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Legal Holds and Data Preservation 2014

The Proceedings from the 2013 Conference on Preservation Excellence

Edited by Brad Harris and Hon. Ronald J. Hedges

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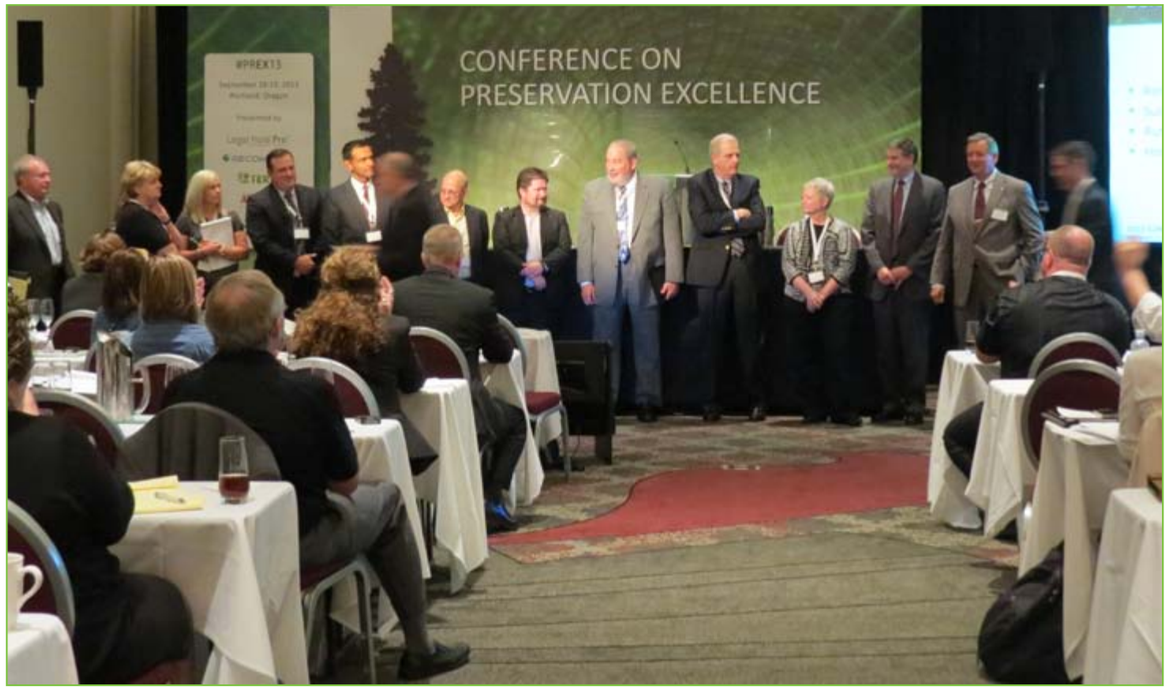

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Introduction

The Key Topics in Preservation Today – Rules Changes, *Sekisui* and BYOD

In September 2013, a number of the nation's leading e-discovery luminaries gathered in Portland, Ore., for the second annual Conference on Preservation Excellence, or PREX13 for short. Over the course of two intensive days and nine panel sessions, PREX13 delved into the most critical challenges facing legal professionals regarding legal holds and data preservation. Legal Hold and Data Preservation 2014 is a compilation of the wide range of topics published so that anyone interested in the topic can benefit from the combined efforts of the outstanding line-up of speakers.

A number of acting U.S. Magistrate Judges contributed their time to share their experiences and perspectives with the audience. Each had issued opinions in which they weighed in on preservation and spoliation issues, so their insights were prescient for understanding the process used for assessing whether or not to issue sanctions. The *Sekisui* case from the Southern District of New York, which only weeks earlier had a second of two opinions issued provided an opportune "teaching moment" for showing how two jurists can reach separate conclusions based on the same set of underlying facts.

A key underpinning at PREX13 was the amendments being proposed to the Federal Rules of Civil Procedure to address the perceived escalating costs and burden of preservation. One panel held a debate representing the viewpoints of the plaintiff's and defense bars as well as from the bench. The attendees were able to understand the motivations underlying the changes and learn about their potential impact on civil litigation in the future.

PREX13 continued a tradition established with the inaugural PREX Conference held the year before, focusing on providing a strong curriculum on teaching best practices as they pertain to planning for, executing and defending a preservation plan. Particular areas warranting special attention at this year's conference included addressing preservation outside of the United States, and the impact of emerging issues such as "bring your own devices," or BYOD, and social media.

This booklet on "best practices" continues the goal of helping lead legal professionals on the path to excellence in legal holds and data preservation. Many organizations are working to instill sound data preservation processes and creating awareness internally among various groups of the importance of meeting the needs of the courts. However, few would rate themselves as achieving a level of excellence.

You are an integral part in advancing the practice of data preservation. The knowledge you gain by reading these proceedings is a concrete step in advancing the level of expertise in our community. Together we can improve how organizations of all shapes, sizes and industries approach the task of responding to a preservation obligation while building a valuable knowledge base for all to do better.

1 *Zubulake* 10 Years Later: The Current Legal Hold Landscape

Michael Arkfeld

I have a lot of respect for U.S. District Judge Shira Scheindlin, the author of the five *Zubulake*[1] opinions ten years ago that have withstood the test of time. They are must-reads for all of us involved in e-discovery because they form the foundation for much of what has moved forward since then regarding the duty to preserve.

Judge Scheindlin issued a number of directives in the *Zubulake* opinions. They include defining a 'trigger event' as once a party reasonably anticipates litigation, focusing on key players, suspending routine document retention and destruction policy, and putting in place a litigation hold to ensure the preservation of relevant documents.

She wrote the Pension Committee[2] decision several years later in January 2010. Judge Scheindlin's primary thrust was that we don't preserve relevant information that is evidence, then we don't have a judicial system. What happens if I bring a lawsuit against you, and I ask you for your information and you don't have it? The reason is you did not stop document retention program from deleting it. The evidence is no longer there so when I ask you for that, I can't get it from you. If we make a decision that we will not sanction anybody for negligent or gross negligent actions, then we don't have a judicial system. The guidelines she painstakingly laid out in *Zubulake* seemed to go unheeded so *Pension Committee* was a strong reiteration of them.

Ten years ago Judge Scheindlin laid out the parameters of a litigation hold and it has become one of the most often cited section of *Zubulake*: Issue a litigation hold at the onset of litigation, or whenever the litigation is reasonably anticipated. In *Pension Committee* she refined that standard to a written legal hold so that the actions are memorialized. Subsequently, the Second Circuit reversed that in Chin v. Port Authority[3] saying that a written litigation hold is only a factor to look at. Having said that, it is best practices to issue one.

Ten years ago Judge Scheindlin laid out the parameters of a litigation hold and it has become one of the most often cited section of *Zubulake*

Other concepts from that seminal opinion ten years ago are rock-solid law. Counsel should communicate directly with the key players in the litigation regarding their preservation duties. Numerous cases have reiterated this idea. Counsel should instruct all employees to produce electronic copies of the relevant active files and make sure that all backup media which is required is in a safe place.

Now this brings us back to the present day. On August 15, 2013, she issues an opinion in *Sekisui v. Hart*[4]. In this case, she said plaintiffs did not instigate a legal hold for more than fifteen months after sending notice of claim to defendants. And remember here, these are the plaintiffs. So you can have a plaintiff who is an employee bringing an action against your corporation. They have the same obligation to preserve evidence as the defendants do. In the last year or two years we have seen eight to 10 cases where individual employees' cases have been dismissed for failing to preserve FaceBook and other social media, text messages, email and other records connected to their lawsuit in employment discrimination matters.

So what we learned ten years later and why is history repeating itself? Are we going to be here in 2023 with Judge Scheindlin writing another opinion about not preserving information? Let's hope not. The first reason I see for these issues coming up is what I call "technological disconnect." If you come up to any attorney today, they should understand what metadata, legacy, archive, forensics, smart phones, Twitter, backup drives, all that information they have to understand. The reason is that they cannot apply the rules of procedure, go after discovery and be involved in deposition if they don't understand the technology.

[1] *Zubulake* v. UBS Warburg , LLC (S.D.N.Y. 2004)
[2] *The Pension Committee* v. Banc of America Securities, et al. (SDNY Jan. 11, 2010)
[3] *Chin v. Port Authority of New York New Jersey,* (2d Cir., July 10, 2012)
[4] *Sekisui American Corp. v. Hart* (S.D.N.Y. Aug. 15, 2013)

The American Bar Association addressed this when they formed a 20/20 Ethics Commission in 2009. It issued a report in May 2012, which was approved in the subsequent August, which updated language about a lawyer providing competent representation to a client. This section was changed to include competent representation requires the keeping abreast of the changes in the law practice, including the benefits and risks associated with relevant technology. Those are the key words. Mind you, they didn't change the rule, just added a comment to it.

Meeting the challenge requires education, it's the only thing that we can do at this point. Another way is through changing the rules. Attorneys say we've got so much data but in my opinion I wonder whether or not we have really put in the time to understand the technological issues and trying to address those with the practice, as opposed to changing the law itself and saying this is too complex and we're not going to deal with it.

