Congress Hears Testimony Regarding E-Discovery

On December 13, 2011, Congress held a hearing to discuss the rising costs of civil discovery, labeled, "The Costs and Burdens of Civil Discovery." The purpose of the hearing was to inform Congress about the progress the Federal Rule of Civil Procedure Sub-committee on E-Discovery is making in proposing amendments to FRCP's discovery rules. Of particular concern to the committee is whether the burdens and costs of e-discovery are endangering the FRCP's goal of a "just, speedy, and inexpensive determination of every action and proceeding."

Critics of the present rules argue that the rules are unclear, especially with regard to a party's obligation to preserve electronic information. Their view finds support in a recent study completed by the RAND Corporation's Institute for Civil Justice which found that "Organizational litigants were generally not confident that their preservation choices were defensible ones. They asserted that this uncertainty resulted in preserving far greater volumes of data than was ever likely to be collected as part of actual litigation." The study also found that "Preservation appears to be the e-discovery area most in need of standardized, unambiguous, trans-jurisdictional authority. Guidance is needed for the proper scope of the ESI preservation duty, the manner in which that duty should be discharged, and the types of behavior that would be considered sanctionable." Thomas Hill, Associate General Counsel for General Electric Company reiterated many of the criticisms found in the the RAND Corporation's study.

Testimony at the hearing also stated the viewpoint of many practitioners and academics including us who believe that it is too soon to begin implementing changes to the discovery rules. Not all organizational clients believe that the costs of preservation are excessive. We participated in the recent Sedona Conference Working Group on Electronic Document Retention and Production survey of its members regarding the proposed changes to the rules. That survey found that some organizations are not necessarily concerned about the costs of preservation, which they see as only one faction of the much larger discovery costs such as attorney document review.

Our views on the proposed changes are in line with those expressed by Craig Ball in his excellent recent blog post entitled "A Fish Story." Our main take away from the Rand Corporation Study is that organizations do still do not have metrics in place to measure their preservation responsibilities. The solution to the e-discovery cost and risk puzzle is more education for practitioners and true organizational buy-in regarding developing the knowledge to utilize the latest technological tools available to reduce the risks and costs of e-discovery. The ostrich with his head in the sand approach which amounts to throwing one's hands up in the air while screaming cost and burden is not acceptable. Members of the bar must be held responsible for failures to develop basic competency in abiding by rules that have been on the books for 5 years.

The consensus reached at the hearing was that the Federal Judicial Conference's Civil Advisory Committee is actively studying the issue and that Congress does not need to intervene at this time. We will continue to monitor the debate. The sub-committee is expected to have proposed rule changes ready for review by March of 2012. The sub-committee is considering several approaches to amending the rules, but is reportedly leaning towards regulating the sanctions for discovery violations.