity result in preservation of the material reviewed? Can prospective plaintiffs safely change their social media postings after they conclude they may have a claim?
- What implications will cloud computing have for civil litigation?

- What other technological innovations are likely to have a significant effect on litigation?
- How often do you attempt to preserve electronic information stored in sources other than information systems? Examples might include employees' personal computers, e-readers, "pad" devices, voice mail, smart phones and safety recording devices. Are there additional devices that might be involved?
Is there a significant cost associated with storing information preserved for litigation? If so, what is the nature of the cost? In 2000, during a mini-conference about E-Discovery, a prominent lawyer asked rhetorically "Why don't you keep all ESI forever? Storage costs no longer are a problem, so why not do that?" How would you answer that question today?
- How will technology help reduce the costs of dealing with ESI in litigation over the next few years?
- What other technology-related issues should the Committee have in mind if it attempts to craft a preservation/ sanctions rule?

3. Possible solutions:

- We would appreciate your careful review of and comments on the three proposed approaches to a preservation/sanctions rule described in the Preservation/Sanctions Issues memo, as well as the questions included in the three proposals.
- Which of the three approaches do you find most promising and why? Least promising and why?
- Is there a fourth approach we should consider?
- How would a rule help you solve some of the problems you identified in category 1?
- How would a rule help reduce some of the costs you are incurring?
- Are cost savings more likely to be achieved through advances in technology than through a rule of civil procedure?
- Would a federal rule solve problems you now face, given that there may remain uncertainties in state law and procedure? Could a federal rule help reduce those uncertainties, perhaps by providing "leadership" for state courts and rulemakers addressing similar issues?

- Do you encounter spoliation claims that are resolved without motion? Does that informal resolution impose significant costs? Is there a significant risk that promulgation of a federal rule on preservation and sanctions would result in a significant increase in spoliation motions? If so, will the cost of such a development be outweighed by the benefits to be derived from a preservation/sanctions rule?
- What are the three most important elements of a preservation/sanctions rule in your view?
- Do all agree that culpability should be required for serious sanctions? What standard of culpability (e.g., negligence, “gross negligence,” recklessness, purposeful efforts to destroy evidence) should be the minimum for imposition of serious sanctions? Should serious sanctions be forbidden in all cases in the absence of such culpability? Should such sanctions be forbidden even if the failure to preserve severely compromised the opposing party’s ability to put on a case?
- Should significant and proven harm to a party’s ability to litigate the case be required before serious sanctions are imposed? How can that harm be demonstrated if the lost material is no longer available?
- What sanctions are serious enough to be limited in the absence of culpability? Are all adverse inference instructions on that list? Would refusals to permit a party to call a given witness or use a certain piece of evidence always be on that list? Can we devise a hierarchy of sanctions’ severity that will demark where the seriousness requires culpability of a certain degree?
- What other thoughts or suggestions do you have for the committee?

APPENDIX

LIST OF PARTICIPANTS
Sep. 9, 2011, mini-conference
Dallas, Texas

Representing the Discovery Subcommittee:

Hon. David Campbell (D. Az.) (Chair)
Hon. Michael Mosman (D. Ore.)
Hon. Paul Grimm (D. Md.)
Elizabeth Cabraser, Esq.
Anton Valukas, Esq.
Prof. Edward Cooper (Reporter, Advisory Committee)
Prof. Richard Marcus (Associate Reporter, Advisory Committee)

Invited participants

Thomas Allman
Retired General Counsel, BASF Corp.

Jason Baron
National Archives and Records Administration

Theresa H. Beaumont
Google, Inc.

William P. Butterfield
Hausfeld LLP

Bart Cohen
Berger Montague

Prof. Gordon V. Cormack
University of Waterloo

M. James Daley
Daley & Fey LLP

Alex Dimitrief
General Electric Co.

Memorandum to mini-conference participants
Page 7

Andrew P. Drake
Nationwide Insurance

Hon. John M. Facciola (D.D.C.)

Yvonne Flaherty
Lockridge Grindal Nauen, P.L.L.P.

Maura Grossman
Wachtell, Lipton, Rosen & Katz

Gregory Joseph
Law Offices of Gregory Joseph

Robert Levy
ExxonMobil

Hon. Nan Nolan (N.D. Ill.)

Robert Owen
Sutherland, Asbill & Brennan

Ashish Prasad
Discovery Services LLC

John K. Rabiej
Executive Director
The Sedona Conference

John Rosenthal
Winston & Strawn

Hon. Shira Scheindlin (S.D.N.Y.)

Donald Slavik
Robinson, Calcagnie & Robinson

Allison C. Stanton
U.S. Department of Justice

Ariana Tadler
Milberg

Memorandum to mini-conference participants
Page 8

Mark Tamburri
Univ. of Pittsburgh Medical Ctr.

Kenneth J. Withers
Director of Judicial Education and Content
The Sedona Conference