Overall I think the courts are very reasonable regarding sanctions. We do not see, generally, any sanctioned opinions where people have missed something after they put a considerable effort into it. I see that the sanctions are coming where a party does not do anything and just ignores the duty to preserve. They get a triggering event and they ignore it for two years, or fifteen months as in the case of *Sekisui*. Many may not know this but there are best practices in order to go after an adverse inference instruction. The reason is that these exist and opposing counsel pursues them, and frankly it's not that difficult, is that the legal hold processes today are simply not being accomplished.

In the end we have created a lot of these problems with technology, and yet we haven't addressed them with technology advancements until the last five to seven years. Now, we're seeing predictive coding and enterprise-wide search capability which are wonderful advancements. I think we are going to solve most of these problems with technology. I think though if you change the rules, sometimes too early, then you are never going to change them back. I don't think it's the strongest or most intelligent that are going to survive all this. It will be those that are going to be the most persistent and adaptable to what we are going through today.

10 years ago… *Zubulake* revisited

***ZUBULAKE*, 2003**	***SEKISUI*, 2013**
Judge Shira Scheindlin	Judge Shira Scheindlin
Duty to preserve	Duty to preserve
Failure to preserve	Failure to preserve
Negligent and wilful destruction of e-mail	Negligent and wilful destruction of e-mail
Adverse inference issued	Adverse inference issued

Why is History Repeating Itself?

2 Creating the Preservation Plan

Moderator: Ariana Tadler
Panelists: Charlotte Riser Harris, Dave Walton, Ruth Hauswirth

The duty to preserve applies equally to both parties, both plaintiff and defendant, while the obligation is shared by both in-house and outside counsel. Regardless, there are issues around preservation with which all parties are consistently grappling. How one looks at preservation can differ case-by-case, but case law has provided guideposts for us to follow.

TRIGGER EVENT

We know from the case law and the developing practice guidance that a trigger event is the reasonable anticipation of litigation. But what is that and how do you know when it exists? Even in a seemingly clear case where a party is sued, it doesn't mean that the litigation hold should not have been issued months or years before. Ultimately, it is the responsibility of the in-house attorneys to make that call.

For attorneys, a rule of thumb for defining a trigger event is when you want work product protections to apply which is a clear signal that one is preparing for litigation or at least a reasonable anticipation. At this point, the process should be commenced to preserve relevant evidence, especially since what is being protected may be beneficial to your case. This "work product" test works because trigger events are so fact-dependent that there aren't any bright lines, so applying the "work product standard" is an unambiguous signal to an attorney. In addition, the anticipation of litigation for work product protection in some jurisdictions is the same test as it is for legal holds.

In general, defining when trigger events are likely for your specific business is an important step for building a defensible process. Every company has the potential to be sued for employment discrimination or contract disputes, for example, but some companies are serial litigants or are prone to regulatory actions which are characteristic of a particular industry.

A key aspect of a trigger event is to document the decision to recognize it, or equally important, when you did not recognize it. Why is it that you made a determination that that moment in time or that particular event amounted to a trigger, versus something else? The average lifecycle for cases is seven to ten years. The chances of the same team being in place from beginning to end is slim, so having that decision-making process recorded is necessary.

PRESERVATION PROCESS IS BUILT ON RELATIONSHIPS

A significant challenge for ensuring an effective preservation process is understanding all the sources of potentially-relevant data, and importantly when a data source or infrastructure has changed in order to reduce the possibility of surprises and lost data. In a corporate environment, this can be a complex process. A clear path of communication between legal, IT, HR and business teams will help ensure that sources of data are identified and protected.

Getting a handle on the data is a great starting point. Understanding who has control of each data source, the storage and retention policies and practices for both structured and unstructured data, how data is managed and who accesses each data source and system is basic information that is required for proactively managing this process. For example, if your company is using an accounting system such as SAP, what does it mean if the "documents are in SAP?" It is important to also be aware when systems change or are upgraded and what impact that may have in the future as well as on any existing legal holds.

A critical step is for many larger corporations is to build a strong connection between Legal and IT. At the most basic level, put processes in place that require notifying Legal when a computer is being repurposed for another employee or taken out of use. That simple step can help avoid a lengthy process of attempting to forensically reconstruct a chain of custody or document trail. Train the IT department at every chance to involve the legal staff in major changes. If communications are working well, the IT staff will call and alert Legal whenever there are any changes that might impact data. Even if the changes are not particularly relevant to the needs of Legal, the fact that Legal is on the IT radar is very valuable and will help ensure opportunities are not lost. Keep those doors of communication open! This level of interaction should be replicated in other areas as much as possible.

SCOPING THE DUTY TO PRESERVE

Once the duty to preserve has attached, it's time to focus on determining what to preserve. While proportionality does not technically apply to preservation decisions most courts use the same proportionality factors to try to make a decision as to whether a party's preservation efforts were fair and reasonable and in good faith. Just keep in mind that whenever you make a decision to preserve or not to preserve, a judge is usually going to be analyzing the appropriateness of that decision twelve months, eighteen months, twenty-four months later. This leads us to preserve more broadly and if it is a close call, err on the side of preservation.

Identifying the scope of a legal hold is essentially tied to the evidentiary process. So the basic analysis is to look at this as such, tying the process to the issues in dispute. Assess what the other side will be looking for as a reasonable adversary and use that as the basis of creating your preservation plan. Document the decisions that you are making. It's not a process by which you are measured by perfection; it's being measured by reasonable and good faith steps. Preservation is also about getting ammunition so you can win your case. In terms of scope, you want to be strategic so you can build your case as well.

DOCUMENTATION IS KEY

It is not just documentation of the plan, it is documentation of the process. Capture notes of the discussion that you are having and the determination that you're making as to why there is a trigger and why the hold starts from that point in time. It's also about what steps you are taking to determine the scope of the hold. Who are the principal custodians? What are the principal data sets? And it's not just who and what; it's why, and why those are the right custodians and why others were excluded.

Documentation doesn't mean you have to tell a huge narrative. Think about the way board minutes are written. They're not a transcription of every single thing that is said, word by word, and attributed to each and every person. Rather the minutes are supposed to tell the reader what happened at that meeting, what was discussed, which concerns or objections were addressed and the resolution of the discussion.

3 Executing the Plan

Moderator: Craig Ball
Dawn Radcliffe, Elleanor Chin,
Hon. Frank Maas

You have a plan now. You've found the trigger and set your scope. Now it's time to fire off the legal hold notice. This section will discuss what it takes to execute your preservation plan.

KEY ELEMENTS OF A LEGAL HOLD NOTIFICATION

The first step is to pull the litigation hold notice together and get it sent out to the list of custodians. In addition to just the notice, an organization should be ready with follow-up questions for custodians in order to ascertain their involvement in the matter, what data they may have in their possession, which IT systems they use, among other lines of inquiry.

Following is a list of key elements to a successful litigation hold notice:

- Write it in plain English.
- Keep it as short as it needs to be to be effective.
- Include concrete examples pertinent to the business environment to help custodians understand as well as case-specific information such as date ranges.
- Provide mechanism so people can contact the in-house team if they have questions.
- Avoid generic language. As much as possible, include language or process specific to the case. For example, if it's an EEOC case and your HR department uses something they call an "on-boarding form," then by all means use that term.
- For key personnel, try to personalize it. For example, if the CFO is a key custodian then address her/him by name and mention specific documents that they would be expected to provide.
- Communicate to the IT department regarding non-custodial data sources to ensure data is preserved, putting focus on highly fragile information that could be lost if action is not taken immediately. Suspend any automatic deletion routines pertaining to the hold.
- If there are key custodians, or potential 'bad actors,' focus on having IT do what they can to lock down their data, such as mirroring their hard drive or disabling the deletion function in their email.

DISTRIBUTION OF THE LEGAL HOLD AND DEFENSIBLE EXECUTION

If legal holds are not commonplace, initially start with a communication, either in person or a brief email that explains to the recipients the process at a high level. It is designed to help them understand that they are going to receive this notice via email and what it is and what they're expected to do with it. Advance notice goes a long way toward helping custodians understand that this isn't junk mail or spam, or that it doesn't relate to them. When it comes out of the blue, one would be amazed at what custodians will do, oftentimes hitting the delete button which is the last thing you want to have happen.

One of the first holds should be directed to the person responsible for shared or non-custodial data, such as a database manager or administrator for an enterprise software system such as a web server or exchange server. These should be given priority since they control data for many individuals all at once. Also, this data can be transitory since it is frequently subject to retention protocols. Identifying the parties who oversee them, as mentioned previously, is an activity best done in setting up a process as well as establishing clear lines of communication and expectations about what to do when contacted.

Several elements we can identify contribute to a defensible process, including:

- Education and training
- Acknowledgement processes
- Surveys
- Follow up
- Audit
- Reminders

The courts are looking first to see what, if anything, has been done when looking at preservation and if it made sense. Judges are also looking for verification that the preservation efforts have been done, including periodic follow-ups to ensure ongoing compliance.

