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PRESERVATION OF DOCUMENTS IN THE ELECTRONIC AGE - WHAT SHOULD COURTS DO?

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Abstract

[a.1] Preservation of information in the electronic age for use in litigation presents difficult challenges to parties, counsel, and courts. There is a dearth of judicial rules of procedure for the issuance of preservation orders. In filling the lacunae, some judicial precedents suggest that the standards for the issuance of preliminary injunctions must be met for preservation orders. However, better reasoning to the contrary is set out in opinions in *Pueblo of Laguna v. United States* and *Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.* These cases promulgate standards that are effective, relevant and fair to all parties in preserving fragile information in electronic form. Also, to be most effective, preservation orders must be timely, clearly delineated and narrowly focused. An appropriate process for the issuance of interim and final preservation orders may be found in the fourth edition of the federal Manual for Complex Litigation.

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I. INTRODUCTION

[I.1] We now find ourselves in an age when the vast majority of potentially discoverable information is created and stored in electronic form.⁽¹⁾ The qualitative and quantitative differences between information in paper form and information in electronic form are now well documented.⁽²⁾ These differences create new challenges to the justice system over how and whether to control the preservation and destruction of information, particularly electronically stored information, in the early stages of litigation. In the days of yore when the information important to a case was in paper form, orders relating to the preservation of that form of information were rare. There was almost no early involvement in preservation issues, and almost always the involvement of the court came only after evidence had been destroyed. In this new electronic age, because of the sheer volume of information and the ease with which electronic information can be destroyed, altered, migrated or otherwise made inaccessible, there is a need for more frequent and earlier involvement by courts.⁽³⁾

[I.2] This article discusses the general standards for the issuance of preservation orders and then argues that courts, in appropriate cases, should strongly consider the use of a preservation order protocol similar to that suggested in the recently published Manual for Complex Litigation (Fourth)(2004) where there has been at least a preliminary showing that the standard for the issuance of a preservation order has been met.

II. PRESERVATION ORDERS - THE APPROPRIATE STANDARD

[II.1] The Federal Rules of Civil Procedure do not address the specifics of the preservation obligation nor discuss the standards for issuance of preservation orders.⁽⁴⁾ In the absence of guidance from the rules, there has been some confusion in the courts over the appropriate standard for issuing preservation orders. Some courts and commentators have suggested that a federal court may not enter a preservation order unless the standards for preliminary injunctive relief are met.⁽⁵⁾

[II.2] The notion that the standards for preliminary injunctive relief must be met has as its genesis the decision of a judge in the Eastern District of Louisiana in *Humble Oil and Refining Co. v. Harang*.⁽⁶⁾ The case involved allegations of conspiracy between Harang and a geologist employed by Humble Oil to allow Harang to acquire leases in an area where Humble was considering establishing operations. According to the allegations of the complaint, Harang would have his agent or lease broker offer to sell the leases to Humble Oil or other operators.⁽⁷⁾ Harang then made large profits from this conspiracy.⁽⁸⁾ The *Humble Oil &*

Refining Co. v. Harang opinion focuses on the fourth count of the complaint.

In the fourth count, the plaintiff alleges that it lies within the power of the defendant, Harang, to remove, conceal, or destroy the documents and other writings that might disclose information prejudicial to him or to cause this to be done and seeks both a temporary restraining order and preliminary injunction for the pendency of this suit. Permanent injunctive relief is not sought.⁽⁹⁾

Thus, the opinion in *Humble Oil & Refining Co. v. Harang* does not flow from a discovery issue but rather from a substantive count in a complaint which seeks preliminary injunctive relief.

[II.3] The *Humble Oil & Refining Co. v. Harang* case should not be read for the broad proposition that the standards for preliminary injunctive relief must be met before a preservation order can be entered. The court's opinion, to the contrary, reflects a common sense view that the complex procedural overlay which attends the issuance and appeal of a preliminary injunction is not meant for resolving discovery disputes.

