

At the Crossroads of Bad Faith & Negligence: How *Sekisui* Shows We Need New Rule 37(e)



*Adapted from a presentation at the 2013 EDI Leadership Summit
Santa Monica, California | October 2013*



TOM ALLMAN Adjunct Professor at the University of Cincinnati College of Law Chair, retired General Counsel, BASF Corporation

ROBERT LEVY Counsel for Civil Justice Reform & Law Technology, Exxon Mobil Corporation

ROBERT OWEN President of EDI, Partner, Sutherland Asbill & Brennan LLP

JON PALMER Assistant General Counsel, Microsoft

JOHN O'TUEL Assistant General Counsel, GlaxoSmithKline

With Commentary from Hon. Andrew J. Peck, U.S. Magistrate Judge, U.S. District Court, Southern District of New York

Overview

We are dealing during this session with possibly the most important issue that's before the Rules Committee, and will focus on spoliation, sanctions, and proposed Rule 37(e).



The Doctrine of Spoliation and the Evolution of the Current Law Governing Preservation

Tom Allman: The duty to preserve is a strange hybrid animal and you are not going to find it written down in any rule and the drafters of the new proposed rule that we are going to talk about here in a few minutes chose not to write it down and not to articulate it. It stems from the ancient doctrine that permitted evidentiary inferences to be drawn from the failure to produce information. And you will recall the ancient case of the individual who swiped the jewels from a young man who walked into a jewelry store with it and later on when there was a suit dealing with the value of those jewels, the court permitted the inference that the jewels were of the highest value because that is the only possible explanation for why a person would not have returned the jewels to the person who wanted them. So this evidentiary inference became what is known as the Doctrine of Spoliation. It became well known that you are not permitted to destroy or otherwise make unavailable information such as discoverable information in the course of a lawsuit. Inherent in that doctrine is the idea that you should hang onto things when they are important to litigation. And that's what the duty to preserve is. It's inherent in the Doctrine of Spoliation. And unfortunately it has become in my view far more anal and far

more overstated than it needs to be. I can recall in the 1980s when I had a case up here in San Jose involving 50 million documents that caused me to rent an apartment up here for eight years. The word spoliation and the duty to preserve was not something that we talked about. It was known ethically that we had responsibilities as lawyers to not destroy information. We didn't expect that our opponents, who were General Electric, would do it and they didn't expect that my client, who built nuclear power plants, would do it and we didn't. And it wasn't until I became a general counsel and began to get these strange orders from the Northern District of Alabama and places like that telling me that I had to preserve all my backup tapes that I began to realize that people had become too serious about the duty to preserve. And so that is the reason why we pushed for the original Rule 37(f) to cut some slack to say that you know, you can make mistakes in the duty to preserve and not be sanctioned for it. But that's where it came from. Mr. Owen, I am sorry to say and as I had mentioned a minute ago we are going to talk in a minute about Rule 37(e). The Rules Committee you will recall at our meeting down in Dallas was told by many of us that it was time to spell out when a duty was on — when it occurred and when — what triggered it and so on, and they chose not to do that.

Is It Clear Under the Current Law How Companies Are Required To Preserve Information?

Tom Allman: Well I guess it depends on where you sit in the United States. I think if you sit in the Southern District of New York it's quite clear. You have an absolute duty, immediately upon the hint of foreseeable litigation, to undertake a written litigation hold and to execute it appropriately and not lose any information. And in doing so you must anticipate the possible extent of discovery, and pick the appropriate custodians and the possible information that has to be served. I would like to think that there are parts of the country where it's a little bit more flexible and where you are only required to undertake reasonable steps to preserve.

And of course, as you have pointed out in your overhead here one of the biggest problems is the auto delete functions and whether or not you are always required to render neutral the auto deletion function of any of your methods of accumulating information and it would be fun to know.

I don't see any real trend towards realism on the auto delete aspect of it. I think if you squarely present to a judge the question — Should I have deleted? Should I have rendered inoperative the auto delete function at a time I knew that litigation was potentially possible? — I think the judge is going to say yes you have to. But I think the real problem is the confusion that's grown up with the idea that just because someone in retrospect can go back and see that perhaps it would have been a wise idea to have taken a certain step — whether that means that you have to take that step in advance — and we are going to get into that later when we get into the question of whether or not, now that we have introduced proportionality into preservation, whether you can rely upon that and you can say it's not proportional for me to deal with auto delete in that function.

The Causes of Overpreservation and Its Effects

Jon Palmer: I suppose it's clear in a sense. Discoverability is the standard that we have to operate under and at least under the Rule 26 as it currently sits — that's extraordinarily broad and we all work with that standard every day. Even anything potentially relevant to the subject matter of the litigation or anticipated litigation falls within that net. I think the problem really is in practice when you start to try to apply that standard, often with imperfect information at a very early stage in a very short period of time, there are tremendous ambiguities and difficulties in doing that. Sometimes it's not clear what the subject matter is really. Particularly in a pre-litigation context but often even when you have a complaint and you read it. I'm sure we have all had the experience of reading a complaint and you still really don't know what the case is about. So there are profound ambiguities in actually trying to put the right hold in place, get the right custodians and we make judgments, often with imperfect information, and do the best we can.