Executing a legal hold efficiently is a blend of technological aids and custodian engagement – the balance between high tech and high touch. Tools to help automate the process of collecting information about our matters and to prepare people for the coming discussions. In that sense, they save time, money and effort. However, they are part of the solution and the rest is follow-up by the legal team in order to understand how custodians are doing their business. A good first step is to distribute an initial interview along with the legal hold notice which will help you understand what data is being generated, how it's being used and stored. For example, did a custodian use a personal device or email account at any time to communicate or work on the matter at hand. It's important to know that as soon as possible.

One other consideration is that early in the process it is important to get buy-in from a senior member of management. This will lend credibility to the process and ensure that resources, in terms of time and budget, are available to fulfill the preservation obligation. Without that level of accountability, everyone will by and large ignore their obligations.

CUSTODIAN COMPLIANCE AND INTERACTION

Some are questioning from the process of securing acknowledgments from custodians, the idea that you have to return something or take some action that says I know my obligations and I agree to comply with them. The concern is creating a paper trail of non-compliance and the downside of forcing one to manage the hold process more aggressively, or not do it at all.

For many organizations, the custodian acknowledgement has tremendous value as a way to engage custodians. It provides an opportunity to involve them in the process. Without the acknowledgement then you are shortchanging the process because you don't know if the recipients understand it or if they are doing what is being instructed. It serves as a feedback mechanism and is not an empty gesture. If we find custodians are not responding, they start getting regular reminders and if it persists then it gets escalated to their supervisor.

A Judge's Note About Cooperation

During the session, Hon. Frank Maas made the suggestion that parties should consider sharing at least a portion of the legal hold letter and who the custodians who will receive it are. By doing so, they can suggest areas that you may have overlooked or, more importantly perhaps, custodians that you may have not yet unearthed. While it would fall under work product or attorney/client communication, with a non-waiver agreement, both sides should consider sharing much if not all of the letters.

Are you going to get a response back from the other side that says the letter should be 12 pages long and instead of going after 10 people, you should go after 10,000? Perhaps in the first response, but all too often people miss important custodians because they don't know that a person is significant. A lot of grief can be saved by some cooperation in the early stage.

The motivation for this level of cooperation and transparency is not to be good folks or because it is the right thing to do to help the other side. You are cooperating in order to buy peace of mind for your client or your company. Cooperation effectively closes the doors to ways that sanctions may crop up. In the event that both sides were wrong, that mutual mistake is likely to be viewed by the court as a "no harm, no foul" situation. A party may have to go back and take some remedial actions, but all of the elements of failure won't be there because both sides put their heads together and did the best they could under the circumstances.

4 Defending Your Preservation Strategy

Moderator: Hon. Ronald Hedges
Panelists: Susie Small, Ruth Hauswirth, Hon. David Waxse

As noted by Judge Scheindlin in *Pension Committee*, perfection is not the standard. Data and records are difficult to contain completely, so at some point in most cases some discoverable evidence goes missing. We must anticipate that this will happen and have a plan to defend our preservation actions so that we can satisfy the court of our reasonable and good-faith as well as find ways to remediate, if necessary.

In reality, sanctions are rare. As Judge David Waxse points out, he has not seen a sanctions case that did not have a component of really bad behavior. Either a party intentionally destroyed evidence, or more frequently, something gets messed up even accidentally and then someone lies about. In reality, many attorneys may see a flaw in a legal hold and try to exploit it. However, just the fact that a litigation hold process wasn't perfect doesn't mean a sanction is warranted. There is no legal requirements that a litigation hold process work as long as you fulfill the requirement of producing what is relevant to the case.

Some common failure points even for those organizations that have implemented mature preservation plans are not anticipating certain groups or key custodians and not getting a litigation hold on them in a timely manner. It is typical that as a matter evolves that new information arises which requires additional preservation and if not done in a timely manner then data may no longer be accessible.

Another vulnerability is for terminated employees or new hires to ensure, in the case of the latter, to track them and capture data for which an exiting employee is responsible. On the new hires, it's more about training and teaching them the process. Many companies tend to have a big effort to train folks when a program rolls out and then perhaps annual refreshers. During the interim hundreds of new employees can join and don't have awareness of their responsibilities.

As discovery proceeds, especially in cases dealing with asymmetrical litigation there are opportunities for parties to avoid issues by cooperating in the Rule 26(f) 'meet and confer.' This is an underutilized opportunity to proactively seek guidance from the court early in the litigation. While judges encourage this, none of have had parties come forward and affirmatively sought preclearance on their preservation strategy.

A practical point that is often overlooked is to document actions contemporaneously. Memorializing decisions in real time is a much stronger position than having to reconstruct what discussions and thoughts occurred weeks or months ago. Work on developing processes internally in which the legal team is capturing information, perhaps in memorandums, which shows their process and state of mind when a key decisions are made.

While it's one thing to have a well-documented policy and plan, it doesn't mean much if it does not work. All too often a policy is implemented and then not enough thought is given to how it will work and what resources are needed to be effective. Upon rolling out a preservation plan, do a dry run. This will help spot kinks in the system and understand what needs to be tweaked here and there. It also serves to start communicating to key custodians and other departments their responsibilities when the time comes and before there are real consequences.

TEN STEPS WHEN RESPONDING TO A SPOLIATION ACCUSATION

In the event that there is a spoliation accusation, whether by accident or maybe a minor negligence, here are 10 steps to follow:

1. Demonstrate to the court or opposing counsel that your company has a comprehensive preservation program in place with documentation of process and protocols, as well as any systems to support it.
2. Show that you sent out a proper and timely litigation hold. Produce not only the custodian list and scope, but records around decisions regarding the "why" of the trigger, scope and key custodians so you can show what influenced the decision at that time. Having a document created contemporaneously is much more credible than showing it after the fact.
3. If there is an accusation of spoliation, ascertain if the data was destroyed as part of the organization's standard records management policy. In this event, showing that policy was well documented and was followed, including any audits, is critical for showing the veracity of the program as well as dispelling notions of willfulness. Show how under the existing document retention protocol that the ESI was subject to destruction, that it was destroyed according to the normal schedule, and that it happened after the trigger event for the current matter.
4. Establish exactly what happened. When was the document destroyed? How was it destroyed? Who destroyed it? Was it destroyed by somebody in the legal department, who presumably would have knowledge that that's a relevant document? Or was it inadvertently destroyed by someone who is not as familiar with the relevance of that document? Establish a chain of events and tuss out if any willful behavior was involved.
5. Learn the relevance of any ESI lost to spoliation. Ask whether or not this piece of evidence is relevant to the opposing side's case. If it's not a key document, it could be a case of something that opposing counsel wants to argue about. If it's not relevant, then explain why and show how its loss would not prejudice the case.
6. The next step is to investigate whether you can reconstruct the record in another way. Maybe it's duplicative? Find if it exists elsewhere, even in another form, and understand whether it exists, in what form (and the implications of that shift, i.e. metadata is lost), and finally the effort and cost required to retrieve it.
7. Show that the spoliated evidence was not reasonably foreseeable as a relevant record.
8. Demonstrate that there was no prejudice to the moving party, or the parties that are saying that we spoliated the evidence.
9. Show your track record for having no prior allegations of spoliation. If you did have prior situations, then it would already be on the record as that would be introduced by opposing counsel as part of any motion.
10. Finally, just show your company has a reasonable process that you have reasonably followed the process and that you acted in good faith.

COOPERATION AND TRANSPARENCY

If any accusations arise, parties need to have transparency and honest communication. You're going to get caught if you start covering up and lying about what's going on. And it may seem like the short term solution, but there's case after case where it's clear it's not the long term solution. Refer to Qualcomm out of the Southern District of California to see what can happen when in-house lawyers and clients and outside counsel don't communicate truthfully to each other.

The best way to avoid sanctions, whether it's preservation or search or any other aspect, is to have an agreement with the other side on what you plan to do. If so, you are not going to get sanctioned for it. That ought to be ample reason for people to really work on cooperating and trying to do preservation and collection by agreement. All these things can be done in a cooperative fashion, it's just not been our culture. Attorneys fall back on their duty of zealous advocacy, but that has not been in place since 1983. Cooperation is much better than zealous advocacy.

5 Creating a Culture of Compliance

Moderator: David Cohen
Panelists: Dawn Radcliffe, Susie Small

Long before litigation arises or a triggering event, organizations can take proactive steps that will lower their risks, create a more defensible process and reduce costs. All of these goals can be achieved by creating a culture of compliance. This is when procedures and policies are in place to anticipate preservation efforts, employees understand ahead of time what their responsibilities are, information management protocols are in force and employees know a trigger event when they see one and know who to alert in the legal department. Some of these efforts can be done reasonably quickly, but culture grows organically through repetition so it is more realistic to consider these to be investments that will take some time to become ingrained at the employee level.

NINE STEPS TO BUILDING A CULTURE OF COMPLIANCE

1. The Importance of C-Level Buy-in

Having high-level buy-in within the company is critically important for setting a tone that these issues are necessary. If it's just the records department telling people to do things, employees won't necessarily pay attention. So once you get the executives to buy-in, to implement procedures for retention or legal holds, that all flows down and creates that culture that you need for compliance.

If you have your top people behind the policies, such as the CEO telling everyone that they really need you to do this and here's why, you're going to get a higher level of compliance from employees. You're also going to know that you have the force behind you to do what you want to accomplish.

