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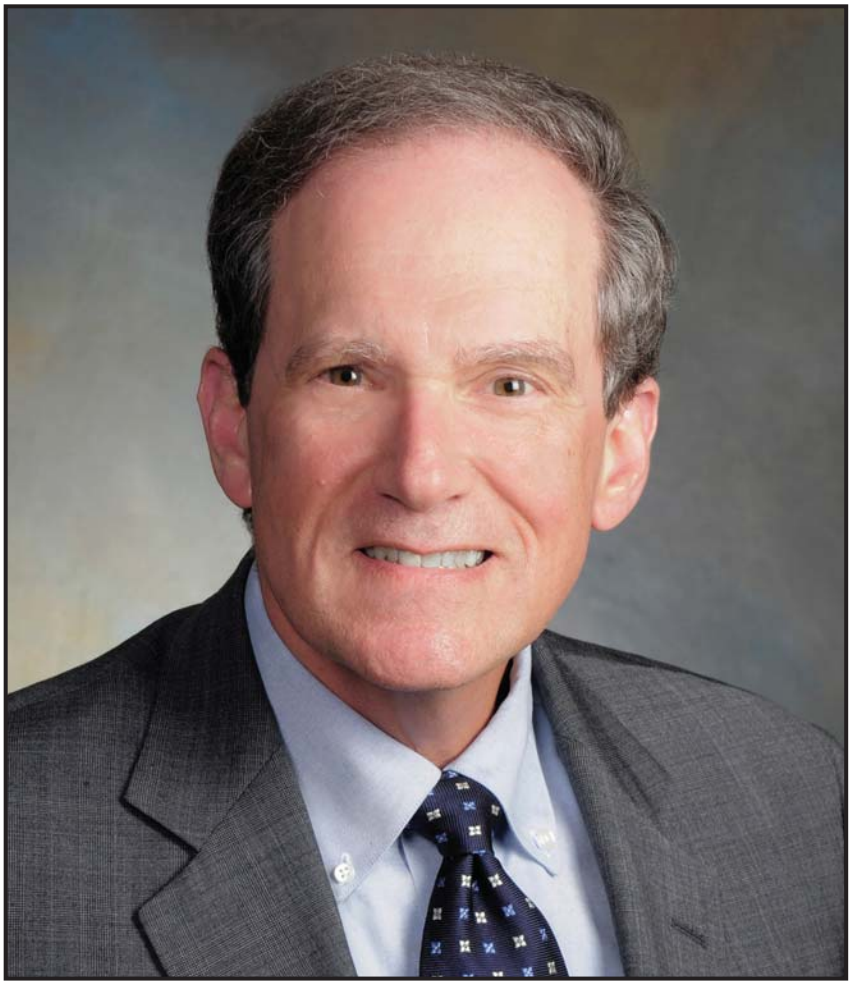
The Duke Conference And E-Discovery Solutions – A Panelist's Perspective

The Editor interviews ***Jeffrey J. Greenbaum****, Co-Chair of the Firm's Business Litigation Section and Chair of the Firm's Class Action Practice Group, Sills Cummis & Gross P.C.*

Mr. Greenbaum is a leader in the ABA Section of Litigation and the Association of the Federal Bar of New Jersey, where he served as President. In the ABA Section of Litigation, he is an elected Section Officer, member of the Section's Executive Committee and governing Council and was its Liaison to the U.S. Judicial Conference Advisory Committee on Civil Rules (Committee).

He attended the Duke 2010 Conference on Civil Litigation on May 10 and 11 (Conference) and was one of the panelists on the Judicial Management of the Litigation Process panel.



Jeffrey J. Greenbaum

Editor: What was your overall reaction to the Conference?

Greenbaum: It was a wonderful Conference. It was a very intensive two-day program with about 70 outstanding speakers and panelists. Included were many of the country's leading judges, professors and lawyers. The panels were carefully designed to examine the wide range of issues generated by the explosion of electronically stored information (ESI) that has accelerated in recent years and the increasing costs and burdens of litigation.

On some issues the panelists reached some measure of consensus, but on many other issues there were differences of opinion. It will be up to the Committee, based on the wealth of material generated by the Conference, to decide how to move forward.

As to next steps, we will know more when the Committee has its next meeting. There is a meeting with the Standing Committee in June at which it will give a detailed report on what happened at the Conference and how it plans to move forward.

When the Committee provides that report, we will have a clearer idea of what the Committee plans to do. I suspect that they are very much committed to taking action after all the hard work that went into the Conference. There is no doubt that the Conference represented great progress in sorting out the issues and focusing on those that were most important.

Please email the interviewee at jgreenbaum@sillscummis.com with questions about this interview.

The Conference launched a process that will in my opinion take two or three years to complete. I sensed that the Committee is intent on making it a worthwhile venture.

Editor: What influence do you think the results of the pilot programs will have?

Greenbaum: Chief District Judge Jim Holderman of the Northern District of Illinois outlined the extensive pilot program that is underway in district courts throughout the Seventh Circuit to test the principles developed by a committee of trial judges and lawyers, including in-house counsel, private practitioners, government attorneys, academics, and litigation expert consultants headquartered primarily in the Seventh Circuit. The principles developed by the committee that he assembled emphasized that the parties to litigation should disclose the facts on which their positions are based at the outset of litigation (no hiding of the ball) and that in determining the extent of e-discovery, the judge should observe the principle of proportionality.