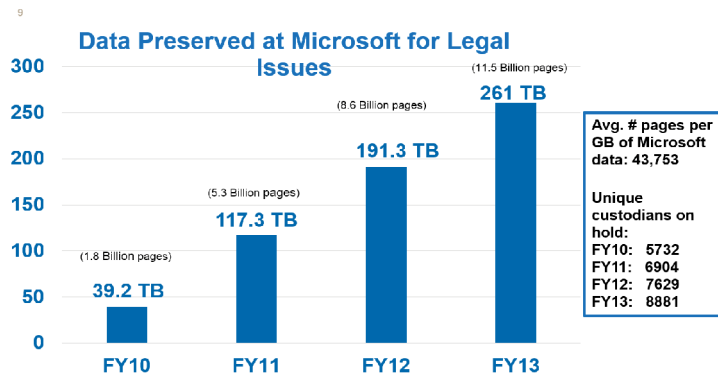
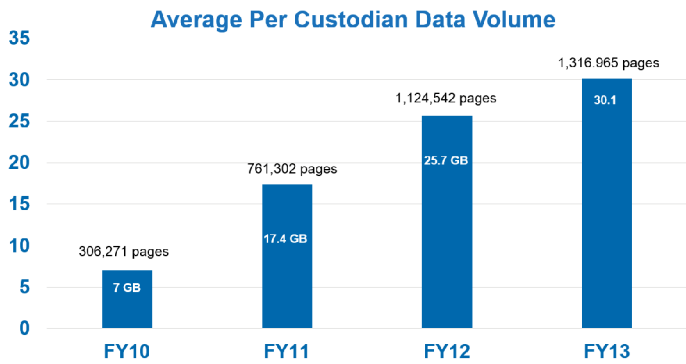
I think the nub of the problem really is what that ambiguity does and how that ambiguity incentivizes behavior of the parties in litigation. From where I sit it certainly incentivizes the plaintiff lawyers to exploit the ambiguity. Plaintiff lawyers as a general matter are smart folks and they understand that if they can come up with some colorable argument as to why you should have preserved something that may have had some potential

relevance to some issue in the case, and if they can come up with an argument that it wasn't preserved, they will shift the dynamic in litigation away from a resolution on the merits to some other issue of what should have been preserved and why it wasn't preserved and what the impact of that was. And that changes the dynamics of the case tremendously and we know that. And we know that in surveys that have been done of the American College of Trial Lawyers and the ABA Litigation Section there is a widespread view that that type of conduct drives up cost and will force settlements on issues that have nothing to do with the merits. So we know that behavior is incentivized on the plaintiff's side and for companies that are often defendants and have a lot of data, such as my company, it also incentivizes behavior.

Overpreserving

The behavior it incentivizes is that we over preserve. We take a very conservative view of what we need to preserve because it's almost like buying an insurance policy. Take the broadest view of what needs to be preserved and that inoculates us against baseless claims that we have somehow lost something. And I'll even say that there are times when we preserve stuff that we know is not relevant to the case but you know the other side is going to come and say, "Well why didn't you preserve it? How do you know it wasn't relevant?" And you have to go through that process of proving the negative. So, why not just preserve it.





Recent Case Involving Microsoft

I can think of one recent case where the allegation was that Microsoft had conspired with its OEMs, computer manufacturing partners, to set certain license terms. Well, we knew after talking to the relevant people that all the license terms in the company were decided and reviewed and all license policies were handled within one small group. We certainly put that group under hold. But we also knew that the plaintiff was going to come back and say, “Well why didn’t you put the entire organization that communicates with these computer manufacturers under a hold? We want to see all those communications even though we knew they had nothing to do with any license terms.” What do we do? We put them under a hold. Hundreds of people in China, Korea, Japan. Each of those OEMs had an organization built around each of them. We put those under a hold simply to inoculate ourselves against that argument.

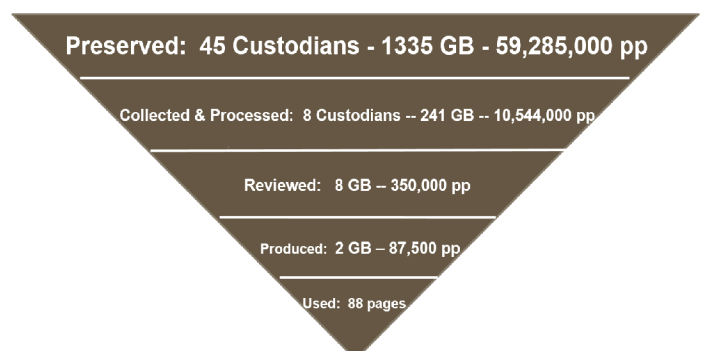
So, some of you who may have been here at this Summit last year, or even the year before, may remember some of these slides. We started to track our preservation data back in the 2010 fiscal year and at the end of the year took a snapshot. And you’ll see in 2010 we had a little over 39 terabytes under preservation. That’s through our litigation hold process and at the end

of fiscal 2013 it was up to 261 terabytes. So, almost a seven-fold increase over the last four years. I like to think of things in terms of paper, so we have actually calculated the average number of pages per gigabyte for Microsoft documents — a little over 43,000. And you’ll see that we increase the number of unique custodian holds each year.

