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Rulemaking and E-Discovery: Is There a Need To Amend the Civil Rules?

Cover Page Footnote

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CONFERENCE ON ELECTRONIC DISCOVERY

PANEL SEVEN: RULEMAKING AND E- DISCOVERY: IS THERE A NEED TO AMEND THE CIVIL RULES?

MODERATOR

*Myles V. Lynk**

PANELISTS

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PROF. LYNK: This panel will begin to sort of institutionalize the discussion that I know we've all been having individually and generically: really, is there a need to amend the Civil Rules? In light of the previous discussions we've heard, is rulemaking the appropriate device to address these issues?

When discussing whether or not amending the Rules is necessary, I'd like to frame that discussion a little differently. I would like to frame it as: Would amending the Civil Rules be helpful?

I say that because, depending on how one defines "necessary," you can always say that something isn't necessary. The litigation process will go forward, the federal common law will develop in this area, parties will propose private solutions in individual cases, and that will be the law.

The question is whether that is the best way for the law to develop in this area? Would it be helpful to have a national standard, even if

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that national standard was a national baseline, if you will, or default in certain areas, subject to modification by the parties with the approval of the court in different cases?

So would amending the Rules be helpful? At present, we have no national uniformity in this emerging area of electronic discovery, what I like to say is the production of data or information that is stored electronically.

We do have a number of judicial opinions, primarily from the U.S. district court and U.S. magistrate judges. Many of those opinions, some of which have been discussed previously, are very learned and scholarly, but while they may have persuasive force, they are not precedent for other district judges and they certainly do not have the weight of precedents of a circuit court or Supreme Court opinion in this area.

At the same time, we have seen that local district courts, at least four U.S. district courts, have promulgated local rules in this area. It is likely that other U.S. district courts will promulgate local rules in this area. Do we want local rules in the absence of a uniform national rule to which those local rules must conform? As we have seen under the Federal Civil Rules, local rules develop where you have Civil Rules to fill in the gaps or to apply a national standard to a local situation. Is the alternative really preferable, where we have no national standard but local rules developing?

On the other hand, at least two arguments, I think, have been made throughout the conference with respect to the need, if you will, for national rulemaking. One is that it's just not necessary, and so we're getting back to the necessary/helpful dichotomy. But the theory is if these issues only arise in a few cases, the mega-electronic document cases, five percent, then it is not necessary because to the extent those cases arise before a district judge or magistrate judge, it will be unusual and the unusual should be dealt with ad hoc, either the common law development of judicial opinions or by local rules.

The other argument that we have heard, I think, is that technological change in this area is so rapid that we must be careful to craft rules, if we craft them at all, that are flexible enough to accommodate technological change, that do not focus so narrowly on a specific technology that they become out of date.

My favorite example of that in the current Rules is in Rule 34(a), Definition of Documents, the reference to "phonorecords."¹ I talk to my students about that and I ask them how many of them know what a phonorecord is, and each year it gets fewer and fewer. I know that the day when I am the only one in the room who does know what it means that will be the day I should retire.

1. Fed. R. Civ. P. 34(a).

With that in mind, I'd like to begin by asking Allen Black from Philadelphia—by the way, what we're going to do is we are going to ask each one of the panelists to comment on specific proposals or specific rules that have been either proposed in our memo or as they've been discussed, and after the panelist to whom I will pose the question responds, the other panelists will have an opportunity to comment as well.

We are going to begin with the question of whether or not we should codify in the Rules a requirement that counsel discuss these matters in their own pretrial 26(f)² conference, in the conference before the court at 16(b),³ and in the Form 35⁴ discovery plan they submit.

Allen, you've heard the arguments pro and con. What do you think?

MR. BLACK: I think it's almost a no-brainer that yes, that should be a required topic of discussion.

I find myself in an unusual position, because usually I come to these conferences and say, "No, no, no, don't fix it, it ain't broke." But I come here thinking, and after the discussion here I continue to think, that we absolutely must deal with electronic information and other technologically stored information, if for no other reason than it's just embarrassing to have the premier set of Rules of Civil Procedure in the United States that don't even seem to acknowledge that computers exist at a point in time when some huge proportion of information in the world is stored on computers and dealt with by computers. By the time a rule is enacted, and shortly thereafter, we are going to get to the point where almost everything is going to be electronic.

