

Source: Digital Discovery & e-Evidence: News Archive > 2013 > Latest Developments > Conference Report > Rules of Procedure: Georgetown's Advanced eDiscovery Institute Debates Merits of Proposed Changes to 37(e)

Rules of Procedure

Georgetown's Advanced eDiscovery Institute Debates Merits of Proposed Changes to 37(e)



By Tera E. Brostoff

Nov. 26 — At a Nov. 22 panel titled “ The Great Debate: Is the Harbor Any Safer Under Proposed New Federal Rule 37(e)?,” Chair Emeritus of the Steering Committee for the Sedona Conference® Working Group 1 Thomas Y. Allman led panelists

Ariana Tadler, of Milberg LLP, and Robert D. Owen, of Sutherland Asbill & Brennan LLP, in a discussion about the new changes to 37(e) and the amendments' implications for eDiscovery practice.

Allman opened the session with an overview of the proposed new structure of Federal Rule of Civil Procedure 37(e), as well as a brief history of the rule's conception, beginning at the 2010 Duke Conference (13 DDEE 593, 11/21/13). Allman stated that he and Tadler were hoping to file a comment on behalf of the Sedona Conference® within a week.

Panel Discusses Duty to Preserve in 37(e)

As for the content of the rule, Allman de-constructed the proposed amendments into bite-sized chunks for Owen and Tadler to discuss. Allman first noted that the Advisory Committee chose not to define the parameters of the duty to preserve in Rule 37(e), and, instead, provided factors for the court to consider as they determine whether a party engaged in sanctionable activity. He reported that a witness at the Nov. 7 public hearing in Washington, D.C., observed with regard to that issue, “the rule will not reduce my over-preservation because you did not define what I need to do to meet the duty to preserve.”

Allman turned the conversation over to Owen and Tadler to address if the witness' concern was valid.

Owen said he could not confirm the validity of her fears, but did say that the rule, if adopted with a few tweaks, would allow his clients to make good faith judgments about which custodians to put on hold, and the time and scope of those holds. Owen opined that the new rule would reduce over-preservation somewhat, in that instead of putting entire departments on hold, he could feel secure in simply putting specific team members on hold.

Invitation for Sloppiness?

Tadler questioned whether the new rule could breed potential for “sloppy behavior.”

“I'm very concerned this is a rule for the after-affect,” Tadler said. “This rule doesn't change the preservation responsibilities in any way.”

Tadler proposed three actions that would have an effect on an attorney's ability to comply with the duty to preserve appropriately. First, she stated that attorneys and clients need to properly manage their data. Second, Tadler advocated for a more confident approach from parties who are making efforts to comply with the duty to preserve.

“The players in litigation continue to refuse to have a defensive process,” Tadler explained. “Put something together [in terms of preservation] and be confident that what you did was OK!”

BNA Snapshot

Key Takeaway: Thomas Y. Allman led a panel at the Advanced eDiscovery Institute that presented two views of the impact of the proposed changes to Federal Rule of Civil Procedure 37(e).

Lastly, Tadler advised attorneys and parties to have an open dialogue with their opponents.

Owen added that there is a consensus that one national standard for preservation is needed. However, he disagreed with Tadler's concerns with rule's potential for promoting sloppiness.

"As far as this rule encouraging sloppy behavior, businesses manage their own data for business purposes ... to suggest that they would no longer do that and take advantage of some loophole in spoliation law is misguided and wrong."

He noted that for years, the safe advice has been to "save everything," in direct contrast to Tadler's statement that attorneys should be confident and take risks.

"I respect people that after assessing the risk, they don't take any chances," Owen said. "I'm of the view that the law is not clear right now."

Owen compared his and his clients' position to that of a motorist, who, not knowing the speed limit—but knowing the risk for going over it is capital punishment—drives 20 miles per hour under the limit.

The Role of the Five Factors

In light of the various concerns regarding the new rule, Allman asked the panelists to consider whether the factors would be helpful in determining one's preservation duty.

Owen said the factors are a help, and that they enshrine in the rule considerations that attorneys already apply.

"The factors start shedding some light for those people who are perhaps not as attuned to the issue," Tadler said. "My concern is that, as written, if you have someone who is a lawyer and a literalist they may read those factors as exclusive."

Tadler noted a lack of clarity exists, and that the rule either needs a lengthier list of factors, or the factors should be confined to the Committee Note.

Does 37(e) Trump the Court's Inherent Power?

Allman then switched gears to focus on a topic he himself commented on at the Nov. 7 hearing—the issue of inherent power. Allman asked the panelists to discuss whether the new rule trumps the court's inherent power to sanction.

"I don't think it can," Tadler said. "I am concerned about the constant and persistent emphasis to further delimit or limit a certain level of inherent authority."

Tadler said she understood why people want a consistent rule for the purposes of sanctioning, but she does not agree with the constant push to limit court power.

"We have phenomenal judges who sit on the bench and they hear all types of cases and have certain experiences that enable them to consider these various situations," Tadler said. "And I know Bob disagrees with me vehemently."

Owen did disagree, stating the "whole preservation regime" has been created by judges in individual cases. Owen said he applauded the effort to put into place the beginnings of a rule-based solution that would displace the court's inherent authority.

Allman also asked the speakers to discuss curative measures, which he said was "in some ways the heart of one of the key parts of the rule." Allman said witnesses argued that the curative measures section shifted the focus of the rule from sanctions to remediation.

"The committee felt compelled to clarify what the court can do," Tadler said. "It seems patently clear

New Rule 37(e) Factors for Determining Sanctionable Behavior

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;

(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

to me that if something has been destroyed, there should be some effort to find out [if] there was prejudice.”

Owens said attorneys have to get away from the system being a “gotcha!,” in which parties and lawyers are sanctioned as soon as they’ve lost something negligently.

As for the *Silvestri* exception (named for *Silvestri v. General Motors Corp.* 271 F.3d 583 (4th Cir. 2001)), which allows judges to impose sanctions based on an “irreparable deprivation” showing), Owen said he would like to see the exception dropped, or, at the least, limited to tangible items (like the automobile in *Silvestri*). Owen said he could not foresee any fact pattern in which the destruction of documents or ESI could cause the type of prejudice described by the exception.

Future Hearings and Submitting Comments

The next public hearing will take place on Jan. 9 in Phoenix.

The final hearing will be held on Feb. 7 in Dallas.

Comments on the proposed amendments can be submitted by U.S. mail to the following address: Committee on Rules of Practice and Procedure Administrative office of the United States Courts, One Columbus Circle NE, Washington, D.C., 20544. Comments can also be submitted online at <http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002>. The incoming comments will be publicly posted at <http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments/civil-rules-comments.aspx>, and a link to them is available on the eDiscovery Resource Center.

Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committee, told Bloomberg BNA Nov. 26 that comments will not be accepted by e-mail.

To contact the reporter on this story: Tera Brostoff in Washington at tbrostoff@bna.com.

To contact the editor responsible for this story: Carol Eoannou at ceoannou@bna.com.

Contact us at <http://www.bna.com/contact/index.html> or call 1-800-372-1033

ISSN 2324-9471

Copyright © 2013, The Bureau of National Affairs, Inc. Reproduction or redistribution, in whole or in part, and in any form, without express written permission, is prohibited except as permitted by the BNA Copyright Policy. <http://www.bna.com/corp/index.html#V>