[II.4] The court's decision in *Humble Oil & Refining Co. v. Harang* is based on the decision of the Fifth Circuit in *Humble Oil & Refining Co. v. Sun Oil Company*.⁽¹⁰⁾ As the *Humble Oil & Refining Co. v. Harang* court's reference to the *Sun Oil* case makes clear, the procedural complexities surrounding the issuance and appeal of a preliminary injunction are ill suited to resolve discovery issues. In *Sun Oil*, the court concluded that a trial judge who had entered an injunction in a case involving an inspection of premises under Rule 34 had erred. In the words of the Fifth Circuit,

[w]hat appellee is attempting to do here is, without any necessity or reason for it, to employ a substitute procedure for that provided in the [discovery] rules. This procedure is not only more cumbersome and less precise and effective in the trial court, but it enables the progress of a suit to be delayed while the interlocutory appeals are being heard. In addition, by introducing interlocutory appealable orders where the rules provide for none, it unduly increases the burdens of the appellate Court.⁽¹¹⁾

[II.5] If there is any doubt about the *Humble Oil & Refining Co. v. Harang*

holding, it can be resolved by reference to the court's conclusions of law. The court holds that the plaintiff is not entitled to a preliminary injunction because there is an insufficient factual basis and "*an inadequate legal basis* shown for the preliminary injunctive relief moved for to be granted."⁽¹²⁾ The explanation for the court's conclusion that there is an inadequate legal basis for the motion can be found in the conclusion of law immediately preceding.

Discovery procedures already commenced by the plaintiff and the additional discovery procedures available under Rule 34 of the Federal Rules of Civil Procedure with the enforcement provisions under Rule 37 and the additional availability of Rule 45 present an adequate remedy to the plaintiff under the facts here presented. Injunctive relief is not normally available in aid or in lieu of discovery under Rule 34.⁽¹³⁾

[II.6] The view that the standard for obtaining injunctive relief ought not to be used to resolve requests for preservation orders has been embraced by two recent decisions. The first of the decisions is *Pueblo of Laguna v. United States*.⁽¹⁴⁾ The *Pueblo of Laguna* is one of a series of cases brought by Indian tribes seeking an accounting and recovery of losses resulting from the government's mismanagement of tribal trust funds.⁽¹⁵⁾ The *Pueblo of Laguna* opinion referenced here decided a motion filed by the Pueblo seeking a preservation order. As grounds for the motion, the Pueblo relied heavily on findings in *Cobell v. Norton*.⁽¹⁶⁾ In that case, the court found that the government had destroyed significant and important documents and lacked a suitable system for ensuring preservation.⁽¹⁷⁾

[II.7] The court in *Pueblo of Laguna* specifically rejected the notion that the standard necessary for the issuance of a preliminary injunction had to be met before a preservation order could be entered. As the court remarked, decisions holding that the injunctive relief standard must be met

ignore significant changes made to the Federal Rules of Civil Procedure since the 1960s, further establishing the case management powers of judges. In the court's view, a document preservation order is no more an injunction than an order requiring a party to identify witnesses or to produce documents in discovery.⁽¹⁸⁾

The court then, without extensive analysis, concluded that a party seeking a

preservation order must demonstrate that such an order is "necessary and not unduly burdensome." [\(19\)](#)

To meet the first prong of this test, the proponent ordinarily must show that absent a court order, there is a significant risk that relevant evidence will be lost or destroyed - a burden often met by demonstrating that the opposing party has lost or destroyed evidence in the past or has inadequate retention procedures in place. [\(20\)](#)

The court concluded that this first prong had been satisfied because of previous findings that the government had destroyed evidence. The court rejected the government's argument that there were now sufficient safeguards in place because "... many of the weaknesses identified by the district court have continued notwithstanding efforts by the Department of the Interior and other government agencies to make meaningful administrative changes." [\(21\)](#) The court also concluded that a preservation order under the circumstances of the case would not be unduly burdensome and thus was appropriate.

[II.8] The second decision, *Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.*, [\(22\)](#) arose out of an action filed by the owner of a power plant seeking compensation for damage to a power plant generator caused by turbine blades which were allegedly defective. Trial commenced in January of 2004 and a mistrial was declared because of the plaintiff's failure to produce an expert witness report in a timely fashion. Following the declaration of the mistrial, Siemens Westinghouse moved for an order directing preservation of "documents, software and things." [\(23\)](#)

[II.9] The court began its discussion of the preservation order issue by noting that the entry of preservation orders are common, but that the case law concerning standards for such motions is "scant." [\(24\)](#) The court then examined the case law flowing from the *Humble Oil & Refining Co. v. Harang* case, [\(25\)](#) and rejected the notion that the standards for granting a preliminary injunction must be met before a preservation order can be entered because of developments in the law. As the court remarked, "Since the time *Humble Oil* was written, motions for preservation of documents or things and orders granting such motions have become widely used in the place of restraining orders or injunction...." [\(26\)](#) The court did, however, note that some incorporation of the standards for the issuance of injunctive relief into the standards for issuing a preservation order was necessary. As the court commented,

