Judicial Roundtable Addresses Amendments, Emerging ESI Technology, and Future Trends

Bloomberg BNA’s Digital Discovery and e-Evidence Report Advisory Board Member Maura R. Grossman, of Wachtell, Lipton, Rosen & Katz, moderated a panel of 12 eDiscovery judges at Georgetown Law Continuing Legal Education’s 10th Annual Advanced eDiscovery Institute in McLean, Va. The session, titled “The Annual Judicial Roundtable,” took place on Nov. 22 and included discussion and debate regarding many of the proposed amendments to the Federal Rules of Civil Procedure, as well as the current state and future of ESI and emerging technology.

The participating judges were Chief Judge Joy Fowers Conti, of the Western District of Pennsylvania, Magistrate Judge John M. Facciola, of the U.S. District Court for the District of Columbia, Magistrate Judge James C. Francis, of the Southern District of New York, Magistrate Judge Lorenzo F. Garcia, of the District of New Mexico, Magistrate Judge Paul S. Grewal, of the Northern District of California, Judge Paul W. Grimm, of the District of Maryland, Magistrate Judge Frank Maas, of the Southern District of New York, Magistrate Judge Andrew J. Peck, of the Southern District of New York, Judge Xavier Rodriguez, of the Western District of Texas, Judge Shira A. Scheindlin, of the Southern District of New York, Magistrate Judge Craig B. Shaffer, of the District of Colorado, and Magistrate Judge David J. Waxse, of the District of Kansas.

Proposed FRCP Amendments Discussed. Grossman began by asking Judges Conti, Maas, Scheindlin, and Shaffer to comment on the proposed amendments to the FRCP, excluding 37(e). Grossman asked Conti if she believed the proposed change to FRCP 1 would actually alter anyone’s behavior in the court room. The proposed Rule 1 encourages parties, and not just the court, to utilize the rules to “secure the just, speedy, and inexpensive determination of every action and proceeding.”

Conti said the amendment reaffirms what is already in the spirit of the FRCP, noting that lawyers are the first bulwark of compliance with the Rules. Scheindlin chimed in, stating that the amendment will not change anything, as nobody pays attention to the Rule. However, Shaffer disagreed, stating Rule 1 will, for the first time, hopefully focus people on a holistic or macro approach to litigation.

Grossman noted the heart of the amendment speaks toward cooperation, and asked Judge Shaffer if he agreed with Judge Waxse’s tactic of sending people into a jury room, videotaping their conference, and then charging fines for the use of uncooperative tactics as a method for encouraging cooperation. Shaffer responded that it is important for judges to look for “creative ways to move the process along.”

Judge Scheindlin was tasked with answering the question of whether the proposed changes to 26(b)(1)—which limit discovery to matters that are relevant and eliminate the “reasonably calculated” language—were a significant change.

Scheindlin said that eliminating the “reasonably calculated” language was a meaningful change, and that the rule makers took out the language to keep the definition of relevance very tight. Scheindlin also said the biggest change to the new rule was the move of the proportionality language of 26(g) to the forefront of 26(b)(1).

“I think the proportionality change is pernicious because you have effectively reduced transparency, which will result in a flood of proportionality motions,” Francis said, with which Scheindlin agreed.

Maas responded to a question regarding the proposed limits to the number of depositions, interrogatories, and requests for admission by saying the changes were largely symbolic, and that most of his cases are small cases that do not require five depositions.

“I view interrogatories as the second most useless device in civil court, preceded only by the answer,” Maas quipped.

Judges Address 37(e) Proposals. Grossman then asked Judges Facciola, Francis, Maas, and Scheindlin to discuss the proposed changes to 37(e). Grossman said that some commentators have taken the position that curative measures versus sanctions amounts to a false dichotomy. According to Grossman, many believe that curative measures are sanctions in disguise. She asked Facciola how courts distinguish between adverse inferences that are curative and those that are not.

“The distinction being drawn in that fashion is a bit superficial,” Facciola responded. “The law in the D.C. Circuit is that whenever somebody’s mistake skews the balance, it is the court’s duty to right the balance.”