The big driver is that the amount of data per custodian has gone up from 7 gigabytes per custodian in FY10 to over 30 gigabytes per custodian in FY13. So, turning to the preservation funnel, this is also something that we do each year. We take a snapshot and create the “average case” at Microsoft by looking at the number of matters we have open at the end of a fiscal year and divide that by the number of custodians under hold, divide that by the number of matters and you come up with your average case. In this year we put about 45 custodians under hold in the average case.

Now I want to make one point clear. That data there — the 1,335 gigabytes of data — that’s just custodial data. That does not include, for instance, structured data that we would also put under hold in cases where it’s appropriate to do so. And then we generally cull about 18% of that out and apply various tool and technologies to try to filter out what we have. People actually review either for privilege or for responsiveness. You see 2 gigabytes which is a very small fraction, 87,000 pages or so. About 1 in 1,000 pages is actually used. Now, that 1/1,000 ratio is something that was taken from a study that was done in 2008. Microsoft’s ratio varies a little bit from year to year but that’s a close enough proxy. So, what you end up with is every page that’s used in litigation is marked as an exhibit, a DEP exhibit or trial exhibit. Based on 2013 numbers we are preserving over 673,000 pages.

The Problem: Over Preservation Microsoft as a Case Study – 2013 Average Microsoft Case – (Custodians/Volume/Pages)





Robert Owen: I ran the numbers a few weeks ago and if the bottom of the inverted triangle is an inch wide the top is 127 miles wide — just to give you an idea of the scope of preservation to what was actually used.

John O'Tuel: For just one single category of ESI we currently have preserved 203 terabytes of information. What has been preserved represents well over half of the entire amount of information at the company within that category. It shows you how broad preservation is. If you look at the over preservation with respect to employees and custodians that are under hold we have over 20% of our employees worldwide have one or more preservation notices or litigation holds sent to them. For the U.S. the number is even higher, over 45%.

Robert Levy: We also have a very similar experience and the numbers continue to trend in the same fashion that Microsoft has reported. What we've looked at in particular is the number of people on hold in relation to the number of collection events that take place. Then, looking at the collection events, how many of those result in information that's actually put through the litigation review process. And for every hundred people that we put on litigation hold, fewer than 20 end up having their data collected. And then of those 20, approximately 4 of them will end up having their data processed in terms of a collection event. So what that means, is that a very small percentage of the people that are on litigation hold will have their information put through the system.

The Impact of the Hold

One of the misperceptions is that the hold is innocuous. It doesn't really do anything. It's easy but it's not. You start with the premise of the individual person who is on a hold. And these are not lawyers. These are not people who go into court. These are not people who deal with depositions and read cases. These are people that are told you must save this information — and if you don't, you or the company could be subject to sanctions, it could be even worse. And that has a profound impact on each individual employee, what they have to do and how they manage information. In a way you could say it takes them off their game. But what it does, is it requires them to refocus everything that they do on observing the whole. And not only is that disruptive, but it's inefficient and it can be very problematic. And when somebody has a question, the time that it takes and the drag on company activities is significant. But there is also another element that has to be addressed which is the systems that are involved.

New Technologies

Every time a new technology is being introduced, we have to address the eDiscovery and preservation impacts. And you might say that's a great thing, we should be doing that — yes. But what happens is the technology people will come and say this is how we are going to design a new system or a new process to achieve a solution. And the goal is to make the company's activities more efficient, more cost effective and supportive of individual employees in doing their work? They have to deal with data security. They have to deal with issues like that. But that's the fundamental premise. And then we come and say, "Great we love that, but you can't do it that way because we have to worry about preservation. We have to worry about what happens if a judge comes in and says you could have done something differently." And that has a significant impact and a significant cost and we have to overlay a number of different tools and processes.

IT Involvement

Every time we put somebody on hold, ten different parts of our IT organization are involved. And it's not ten people, it's ten parts. Each part has multiple people. We've automated that to the extent possible, but it's a significant impact. And we are not mentioning the eDiscovery people that are full-time professionals working in support of this. Professor William Hubbard is working on a study where he has documented more specifically the cost of preservation and the impact that it has on businesses. The study is ongoing, but its preliminary work has demonstrated the impact that preservation is having and the cost incurred by companies on litigation.

Preserving Legal Risk

Robert Owen: Here are some of the reasons why corporate counsel overpreserve: First, there are no safe harbors, no bright lines in this area and at the same time there are great risks to the company's brand and to corporate counsel's careers if something goes wrong. Recall EchoStar, a company that was sanctioned in the Broccoli case in 2005 and then years later in the Voom case, the First Appellate Department court in New York said, "Oh, you all were sanctioned back in 2005." That case highlights the danger of being labeled a serial spoliator. On the question of the risk to career, you can ask the lawyers from Qualcomm whose careers were very adversely affected by that unfortunate episode. Finally, perhaps the most important factor is that in some jurisdictions negligent loss of data can result in sanctions. So for those reasons corporate counsel overpreserve.