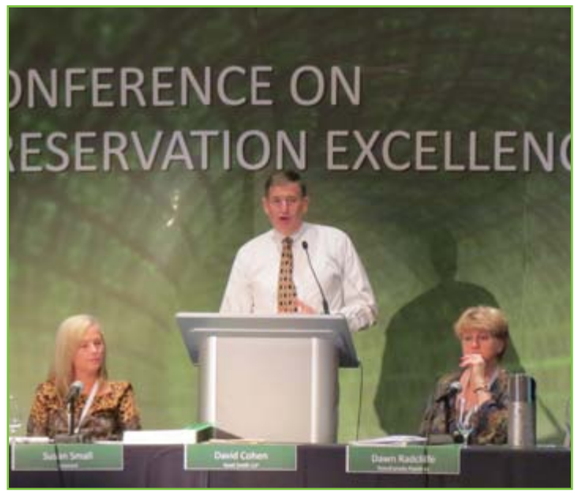
Educate your company management about why this is important. Your lawyers will also be helpful in communicating this to company management. If necessary, invite outside counsel as a third-party to do presentations at executive meeting about the importance of sound preservation and how, from an electronic discovery perspective, they will save money and reduce liability risks.

2. Adopt Information Management Policies to Limit Retention

One of the best ways to create a culture of compliance is to have fewer records. The fact that electronic storage is becoming cheaper is a dangerous trap. The real cost isn't the storage, it is those e-discovery expenses that you may be facing down the road when you have kept all that data and now you have to search and process it. Practice good record hygiene. Keep what you need for company business purposes and for legal compliance and for legal holds. Beyond that don't keep too much.

E-mail is the main culprit since it is the primary system for documenting business communications and for transferring information. Employees tend to hoard data and can accumulate gigabytes and gigabytes of ESI, and are uncomfortable deleting any of it. In trying to change that culture and move toward a better system, it is important to understand the current culture and why people do the things they do, how they access and use the information. Rather than wanting to take everything away from them and inhibiting their workflow, approach them with an understanding of their process and show how a new method will help them by being more organized.

One step is to implement an email archiving which is beneficial because it preserves the data, but in a way that makes



it accessible and controllable for purposes of preservation. Moving away from PST files, which are email archives stored on each individual PC and present a huge collection challenge, should be a goal for any organization that has not yet done so.

Also, setting a standard for email retention, be it 30, 45 or 60 days, imposes a clear way to improve data hygiene. However, you have to give employees an alternative for saving emails and other records long-term for legitimate business purposes. If not, employees will skirt the rules and create more headaches.

For example, organizations using Microsoft Outlook Exchange, the leading enterprise email server, one of the easiest ways to do this is to set up folders. Instead of having the folders being on hard drives, however, locate them on shared servers so they are easier to control and collect. This allows the employee to continue "business as usual" while reducing effort and risk if that information is potentially responsive.

Another major area, and one where we've seen significant sanctions ever since the days of *Zubulake*, are the issue of backup tapes. Most companies keep backup tapes or now sometimes backup information on discs for disaster recovery purposes. But as the IT people in the room can tell you, for disaster recovery you only need the latest versions of what was on your systems. At most, you want to go back days or weeks, not years. There's no reason for disaster recovery to keep those backup tapes from three, five or 10 years ago. Think about whether you can do backup tape remediation by looking at what backups you have and comparing it with what litigation you have. Usually companies can draw some lines around the litigation and get rid of at least some of the backups.

3. Schedule Records Clean-up Days

Consider having a record cleanup day in which all the employees participate in helping properly store business records and dispose of unneeded files and obsolete information. This effort applies not only to electronic records but to backups and hardcopy archives.

An annual or bi-annual record cleanup day can be organized by records management or legal, and can be used to educate but also try to make it fun, i.e. buy pizza and wear casual clothes. It is an opportunity to clean things out but also to train employees on what a record is. You want employees to get rid of stuff, but also understand what it is that you need to keep.

One final point is to incorporate the idea of a litigation hold into effort. If some records are under a preservation order, then be sure have controls in place to ensure that those are not touched. Again, it is an opportunity to educate about the legal hold process should one be in place and show employees that information can still be culled as long as it is not on hold.

4. Address the Issue of Departing Employees

Many companies get tripped up on the problem of departing employees and it is an issue that needs to be addressed if you have not done so already. It is common to have polices that when an employee leaves, his laptop or office computer is recycled with the hard drive getting wiped. If that individual is a custodian on litigation hold, then that data can be irretrievably lost.

Build a process, perhaps in conjunction with the Legal, Human Resources and Information Technology teams to generate an email alert when an employee is terminated. Legal can check the current list of legal hold custodians to assess whether that computer and other resources that custodian may have are preserved. As a backstop, some companies actually put a sticker or other indicator on computers belonging to employees on legal holds that will prevent IT from mishandling it should they not get word about a departing employee quickly enough.

5. Publish legal hold policies or guidelines and procedures.

Give the subject matter of this conference, legal holds are naturally part of the process. This recommendation is specifically regarding publishing to the entire organization written policies and procedures rather than confining them to the in-house legal team. These shouldn't be the company's best kept secret! This can be particularly helpful to insulate you from certain sanctions and allegations should spoliation occur.

Anybody that deals with or creates data of any kind needs to understand legal holds and impact on their work. So it is critical to have those policies and procedures out in the wild where everybody can see them and understand them and ask questions about them. Employees appreciate having clear instruction about exactly what they are supposed to do, so having them in writing helps build the culture of compliance right from the start.

6. Consider maintaining a data map.

A data map essentially lists the different kinds of records throughout the company, shows where they are stored, who controls them and any schedules for automated deletion. In the past, it was in vogue pay consultants six figures to create big, detailed data maps which frankly weren't very useful because they were too detailed and became outdated quickly.

A "data map" need not be a comprehensive overview of every byte of data throughout an enterprise. It could be a document that lists the top 100 systems and identifies the business and IT owner for each system. When the time comes, it can help the team move quickly to communicate out to the appropriate people, in particular where there is ephemeral data that is fragile.

7. Adopt employee training programs.

Education and training to the employee population will dramatically improve compliance when issuing a litigation hold. The lowest impact method is to piggyback on other training efforts and ensure that legal holds have a few slides dedicated to them as part of regular corporate programs – including orientation trainings for new hires. In addition, reinforce the training with some way to certify that the employee has taken the training, or even have them take a short electronic test.

Training and education extends beyond the direct impact of preservation orders, but should also include behaviors. Some examples include how to manage email and purge your inbox of junk. This includes discouraging employees from using their work emails for personal messages. A good way to illustrate this is to imagine that fuss you're having with your teenage daughter ending up in front of a bunch of attorneys to review it.

8. Prohibit messaging and texting regarding subjects of legal holds.

SMS messages, Skype chats and other messaging tools are becoming more commonplace in work environments. Naturally, this information is discoverable just like everything else. While prohibiting their use is not possible, do try to instill in employees that discussing any matters that are currently on legal hold is expressly prohibited. This will, at the very least, create one less collection and review headache down the line. You can include this prohibition in the legal hold notice or as a separate communication.

9. Audit compliance of litigation holds.

It's one thing to have a legal hold process in place, but another matter entirely to show it is working. Building a feedback loop in the form of an audit process. The first step is to see that custodians are acknowledging their compliance by responding to the litigation hold notice. If the company is using an automated legal hold management system, the legal team can quickly identify those who are not in compliance and take remedial action, either with more frequent reminders, a call or escalation to his manager.

For key custodians, consider going one step further than just having them acknowledge the hold but query them to make sure they are doing what they've indicated they would do. When doing this, be sure to record the effort as part of the audit trail for the litigation hold.

Another focus should be on sending periodic reminders to custodians about their ongoing obligation to preserve information, which is one component of the *Zubulake* opinion. Have a process in place and check that reminders are going out regularly, perhaps once a quarter or more frequently if merited.

If you learn that an employee has not taken the steps necessary to preserve ESI as they had acknowledged they would, be sure to have some disciplinary procedure in place. It can be a serious violation that could materially change the outcome of a case, so having that in place and communicated in advance to employees can increase compliance across the organization.

6 International Issues

Moderator: Hon. Paul Grewal
Panelists: Conor Crowley,
Hon. Ronald Hedges

With the fluidity of the global economy, many companies operate in jurisdictions outside of the United States. If a company isn't facing this issue now, it likely will in the foreseeable future: How do we reconcile our obligations in the United States to preserve ESI with obligations elsewhere to dispose of ESI? There are obligations other than preservation that are important to consider when looking at preservation and production and how to reconcile obligations in the United States with those an organization is subject to in foreign jurisdictions.

The fact of the matter is that it is no longer sufficient to think only of one's obligations under the Federal Rules of Civil Procedure or similar rules here in the United States. You have to think about what may be required in other jurisdictions where your ESI may "reside."

HISTORICAL BACKGROUND ON PRIVACY ISSUES

The reality is that the United States' preservation model has lost the race. The United States has traditionally had a sector-based approach to privacy. In other words, the focus is on specific types of information (such as protected health information) where the risk of misuse has been dealt with by statute.

