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FEDERAL E-DISCOVERY

New Rule 37(e) Overrules Second Circuit on Sanctions for Loss of ESI


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zet·ta·byte *(zet-*uh-*bahyt) n. A measure of data storage capacity equal to approximately 1,000,000,000,000,000,000,000 bytes.*[1]

Former NSA Director Keith Alexander recently estimated that the world would generate approximately 3.5 zettabytes of information in 2014. That is the equivalent of the hard drives for 3.5 billion new desktop computers.[2] In recent years, questions as to how much of this mind-boggling volume of data should be retained and what resources should be devoted to this retention have been at the fore of legal and policy debates surrounding electronically stored information (ESI). But while the overall volume of ESI has been growing at breakneck speeds, the Advisory Committee on Rules of Civil Procedure moves at a more pedestrian pace.

In May 2010, the Advisory Committee sponsored a major conference at Duke Law School, the purpose of which was "to undertake a comprehensive examination of issues of access, fairness, cost, and delay in the civil litigation process."[3] In the four years since, it has become increasingly clear that the Advisory Committee was committed to replacing the existing Federal Rule of Civil Procedure 37(e) with a new Rule clarifying how courts should respond when parties have failed to retain ESI. And it has become equally clear that the emerging rule would be unkind to the Second Circuit's case law on sanctions for loss of ESI. The final proposed amended Rule 37(e)[4] was just approved by the Committee on Rules of Practice and Procedure at their May 29-30 meeting in Washington, D.C. The Rule's final form did not crystalize until very late in the game, going through a rewrite after public comments[5] and then another last second rewrite the night before its adoption at the Advisory Committee's April 2014 meeting.[6] The new Rule flatly rejects the Second Circuit rule from *Residential Funding v. DeGeorge Financial* that a showing of mere negligence is sufficient to support an adverse inference instruction.[7] Instead, the new Rule 37(e) imposes what is essentially a bad faith standard in order to impose more serious sanctions, requiring a "finding that the party acted with the intent to deprive another party of the information's use in the litigation."


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Judge Shira Scheindlin of the Southern District of New York, widely recognized to be one of the most influential figures on the federal bench on e-discovery issues, has been an outspoken champion of the Second Circuit standard. As we discussed in a column last fall,[8] Scheindlin delivered a late appeal for the Second Circuit position in *Sekisui Am. v. Hart*, explicitly rejecting the standard contemplated by the proposed Rule 37(e).[9] While Magistrate Judge Frank Maas looked to the proposed Rule 37(e) for guidance,[10] Scheindlin, in reversing and granting sanctions, did not simply note that the proposed rule had not yet been passed and that, until it was, *Residential Funding* remained the governing law in the Second Circuit. Instead, she went further, expressly disagreeing with the policy behind the proposed Rule:

> 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.[11]

Scheindlin was not the only Southern District

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judge standing up for the position of the home circuit. Following the August 2013 publication of the Rule for public comment, Magistrate Judge James Francis submitted a comment criticizing the proposed Rule on a number of grounds, including that it does not address what he takes to be the principal underlying the rule in *Residential Funding*—that when one party is responsible for losing evidence, it is fairer to make the party at fault suffer the consequences of that loss rather than the innocent party.[12]

Francis is correct that the Advisory Committee gives little attention to this argument. Instead, the Advisory Committee has been much more concerned with the costs associated with preserving all those zettabytes of information that are constantly being churned out. Along with imposing a higher degree of national uniformity concerning the treatment of loss of ESI, the Advisory Committee cited as its other main goal "to relieve the pressures that have led many potential litigants to engage in what they describe as massive and costly over-preservation."[13]

There is no doubt that these costs are real, and they are large. In a previous column,[14] we highlighted an example from a recent conference on ESI preservation in which the general counsel for a large company stated that the company had spent $5 million on preservation in response to a matter where litigation was not even pending, and it was spending $100,000 a month to separate and preserve that information in the event of future litigation.[15] That is not exactly pocket change, even for large company, particularly given that many such efforts will inevitably go toward preserving data that will never see the light of day in actual litigation.

One major unanswered question is whether the new Rule 37(e) will succeed in its goal of bringing down the costs of ESI preservation.[16] The new Rule distinguishes between curative measures and sanctions. Under Rule 37(e)(1), a court may "upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice." While the Rule expressly excludes the more serious measures in the absence of bad faith, these curative measures could have enough bite on their own to maintain a real incentive for robust preservation. For example, the Committee Note explicitly contemplates "serious" curative measures "such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence."[17] Depending on the particular circumstances, the exclusion of evidence can have a substantial impact on the ability of a party to make its case. Further, while the Rule clearly prohibits a judge from giving an adverse inference instruction in the absence of bad faith, the line between the kind of jury instructions contemplated by Rule 37(e)(1) and a permissive adverse inference may not be entirely clear in all cases.

The circuit split on the question whether negligence is sufficient to justify more serious sanctions has now been clearly resolved in favor of the "no" camp.