Grappling With the Negligence Standard

Tom Allman: Back in 2002, Judge Cabranes on the Second Circuit authored an opinion in which he made the statement based on prior opinions from the Second Circuit that information that was lost negligently was sufficiently culpable, that it justified the imposition of sanctions. And the logic that he used, was based on an opinion by Judge Francis in a 1991 opinion in the Hudson Bus case in which he said that you have to look from the point of view of an innocent party. How or why the information is lost makes no difference. The infor-

Negligence vs. Bad Faith

Negligence

- Mere mistake enough
- Honesty is no defense
- Hard to avoid mistakes in complex environments
- Complex situations require complex rules
- As ESI sources and volumes multiply, opportunities for error increase

Bad Faith

- Malicious, fraudulent
- Easy to avoid acting in bad faith
- No need for complex rules defining conduct
- No need for extensive and detailed training of employees

mation is gone. And it's hard to rebut that argument but that is in fact the contrasting arguments that the two circuits have been wrestling with ever since. From my point of view the weight of logic falls on the other side of the equation. As I said earlier, with respect to the jeweler who refused to give the jewels back to the young man who brought them in, what reason would you have for consciously withholding something if you didn't fear what the consequences would have been on producing the information?

Sanctions for Negligence?

So it takes more than negligence in my view to justify the imposition of serious sanctions. And that's where the doctrine came from. And the split among the circuits, I can't number them all but they go something like this. The Sixth Circuit, the Second Circuit, The Ninth Circuit, all appear to agree with one another. The rest of the circuits to one degree or another adhere to the traditional view that it does take a consciousness of why you are not preserving information to justify imposing sanctions on it.

John O'Tuel: I think I can take us back even prior to 2002. I remember one of the very first research projects I took on as a young associate — again, far prior to 2002. The project was to research the law around spoliation and the destruction of evidence in a specific case. We were trying to make out the case that certain evidence had been destroyed and determine what proof we needed to put forward and actually achieve some measure of sanctions. And I remember the end result of that was we didn't feel comfortable unless we actually

put forward some proof that the other side had deliberately destroyed this particular information and had done so with some level of bad faith.

So, you move forward from that with a framework of 'thou shalt not destroy'. And moving forward from that, we've changed and transformed that into an affirmative duty of 'thou shalt preserve'.

Practical Impact on In-House Counsel

That does have some significant changes in the way that in-house counsel have to approach things. What we've really done is we've taken something that was within our code of ethics and within the concepts and the obligations of professionalism, and changed it into a litigation sideshow. As we saw this morning during an earlier discussion about the cases that have arisen throughout, from 2002 to 2004, a number of these cases showed the horrors, the fear that it strikes in the heart of in-house counsel both to your company's reputation and to your individual career. On top of that, the lack of consistency and the clear standards as to what is sanctionable conduct. So, if you take all of that together along with the advent and expansion of technology, what you get as a result from conservative companies is a natural tendency towards overpreservation both as to custodians as well as to scope. So, very pertinent for our discussion today because those are the things we are looking to reform.

Burden of Proving the Lost Data Was Prejudicial

John O'Tuel: I was struck by something that Judge Cardonne Ely said this morning. I hope I get it correct and don't misstate it. But, basically, she said that the focus of discovery should be getting to those documents, the information that is actually going to resolve the dispute. So, getting to that material information that will yield a decision one way or the other. Either through resolution via settlement or a decision at trial or otherwise. And if that is the goal and that is the standard then when a requesting party has a belief that something is missing they should easily be able to state the prejudice. If, instead the documents that they are requesting or the area of the information that they are trying to seek is at the periphery of relevance, they are going to have a harder time showing prejudice, and appropriately so. So, what it really comes back down to

is why should the producing party be required to show the negative, when in fact we should be trying to incentivize the parties to come together on those documents that will actually resolve the dispute in front of them.

Cannot Achieve Perfection

Jon Palmer: The lawyers that are involved have ethical duties not only to their client or to their company, but also to the courts and through our taking the oath of being an attorney. And when we engage in discovery we do that with the understanding that even if we find bad information we have to produce it. It certainly is possible that a party could decide deliberately to destroy information to try and benefit their position or their client's position, but our system is based, and has to be based, on the idea that this does not happen. If it does happen, that person is going to be punished for it.

This whole process that we've been dealing with now with Residential Funding and other decisions turns that on its head. And it basically says that the party producing information has an obligation to prove that what they did was right. Not only that they didn't lose any information, but that they did everything they should have done to insure that all of the information that should have been reviewed was reviewed, and all of the information that should have been produced was produced. And that is impossible. It's not only impractical but it is impossible.

We are assigned the job of doing our best effort and acting reasonably in accomplishing those tasks. But, we can't prove that we did everything. Particularly in companies that have tens of thousands of employees, to suggest that we then should have to show that information was lost was not prejudicial again turns it on its head. It's dealing with the issue of acting reasonably and appropriately and with the presumption that you are doing that and not the presumption you have to prove otherwise.