In 1995, the European Union issued Directive 95/46, which does not set out an EU-wide statute but gives general guidance to, and sets minimum standards for, member countries. Under the Directive, individuals are deemed to have the right to control how their personal identifiable information (PII) is collected, stored, processed, used, manipulated, or transferred. For non-EU countries, if a country follows the minimum standards set forth by the EU, it is put on what is known as the "White List", meaning the European Union has determined that the country has in place sufficient protection for PII to allow for transfer of the ESI from the EU to that country. Notably, the U.S. is not on that list.

In some countries, citizens have the right to be forgotten. This means that an individual has control over his or her PII and may ask a company that has PII to remove, delete, or make it no longer available.

Another important concept is that privacy regulations are generally triggered by the location of data, not by the citizenship of the data subject. This means that, once the data is in a country, it may be subject to that country's privacy regime, even if the data is information that relates to somebody who is not a citizen of that country.

PRESERVATION ABROAD

Remember that in the United States the duty to preserve arises when one is aware of litigation or reasonably anticipates litigation. Most countries have no comparable obligation. In the European Union, "processing" is defined so broadly that the mere act of preservation can trigger the Directive and related statutory protections in individual member states. Companies may be faced with conflicting compliance obligations: Preservation may be required here but to do so may run afoul of foreign laws which restrict the ability to preserve or requires affirmative action be taken to delete the information. That is the conundrum for which there is no clear answer.

Due to the disparity in privacy laws, certain situations can arise overseas that are not common in the United States. For example, take the issue of consent: An employee provides "gold-plated" consent on day one, but then leaves the company he worked for and revokes his consent for the preservation, collection or production of his information. "Informed" consent is also vital. You must explain to the employee why information is being collected, what it will be used for, where it will be kept, and who he can contact if there are questions.

If you have been sued or if you reasonably anticipate litigation in the United States and you are now executing on a strategy to preserve data, you have to think immediately about how to square that duty with obligations that may arise in other jurisdictions where the data resides. An important step is understanding how U.S. courts balance the conflicting obligations that an organization may be subject to.

U.S. courts attempt to reconcile these conflicting obligations that organizations face using the comity analysis set forth in the 1987 Aerospatiale decision. In Aerospatiale, the United States Supreme Court developed a five-factor test. The Aerospatiale test guides a judge in deciding whether a party has to produce discovery under the Federal Rules or go through the Hague Convention process. The factors are:

1. Importance to litigation of the electronically stored information;
2. The specificity of the request;
3. Whether the information originated in the U.S.;
4. Whether there's an alternative means to obtain the information; and
5. The extent to which non-compliance with the request would undermine an ordinance in the United States, or compliance with the request would undermine the important interests of the state where the information is located.

In *Bank of China*, the Second Circuit added two additional:

6. The hardship of compliance of the party, or witness from whom discovery is sought, and
7. The good faith of the party resisting discovery.

If for some reason one wants to avoid preserving or producing under these balancing tests, it is important to be very specific about the specific laws or regulations an organization is subject to in the foreign jurisdiction, and to clearly articulate the sanctions or penalties that violation of those laws or regulations would trigger.

PRACTICAL STEPS

Narrowly tailor your preservation efforts. One approach that may satisfy or persuade data protection authorities in the various European Union countries and jurisdictions is if the preservation is as narrowly tailored as is feasible. If you go in and tell your Belgian subsidiary that they must preserve all information for all employees that is simply too overbroad to indicate to satisfy data protection authorities that you are undertaking good faith efforts to comply with their regulations. You need to trim it down to what is needed. It also provides a good opportunity to chat with the other side about why those decisions were made.

Preserve and review data in-country. Doing this allows you to minimize the information that will have to be transferred out of the country which reduces any potential exposure. What this does not mean is having attorneys review the information remotely even though it resides on a server in-country. That is not how it works.

Informed consent in the legal hold. The legal hold notice has to include the opportunity for the data subject to be informed. If you're sending out the preservation notice include in there the opportunity for the employee to consent to the preservation. So you're not simply saying, you must preserve. You're saying, you must preserve and we'd like your consent to do that.

Educate yourself about privacy regulation in foreign jurisdiction. You have to understand the privacy regulations in the foreign jurisdiction. Europe isn't a country. Asia isn't a country. South America isn't a country. There are many, many variations amongst all these regions and amongst all the constituent countries and you need to be aware of the ones that are at issue in that specific country. You may also have to understand the reasoning behind some of these, because that's going to impact the way in which these laws are going to be enforced.

The issues concerning preservation in foreign jurisdictions are still in their nascent stage so guidelines and case law have not yet emerged to provide clear direction. The best approach as described above is to understand the data protection laws in the jurisdictions where you may need to administer preservation orders and then work to balance the U.S. obligation to preserve data with the need to comply with foreign regulations protecting personally identifiable information.

7 The Challenges of Social Media and BYOD (and Other Emerging Technologies)

Moderator: Charlotte Riser Harris
Panelists: Craig Ball, Elleanor Chin, Dave Walton

The proliferation of new technologies, whether it's the mobile devices, cloud applications or social media, creates a new challenge when it comes to preservation. These devices and services are gathering information – some of it overt, some of it concealed – that can be hard to grasp because it is both extensive and ephemeral, difficult to collect and creates awkward situations with employees who use personal devices or services for work, or conversely work resources for personal matters.

The challenge of social media and portable devices and bring your own device, it's really more than just a technical challenge. It's more than just a legal challenge, but it's really in many ways a mindset challenge. Some recent survey results to consider regard "bring your own devices," or BYOD:

- 68 percent of employees surveyed use their personal devices for work.
- Less than a third of the companies that they work for have any kind of a BYOD policy in place.
- 93 percent of people who are recently surveyed at the end of last year said that they would not be part of a BYOD program if it meant that their employer would have access to their personal information.

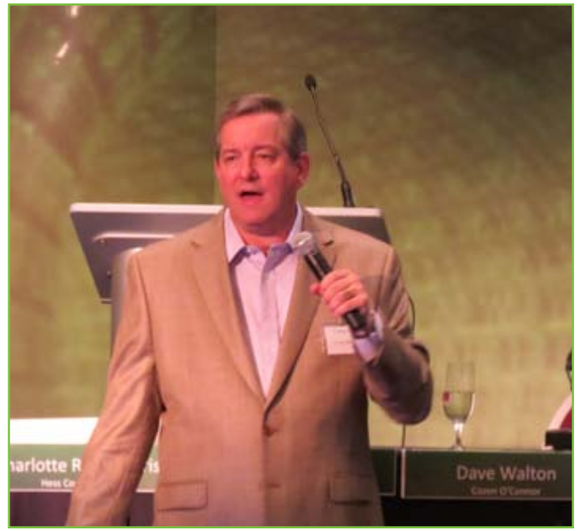
So there's a big disconnect mentally between what people are agreeing to with BYOD and what they think they're agreeing to.

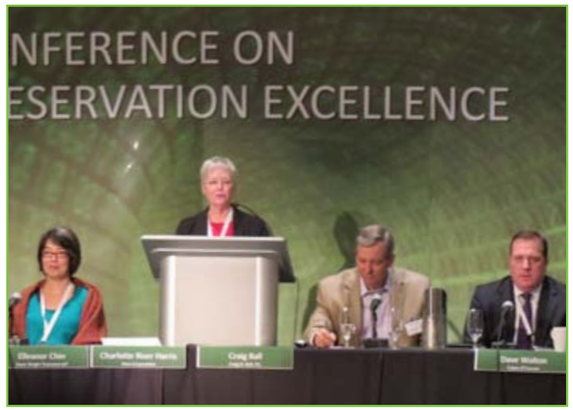
Similarly, consider the impact of social networking. The numbers are staggering:

- 1.11 billion members of Facebook at last check.
- By December 2013, 60 percent of all internet users age 16-24 will visit Facebook at least once a month.
- On average, users check Facebook 14 times daily, meaning that much of this is happening during the work day often in connection with work.

Preservation is much harder and it's much different. It's no longer all PC and server content, in fact it's radically different. For example, gathering data from a tablet takes longer, on the order of 4-6 hours. You have to start factoring this in in your compliance and your preservation. This isn't something that when an employee departs and you get a brief window within which to acquire their device. The obligation for you to have a minimum of six or eight or even 15 hours with an unobstructed window for these devices in order to simply do a lockdown preservation is going to change the feasibility of a lot of what we have done.

Preserving social media content presents enormous challenges. One of them is going to be challenges of process. We're going to have to start mapping this information; remembering throughout the process of employment and termination to be interrogating our employees as to where they post their information so we'll be able to engage its potential relevance and the challenge of its preservation. In addition, we're going to have to be able to get credentials. You simply cannot make an acquisition of Facebook content without credentials. You can't make an acquisition of full LinkedIn content without credentials.





BYOD AND LEGAL HOLDS

BYOD has turned the litigation hold process on its head and most companies haven't caught up to it. They are sticking their heads in the sand and just hoping it doesn't become an issue because things are changing so quickly. It is safe to always assume from the beginning that your custodians are going to have personal devices and personal data stores. Up until recently we saw issues with flash thumb drives, but they are passé now. Now it is cloud storage services such as DropBox and Box.