Even before getting to curative measures under Rule 37(e)(1), the Rule contemplates exceptional measures to restore or replace lost information through additional discovery. The Committee Note acknowledges that "discovery from sources that would ordinarily be considered inaccessible . . . may be pertinent to solving such problems."[18] This would appear to be a reference to restoration of backup tapes and other comparable measures for restoring information no longer available in more accessible formats. Such measures can themselves be extremely expensive and burdensome. Therefore, even without a showing of bad faith, the new Rule allows for fairly far reaching measures when a party has failed to preserve ESI. It is yet to be seen how companies respond to this new set of incentives and whether the Rule succeeds in curbing the massive expenses associated with over-preservation.

It is also unclear how successful the new Rule will be in its other objective of promoting uniformity in the treatment of these issues. Here it would seem determined to be at least partially successful. The circuit split on the question whether negligence is sufficient to justify more serious sanctions has now been clearly resolved in favor of the "no" camp. This change alone should do much to increase uniformity as compared to the previous state of affairs. Nevertheless, the new Rule leaves judges with a great deal of discretion in terms of imposing curative measures and requiring exceptional efforts to retrieve less accessible information. Therefore, much remains to be seen in terms of how this new Rule plays out. Assuming the U.S. Supreme Court blesses the new Rule and Congress does not intervene, the Rule is expected to go into effect on Dec. 1, 2015. So it could be some time before the full implications of this change become clear. Companies may be well-advised to see how courts interpret new Rule 37(e) before going too far toward revamping existing preservation practices.

1. Dictionary.com, http://dictionary.reference.com/browse/zettabyte?s=t (last visited May 28, 2014).

2. Frank Konkel, "Former NSA Director: Big Data is the Future," Nextgov (May 19, 2014), http://www.nextgov.com/big-data/2014/05/former-nsa-director-big-data-future/84712/?oref=ng-HPtopstory.

3. Duke Law News, "Duke Law hosts conference on litigation in federal courts, May 10–11" (May 5, 2010), http://law.duke.edu/news/4933/.

4. Full text of the new Fed. R. Civ. P. 37(e):

> Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may: (1) upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.

5. After the Advisory Committee received 2,345 comments, it substantially revised the text of the proposed Rule. Agenda Book for Meeting of the Advisory Committee on Civil Rules, Washington, D.C., May 29-30, 2014 (Agenda Book) at 306. For a summary of the changes between the two versions, see the Advisory Committee's Gap Report. Agenda Book at 317.

6. Thomas Allman, "FRCP E-Discovery Rule 37(e) Revision Is Pending," L. Tech. News (May 12, 2014), http://www.lawtechnologynews.com/id=1202654888824?slreturn=20140430100225.

7. 306 F.3d 99 (2d Cir. 2002).

8. H. Christopher Boehning & Daniel J. Toal, "'Sekisui' Shakes Up Sanctions Analysis for Evidence Spoliation," 250 NYLJ, 26 (Oct. 1, 2013).

9. 945 F. Supp. 2d 494 (S.D.N.Y. 2013).

10. The version that had been proposed at this point differed from the version that was ultimately passed. Both the published version and the final version reject the Second Circuit position that mere negligence can support sanctions for loss of ESI. See supra note 5.

11. Id. at 504 n.51.

12. Magistrate Judge James C. Francis IV, Letter to the Committee on Rules of Practice and Procedure (Jan. 10, 2014), available at http://www.regulations.gov/index.jsp#!documentDetail;D=USC-RULES-CV-2013-0002-0395. Judge Scheindlin also submitted a comment expressing opposition to the proposed Rule 37(e). Judge Shira A. Scheindlin, Letter to the Committee on Rules of Practice and Procedure (Jan. 13, 2014), available at http://www.regulations.gov/index.jsp#!documentDetail;D=USC-RULES-CV-2013-0002-0398.

13. Id. at 306.

14. H. Christopher Boehning & Daniel J. Toal, "Proposed Rule 37(e): A Step in the Right Direction?," 250 NYLJ, 26 (June 4, 2013).

15. Minutes from Mini-Conference on Preservation and Sanctions, 2, Sept. 9, 2011 at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Notes%20from%20the%20Mini-Conference%20on%20Preservation%20and%20Sanctions.pdf.

16. The Advisory Committee itself concedes that this is a highly uncertain question and cites this uncertainty as one reason not to go further in restricting courts' discretion in imposing sanctions:

> One reason for significantly limiting sanctions was to reduce the costly over-preservation that had been emphasized by many; the hope was that reducing the risk of sanctions would correspondingly reduce the incentives for over-preservation. The Advisory Committee continues to believe that this is a worthwhile goal, but has realized that the savings to be achieved from reducing over-preservation are quite uncertain. Many who commented noted their high costs of preservation, but none was able to provide any precise prediction of the amount that would be saved by reducing the fear of sanctions. And many incentives for significant preservation will remain—the need for the information in everyday business operations, preservation obligations imposed by statutes and regulations rather than the prospect of litigation, and the desire to preserve information that could be helpful in litigation. So the potential savings from reducing over preservation, although still worth pursuing, are too uncertain to justify seriously limiting trial court discretion.
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> Agenda Book at 309.

17. Agenda Book at 321.

18. Id. at 320.