[t]he determination whether to issue a preservation

order should properly include consideration of a court's power to oversee discovery and correct abuses. Additionally, where the preservation of evidence is alleged to be of the utmost urgency because of an imminent threat to the integrity or existence of evidence, either by intentional or unintentional means, the guidance and approach utilized by courts in the granting of injunctive relief can assist a court in assessing the level of the threat to the evidence with regard to the magnitude and imminence of the danger.⁽²⁷⁾

[II.10] The court then articulated a three-part balancing test to be used in deciding whether or not to issue a preservation order. The test, in the court's words, examines

1) the level of concern the court has for the continued existence of the maintenance and integrity of the evidence in question in the absence of an order directing the preservation of the evidence; 2) any irreparable harm likely to result to the party seeking the preservation of the evidence absent an order directing preservation; and 3) the capability of an individual entity or party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.⁽²⁸⁾

[II.11] The first prong of this test focuses on the existence and integrity of the relevant evidence in a particular case.⁽²⁹⁾ The thrust of this inquiry will inevitably be the system a responding party has in place for retaining and destroying information. The lack of a records management system or the existence of a haphazard one should be a strong factor militating in favor of the issuance of a preservation order.

[II.12] The second prong of the test focuses on potential harm and imposes a difficult burden on the party moving for a preservation order. While rejecting the notion that the failure to show irreparable harm is outcome determinative, the court nonetheless concluded that demonstration of an imminent and specific harm is generally necessary. The court noted as follows:

Therefore, where the need expressed by the moving

party for a preservation order is based upon an indefinite or unspecified possibility of the loss or destruction of evidence, rather than a specific, significant, imminent threat of loss, a preservation order usually will not be justified. Also, where an imminent, specific threat to the evidence is demonstrated, but the level of harm which will result is not significant, then an order of preservation usually will not be justified. In most cases, the presence of both factor one and factor two to a significant degree will be required in order for a preservation order to be justified. However, it must be remembered that in a balancing test one factor may be so crucial that the presence of just that one factor may provide a sufficient justification for an order of preservation.⁽³⁰⁾

[II.13] The third prong of the test focuses on the costs and difficulty of maintaining the evidence. It embodies many of the cost-benefit notions associated with cost-shifting under Rule 26 (b)(2)(iii) of the Federal Rules of Civil Procedure. The court, for example, suggests that a court, in analyzing facts under this third prong, should take into account such factors as storage space, maintenance and storage fees, and the possibility of physical deterioration of evidence.⁽³¹⁾ The court also suggests that it may be appropriate in some circumstances, particularly where a non-party is involved, to shift the cost of storage to the requesting party. In the court's words,

[c]ertain circumstances may impose burdens upon those parties and non-parties possessing evidence which may be unfair or oppressive to the point that a judicially imposed allocation of the burdens between the parties to the civil action may be required. Preservation of evidence may be particularly burdensome for non-parties, considering that their interest in the pending civil action is minuscule while the restrictions that can be imposed in a motion for preservation may be expensive and voluminous. In such instances, the party seeking preservation, and possibly the opposing party, may be required to ensure the preservation of the evidence, rather than placing that burden upon uninvolved third party possessors of the evidence.⁽³²⁾

[II.14] The court then applied the three-prong test to deny the motion for a preservation order. Of critical importance was the fact that the moving party failed to demonstrate that specific evidence would be lost or destroyed.⁽³³⁾ The court noted:

While loss of the subpoenaed materials would prejudice the Defendant, the Court's level of concern for the loss or degradation of the evidence in question is not sufficiently elevated based upon the lack of the presence of a specific, imminent threat supported by the record. In addition, the other two factors do not favor the granting of a preservation order.⁽³⁴⁾

The court also noted that the evidentiary presentations of the parties did not adequately address some important issues such as the systems available for storage of the records.⁽³⁵⁾

[II.15] The *Pueblo of Laguna* and *Capricorn Power* cases are the latest word on the standards for the issuance of preservation orders. To be sure, there are differences in the two cases. For example, the test enunciated in *Pueblo of Laguna* is open-ended and somewhat imprecise. As the court in *Capricorn Power* remarked, "[t]his test does not appear to have adequate precision or sufficient depth of analysis of the factors set forth above that are germane to every preservation order."⁽³⁶⁾ The standards enunciated in the *Capricorn Power* case are more detailed and the court provides a much deeper analysis of the standards.

[II.16] There is, however, an important similarity. Both place emphasis on the records management policies of the responding party. The *Pueblo of Laguna* case specifically indicates that a showing of likely destruction may be made by showing that a defendant has "inadequate retention procedures in place."⁽³⁷⁾ The *Capricorn Power* case does the same. By framing a balancing test which examines the continued existence and integrity of the evidence and the ability to maintain and preserve the evidence, the court is inviting an appropriate inquiry into an organization's overall records management policies. Thus, records management policies have now become an important focus of the preservation order inquiry.