Presumption of Fair Behavior

Robert Owen: When I first started practicing with a big Wall Street firm in fairly complex commercial litigations, there was the assumption that people in the system would behave fairly, that the information would be gathered. It would be turned over. And were we so naïve to think that things were not destroyed or things

were not produced when they should have been? No. But I look back and I don't see any unfair results that I thought where the outcomes were changed. The presumption that everyone would act fairly and honorably has been flipped and now our system presumes that unless the custodian and companies are policed; unless they are overseen by lawyers with ethical duties, unless there is this great system of enforcement, that there will be rampant spoliation and changed outcomes. And I think that has occurred without people focusing on it.

Practical View

Tom Allman: Let me take a different, more practical view of this. This is not an unfair burden to put on somebody. Judges have tons of ways of inferring from surrounding circumstances, from other types of evidence and/or from the context. There are many of ways to figure out what was, and is missing, and what the implications of that are. I do not think it's an unfair burden at all to say that the movant, the person who seeks relief, should have to bear that burden. And I think it really is a slap in the face to judges to say they cannot figure it out.

Jon Palmer: The only slightly tangential comment I would make is there is often a presumption in some of these decisions that we're going out as companies and trying immediately to destroy everything. We're forgetting that at the point in time when we are making a decision as to which custodians to place under a hold I got 30 gigabytes of data. Am I looking at that data? No. I just want to make the right decision. In part, this is because I want to save the stuff that is going to be material, that is going to the merits that will help us resolve the dispute. And I have a very strong incentive even aside from my ethical obligations and the reputation of my company that I'm seeking to protect. I have a very strong merits - based reason for putting the right people under a litigation hold.

There have been a number of submissions and then we'll talk in more detail later on the proposed rules. Some of those that have made written submissions have argued that they, the plaintiffs, want to produce all of the information but the defendants — the bad corporations — all they try to do is not only avoid discovery but they actually don't produce things. They act unethically and that's a pretty startling comment. If that's the case, then

where we're going to go is a whole different paradigm where you can't trust the producing party to produce. What are we going to do? Have discovery masters go in and search? No. And that would just bring our legal system to a halt, much less have a disastrous impact on our economy.

One of the other thoughtful comments that was submitted, argued that these are situations where the scope of discovery was argued and information was not produced. But later on, through various processes, we found more information that related to the claims and therefore justice was not done by this party not producing the information. The idea was, if you narrowed the scope further, you're going to have more of those scenarios. But what that comment did not discuss is, how many cases have settled by parties who have meritorious claims or defenses because of the cost of discovery. If a party is forced to settle a lawsuit because they cannot afford it, or because they simply are doing an economic analysis that the cost of the process is so high that they have to cry uncle, then our legal system is just not working. Even if my company can pay the freight, if another company can't then that's injustice. It's not just a company. It's any litigant who has to deal with that.

Responsibility of Corporations To Reduce Cost

Question from Audience Member: Is it not incumbent on the clients or the corporations to take advantage of the various ways in which cost can be significantly reduced?

Jon Palmer: This is a question that hits very hard and is one that I've been asked before and have a visceral reaction to. Isn't it just completely wrong to suggest that we have to invest hundreds of thousands of dollars, hundreds of millions of dollars on information system and data management systems simply to deal with the issue of eDiscovery. Doesn't that seem wrong? We are greatly incentivized as a company to implement technology to make our company work more effectively and more efficiently, including trying to limit information where possible and trying to reduce the data storage that takes place. And we look at issues and those are all very pertinent points. But I don't want to be forced into implementing a tool set like that simply to deal with eDiscovery concerns.

Challenges To Reducing the Burden

I think there is a more fundamental question here. Absolutely technology can and does help. We, along with many companies invest heavily in technology to reduce this burden. Two points that I would make: The sources of data and the volumes of data are always going to outpace our ability to control. And you know we're always a little behind. So, just when we solve one problem, new sources crop up that we have to deal with, whether it's text, social media, whatever. There will be something tomorrow or a year from now that we will then have to grapple with. The technology is never going to be perfect and this is coming from a person who works for a technology company.

The second, more fundamental issue: Is this really the system we want? A system where we are putting hundreds of people under a hold in Asia even though we know they don't have any documents? A system that requires us to pay numerous legal fees to fight side shows over whether something was deleted in some corner of some company that may possibly have some impact on some side issue? Are we going to make technology decisions as to how we manage our businesses, not based on what's most efficient for the business, but based on efficiency concerns related to litigation? We should have a conversation about whether that's really the system that we want. We're the only country in the world that inflicts that system on its litigants. That to me is the fundamental question. Not whether technology will help at the margins but whether this is a problem or not.

I would also add two other features. One, if you are involved in the healthcare world, you have the added problem of trying to maintain the confidentiality of the information that you are now saving forever. And two, you're dealing with legacy systems. Even if you have that technological solution now, for whatever system it is, tomorrow the new version of this system comes out and you're left with having to maintain a system that you're not going to use. You maintain this system because you want to make sure that you don't wind up in a conversation about how some bit of information might have gone missing because you let that software lapse or you didn't maintain that system anymore because you never used it. The cost prohibition of this is ridiculous, it is not where we started and it's not where we want to wind up.

