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Acts of Faith

Good-faith vs. bad-faith data destruction in recent court cases and the new amendments to the FRCP

As e-discovery continues to evolve, so do the rules surrounding it. For example, between 2003 and 2004, United States District Judge Shira Scheindlin wrote five groundbreaking opinions that greatly affected the way duty to preserve electronically stored information (ESI) and consequences of data destruction are viewed in the court and continue to be referenced today.

Furthermore, in 2006, Congress amended the Federal Rules of Civil Procedure of which Rule 37(f), which states that a court may not impose sanctions when electronically stored information has been lost as a result of a good-faith operation, has been the subject of much good faith vs. bad faith discussion and debate. Also of growing importance as e-discovery and its governing rules evolve is the necessity of having a sound legal holds system firmly in place and in use.

The landmark case of Zubulake v. UBS Warburg, on which Judge Scheindlin ruled, is often considered to be the nation's first definitive case on a number of e-discovery issues. This case set the precedent that counsel is responsible for monitoring a client's compliance and ensuring that data is identified, preserved and produced. As a result, an attorney would place a legal hold on data to communicate the need to preserve. Alitia Faccone, a partner at McCarter & English LLP, wrote in 2012 that Zubulake IV set the "standard for data preservation."[1] In fact, Judge Scheindlin's first opinion has been cited more than 765 times in 134 opinions in both federal and state cases.[2]

As electronically stored information (ESI) grew exponentially, new technical complications also arose. In order to maintain a smoothly running system, many computer programs delete certain data. Data that is seemingly irrelevant, however, may become quite relevant once a legal matter comes to light. Its deletion could be considered as a failure to preserve. To address this, the Federal Rules Advisory Committee added subdivision (f) to Rule 37 of the Federal Rules of Civil Procedure.

The Committee noted, "Sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system." This includes commonplace operations such as overwriting information when a new copy is saved or the deletion of items from Random Access Memory (RAM) to improve system performance. The bar from sanction only applies to people who, in good faith, attempted to intervene and change the course of action that was causing ESI to be deleted. In order to avoid sanctions, it is critical to have thorough documentation that the legal hold was followed in good faith.

Both Rule 37(f) and Judge Scheindlin's opinion on Zubulake remain relevant and informed the judge's most recent decision on failure of preservation. In Sekisui American Corp v. Hart, the Plaintiffs knowingly

1: *Alitia Faccone, E-discovery: The Many Lives of Laura Zubulake, INSIDE COUNSEL (Sept. 25, 2012), http://www.insidecounsel.com/2012/09/25/e-discovery-the-many-lives-of-laura-zubulake?t=e-discovery&page=2* **2:** *Id.*

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destroyed critical emails. Fifteen months after sending a Notice of Claim to the Defendants, Sekisui finally initiated a legal hold. When the Defendants discovered that the Plaintiffs had permanently deleted any related ESI, they requested sanctions for spoliation. In what seemed like an easy strike against the Plaintiffs, the Defendants opened a new e-discovery can of worms.

In reference to Zubulake, United States Magistrate Judge Maas determined that the deleted ESI could not be proved as relevant, and that the Plaintiff had not necessarily destroyed data in bad faith because it had later recovered more than 36,000 emails involving the defendant. Judge Scheindelin reversed this decision, however, stating, "That Sekisui provides a good-faith explanation for the destruction of Hart's ESI – suggesting that Taylor's directive was given in order to save space on the server – does not change the fact that the ESI was willfully destroyed."[3]

The timing of this opinion is interesting as the Federal Rules Advisory Committee has opened possible amendments to FRCP 37(e), Failure to Provide Electronically Stored Information, to comments from the public. The Civil Rules Advisory Committee released their proposed amendments to the Federal Rules of Civil Procedure in August 2013. The Committee is seeking comment on their proposals through February 15, 2014.

A summary of the possible amendments is as follows: "Rule 37(e) regarding discovery sanctions would ease preservation requirements by allowing a party to make and defend preservation decisions based upon the proportional benefit of the information and the burden that preserving and producing it would require."

Proposed changes to Rule 37(e) add more protections against sanctions by allowing them only if the party's actions in failing to preserve or produce documents was "willful or in bad faith" and "caused substantial prejudice in the litigation." This is intended to prevent parties who adopt "reasonable and proportionate preservation measures" from sanctions. This amendment is also intended to make sanctions more uniform across various Circuits, which currently vary a great deal in their imposition of sanctions.

Another major adjustment reflected in the proposed changes to Rule 37 (e) is the new "safe harbor" language, which is intended to protect parties from sanctions should they follow reasonable protocols to ensure the preservation of ESI. This protection will apply unless the court finds that a failure to preserve was "willful or in bad faith" or if it "irreparably deprived a party of any meaningful opportunity" to litigate the claims in question. Many corporations who have compliance programs in place to avoid sanctions or adverse jury instructions could benefit from this rule.

Judge Scheindlin has not yet commented publicly[4] on the amendments but in the Seiksui memorandum she stated: "I do not agree that the burden to prove prejudice from missing evidence lost as a result of willful or intentional misconduct should fall on the innocent party. Furthermore, imposing sanctions only where evidence is destroyed willfully or in bad faith creates perverse incentives and encourages sloppy behavior. Under the proposed rule, parties who destroy evidence cannot be sanctioned (although they) can be subject to 'remedial curative measures' even if they were negligent, grossly negligent, or reckless in doing so."

In more detail, the Sekisui motion reads: "The destruction of evidence is merely negligent, the burden falls on the innocent party to prove prejudice."[5] "In the context of an adverse inference analysis, there is no analytical distinction between destroying evidence in bad faith, i.e., with a malevolent purpose, and destroying it willfully."[6]

Furthermore, "the proposed rule would permit sanctions only if the destruction of evidence (1) caused substantial prejudice and was willful or in bad faith or (2) irreparably deprived a party of any meaningful opportunity to present or defend its claims … The Advisory Committee Note to the proposed rule would require the innocent party to prove that 'it has been substantially prejudiced by the loss' of relevant information, even where the spoliating party destroyed information willfully or in bad faith."[7]

One can have faith that the debate around these proposed amendments will continue to and well beyond February 15, 2014. Whether a future plaintiff or defendant, standards relating to preserving electronically discoverable information are of great importance as the digital age continues to expand. Also of importance for future parties concerned is having a premier legal holds system in place that can effectively and efficiently streamline the critical safeguarding process. •

Report of the Advisory Committee on Civil Rules: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf
Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure - Request for Comments: http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf

3: *Sekisui American Corporation v. Hart, No. 12 Civ. 3479 (SAS) (FM), 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013)* **4:** *Proposed Amendments to the Federal Rules of Civil Procedure, http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002* **5:** *Sekisui at 18-19* **6:** *Id. at 21-22* **7:** *Id. at 14.*