The desire of employees to have seamless access to all forms of media and communications at all times is outpacing the law's ability to conceptualize it, much less deal with it. However, there are basic steps that if you make thoughtful decisions when integrating new technology into the corporate IT environment that can minimize or eliminate headaches. For instance, portable and mobile devices can be set up to that email that passes back and forth is always backed up on the email server.

Be as proactive as possible and express how you expect employees to use personal versus corporate devices. In many cases these devices have been acquired by the employee so it is coming with their configuration and you don't have the advantage IT setting it up and having superior administrative rights, such as we commonly see with laptop computers. For an Apple device, Apple will look at who registered it and that person has ultimate control over what happens.

Companies should protect themselves by updating employment agreements to grant the right to access devices on which company data is stored or connects to the corporate servers. This should also include the right to wipe that data. Also consider the impact of virtualization, which is when mobile environments are replicated in the cloud, think of iTunes and iCloud as common examples. It is a completely redundant source and should be accessible as well as the device itself.

The reality is that when push comes to shove this is not going be dealt with rationally. Our devices and social networks are part of our lives. When it comes time to collect information, we have to take prophylactic steps to guard against them changing or deleting the data. We're dealing with their device and their account. They are the one paying the monthly bill, sharing it with their family and their attachment to these devices and information is not like anything we have dealt with before. We must take much more aggressive measures to warn against the kind of behavior that can create problems down the line.

PRACTICAL TIPS

Collaborate with IT on tracking digital footprints of devices. Learn how the corporate network identifies and affirms the devices which are connected to it, be it with an electronic serial number (ESN), or some other way. Then find if credential issued to an employee are being used by what device so that you are tracing the physical hardware that is connecting to the network. In the event of a legal hold, you will then know what devices a key custodian has been using and to the resources they have been accessing. This will inform you greatly about what you need to collect so you know your inventory solidly first and foremost.

Build redundancies into your IT system. Work with IT to figure out ways to try to centralize your data, and then assume that every one of your employees, even if you have the greatest BYOD policy in the world, every one of your employees are going to violate it. And every one of your employees are going to, or at least a big part of your employees are going to violate it and they're going to have fifteen different personal sources. Then try to build the redundancies into your system so that when you have a collection you can go get it from one source.

Work with HR on communicating and reinforcing policies. A robust HR function is the primary conduit for communicating and education employees, even on matters where IT is the primary owner. Have as part of the personnel handbook that mandates compliance with IT policies, and then include unambiguous guidelines in the IT policies about using personal devices and accessing personal sites using company resources. Every place the employee looks they are getting clear and consistent messaging. They should know that by your granting them access to the infrastructure that they have responsibilities and obligations.

Take special note of departing employees. When someone is leaving the company, that is a very brief window where there is a high likelihood of challenge or change to the device. The individual may not be able to afford the associated account and services that they were using with those devices, so they may consolidate and get rid of some things. More likely, however, is they will join a new employer and will either be issued new devices, in which case their old devices will be redundant and either handed down or sold on Craigslist. HR needs to be very sensitive that there is a much greater risk shortly after termination with respect to BYOD devices than probably at any other time in the relationship.

Rely on self-preservation only with adequate instruction. Why not put the onus of preservation on the employee? We'll have them execute agreements that when we give them an instruction they promise that they will preserve the contents on their device, or they'll preserve the contents of their social networking. But you have to remember that you can't impose a duty on an employee unless you also have reason to believe that they have the necessary skills and tools and education to reasonably meet that duty. If you take that approach, HR must instruct them how to do it.

Understand the implication of cloud storage on preservation. More and more companies are putting data out into the Cloud without the knowledge, or in many cases even the ability, to control how it's preserved. While technically you own the data, and the service level agreement, or SLA, corroborates that fact, so that means it is in your control and custody. However, that doesn't mean that once a duty to preserve attaches that the data is not being reconfigured or moved to different locations by the cloud service provider. Come up with an issue spotting checklist for the purchasing group and have them sensitized to these issues so they can make better contracts when they still have the leverage to do so.

Use social media. If you haven't done so already, sign up for Facebook, LinkedIn and Twitter and other social networks. It will help you understand how they are used and what implication that may have on any upcoming matter and also give you that extra edge of knowledge and experience. Also, check the option and settings to understand what they are and know how to navigate the user interface. As a final suggestion, do the mental exercise of seeing how you would preserve your own information.

You can't impose a duty on an employee unless you also have reason to believe that they have the necessary skills and tools and education to reasonably meet that duty.

The eight- hour workday is a relic of another era. Today, the plugged-in business day starts when we wake and ends when we sleep, blurring the line between devices and services holding business and personal information. As well, BYOD signals the consolidation of multiple devices and services into a single platform. We can no longer imagine there are "work" computers and "personal" computers that physically segregate work and personal ESI. As multiple devices collapse to one or two, work and personal data live side-by-side, making it harder to protect, preserve, collect and destroy. Our challenge is to learn to deal with mobile data with the same ease we now bring to e-mail.

8 The Changing Rules

Moderator: Michael Arkfeld
Panelists: David Cohen, Ariana Tadler, Hon. Craig Shaffer

Since 2010, an effort has been underway to amend the Federal Rules of Civil Procedure with goal of expediting cases and lowering the burden and costs on litigants. A number of proposed amendments have been drafted and are now under consideration. In 2014, they will be approved or rejected and those that make the cut would go into effect no earlier than December 2015.

The process was initiated to address a general perception that civil litigation, at least in the Federal system, is taking too long and costing too much. There was a belief that by modifying or amending the rules, we could put processes and tools in place that would allow the litigants in the court to proceed through the pretrial process more efficiently and cost effectively. The proposed amendments address issues around case management, explicitly adding "cooperation" to Rule 1, proportionality under Rule 26 and limiting sanctions for spoliation under Rule 37(e).

Following are highlights from the session that was moderated by Michael Arkfeld, with panelists Ariana Tadler representing views from the plaintiff's bar, David Cohen for the defense bar, and Hon. Craig Shaffer providing the view from the bench. Any views represented below are their personal observations and do not represent the organizations to which they are affiliated.

PROPOSED CHANGES TO CASE MANAGEMENT

TADLER: If we're talking about the ones that are shortening the periods of time, for example relating to service, relating to when there should be the scheduling conference and the scheduling order, the extent to which certain items should be included or considered for purposes of discussion, those are all fine particularly because there is an "out" where the judge can extend those periods of time for good cause. I'm not really troubled by that.

With respect to those first parts about timing and moving things more quickly, it actually, in my mind, probably inures to my benefit. I get very troubled and frustrated by the fact that I have to wait, for example, to serve my discovery request when I know what I'm going to be looking for. I always found it so odd, how am I supposed to have a meet and confer, and show up before a judge and tell the judge what I think the discovery issues are if I'm not supposed to have yet served my discovery request. It just didn't make any sense, so I think this cleans some things up.

COHEN: I don't think you're getting a lot of debate from the defense bar on the time limitations. I think everybody likes the idea of speeding things up where they can be sped up and in particular, some limit on the amount of depositions and the length of depositions is viewed as a positive as well. Obviously, there are cases where five depositions isn't enough or where more than one day is required for a particular witness and the rules provide for exceptions to be made. But to have a discussion started of a low limit on depositions and have the parties essentially have to justify, or discovery should limit the total amount of discovery that goes on, cut down litigation costs, speed things up and advance these goals that you mentioned at the beginning of the program.

JUDGE SHAFFER: There is one rule in the case management category that I think is going to be interesting to watch to see how it plays out. A proposed rule would allow a party to serve requests for production, in advance of the 26(f) conference. If this rule is actually passed, in Colorado, our local rules limit a party, absent of showing good cause, to 25 requests for production. So for our lawyers in Colorado, this would present a tactical dilemma: do I serve requests for production early because that may trigger some preservation obligation or at least a preservation discussion with opposing counsel, or do without some assurance that the court will not later count those same early requests against the total number of requests that I can serve over the course of the entire discovery process?

I think this rule highlights what I believe is going to be the most intriguing development coming out of the proposed amendments, because I think these proposed amendments are going to force lawyers, and to some extent judges, to rethink existing practices; things that we have been doing as lawyers and judges for the last 50 years, almost robotically. I think these amendments are going to be valuable, if only because they cause us to rethink and say, "Are these truly still the best practices in conducting discovery? Is there a better, more strategic way to approach some of these issues?"

PROPORTIONALITY IN RULE 26

TADLER: I foresee the word proportionality becoming the next tool for motion practice and every item of discovery that I request going forward, I am going to be told that it's not proportional. Therefore, we need to go to the judge. And now we're going to have this discussion about a whole series of factors that may or may not actually resolve that dispute.

In contrast, the concept of proportionality is in the Rules. It's there! It's just that people really have not paid sufficient attention to how to utilize it. I'm just fearful that this Rule as written, notwithstanding the fact that it's picking up on a principle that is there, is not articulating it and moving it and adding to it, is going to end up being a sword that many people may not have the ability to push against and to argue against. That's my fear.