Example of Bad Faith

Daynight LLC v. Mobilight, Inc., 2011 Utah Ct. App

“actions and words attributable to KK Machinery after it filed suit, including throwing the laptop off a building; running over the laptop with a vehicle; and stating, ‘[if] this gets us into trouble, I hope we're prison buddies,’ unquestionably demonstrate bad faith and a general disregard for the judicial process.”

The Rules Committee's Express Rejection of *Residential Funding* and the Proposed Rule 37(e)

Robert Owen: I just love this case. This is a Utah Court of Appeals from 2011. This is in support of my view that there is a great difference between bad faith and negligence. The spoliators threw a laptop off the building. They ran over it with an SUV and one of them said to the other, if this gets us into trouble I hope we're prison buddies. That was spoliation. I don't think its news to many in the room that the Rules Committee (and this is a quotation from their submission to the Standing Committee) “proposes to reject and overrule *Residential Funding* which states that negligence is sufficient culpability to support sanctions.” That is the basis for Proposed Rule 37(e). Robert Levy will talk to us about their intention to overrule *Residential Funding* and then walk us through the essential elements of 37(e) which is here on the slide.



Rules Committee

Robert Levy: I think the Rules Committee was trying to address a couple of different factors. One of which is very obvious. There is an inconsistency among the circuits about the culpability standards that should be applied in determining whether sanctions are appropriate in the case of spoliation. So the goal was to have a consistent standard. Obviously, the question was whether it should be negligence versus a finding of deliberate conduct that would indicate that a party acted intentionally to try to destroy information, or otherwise doing it in bad faith. And the committee landed on what I think was an appropriate approach to suggest that the standard should be that sanctions would not issue unless a party acted willfully or in bad faith and there was substantial impact as a result of that. And they struggle, though as you point out, 37(e)(1)(B)(ii) says that if information was lost and the other party's ability to present their case was irreparably deprived, i.e. that the information lost meant that they couldn't present the issue, their claim or defense, then, even if there was no culpability, that would still be a basis for sanctions.



context or any other context. The court also considered whether this new rule should just be for ESI. I don't think so. I think it should be a broad rule that applies to any situation where a claim of spoliation has been made.

Silvestri Case

Robert Owen: Silvestri is a case that came up in the Fourth Circuit where there was a single driver car crash. He was drunk. He was speeding. He went off the road. He ran into a fence. He ran into a pole. And he didn't tell GM until three years later that he was considering filing any kind of claim. In the meantime, his expert witnesses had done work on the car. The car was sold to the insurance company and then repaired and resold. His experts told him to notify GM and to preserve the car. He didn't do that. I personally think that his actions can be viewed as reckless because it was a central piece of evidence and he let it go knowingly and I think that satisfies the culpability standard. However, the Rules Committee has read it as simply being — the defendant was irreparably deprived.

Curative or Remedial Measures

Tom Allman: This is really troublesome to the Rules Committee. You see two clauses there. The first clause which is the (B)(i) clause says you've got to have a showing of high culpability and substantial prejudice or you don't get sanctions. Now, what it doesn't say there is the next part of it which is that you can get curative or

Proposed Rule 37(e)

Would replace current Rule 37(e) entirely.

- *Sanctions allowed "only if the court finds that the party's actions caused substantial prejudice in the litigation and were willful or in bad faith."*

OR

- *Irreparably deprived a party of any meaningful opportunity to present or defend against the claims [in the litigation]."*

And that is the committee's effort to try to preserve the *Silvestri* case which the committee felt was an appropriate result and therefore we need to have the irreparable deprivation provision in the rules. I disagree with that. I think the rest of the rule gives the basis for preserving *Silvestri* but that was the thinking of the court, of the committee. They had struggled with different elements. At one point, they talked about making the irreparable deprivation rule based upon some type of higher conduct that would be negligent. We actually argued against that and John Rosenthal, of Winston & Strawn, made a very strong and effective argument on the point that negligence doesn't belong in the rules in that



remedial measures that will take care of the unfairness of the failure to preserve. So, that top part of it is the core element of the rule. If that can get passed it may very well mean a change in the culture and a change in the concern that these folks have about over preservation. But because the draftsman came from Maryland, they are hung up on the second part of this rule. And that is that irreparable harm alone regardless of culpability justifies that someone should get sanctioned. Now, where in the world does this come from? It comes from the doctrine that you usually find in products liability cases where the thing that you are going to talk about is lost or damaged or destroyed or hidden and you'll see it in fire cases. You'll see it in boat cases, you see it in explosions. You know you see it in case after case after case. And our friends who first drafted this rule, felt that it was equivalent and important to the first part of the rule.

An Extraordinary Exception

My contention is that it is not equivalent. It is an extraordinary exception that should be dealt with as such by simply describing it as, absent exceptional circumstances, you get the first rule. Now that's my position. But, I must tell you that Judge Grimm and Judge Campbell really are concerned about this. Judge Sutton, who sits as the Chair of the Standing Committee, has also spoken to me about his concern. What they don't want to do, is pass a rule that somehow reads *Silvestri* out of the body of case law, that these judges can rely upon, where it applies. I know this is getting

subtle, but this is important. What they are trying to do is pass a rule that will occupy the field entirely and, thus, prevent the use of inherent sanctioning power. In other words, instead of each judge saying on their own – “I'm going to make up what the rules are that apply in sanctions” – they are going to be bound by the rule. But, if they just take that second part and don't put it in, what happens to *Silvestri*? Is it now wiped off the books? Well, that's what their concern is.