The local township where I live out in the country in Bucks County, Pennsylvania, just went paperless. It's astounding. So we've got to deal with it.

The particular area of putting it on the checklist of "must discuss" items is a no-brainer to me because I don't see how it can possibly do any harm. And it fulfills, or would begin to fulfill—it seems to me one of the very basic, but often forgotten in these high-powered conferences—functions of the Federal Rules, which is to help practitioners who are perhaps doing their very first case in federal court and are unfamiliar with these things to be alerted to what the important things are, what the important issues are. People who are not from the biggest law firms in the country dealing with the multibillion-dollar cases every day, when they get a client in the door

2. Fed. R. Civ. P. 26(f).

3. Fed. R. Civ. P. 16(b).

4. See Fed. R. Civ. P. 35.

who has a federal case, they pick up the Federal Rules and that's where they start to look.

So to me it seems that the Committee should keep that in mind, centrally in mind, in thinking about what to do about electronic discovery, that you need to put something in the definition of "documents" or discoverable material⁵ that says it includes electronically or otherwise technologically stored material. And you need to deal with some of these basics.

With respect to the argument that things are moving so fast that we can't possibly keep up with them, therefore we should do nothing, I don't buy that. I think we have to do something. I think what that argument cautions, and cautions properly, is that we should not attempt to do anything too specific.

I had lunch yesterday with Harris Hartz and Dan Regard. Dan is a consultant in this area. He told me, "You know, in five years there aren't going to be backup tapes, so you better not phrase a Rule in terms of backup tapes." He'll tell you about it. I won't go into it now because I'll get it wrong and it will take too long.

But when we do move into the twentieth century with the Rules, or maybe even the twenty-first, if we're lucky, we've got to be careful to do it in a way that's general enough that doesn't get into those kinds of phonograph record problems.

PROF. LYNK: Any other comments?

MR. WELLS: Let me just add, I come to this with the idea that the Rules Committee should heed the physicians' first rule, which is "do no harm." I don't see any harm in adding this to Rule 16 and Rule 26. I think it in fact would be useful to a practitioner in an appropriate case to think about what are you going to do about electronic discovery and include it in the report. I think if you go beyond that you may be treading into the area where you may do some harm.

PROF. LYNK: Carol?

MS. POSEGATE: I might just add a word of caution. I perhaps would be a little slower to move in the direction of incorporating language which specifically addressed electronic data simply because I think we need to always view the Rules in terms of long-term existence and service to the practicing bar.

I suspect many of us in this room completed our law school training at a time when computers were not even something we thought about, much less cell phones and everything else that has changed our life. Our children, on the other hand, can't imagine a world without these things, and everything that they do is computer related. So many of us are probably struggling with a lot of definitional issues that are not going to be an issue down the line.

5. See Fed. R. Civ. P. 34(a).

So while I would not be averse necessarily to consideration, I do think we have to think in terms of the longer timeframe.

PROF. LYNK: Let me just follow up that comment with sort of a devil's advocate question for the panel. How do you respond to the argument that by adding items to the checklist you trigger lawyers' thoughts: "Well, you know, I hadn't thought about asking for their computer tapes, ah, but now this is something I should focus on"?

MR. BLACK: Good thing. It's a good thing.

MS. HECKMAN: I also think the lawyers really have thought about it, and it is helpful for the court. I mean I can say as a former magistrate judge the more early planning you do on a case, the better you can administer that case. The more subjects you have to cover, the more you do cover in your 16(b) conference and in your pretrial orders.

Getting that out on the table and discussing it—I mean if it is a surprise to someone, it shouldn't be. They should be thinking about it. Just as you want early discussion of settlement, an early discussion of some of your unique discovery problems is completely appropriate. If you put it in a rule, it certainly doesn't do any harm.

If it later turns out that technology has overtaken the utility of such a rule, you can take it out. But right now it's an issue.

PROF. LYNK: Okay.

Let me stay with Carol Heckman for our next question. We saw significant discussion about the efficacy of defining electronic documents in Rule 34(a). First of all, can you do it in a way again that is helpful and useful, and then should you do it?

Related to that is the Rule 33 interrogatory requests.⁶ How does that interact with the definition in Rule 33?