COHEN: I'm going to give you a two-part answer. The first part is, partially a response to Ariana's preface before about the system, "If it's not broken don't fix it." The defense bar's answer is, it's broken. And it's been broken. A survey of the ACC members showed that 80 percent of counsel felt that litigation outcomes were more driven by costs than by the merits of the case. People are spending money or settling cases because it costs too much for discovery. Ninety-seven percent thought litigation was too expensive. And the biggest driver of that expense is discovery.

Now, the way it really works isn't what the Rules say; it's really the attitudes that develop as a result of the Rules. And the attitude has been is if the lawyer can make an argument that they might find something relevant to the case, it's discoverable. That's been the rule. The fallback has been, it's discoverable. Efforts have been made over the years to put a proportionality element into things. I agree with Ariana, it's been ignored.

Let's not start with a rule that everything's discoverable.

> A survey of the ACC members showed that 80 percent of counsel felt that litigation outcomes were more driven by costs than by the merits of the case.

Let's start with a rule of what's reasonable. So we need this new attitude of managing discovery by starting with the idea that there are limits. This proportionality factor should be considered and now let's get together and figure out how we can cooperate and agree so that we don't go to the court and lose. I see these rules as rebalancing things and getting the focus of the parties on what do you really need in discovery. Let's do that. Let's not do all this extraneous discovery.

JUDGE SHAFFER: I predict that we will start to see more objections that are based on proportionality principles. I think that's a given. This proposed Rule change may alert counsel to the viability and availability of those objections. I think the objections may be well founded, if parties propounding discovery continue to do what they've always done. If you continue to send out pattern interrogatories, if you continue to send out the same interrogatories you've used for the last 20 years, without change, you are inviting a proportionality objection.

Now the old objection we used to see unduly burdensome, without any factual recitation or support. If you do a boilerplate proportionality objection, I would argue it's no more valid and no more effective than any other boilerplate objection. So again, I think the Rule has some value, to the extent that it focuses people on this issue. The effectiveness of the Rule, and your ability to work within this new Rule, is largely going to be a function of how creative you are and whether or not you're prepared to step away from your old bad practices.

RULE 37(E) AMENDMENT TO LIMIT SANCTIONS FOR SPOLIATION

TADLER: There has been so much time spent on this Rule talking about culpable state of mind or do we work off of a bad faith standard, or a good faith standard. I just know what's going to happen with this Rule. We are going to end up having massive chaos. That's where we're going to go.

I think that people who weren't even focused on sanctions before are going to be further confused by a sanction versus remedial measures and now they're just going to go in with this blunderbuss approach. We're just going to have more satellite litigation. That's what's going to happen. I also think that there are situations where a sanction, an actual sanction, not a remedial measure, is appropriate, regardless of what that state of mind is. You have to look at all of the circumstances. So, I just think it's very problematic.

COHEN: We are seeing some law firms use the sanctions rules today as part of their litigation strategy in just about every case because there's no perfect way to do discovery or to do preservation. There's decisions you have to make. You're subject to second-guessing on every decision. And, sanctions from e-discovery are the most common cause of sanctions today. It's what keeps in-house lawyers and outside counsel up nights, because they're so easily given when you don't have a need for culpability. When you can be sanctioned because of something that is unintentional and caused no prejudice, which is the state of affairs today, it's a landmine out there.

JUDGE SHAFFER: In looking at Judge Scheindlin's opinion in *Sekisui*, I'm struck by her phrase that says, "Imposing sanctions only where evidence is destroyed willfully or in bad faith creates perverse incentives, encourages sloppy behavior." One argument would be if people preserved evidence obsessively and comprehensively based upon a remote possibility of sanctions, does that constitute perverse behavior and arguably is that sloppy litigating? I mean "perverse" and "sloppy" are very much in the eye of the beholder. It's an interesting footnote and obviously Judge Scheindlin feels very strongly about it.

If you came to me and said, "Does 37(e) need some revision?" I would probably have to say yes. I agree with the philosophy underlying 37(e). I think some uniformity and predictability is a good thing. The concern I have with the proposed revision of 37(e) is that it speaks of conduct that is, "willful or in bad faith." Those are two standards that could, in a particular set of facts, be squarely at odds.

If you read the Advisory Committee notes to the proposed amendment, they say, while we are substantially changing 37(e), we still believe that if a party deletes material in a good faith, routine application of their document destruction policy, that's acceptable. But routine destruction of documents is by definition willful conduct.

The litigation process should ensure that both sides have the information they need to pursue a truthful and fair resolution of the dispute. We need to formulate a Rule 37(e) that reflects that underlying tenant. If you engage in behavior to obstruct the truth-seeking purpose, or the truth-seeking function, then I absolutely believe that's sanctionable conduct. "Willful or bad faith" I think is confusing in its current formulation.

FINAL THOUGHTS

COHEN: Well, I think that we in the United States can learn from the experience of the rest of the world. In most of Europe, there's little if any discovery and they're managing to resolve disputes. They're doing it a lot more cost effectively. There's a balance between turning over every rock to look for every shred of duplicative evidence versus resolving disputes. I think that the balance maybe lies somewhere between European "no discovery" and U.S. "wide open discovery." These rules will move us back towards that balance.

One interesting statistic I saw was that in the average big case, parties are producing about five million pages of documents and about 4,700 are used for any purpose in the litigation. That comes out to less than 0.1 percent. That's too many documents. That's too much electronically stored information. If you look at the statistics, that is one of the major things driving up the cost of litigation. We're not getting our money's worth and cases aren't being decided on the merits because discovery is so expensive.

TADLER: The Rules need to be consistent with what the foundation of our legal system is supposed to be about. We're supposed to have access to justice and that means for anybody and everybody. It doesn't matter how much money they have in their pocket or not. I think the Rules needs to be clear and they need to be fair.

I don't agree that we should be more inclined to go the European way. There is a reason the founders of our country created the system that we have here. We need to really look at the Rules as they've developed and read the Rules. We need much greater education. It's very nice to be in a bubble of people who know what the Rules say. You need to pop the bubble and get the other people out there knowing what they actually do.

9 Judicial Panel: The View from the Bench on Preservation

Moderator: Hon. Ronald Hedges
Panelists: Hon. Paul Grewal, Hon. Frank Maas, Hon. Craig Shaffer, Hon. David Waxse

Following are excerpts from the panel of United States Magistrate Judges that assembled for the 2013 Conference on Preservation Excellence. The text below has been edited for length and clarity. All views expressed are those of the individual and not necessarily representative of their office or organization.

CASE REVIEW 1 – SEKISUI V. HART

JUDGE WAXSE: Having read both opinions in this civil action, it seems to me this is just a question of how you look at the law in this area. I think there are clearly two possibilities here. What Judge Scheindlin did was presume that if evidence is destroyed, either willfully or through gross negligence, prejudice to the innocent party may be presumed. What Judge Maas said was he didn't find any prejudice so he wasn't going to sanction anybody because although some evidence had been there was no indication that the destruction was purposeful.

It boils down to this tough question: Do sanctions require that you actually show prejudice because there wasn't a showing of prejudice. I've had some opinions in this area, and it's a tough issue because, the argument of the person alleging spoliation is, "I can't show you what the prejudice is because they destroyed the evidence." Generally, in the law, if you're going to get damages you have to show injury and here you're guessing there might be injury.

What *Sekisui* says is that we don't have to get to that showing of prejudice if you show either willful destruction or gross negligence, then you assume. What Judge Scheindlin did was draft an instruction to the jury on how this presumption would work when the case goes to trial.

JUDGE MAAS: It's a rebuttable presumption. At the end of my decision...and I don't think I'm commenting improperly to say, I recommended denial without prejudice to a renewal of the application on a full record because there were some facts that were less than totally clear. I think Judge Scheindlin, or any other judge can say, "Well, okay, I'm presuming prejudice, but I'll keep an open mind and you can convince me that that's wrong."

I think one of the interesting things, and candidly I hadn't focused on it before I wrote my decision in *Sekisui*, and probably not until Judge Scheindlin issued her opinion was that, at least in the Second Circuit, negligence is a sufficiently culpable state of mind to warrant sanctions. But if you think about the definition of negligence, it's not just omissions, its acts or omissions that depart from a standard of care. If you do something, anything, that is willful

conduct. When can you have negligence but not willfulness? Which is one of the things that the commentators on the two decisions have been addressing.

CASE REVIEW 2 – AMC TECHNOLOGY V. CISCO SYSTEMS[1]

JUDGE MAAS: Judge Grewal issued a decision in AMC Technology v. Cisco Systems in July of this year which is interesting because it dealt with a trigger of the duty to preserve, but not in the context of somebody who was a key player. The individual at issue was a fairly tangential player. The individual was a number cruncher who provided data to help price a software contract. He provided information to people who were part of a team negotiating a contract. He was sufficiently tangential that when parties initially described who had relevant information, neither side mentioned him. At a subsequent point, after getting some documents, one side said, "We want information from him."

By then the individual had left his employment and pursuant to its standard practices his laptop had been erased, so a lot of information was no longer available. The plaintiff, based on that, sought a devastating inference instruction that virtually would amount to a directed verdict.

The judge applied what in the Second Circuit would be the *Residential Funding* standard. First, was there a duty to preserve? Yes, there was a general duty to preserve, because there was an understanding that litigation was contemplated. But Judge Grewal found that there was not a duty to preserve the individual's data because he was so tangential.