According to Facciola, an adverse inference may not even arise as a curative measure in that instance. He said that the issue of curative measures and sanctions is a question of gradation, and that he is required to use the least punitive rehabilitating measure first.

“I think juries have great difficulty with judges’ instructions generally, and I think adverse inference instructions are hard for them to parse,” Francis said. “I agree with Judge Facciola that a better regimen would be one that simply says the courts may not impose any
remedy greater than that which is necessary to fix the
balance unless there is some finding of bad faith.”

Francis said the difference between curative and pu-
nitive does not have to do with the severity of the rem-
edy, but with whether or not prejudice occurred.

On the topic of the contested Silvestri exception (named for Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001), Scheindlin said the exception be-
longs in the proposed Rule 37(e), and that it applies as
much to tangible items as it does to ESI.

Grossman then turned to Maas to ask him to define
"willful".

“That’s one of the issues that has perplexed me over
time,” Maas responded. “I have had trouble with the di-
vide between negligent acts and willful acts, and I think
conceptually we are dealing with a continuum.”

Scheindlin said she is writing a law review article on
willful, and has found through her research that the
definition completely depends on the context.

“The one that I found was the most commonly used
is ‘knowingly or recklessly that is something more than
negligent,’” Scheindlin said. “If that’s true, then the
rulemakers have brought back reckless.”

Maas lamented the situation in which a proposed
Rule “requires footnoting a word with a law review ar-
ticle.”

“We saw a case earlier this year where a party took
her laptop and grilled it on the BBQ, yet the e-mail she
tried to destroy was still in her Yahoo! account,” Gross-
man said. “You have no prejudice, but there’s certainly
willful or bad faith conduct . . . As the proposal is writ-
ten, would there be no sanctions?”

Francis said there would certainly be curative mea-
sures taken under the rule, while Facciola said he
would permit the matter to be mentioned in closing ar-
eguments.

“You would not give an evidentiary sanction, but this
party has acted unethically and should be disciplined in
some way,” Scheindlin explained.

Sources of ESI and the Future of eDiscovery. Grossman
switched gears and opened up the discussion to the
topic of new sources of ESI. She began by asking Gre-
wal if he has dealt with social media or eDiscovery in
the cloud, and inquired as to what test he would apply
to determine possession, custody, or control of those
forms of ESI.

“As for your first question, yes,” Grewal said. “I have
not really confronted any dispute, however, where a
lawyer or a party has asked for unbridled access to a
person’s Facebook account.”

Grossman turned to Peck to discuss the topic of pre-
approving the use of technology-assisted review.

“One of you may have masochistic tendencies be-
cause you seem to have an interest in pre-approving
TAR before the production has even been initiated,”
Grossman joked, in a thinly veiled reference to Peck’s
opinion in Da Silva Moore v. Publicis Groupe, S.D.N.Y.,
No. 1:11-cv-01279 (02/24/12). “Others of you may feel
there should be at least substantial production and
some gap identified before the requesting party gets to
challenge the use of the tool . . . Judge Peck, why do you
do pre-approval?”

Peck said that his decision to pre-approve TAR “goes
back to Rule 1,” in an attempt to promote speedy and
inexpensive litigation. Peck said he would rather deal
with the issue up front and set the parameters and
boundaries at the beginning of discovery.

Grossman followed-up by commenting that many
people believe TAR is now being held to a higher stan-
dard for completeness and accuracy than other forms of
document culling and review.

“I don’t agree with that,” Waxse said. “You have to
have standards that are used equally with the technol-
gy and without the technology.”

Peck said a confidence problem exists, and that law-
yers are still using keywords to do document review
when other technology is available.

And when Grossman asked Shaffer if he believes
there is significant knowledge about ESI and eDisco-
evry on the bench, Shaffer responded by saying a learn-
ing curve exists, and some members of the state bench
are trying to “catch up.”

Grossman closed the session by asking the judges to
discuss copying costs under Race Tires America Inc. v.
Hoosier Racing Tire Corp., W.D. Pa. No. 2:07-cv-01294-
TFM (05/06/11). Grewal said that 28 U.S.C. § 1920 is on
“life support” and that Race Tires has essentially set the
metes and bounds for the issue of costs.

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