Jon Palmer: We said drop it, and the reason is because the Rules Committee's perception is this will be rarely applied. There are very few circumstances where it should be applicable. The reality is that this is a big wedge item that could be used to try to open up discovery.

Let's say we have a tort action and the victim did not perceive it. But, there are witnesses. There is one witness who saw it and that is the witness that has all the information. And let's say that person is a foreign national and he gets repatriated back to his country for no reason related to the lawsuit. And these things do happen and then you don't have the ability to depose him. You don't have the ability to have him testify. Is that a situation of irreparable deprivation? I think you can make the argument. Even if you don't win, you have to deal with that issue.

Proposed Advisory Committee

Hon. Andrew Peck: Good lawyers make lots of arguments. But, I think the proposed Advisory Committee notes are crystal clear that while there is the theoretical possibility of using this for ESI, it is really meant for *Silvestri* or the exploding toaster, tire, you know all of those physical cases where you don't keep the only item that could be tested to prove the case. I'm not sure that it would ever apply to ESI. I'm not sure why it would apply to a missing witness. There is almost never only one witness to anything. Maybe the language would have been better if there were some exceptional circumstances. We can all play with the drafting, but I think the intent is clear that it is not going to be used in the ESI context, or anything other than the *Silvestri*-like context.

Curative Measures

I think, though, that the issue of curative measures is a way to resolve it. Because, again, the result in this situation will be that a party is sanctioned and the implication is that sanction will be death penalty sanctions, because an average inference wouldn't work. So, what's the option? You've got to say, "well, you don't have the evidence." And whether we think you would have won or not, you win. The rule doesn't describe to you. You have to meet a burden of showing that you would have won with whatever it was that was lost. That is up to the judge. The judge is not addressing culpability, because that's totally out of the rule. So, how does the judge make a decision and what sanction could a judge enter other than the ultimate sanction?

If there is a curative measure that could have been used, I think the structure of the rule denotes that the judge should always look to curative measures before going to sanctions.

Jon Palmer: Judge Peck, how would you see it if the defendant did not preserve the device, or whatever it was? How do you present the issue to the jury? Again, that's one of the problems that the rule doesn't give any guidance in terms of how it would be applied and what standards should exist in that circumstance. And that raises a bit of uncertainty in our view.



Hon. Andrew Peck: I suppose. But I think since the willful, or bad faith and prejudice, is probably more important to this group in general, I'm not sure we should spend too much time worrying about the irreparable deprived issue.

Robert Owen: I'm going to move us to the next session. We will talk now about the *Sekisui* case. It's my home court. I'm going to run us through the facts quickly. It's the mother court of district courts and I'm proud of that. It was a corporate transaction gone bad in 2009. A man named Hart sold his company to Sekisui and he joined Sekisui as an employee. In 2010, Sekisui didn't like the way things were working out and sent him a notice of claim. They were claiming breach of warranties and a year later Hart's emails were deleted. They were intentionally deleted by the head of HR because she didn't know about the lawsuit. A litigation hold hadn't been issued. She was trying to be responsive to space limitations. She went through his email account and printed out emails that she thought might be relevant. But, it is true that his email account was intentionally deleted. In early 2012, Sekisui puts a litigation hold in place. In May 2012, they filed a complaint and that July, the outside IT service provider was told to preserve. And then in 2013, Hart moved for sanctions for deletion of his emails. Judge Scheindlin issued her opinion on August 15th, which by sheer coincidence, was the same day that the proposed rules were released for comment. And in it, she states that the intentional deletion of the email account was willful and that was sufficient.

Meaning of Willful

Willful is a word of many meanings according to the United States Supreme Court. Some cases read bad faith into willful, whereas some cases don't. Some cases say an action is willful if an act is done intentionally irrespective of evil intent. Here are some willful acts choosing to send a litigation hold to one employee but not to another. Adopting a document retention policy and adhering to it. Ordering the deletion of all emails that no longer required action before a closing. That actually happened in *Sekisui*. There is no allegation that deletion had anything to do but Judge Scheindlin takes care to point it out in her opinion that before the acquisition of the Hart's company by *Sekisui* there were deletions of emails but there is no connection to any alleged spoliation.

Sekisui v. Hart (SDNY 2013)

- Corporate transaction gone bad
- 2009 - Hart sold his company to Sekisui and joined Sekisui as employee
- 2010 - Sekisui claimed breach of warranties, sent Hart Notice of Claim
- 2011 - Hart's emails on Sekisui system deleted
- Jan. 2012 - Sekisui puts lit hold in place
- May 2012 - Sekisui files complaint
- July 2012 - Sekisui IT service provider told to preserve
- 2013 - Hart moves for sanctions for deletion of his emails

John O'Tuel: Well, let me propose that according to both opinions, of Hon. Frank Maas, who is here, and Judge Scheindlin. There was a push back against Dicey Taylor. She was told by the IT people that they were expecting that this needed to be on hold. They understood it was on hold. I am not trying to argue the whole issue with you but just on the factual recitation in terms of the timing. If you go back to the chronology you had several slides ago it will show that *Sekisui* anticipated their own litigation before this event took place. And, in particular, Dicey Taylor was told that there was supposed to be a hold and she pushed back. And she specifically wrote something to the affect that no, we want this pushed out into cyber space. We want this gone. And in very express terms. I think others have read the decision.

