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Change in the FRCP: A Fourth Way

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Requests for spoliation sanctions continue to dominate the e-discovery litigation process and, if anything, are dramatically increasing.[1] Sanctions are typically addressed in the lower courts through "the relatively unstructured analysis" of inherent powers.[2] Rules 37(a)(b)(c) & (d), read literally, do not cover violations of the duty to preserve in the absence of a prior order, but do provide a wide range of appropriate responses for failures to make discovery.

I agree with the Rules Committee, however, that it is time to update the sanction provisions of the Federal Rules to "obviate reliance on 'inherent authority'"[3] by authorizing use of the listed sanctions in Rule 37. This would promote uniformity of result and facilitate appellate review as well as eliminate the artificial and unnecessary distinction between non-performance of preservation and discovery obligations.

A Modest Proposal

Accordingly, I would amend Rule 37 to apply to breach of the duty to preserve while making appropriate changes to Rule 37(e) to encourage uniform culpability requirements for serious sanctions. As a result, courts

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[1] The number of instances in which litigants sought sanctions has doubled in the first half of 2011. Gibson Dunn 2011 Mid-Year E-Discovery Update, July 22, 2011, copy at http://www.gibsondunn.com/publications/pages/2011Mid-YearE-DiscoveryUpdate.aspx.

[2] Sentis v. Shell Oil, 559 F.3d 888, 900 (8th Cir. March 24, 2009)(contrasting use of "specific rules tailored for the situation" and "the relatively unstructured analysis associated with inherent authority").

[3] Memo on Preservation and Sanctions Issues, (hereinafter "ISSUES MEMO, , 14, at n.37 & 22 ("should generally make reliance on inherent authority unimportant"), copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/Preservation.pdf.

could act within the four corners of the Federal Rules, because they would be "up to the task."[4]

I would not, however, incorporate the types of proposals considered by the Rules Subcommittee[5] to detail the trigger and scope of the duty to preserve, but would, instead, leave that to the continued evolution of the common law. At the most, a general standard of care could be included.

Rule 37

Rule 37(c) currently authorizes attorney fee awards, jury instructions and "other appropriate sanctions," including the evidentiary, remedial and punitive options listed in Rule 37(b). The changes required to make these provisions applicable to preservation violations would be easy to make.

Thus, Rule 37(c)(1) could be amended to authorize sanctions if a party "fails to *preserve or* provide information *as required by these rules or by known preservation obligations."* Rule 37(b)(2)(A) could provide that it applies "[if a party] fails to obey an order to *preserve evidence* or provide or permit discovery." Existing case law would apply to selection of a sanction as long as it yielded "just" results,[6] constituted an "appropriate" sanction[7] and was "substantially justified."[8]

Rule 37(e)

Expanding Rule 37 to explicitly cover spoliation would bring Rule 37(e) into focus and finally allow it to meet its full potential. That rule, added in 2006, restricts sanctions for losses of ESI due to "routine, good faith" operation of information systems, a crucial linchpin in the argument for adopting neutral policies and practices in the management of information. This trend ought to be encouraged.

Currently, the Rule applies only to sanctions issued "under these rules," tempting some to dismiss its teaching absent exclusive reliance on a

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[4] Chambers v. NASCO, 501 U.S. 32, 50 (1991)(a court should "ordinarily" rely on the Rules rather than inherent power); Kovilic Construction v. Missbrenner, 106 F.3d 768, 773 (7th Cir. 1997)(inherent power available "only when no direct conflict with laws or national rules of procedure")(Wood, J.).
[5] *See* Proposed Rule 26.1, ISSUES MEMO, 3-13 & 18-20.
[6] Rule 37(b)(2)(A).
[7] Rule 37(c)(C).
[8] Rule 37(d)(3).

rule.[9] Authorizing sanctions for failures to preserve under Rule 37 would broaden the scope of Rule 37(e) while providing a reason for clarifying enhancements, such as those recently adopted by Connecticut in its Rule 37(e) counterpart. That provision bars sanctions for failure to provide information, including ESI, due to "routine, good-faith operation of a system or process in the absence of a showing of intentional actions designed to avoid known preservation obligations."[10]

An alternative formulation which could be adopted is before the Rules Committee. One of the suggestions in proposed Rule 37(g) would permit reliance on existing rules "unless the failure to preserve discoverable information was willful or in bad faith and caused [substantial] prejudice in the litigation."[11]

Duty to Preserve

Under this proposal, the dimensions of the duty to preserve would continue to be developed under the common law in contrast to describing, in a new rule, the events which would presumptive trigger a duty to preserve, whether or not an action has been commenced, as well as the scope of the duty itself.

My concern is that adoption of a detailed rule risks a "slippery slope" of imposing constraints on primary conduct of persons or entities in managing their non-litigation practices. Moreover, based on informal surveys of colleagues - and a preliminary analysis of responses to the Sedona Conference® Survey[12] - there is no consensus that more detailed rules would meaningfully enhance the ability of parties to meet the fact-specific challenges at the outset of disputes.

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[9] Johnson v. Wells Fargo, 2008 WL 2142219, at *3, n. 1 ((D. Nev. May 16, 2008); *but cf.* Olson v. Sax, 2010 WL 2639853, at *2 (E.D. Wis. June 26, 2010)(relying on Rule 37(e) where recording over occurred after duty to preserve attached since there is no evidence that it engaged in bad faith destruction of evidence "for the purpose of hiding adverse evidence").

[10] *See* Sec. 13-14 CONNECTICUT PRACTICE BOOK (2011)(eff. Jan. 2012)(copy at http://www.jud.ct.gov/Publications/PracticeBook/PB_070511.pdf.

[11] Rule 37(g)(2), ISSUES MEMO, 23.

[12] Sedona published a survey of over 700 members of WG1 based on the Questions raised by the Committee in its June 29, 2011 Memo. A total of 132 responses – many with highly articulate and relevant comments – were received. A full Copy will be made available to the Committee.

At the most, any rulemaking outside Rule 37 should be confined to stating a general standard of care which would apply to parties with actual or constructive knowledge of litigation. For example, such a standard – set forth in the footnote - could acknowledge the importance of core principles, such as reasonableness and good faith and the role of proportionality in assessing compliance.[13] While it would apply prior to commencement of litigation, the mere fact that an action has not commenced is not decisive under the Rules Enabling Act. The test is whether it relates to conduct which is clearly linked, as preservation implementation assuredly is, to the discovery process.[14]

[13] A standalone provision could simply provide that "Parties with actual or constructive notice of the likelihood that relevant and discoverable evidence is or will be sought in discovery shall undertake reasonable and proportionate efforts to preserve any such evidence within its possession, custody or control subject to the considerations of Rule 26(b)(2)(C) and Rule 37(e)." Thomas Y. Allman, Preservation Rulemaking After the 2010 Litigation Conference, 11 SEDONA CONF. J. 217, 225 (2010).
[14] *Id*., at 223.