III. THE TIMING OF A PRESERVATION ORDER

[III.1] Regardless of the test used in deciding a motion for preservation order, the timing of the order is critical. In today's world, where huge amounts of

information in electronic form are being created and destroyed, modified, or migrated every minute, there is an ever present possibility that relevant information may be destroyed or placed in other areas of an information system from which it either cannot be retrieved or can be retrieved only at great cost. This destruction, modification or migration may occur because an organization wants to destroy evidence or make it inaccessible or simply because the company has failed to communicate to an employee that relevant information should be preserved. It may occur because an organization has a wholly inadequate or irrational records management policy. It may also occur because an organization simply misapprehends its duty to preserve.

[III.2] Regardless of the reason for the destruction, modification or migration, the result is the same. Relevant information which would help the court perform its truth seeking function is destroyed or converted and either cannot be retrieved or can be retrieved only at great cost. The integrity of the fact-finding process is undermined.⁽³⁸⁾ Thus, the entry of a preservation order very early in the litigation is essential. As the court in *Capricorn Power* noted, when discussing information stored on a hard drive,

the timing of the preservation order may be of the essence, especially if the person possessing the computer is without knowledge that the information contained on the computer hard drive is evidence which needs to be preserved. Such a situation may require immediate action to preserve such electronic evidence at least temporarily in order that the parties may have an opportunity to confirm that such evidence is relevant to the claims before the court.⁽³⁹⁾

IV. THE SCOPE OF THE PRESERVATION ORDER

[IV.1] One of the most serious errors which a court can make is the issuance of a preservation order which is overbroad.⁽⁴⁰⁾ A preservation order is overbroad when it fails to delineate the material to be preserved, in terms of such concerns as factual issues, authors, addressees, time periods and modes of communication or storage such that the scope of preservation cannot reasonably be defined. An order, for example, which tells the parties to "preserve all relevant evidence" has none of the important features of a well defined preservation order and is worse than no order at all. It is virtually unenforceable yet may require an organization to spend untold and unnecessary resources both personal and financial in trying to comply with it. The best order is an order which defines with precision the information to be preserved, an order which gives specific guidance to the parties about their preservation obligations.

[IV.2] It is impossible to enter the kind of a precise order which is required without significant input from the parties and an opportunity for the court to consider the submissions of counsel. In addition, discovery relating to the operation of the organization's information architecture, including its record management policies and procedures may be necessary before an informed preservation order can be entered. The obvious question is what to do while the preservation issue is being sorted out. If nothing is done, there is the ever-present possibility that not only relevant information will be destroyed or somehow modified or migrated but (even more likely) that the metadata and system information that provide context to the information will be in danger, thus making retrieval exponentially more difficult. If an overbroad preservation order is entered, a company may be forced to spend unconscionable amounts of time and money to preserve irrelevant information. The best approach is to issue an interim preservation order which requires reasonable preservation of evidence while the parties and the court develop a more precise, focused and workable preservation order that recognizes information management issues. It goes without saying that such an order ought not to be entered in every case. In most cases, after consultation, the parties will be able to agree on the preservation protocol. However, such an interim order would be appropriate where there is some minimal preliminary showing that relevant and discoverable information may be destroyed, modified or migrated if a preservation order is not entered. ⁽⁴¹⁾

V. A SUGGESTED PROCESS

[V.1] One need look no further to find such a procedure than the Interim Order Regarding Preservation which appears at § 40.25 of the recently published Manual for Complex Litigation (Fourth)(2004). The process recommended in § 40.25 begins with the issuance of an Interim Order Regarding Preservation which requires the parties to preserve relevant evidence and ends with the issuance of a detailed, focused and specific final preservation order either by agreement of the parties or following input from the parties.

[V.2] It is important to note at the outset that the Interim Order contained in § 40.25 is not simply an interim preservation order. It is a multifaceted order which requires the parties to

meet on the preservation issue, sets out suggested subjects for discussion at the meeting, and reminds the parties of the duty to preserve. Each of the sections merits a further discussion.