Are we treading into deep water if we begin to try to define what we mean by e-documents or electronic discovery, or is that a necessary predicate to anything else we do in this area?

MS. HECKMAN: Where I come down on that is if all you are doing is adding to a definition, I don't think I would bother. On the other hand, if you are altering or substantially changing a rule otherwise with a substantive change, such as a safe harbor provision, then obviously you do need to consider whether you need to define it in order to make your substantive alteration make sense.

I am not too excited about just changing the definition and making no other changes. I think that in practice attorneys routinely understand that evidence that is introduced in the courtroom, whether it is electronic or hard copy, still has to be subject to disclosure. I can't imagine attempting to offer into evidence an e-mail at trial and the other side objecting on the basis that it has not been disclosed, and me

6. Fed. R. Civ. P. 33.

arguing to the judge, “Well, but it’s not a document.” It would never fly.

And I also know routinely in all discovery demands that I issue and I receive we define “documents” to include e-data. So I don’t think there is any lack of uniformity, I don’t think there is any lack of predictability.

When I think about a rule change, I think, well, is it helpful to facilitate litigation? Is it necessary to provide predictability and uniformity across different districts? And does it provide judges with the flexibility they need in order to exercise their discretion and reach a just result?

I don’t think there is anything in the definitions alone that really requires any of that, unless you’re changing some other aspect of the Rules.

PROF. LYNK: Okay. What about —

MR. BLACK: Myles, could I just jump in on that?

PROF. LYNK: I’m sorry, Al.

MR. BLACK: I would have thought so too, until I heard that shocking statistic yesterday that 65% of the people surveyed, companies surveyed, said that when they got hit with a lawsuit and sent out a document hold instruction they did not include electronic information in that. That was shocking to me. It tells me that Rule 34 has to say “electronic information.” It’s just got to say it, so that when the outside counsel looks at it and the general counsel looks at it, that 65% goes down to three percent, which is where it ought to be—two percent.

PROF. LYNK: One of the issues the Committee has been wrestling with is the extent to which, for counsel and for the courts, the evolution of document to data is taking place. That is to say, the Rules focus on the discovery of documents because they focus on discovering those tangible items from which discoverable information can be ascertained, whether it is a photograph or a written memorandum or something like that.

In an electronic era, we are focusing on the actual information itself because it can exist and then you download it onto something that’s tangible, but it is the information itself that is the focus.

Should the Rules reflect that by reflecting a change, for example, from “document” to “data”? Would that be helpful or is that moving too far ahead of where practice is today? Carol?

MS. POSEGATE: I think you have to be concerned with the mixture of cases that typically one finds in a federal district court’s docket calendar.

I think comments have been made previously here, and I would like to reiterate, that the cases that have consumed much of our discussion are these very large cases involving hundreds of thousands of

documents, if not millions of documents. And indeed those cases get a great deal of attention, but the majority of the cases that are on a federal docket tend not to be of that sort, particularly in areas such as the one where I practice, which is the Central District of Illinois. At any given time there may be two or three very significant cases and then there is a whole quantity of cases that are more routine in nature.

I think, if I am not mistaken, that the number two variety of cases found in the federal docket on the civil side are the employment law cases, many of which involve a single plaintiff complaining of some wrong in the workplace, and those cases do not involve typically the kind of volume that we are discussing here. So we have to be mindful of that when we talk about revising a rule.

PROF. LYNK: Tom, in the discussion yesterday one of the panels focused on the burdens of production and the fact that in a world of e-discovery, in a world where you are looking not just for, say, active data, which is the data that is in use, but also backup tapes and material which have been stored, that the burden of production on the producing party can be significant. It can be a burden in two ways: (1) the cost of accessing the data, although our technological consultants tell us that that cost of production may actually go down; but (2) the cost of review, reviewing for privilege and relevance millions of documents and millions of bytes of information.

Can the Rules properly draw the balance between the burden to the producing party and the value to the requesting party? Do the Rules already properly draw that balance with respect to discovery generally? Or should we have a rule that in addition to those general requirements focused on the specific issues involved in electronic discovery?

MR. WELLS: Well, Myles, you've done a pretty good job, like Ed Cooper, of asking about four questions in one.

