Judges Address the 3 'P's of E-Discovery at Georgetown Panel

12 jurists discussed proposed changes to the FRCP that may affect e-discovery proportionality, preservation and paying for the process.

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One of the great strengths of the Georgetown Law Advanced E-Discovery Institute is the participation of the leading jurists in e-discovery law, and this year's 10th annual program was no exception. Held Nov. 21-22 in MacLean, Va., just outside Washington, D.C., one of the conferences' big draws was its final session, the annual panel of federal judges. This year, the judges tossed around topics from proportionality to preservation and how amendments to the Federal Rules of Civil Procedure could affect the conduct of e-discovery.

The 2013 judges panel was one of the largest ever, featuring 12 federal judges with extensive e-discovery experience from across the nation. Participating were U.S. District Judges Joy Flowers Conti (W.D. Pa.), Paul Grimm (D. Md.), Xavier Rodriguez (W.D. Tex.) Shira Scheindlin (S.D.N.Y.) and U.S. Magistrate Judges John Facciola (D.D.C.), James Francis IV (S.D.N.Y.), Lorenzo Garcia (D.N.M.), Paul Grewal (N.D. Cal.), Frank Maas (S.D.N.Y.), Andrew Peck (S.D.N.Y.), David Waxse (D. Kans.), and Craig Shaffer (D. Colo.).

Proportionality in electronic data discovery was a major topic, and the judges stressed that the topic was not new in the FRCP— Both Fed. R. Civ. P. 26(b)(1) and 26(b)(2)(C) have proportionality provisions. Many advocates for amending the rules say they would like to see more emphasis on proportionality, but they might be surprised that the judges at Georgetown had different views on approaches to proportionality in the federal rules.

Garcia said he believed the proportionality proposals were significant, arguing that moving proportionality from Rule 26 to a more prominent place in the rules was more than merely a cosmetic change. However, Waxse wasn't buying it, and countered that there were problems with proportionality that weren't going to be solved by moving to a new place in the rules. Peck took a middle-of-the-road position, saying he thought moving proportionality to a more prominent place in the rules was a good idea, but likenedit to a public relations move.

Scheindlin warned that the proportionality proposals could clog the already overcrowded and overworked courts. "I'm worried the amendments will cause a flood of proportionality motions," she said.

On EDD preservation, Facciola reminded the audience that—like proportionality—the idea is not new."We've been under an obligation to preserve evidence for 400 years. There's nothing new there," the judge said.

LOSER PAYS?

Cost-shifting in e-discovery was another major topic, as the judges discussed the impact of the Third Circuit's opinion in Race Tires Am., Inc. v. Hoosier Racing Tire Corp., and how the decision has affected the ability to shift EDD costs under 28 U.S.C. 1920, a federal statute limiting a prevailing party to costs for "copying" and "exemplification."

Although the panel acknowledged that some courts have declined to follow the narrow interpretation of §1920 in Race Tires, some judges on the panel said decision was influencing many courts' interpretations of §1920, in what Conti called "the onward march of Race Tires."

Of course, the judges agreed also that §1920 was an outdated law, with Grewal adding the statute was on "life support" after Race Tires. Conti was even more strident. "The question isn't whether 28 U.SC. 1920 is alive or dead; the question is whether it should have been alive in the first place," she said.

Rodriguez, who relied, in part, on Race Tires in one of his recent decisions on EDD cost-shifting made a more fundamental observation about the appropriateness of making the losing party pay the prevailing party's e-discovery expenses. "If you've managed to make it past summary judgment, perhaps cost-shifting is not appropriate," Rodriguez said.

The judges noted the American tradition in which the producing party—in most cases, the big corporate defendant—pays for the e-discovery and production of its own documents. The judges then discussed the wisdom of a changing to having the party requesting the EDD pay. Peck warned there might be unintended consequences."Be careful what you wish for on requester pays," he said. "Does that mean they get to dictate the methods?"

Earlier panels had discussed last year's amendments to Comment 8 to ABA Model Rule of Professional Conduct 1.1, which added that lawyers should keep abreast with the lastest developments in technology. Despite the newly amendment comment, the judges lamented the lack of technical prowess among the nation's attorneys. "There are still many lawyers who lack knowledge of e-discovery and [electronically stored information], and the problem is bigger in state courts," said Shaffer.

In addition, more judges agreed with the belief that it constitutes legal malpractice for a lawyer to fail to protect the attorney-client privilege by obtaining a court order on inadvertent disclosure under Federal Rule of Evidence 502(d). The judges also expressed disappointment that even the type of sophisticated e-discovery lawyers one finds at the Georgetown Institute aren't getting on the 502(d) bandwagon. "There can't be many lawyers here who haven't heard us preach about Rule 502(d), but many still don't use it," Peck lamented.

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