My perception was that the Committee is going to follow the results of the Seventh Circuit's pilot program very closely and that those results will have a significant impact on its thinking. It looks like a very productive program that will give us very good results.

The American College of Trial Lawyers and IAALS developed pilot project rules for pilot projects in state and federal courts throughout the country to test their recommendations. Also, one of the panels was devoted to different approaches followed in Arizona and Oregon. One panelist, Loren Kieve, described how courts in the Eastern District of Virginia had a "rocket docket" that moves cases fast with tight deadlines. My belief is that cases settle there because people can't live under those extremely tight deadlines. The ABA Section of Litigation, the New York State Bar Association Committee on the Federal Courts and other bar groups developed different proposals, and a panel was devoted exclusively to the ideas generated from the bar groups. So, many different ideas and alternatives were put on the table.

Editor: With so many groups with diverse interests being represented, was there a consensus that action should be taken by the Committee on any of the issues?

Greenbaum: Greg Joseph's panel of very sophisticated e-discovery experts, judges and lawyers reached a consensus that there should be a rule on preservation and spoliation, and they identified the issues that should be covered in a rule, without resolving where the lines should be drawn.

My guess is that the Committee will want to give priority to addressing the preservation and spoliation issues and then go forward with drafting rules. When the 2006 e-discovery rules were adopted, it was too early to draw the line as to where the preservation obligations should start and end, but over the last four years there has been growing recognition that maybe now is the time to address those issues.

Judge Scheindlin's decision in the *Pension Committee* case reinforces how important certainty is. Wherever the lines end up getting drawn, certainty would be better than the current state of affairs. There's a lot of uncertainty in the corporate world and the world of plaintiffs' lawyers as to what their obligations are and where they start and where they end.

Another area of consensus, although the opinion was not unanimous, was that the surveys presented at the Conference, including that of the ABA Litigation Section, had established that litigation is too expensive and that discovery, including e-discovery, is the principal reason why. Most people at the Conference seemed to feel that e-discovery is too broad, too costly and that something has to be done to rein it in. A related theme is that the cost of litigation, and in particular the cost of discovery, including e-discovery, has placed greater emphasis on settlement and avoiding trial. Judge Higginbotham said that this has resulted in courts becoming more like administrative agencies, just processing cases.

Editor: It seems like great waste is involved in e-discovery where millions of documents are reviewed with only a few being used at trial.

Greenbaum: District Judge Campbell from Arizona, who was on the panel looking at solutions for excessive discovery, pointed out that when attorneys come up with their trial list of exhibits they might have 300 exhibits, but when they go to trial there are only 25 they really use. His point was, why can't people try civil cases like they do criminal cases where they get less discovery and every stone is not turned. Yet criminal cases get fair results.

Judge Campbell suggested that we adopt some of the approaches used in criminal cases. Where someone's liberty is at stake, these cases involve a lot more than only money. Why do we have to feel that we must turn over every stone in the whole world to find documents that we'll never use at trial? Why can't we be more focused on what is relevant for the trial?

He talked about some ideas he had about how he gets people to focus on the trial by giving an opening statement at the initial conference to focus on what the case is about. He described a number of techniques he's been trying to implement in his court.

There was a consistent theme that judges need to manage cases better. Some people thought the rules didn't need to be changed and that all we needed was better judicial management.

Editor: Do you think that all the problems can be solved by better judicial management?

Greenbaum: No. We should have better judicial management and there is more training that needs to be done, but that alone is not the solution because there is no consistency. You will always have some judges who are better managers then others. Judge Baylson made that point. Unless you change the Rules, you are not going to solve the problem. There are many places where cases are managed very well and litigation is still too expensive. Rule changes should change the notion that minimal pleading, coupled by the broadest possible discovery, is the best way to resolve civil disputes.

Editor: What about the concept of proportionality?

Greenbaum: Proportionality was a subject that was discussed very frequently and consistently throughout the Conference, and there was a sense, in my judgment, almost a consensus, that the Rules should contain a proportionality provision that provides more guidance as to how it is to be implemented and that it should be enforced.

Editor: Tell us where the Conference came out on preservation?

Greenbaum: The Greg Joseph panel reached a consensus that there had to be clearer guidelines for when you had to preserve documents, although they did not propose a specific rule. The panel was diverse and included recognized experts, including Judge Shira Scheindlin, the author of the *Zubulake* opinions and the recent *Pension Committee* opinion, and Magistrate Judge Facciola. Therefore, this consensus will probably carry great weight with the Committee.

Editor: Was consideration given to LCJ's proposal that the costs of e-discovery be allocated to the requesting party?

Greenbaum: A view was expressed several times in the course of the Conference that cost allocation would be an effective way of limiting excessive e-discovery.

Editor: Searching backup tapes adds greatly to the cost of e-discovery. Was this discussed?

Greenbaum: Judge Scheindlin said that one way to address some of the issues with backup tapes is to stage discovery so that active data is produced first and that backup tapes would be searched only upon a showing that what is needed is not on the active document servers.

I recall that many of the witnesses who were testifying on the original e-discovery rule proposals prior to 2006 mentioned that many times once you search for documents that are readily available on the active servers you usually don't need to go any further. The theme from some of the plaintiffs was that we don't want two million documents. If we get the documents that we need in the first round, we prefer not to have to wade through so many documents.