In terms of the privilege review, let me start there. That reminds me, I was on a Delta flight the other day, and the flight attendant made the usual announcement when we landed, "Be careful when you open the overhead bins, items may have shifted during flight," and then he added, "We all know shift happens."

You know, that is sort of how I view the inadvertent privilege idea, shift happens, and it is going to happen more with more documents.

However, in looking at the privilege issue—you know, I thought I was here for a Civil Rules Advisory Committee and it turned out I was here for an Evidence Rules Advisory Committee—I do not think that you can deal with inadvertent privilege issues in the Civil Rules. I think that is a broader question.

I think a better way to do it if you are going to do it is to put it in a case management order, to do it up front, to do it with a court order that says, "If you want to do a 'quick peek'"—and, quite frankly, I think the "quick peek" gives something in big, huge document cases

to both sides, because, like Steve Susman said, when you get down to it, there are only ten or twelve documents that ever matter in a case, no matter how many documents are produced—unless you are just dealing with statistics, and then you just do a data compilation and then it's one document that shows all the data compilation.

So I think it is better to deal with that type of issue in an initial case management order. It gives the plaintiff the idea, "Look, I get a quick look at the documents." I know when I'm a plaintiff that I don't want to go through 100,000 pages or one CD-ROM having to look at every page. What I want to find are the ten or twelve documents and then dig in, drill down on those documents.

So I think the case management order is a better place for doing that, and that is probably why I come down more on the side of dealing with electronic discovery primarily in the areas of Rule 16(b) and Rule 26(f), making the parties report to the court on if you are going to have electronic discovery, how you are going to do it, what are going to be the parameters.

The issue of the burden, and the whole backup tape idea, it is a real issue. It is a real burden. It is hard to go tell a client that, "You've been sued in Mississippi and they are asking for all of the documents from every insurance agent of whatever insurance company all across the United States. You have to send out an e-mail telling them to basically freeze their computers." But that is going to happen.

The inaccessible materials—you know, what is inaccessible today is probably going to be accessible tomorrow; if not tomorrow, probably next week. I think it is short sighted to try to write a rule with backup tapes in mind. I am afraid if you do, you will look like the Rules do now dealing with phonorecords. You know, in ten years you ask somebody what a backup tape is, they are going to look at you like you are from Mars or something.

So I think it is going to be very difficult to draft anything that really gives relief, that is in fact a safe harbor in terms of what you have to do to produce, other than dealing with it on a case-by-case basis in a case management order.

PROF. LYNK: Okay. And so I hear you say that the current Rules, in Rule 37 and in Rule 26, already provide the courts with the tools and the flexibility to deal with the balancing that must take place when the producing party alleges that the burden of production is far greater than the value of production.

MR. WELLS: I think the courts have the authority now to deal with it. I have looked at the various formulations, and I am not sure that the formulations I have seen do a whole lot in terms of relieving the burden or really create much in the way of a safe harbor.

PROF. LYNK: Okay.

MR. BLACK: Myles, I think that the Committee can draft conceptually and avoid the backup tapes/phonograph records kinds of

issues. The concept, it seems to me, is that information that is reasonably available and recoverable ought to be made available routinely. Information that exists but is not recoverable or available within reasonable effort and expense ought to be subject to some other rule, and that might be good cause, it might be cost-shifting, it might be a combination of that; it might be some sort of marginal utility analysis.

But it seems to me the concept that has come out of this weekend's discussion, and otherwise, is pretty clear: that information—whatever it is, metadata, embedded data—whatever is reasonably available within reasonable cost and effort, ought to be fair game and turned over at the expense of the producing party; and whatever is not reasonably available with reasonable cost and effort—and that leaves the flexibility there, as technology changes and everything else, to decide what is “reasonable” and what is “reasonable effort.”⁷

I do agree that 26(b)(2)⁸ provides good guidance on the cost/benefit analysis. I don't think that needs to be specified. But I think there probably does need to be something in there about “reasonably accessible or available data.”

Theoretically, you have that with paper discovery too. I wrote a draft, I threw it in my trash bucket, the janitor came around and took it out; it was then taken to the landfill, where it was logged in, so you can figure out where in that landfill, at least within some general parameters, that draft is.