[V. 3] The Interim Order Regarding Preservation begins with a requirement that the parties meet and confer to develop a plan for the preservation of evidence

within 30 days of the entry of the order. ⁽⁴²⁾ The order also indicates that the conference may be subsumed into the conference required by Rule 26(f) of the Federal Rules of Civil Procedure and that the preservation plan may be submitted to the court for inclusion in the scheduling order. The order then lists the points of discussion for the parties on the preservation issue. The list is extensive and requires the parties to discuss such topics as notice of the duty to preserve, mechanisms for monitoring, and the anticipated costs of preservation and ways to reduce or share the costs. ⁽⁴³⁾

[V.4] The third section of the order concerns preservation. It begins by reminding the parties of the duty to preserve evidence. It is important to note that the preservation section of the order stresses reasonableness. Paragraph 3(a) of the Interim Order makes clear that the duty to preserve evidence extends only to information "reasonably anticipated to be subject to discovery" in a case. It also defines the duty of counsel in "reasonableness" terms by stating "[c]ounsel is under an obligation to exercise reasonable efforts to identify and notify such non-parties, including employees of corporate or institutional parties." ⁽⁴⁴⁾ The heart of the order is paragraphs (c) and (d) which contain specific directions about preservation. These sections emphasize that the term "preservation" is to be interpreted broadly but again emphasize reasonableness. In the words of the order,

[p]reservation includes taking *reasonable* steps to prevent the partial or full destruction[,] alteration, testing, deletion, shredding, incineration, wiping, relocation, migration, theft, or mutation of such material, as well as negligent or intentional handling that would make material incomplete or inaccessible. ⁽⁴⁵⁾

[V.5] The order then goes on to state with more specificity what the obligation to preserve means where the party has a scheme in place for destroying or changing documents.

If the business practices of any party involve the routine destruction, recycling, relocation, or mutation of such materials, the party must, to the extent practicable for the pendency of this order either

(1) halt such business processes;

(2) sequester or remove such material from the business process; or

(3) arrange for the preservation of complete and accurate duplicates or copies of such material, suitable for later discovery if requested.⁽⁴⁶⁾

The order goes on to encourage those parties who may have concerns about compliance with the broad preservation obligation articulated in paragraph 3 (c) to seek assistance from the court.

Before the conference to develop a preservation plan, a party may apply to the court for further instructions regarding the duty to preserve specific categories of documents, data, or tangible things. A party may seek permission to resume routine business processes relating to the storage or destruction of specific categories of documents, data, or tangible things, upon a showing of undue cost, burden or overbreadth.⁽⁴⁷⁾

[V.6] The order has a concluding provision which applies if the parties are unable to agree on a preservation order. That provision calls for the court to enter an order after receiving a statement of the unresolved issues and each party's proposal for resolution of those issues.⁽⁴⁸⁾

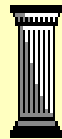
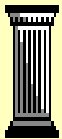
[V.7] There has been some criticism directed at the proposed interim order because of the language of sub-paragraphs 3 (c) and (d) which require that the preservation obligation be broadly construed and that records management policies be modified. Those provisions, however, need to be examined in light of other provisions of the order which are designed to minimize any potentially harmful impact. First, the order makes clear that reasonableness is the benchmark for determining compliance. A party need only act reasonably with regard to preservation issues to fulfill its obligation. Second, the order has provisions for narrowing the scope of this order. Sub-paragraph 3 (e) allows the court to modify its instructions on the preservation issue and to allow the resumption of routine business practices upon a showing of undue cost, burden or overbreadth.

[V.8] The protocol suggested by the Manual Fourth and its focus on the Interim Order has much to commend it. The efficient and cost-effective resolution of a preservation issue often requires that the parties be forced together to resolve preservation issues and that the court be actively involved. The Interim Order does exactly that. It requires the parties to meet and confer in an attempt to resolve the preservation issue. It specifies the topics of their conversation. While these discussions are in progress, an Interim Order is entered reminding the parties of their obligation to preserve information in a reasonable way and

specifically ordering that records management policies which might call for the destruction, modification or migration of relevant information be suspended or replaced. If the Interim Order has the potential for causing undue cost or burden or is overbroad, a party may seek further guidance and relief from the court. The process ends when parties either agree on an order or the court enters an order after examining proposals from the parties.

VI. CONCLUSION

[VI.1] Because of the speed with which potentially relevant documents may be destroyed, altered, migrated or otherwise or made inaccessible when they are in electronic form, a court must be actively involved in preservation issues from the earliest stages of litigation. This active involvement must be tempered with an understanding of the potential harm that an overbroad preservation order may cause. It will often be impossible to craft an appropriate and precise preservation order until there has been some discovery and significant interaction with counsel. While the process of crafting a precise preservation order goes on, courts should consider adopting the procedure which appears in § 40.25 of the Manual for Complex Litigation (Fourth)(2004). That procedure facilitates the discussion of the parties and requires reasonable steps to preserve documents until a final order of preservation can be entered.



Footnotes