Jon Palmer: I think if that was correct then there would have been a basis for finding that the willfulness existed. It was deliberately designed to delete the information and even Judge Scheindlin did not hold that and certainly was not in Judge Maas' opinion as I understand it. It might have been reckless and it might have been negligent but there is still the question of, "Was there a willful intention to destroy information that related to the lawsuit?" Neither opinion made that finding.

Narrowing Preservation Practices

Robert Owen: The purpose of the spoliation doctrine was to put it on the person who destroyed the information because you can infer that their state of mind was negative and that the stuff that was lost was negative. Hart's state of mind was irrelevant to the breach of warranty claim. *Sekisui* recovered 36,000 emails from his email account by going to other accounts and they produced all of them. And, there was no showing in the case that anything relevant was lost. There was no showing. And there was no showing in the case that the deletion was done on purpose. But the deletion was intentional and the question before us is, "Was that enough?" Will 37(e), as proposed, change your preservation practices? And if not, what form would a rule have to take in order for your preservation practices to be made more narrow?

Will the New Rule 37(e) Really Make a Difference?

Jon Palmer: A uniform standard that requires some level of culpability before death penalty sanctions can be issued would at least change my behavior. I would no longer put entire organizations under a hold when I know that there are three or four key players within the organization that are going to have all of the relevant material. Just simply to inoculate myself against spurious arguments. I would not put the entire Chinese OEM organization under a hold. For instance, in the case that I mentioned earlier, because I know that in good faith I understand where the documents reside that are going to be relevant to the merits of that dispute. As long as I know that and I can document that and I have a safe harbor under Rule 37(e) it will change my behavior.

Right now our processes are designed with basically the lowest common denominator in mind which is that culpability may not be required in all courts. And you can't set up separate systems. You have to set up one system. It doesn't make any sense to set up separate systems for one jurisdiction and another system for other jurisdictions. So currently, the only thing that's going to change — and what that leads to is the over preservation that we've been talking about. The only thing that's going to change is adding in that level of culpability. Whether it's through definition of willful-

ness—whether it's through getting rid of the disjunctive and adding a conjunctive for willfulness and bad faith. Despite the good arguments by Hon. Judge Peck, it really is dealing with the irreparable devaluation issue. I do see some mischief that can be caused by that. Whether it ultimately gets through in decisions is a different issue, but I can see some mischief being created by that. So, if that is tempered by explicitly tying that to curative and remedial measures plus insuring that some level of culpability is required in the main text of 37(e) that would change, I think, behavior. And I think it would change our behavior and notably how broadly we define the scope of custodians that are going to be placed on hold. How broadly are we going to define the issues and the content that must be placed on hold?

Robert Levy: I'll admit in advance that this might sound gratuitous but it will not change our effort to preserve and protect information that is relevant to the case at issue which I think is a concern that some have expressed about the views of the parties. But, it will provide us with a basis to be much more focused on not only who we put on hold and how much information they have to preserve, but, also when we make decisions out of the context of litigation about systems and processes and the ways that they have to be re-engineered to address preservation issues that we currently deal with.

Rule Affecting the Fairness of the System for Individual Litigants

Tom Allman: Well this is something that has always troubled me. My observation is that most individuals really do not fully understand the extensive way in which over preservation as it is now, has been applied to corporations. My guess is that if we applied those same standards to the individuals they would all fail. So, the beauty of this new rule — at least the first section of the new rule by requiring that there be a showing that when that person deleted their Facebook page they did so intentionally to prevent that information from coming out in the lawsuit. It's going to give a sense of fairness to individuals that is not presently there.



Upcoming EDI Events:

The 2014 EDI Leadership Summit
October 15-17, 2014 | Fort Lauderdale, FL

The 2015 EDI Leadership Summit
October 14-16, 2015 | New Orleans, LA

This publication is part of a series of Proceedings published by the Electronic Discovery Institute



*Adapted from a presentation at the 2013 EDI Leadership Summit
Santa Monica, California, October 2013*

About the Electronic Discovery Institute

The Electronic Discovery Institute is a 501(c)(3) non-profit organization dedicated to resolving electronic discovery challenges by conducting studies of litigation processes that incorporate modern technologies. The explosion in volume of electronically stored information and the complexity of its discovery overwhelms the litigation process and the justice system. Technology and efficient processes can ease the impact of electronic discovery.

The Institute operates under the guidance of an independent Board of Diplomats comprised of judges, lawyers and technical experts. The Institute's studies will measure the relative merits of new discovery technologies and methods. The results of the Institute's studies will be shared with the public, free of charges. In order to obtain our free publications, you must create a free log-in with a legitimate user profile. We do not sell your information. Please visit our sponsors - as they provide altruistic support to our organization.

All EDI publications are free and available on the EDI website at www.eDiscoveryInstitute.org