We have not gotten to that degree of craziness with paper discovery because it is so much more difficult, but I do think you need to deal with that “accessible with reasonable effort” kind of issue.

PROF. LYNK: But then you would craft sort of a “reasonably available” standard for electronic discovery or electronic data that is different from the standard for—for example, would this place the burden on the plaintiff of having to show that the data is reasonably available, or the burden on the defendant or the producing party to show that it is not reasonably available and therefore should not be subject to —

MR. BLACK: Sure, I would think it would have to be the latter. They are the ones who have the information. As technology goes along—you know, for every ten-year period everybody is going to know that backup tapes are tough and optical disks are not and so forth, and ten years from now it is going to be something else. But people will know after a few cases what is and what is not easy.

PROF. LYNK: Okay.

Carol, Tommy talked a little bit about safe harbors, and we now address whether we should craft a new rule, Rule 34.1, or whether we

7. Fed. R. Civ. P. 26(g), 37(c).

8. Fed. R. Civ. P. 26(b)(2).

should amend Rule 37,⁹ to explicitly provide for protection for producing parties, parties that have a lot of electronic data that may be subject to discovery, such that they can continue to avail themselves of good business practices, which may include some routine document destruction, without fear that that could subject them to sanctions in civil litigation.

Again, do you think that from what we've heard there is a need for such a crafting of a rule in this area, which would be available for electronic data and not necessarily available for print data or other forms of documents, or do you think that this is perhaps an area where technological change may overtake any particular rulemaking?

MS. POSEGATE: I am not presently persuaded that Rule 37 needs to be amended to deal specifically with electronic discovery. I would state at the outset that as we talk about electronic data it is important to remember that however information is recorded or retained, it is still information, and the discovery process is about the gathering of information.

There is nothing in the language of Rule 37 which would suggest that the authority of the court is any less to deal with issues of electronic discovery than it is any other forms of discovery. And I frankly think that the courts have full discretion at this point in time to deal with whatever issues might present themselves for considerations of sanctions with respect to electronic discovery.

I've gathered from the discussions of the last two days that there would be in all probability a consensus here that if there were deliberate conduct on the part of a plaintiff or a defendant in the destruction of relevant information or other alteration of that information, that under most circumstances a judge should or would consider appropriate sanctions for that conduct. There might be certain circumstances where, because of other factors, a judge would decide that that was not an appropriate course of action. But the discretion should lie with the judge.

I listened as we discussed certain cases about whether or not courts should intervene or impose sanctions. The questions that came immediately from the audience were: "Well, we need to have more information. What about this . . . what about this . . . what about this?"

I think probably sanctions, as much as any area addressed by Discovery Rules, require that there be that exercise of discretion by a court, particularly if you get to circumstances where you have something that falls short of intentional or conscious effort to either destroy or otherwise alter information. I think then it is particularly important that the court have the authority, unrestricted, to make the

9. Fed. R. Civ. P. 37.

proper inquiries to determine whether or not there is an appropriate basis to sanction conduct, and, if so, what that sanction should be.

So at this point in time I would suggest that Rule 37 not be amended.

PROF. LYNK: Okay.

MS. HECKMAN: I'd like to give a little counterpoint to that. It's interesting how my perspective on this has changed after leaving the bench and going back to practice.

As a court, you get parties in with disputes, and the dust is kind of settled and the issues are clear, and they come in. The court wants flexibility. The judge wants to have discretion to call the shots—"What's the problem? Let's get specific. Okay, what's the cost involved? What is this going to take? Let's be pragmatic and let's get a quick decision."

But when counseling corporations, which is what I do now, you've got to rewind all that and think about what is going on two, three, four, five years before that, where you are sitting down with a general counsel of a company and there is definitely a duty to preserve that has arisen. It can be a government investigation, it can be just a claim, it can be a lawsuit.

A lot of these companies, as we've heard, are subject to ongoing litigation. I have one client who is regularly sued for some of their medical products. They manufacture a laser that is used in eye surgery.

MR. BLACK: Isn't that nice that they're regularly sued?

MS. HECKMAN: So we are sitting, having the conversation about what we have to preserve. And what if we make a mistake in the way that we decided what to preserve and what not to preserve? Can we do this by employee? Can we do this by department? Is it enough to just print out the e-mail or do we have to actually save the electronic copies of the e-mail? Do we have to save the backup tapes?

You get into all those discussions and you try to make reasonable decisions based on what you believe the scope of this litigation is likely to be. But we all know when we get into court and we get right up to trial—and this especially happens in patent cases, but it happens in a lot of cases—the issues sharpen and they morph and they change. And you get to trial or you get in front of a judge after a suit is filed and you're really looking at kind of a different landscape, and meanwhile you have made decisions two or three or four years before that are based on a different set of assumptions.

Then you come in and you look at the law on spoliation. There are decisions all over the place. There is unintentional conduct that is on occasion sanctioned. There are mistakes that have happened that have been sanctioned. It is not uniformly true that only intentional conduct results in spoliation awards.

I think that is a real problem. I really think the Rules ought to take a look at that because I think that litigants are entitled to some predictability, they're entitled to some uniformity. Lawyers have to be able to advise their clients.

And some kind of rule of reason would not take flexibility away from the judges. If there was a rule that said, "If you acted reasonably in your decision as far as what records to retain, then you shall not be sanctioned or there shall not be a spoliation order against you, unless perhaps some other circumstances are present." Something like that it seems to me would really help litigants a lot.

And it is a problem, because it does create a lot of cost. What I see is companies taking the most conservative possible approach to preserving documents. And then you've got the general counsel who is having this discussion with the CFO, who is saying, "Come on, we've got to operate a business here"; and the general counsel is saying, "Yeah, but I'd really hate to see anything bad happen. We can't predict here what is going to happen."

I think if the cost of litigation goes up, in general people's access to the court goes down. I think that is a shame. I think that the courts should be available to resolve disputes at a reasonable cost.

The arguments that I have heard these last couple of days on this issue that go the other way are not convincing to me, frankly.

Someone suggested yesterday that the Rules would be misused by the attorneys. If that is the case, Rule 11¹⁰ is already in the Rules. I think we have to assume attorneys and companies are not going to misuse the Rules.

People have suggested the case law is sufficient. I don't think in this area of spoliation that the case law is sufficient. It is very hit-and-miss; it is very factually driven; it is very hard to read it and come away with some real guidelines that you can discuss with your clients.

I don't think having it done in the local rules is an answer, because frequently these companies have litigation all over the country, and even beyond, so having a different rule perhaps in each district court does not really solve the problem.

The argument that we should take the long view and this problem will go away—I don't think it is going to go away. You can define it as the retention of any kind of record, whether it is an electronic record or a hard-copy record. That is something that has been with us since we have had litigation.

We have heard the argument, don't limit judicial flexibility. My answer to that is if the standard were one of reasonableness, then you are not limiting judicial flexibility.

10. Fed. R. Civ. P. 11.

PROF LYNK: One of the interesting things to note is the context within which this rulemaking discussion takes place. Many federal courts—I'm thinking of the District Court of the District of Columbia, the division in Tucson of the U.S. District Court for Arizona, for example—are virtually paperless today, and they are receiving and filing documents. Many federal agencies define electronic communications, electronic data, in their definitions of material that regulated parties need to file—I'm thinking of the SEC. The National Archives and Records Administration has done a tremendous amount, as its statutory charge requires,¹¹ in defining for the Executive Branch and the federal government electronic communications, electronic data.

This goes back to something Allen said. Is it anomalous for the government and for the courts in other guises to be addressing these issues whereas the Federal Rules do not currently provide guidance either to the courts or to parties with respect to these issues?

Whatever technological change there may be, I think it is clear that this is an area that is not going away. It may get more complicated, although I suspect in some ways it will get simpler. I think the question of backup tapes may in fact—if that disappears, I think the access to information will be easier. The question under Rule 26,¹² though, will always be whether this is relevant and should it be produced because it is relevant?

Tommy, looking ahead, how do you see the environment within which the courts and civil litigants operate affecting the need or advisability of Civil Rule changes?

MR. WELLS: I think—well, let me back up and maybe not quite answer that question, Myles, but speak to the issue of codifying, or attempting to codify, in the Rules what I consider to be best practices. I think that is generally a bad idea, because what is a best practice today may not be a best practice next week or next year. And, given the timeframe for the Rules process, quite frankly, you cannot amend a best practice—or a rule, if you've got it in the Rule—in time to keep it up-to-date.

I think a much better way to handle it is the way, for example, the Civil Discovery Guidelines that the ABA Litigation Section is putting together and amending.¹³ Those try to be a best practices guide. They can be amended relatively quickly. They were adopted in 1999; they are probably going to be amended in August of 2004 yet again. And those are some guidelines on, for example, the duty of preservation:

11. See 44 U.S.C. § 2107 (2000).

12. Fed. R. Civ. P. 26.

13. Litig. Section, Am. Bar Ass'n, Civil Discovery Standards (Aug. 1999), available at <http://www.abanet.org/litigation/taskforces/standards.html>.

What do you have to preserve? What is a best practice to tell your client they have to preserve?

I think Carol's idea of the court using reasonableness is a good one, but I think you don't need it in the rule, you just need the court to look at things like the Civil Discovery Guidelines, to say, "If you follow that, you are not going to be in a spoliation case later."

The other thing I think in terms of spoliation—we've talked a lot about it, but, quite frankly, in the electronic age somebody would be a lunatic to try to destroy evidence, because you can never get rid of the damn stuff. You know, I delete something from my computer and it is hanging out there in cyberspace somewhere; it is little bits and bytes in areas of my computer that I cannot find and I can never erase. The only way you could ever get rid of it is take the hard drive and put it in the dump, but then they are going to know where in the dump the hard drive is. And besides that, I've got it backed up on a Zip drive or a thumb drive. Or somebody hacked into my computer and has it downloaded on their computer somewhere else.

You know, the idea of ever destroying electronic data I think is ludicrous. I think it is there somewhere. You can almost always dig it out, you can mine it.

I think the bigger issue with electronic data is really not so much a civil discovery problem, it's an evidentiary problem, because the data can be manipulated.

I mean you can do digital photos. It used to be the photograph was the best evidence. Well, now you look at an altered digital photo—you know, they could move my head over onto your body and, lo and behold, it looks great. Maybe that's not a bad idea.

PROF. LYNK: You are asserting a fact not in evidence.

MR. WELLS: I think the electronic issues are more evidentiary issues long term than they are going to be discovery issues or spoliation issues.

PROF. LYNK: I know Dan Capra appreciates you saying that.

Carol, what do you think?

MS. POSEGATE: I would like to make a couple of different comments.

First, I would like to respond to the remarks that Carol Heckman made. I think she has made a strong case for the desirability of having guidance when one deals with particular clients, because the clients want to know: "How can we stay out of trouble; how can we do the right thing?"

But frankly, in order to get the kind of security that I think she is advocating, one would have to have a rule that would be very specific, and I don't think that is what these Civil Rules are about. I think we are dealing with a changing world, I think that we have issues that are unique to virtually every case of size that is out there, and I think it

would be extremely difficult—and perhaps even dangerous—to try to get a rule that would cover all of those circumstances, where a particular client could walk away and say, “Well, I don’t have anything to worry about because I have done A, B, C, D, and E.” I think that would be very difficult to do.

The second point that I would like to make would piggyback some remarks that Tommy Wells made earlier. He spoke in terms of the case management order or the discovery plan that is required by the federal courts. I think that that is an extremely helpful tool. It is the primary way by which parties do focus on issues at the outset, they define the course that discovery will take, and hopefully anticipate many of the concerns that we have raised over the two days of discussions here.

As an attorney, I very much appreciate a strong hand of the court. I appreciate the early attention that a court will give to a case in terms of dealing with discovery matters and moving the case along. I think that to the extent that we can use the available tools that are there for each and every case, and dealing with it on an individual basis through the case management devices, that that is by far and away the preferable way to handle these matters.

PROF. LYNK: All right. I am gong to let Carol Heckman have the last word.

MS. HECKMAN: Just quickly responding to Carol’s first point about the difficulty of drafting a rule that would deal with the issue of spoliation without having it be too lengthy and perhaps obsolete. Not that that would be the only way to go, but it is a simple provision: that there would not be sanctions for failure to produce unavailable electronically stored data unless the information was both requested during discovery and there was a finding that the party acted willfully or recklessly, as opposed to by mistake or accidentally or inadvertently.

Notes & Observations