The second question was, was there a culpable state of mind such as negligence or willfulness? Although, I believe that the Ninth Circuit standard is not negligence, correct?

JUDGE GREWAL: Correct. Not yet anyway.

JUDGE MAAS: The decision says that the ESI at issue was destroyed in the ordinary course of business pursuant to a preexisting policy and therefore there was no reason to conclude that there was a culpable state of mind. Essentially, the Rule 37(e) 'Safe Harbor' provision was applied although that Rule was not specifically cited.

The judge moved on to the third step of whether the documents on the laptop were relevant; therefore, was the plaintiff prejudiced as to whether or not there was a contractual breach. The information was wholly irrelevant. He, evidently, used a formula that could be reconstructed. Unlike *Sekisui*, where the information related to somebody who was no longer mentally competent to testify and was a key player, this somewhat tangential figure was available, and, in fact, he did testify. The net result was there were no sanctions imposed.

JUDGE HEDGES: How does one make a decision as to who a key player is?

JUDGE GREWAL: You touch upon perhaps the most important point: Evaluating one's "keyness" is a function of his significance to the dispute, not necessarily to his role within an enterprise as a whole.

In terms of process, I think it's critical to follow the guidelines and pieces of advice we've been talking about over the past day and a half. Conversation, investigation, and proactive pursuit of information should get you the answer to the question, as oppose to waiting for a motion for sanctions and hoping for the best. I don't think there are clear lines that one can draw around certain people in evaluating whether they are definitely on the list of key players or not. I do think looking at what they did, when they did it, and how it relates to a dispute will answer the question of extending the duty to preserve to a specific person most of the time.

CASE REVIEW 3 – GATTO V. UNITED AIRLINES[2]

JUDGE GREWAL: This is a personal injury case involving a baggage handler for Jet Blue at JFK Airport in New York. He was injured when a United Airlines plane knocked a set of stairs onto him while he was unloading the plane. The issue had to do with what access United and its co-defendant, the servicer of the staircase, ought to have to the Facebook account and other online activity of the plaintiff. The plaintiff was claiming damages for injuries to his shoulder and knee, and also for lost ability to work and to earn future wages.

One of the things the defendants were quite interested in, of course, was not only what physical activities the plaintiff was engaged in after the incident, but also what commercial activities might have been. Acting on that, a demand was made for access to the plaintiff's Facebook account.

The challenge for United was this: after it negotiated a protocol with the plaintiff whereby the plaintiff tendered a password to United's outside counsel, the counsel went to the site and attempted to log in. It's unclear how much of the account was reviewed by counsel. But, in any event, what followed was that the parties agreed that counsel would not continue to access the account. Instead the defendant, United, would access the information by virtue of a download by the plaintiff himself of his own account.

Here's the problem: After the plaintiff agreed to secure the material from his Facebook account he confessed that in the intervening period he had, in fact, deactivated it. A few days later Facebook, pursuant to its own cleanup policies, eliminated the information. The plaintiff said he deactivated the account without speaking to his lawyer, the plaintiff learned from Facebook that an unknown party was trying to log into his account. Some of you may get such messages from time to time from various ISPs when someone is logging in from a location or from an IP address that is unknown or unfamiliar based on past activity.

The question then raised was what remedy was appropriate, in this instance, given that United no longer had access to the information in Gatto's Facebook account. The court, applying the standard in the Third Circuit for spoliation, asked the classic question: "What did Mr. Gatto know and when did he know it?" and should he have reasonably foreseen that the information in the Facebook account was relevant or requested as relevant by United in this case?

The thing that struck me the most about this opinion was the curious timing. Remember, Gatto deactivated the account months after his suit had been filed. Indeed, he did so months after United had asked him for access. So Gatto had a tough argument to make that he wasn't aware that this information may be relevant and asked for. What his lawyer argued was that while Gatto took willful action that led to the loss of information, Gatto was not willfully seeking to deprive United of that information because Gatto was responding to the alert. Gatto pointed out that he had just been in a messy divorce and he had suffered some recent activity on his account that gave him great concern about being hacked.

The court said: "Interesting argument, Mr. Gatto. I'm not persuaded." The reason for it – and I think this is the key takeaway – is that when we're assessing the intent, or the mens rea of the actor who is accused of spoliating evidence the question isn't whether there was an intent to deprive the defendant of the information in the litigation but, rather, whether intent could be found as to the activity which led to the deprivation. In this particular instance, because Gatto was not merely negligent in taking these steps which led to the destruction of the information, but acted purposefully, the court found an adverse inference instruction.

CASE REVIEW 4 – HIXSON V. CITY OF LAS VEGAS[1]

JUDGE SHAFFER: This case is interesting because you can analyze *Hixson* at three different levels. On the practical level, it's interesting that the decision itself was dated July 11. The court heard oral argument on plaintiff's motion for sanctions on two different dates: May 21 and June 25. I'm assuming that this motion for sanctions was filed sometime in early April.

The first level of interest I have in *Hixson* is that a motion was filed in early April and was decided in mid-July. The first lesson that you take from *Hixson* is that filing a motion may be to your disadvantage. The parties got bogged down in what was really a sideshow and probably invested several months fighting about a battle that should never have been fought. The first lesson in *Hixson* is to figure out what your ultimate objective is. Figure out if it's a realistic objective, and then decide if it's worth pursuing. I would argue in this case that this was a battle that should not have been fought.

The second level is to analyze *Hixson*, for those who are IT people. *Hixson*'s very interesting because it really does point out the dilemma of what is an appropriate trigger and when that occurs. *Hixson* had been in a relationship with a coworker. The relevant time period was from April 2009 to July 15, 2010, when she resigned and then argued she had been constructively discharged.

The relevant period was in the order of about 15 months. During that 15-month period, *Hixson*, who had been in the relationship, filed a number of informal complaints with a supervisor. Then she went up the chain of command, complaining t on a monthly or 45-day basis about her coworker. Meanwhile, the coworker was filing complaints against *Hixson*. They were dueling complaints. *Hixson* ultimately goes to Human Resources and files a complaint there. After 15 months of this she resigned.

The court determined ultimately that these various complaints never constituted a trigger. The court pointed out that *Hixson* had never threatened to file a lawsuit. If she hired a lawyer, she never advised her employer that she

[1] AMC Technology, LLC v. Cisco Systems, Inc. (N.D. Cal. July 15, 2013)
[2] Gatto v. United Air Lines, Inc. (D.N.J. Mar. 25, 2013)

[1] *Hixson* v. City of Las Vegas (D. Nev. July 11, 2013)

had done so. There was just this constant litany of complaints. The lesson that you take away is that at some point the frequency of complaints starts to work against you. It's much like the little boy crying wolf: At some point you'd better be able to produce a wolf.

I'm not suggesting her complaints fell on deaf ears. But *Hixson* may unintentionally have sent the wrong message: "I'm angry, but I'm not real serious about being angry." I think you can look at *Hixson* on that level. If you want to create a duty to preserve, you've got to be more affirmative about it!

From a legal perspective, *Hixson* is interesting because it was a motion ostensibly brought under Rule 37(c). Rule 37(c) says you have a duty to supplement your disclosures to the extent that you realize or learn that your disclosures or discovery responses were incomplete or inaccurate. *Hixson* was alleging that the defendant had not complied with its disclosure obligation, because it had not produced a particular email. In fact, *Hixson* and her lawyer had the email. So she was saying: "I want an adverse inference because you didn't produce what I already had." And then she was arguing, "Judge, I want you to impose a monetary sanction in an amount which will allow me to go out and hire a forensic expert to search whatever they find out if there's anything else they didn't produce that I already had."

The court found that there was no sanctionable conduct because *Hixson* had the information. Rule 37(c) says you don't have a duty to supplement if the information has otherwise been produced. So there was no 37(c) violation. The court also said there were no real preservation issues, because the defendant deleted emails routinely every 45 days, had never done anything to trigger a duty to preserve and the email in question had been routinely purged or destroyed. Under Rule 37(e), it was lost in the good faith, routine operation of a records management system.

Again, the lesson from *Hixson* is, if you are a plaintiff and if you really want to pursue litigation, you have to be more affirmative if you're going to force the other side to start to preserve. Ambiguity does not work in your favor in a preservation contest.

ON FREQUENT TRIGGER EVENTS

JUDGE HEDGES: Someone works for a company that gets 2,000 claims a year. Of the 2,000 claims a lot go away and the company only winds up with about 60 cases. The question is, what should the company preserve?

JUDGE SHAFFER: The legal standard is the same. You have a duty to preserve relevant information when litigation is pending or reasonably foreseeable. The Sedona Conference takes the position, and I think it's the correct position, that the duty to preserve has to be applied on a basis of reasonableness and it has to be applied based on the totality of circumstances.

One could argue that if you get 2,000 incidents a year, all of those incidents shouldn't be evaluated the same way. I would not suggest that you robotically save every piece of information for every incident. I think you're entitled to make informed decisions about reasonably and likely litigation. My best advice would be, whatever you do, do it consistently and do it based upon some documented methodology. If you decide that a mere incident doesn't trigger a duty to preserve, be consistent with an established policy because then you can show that to a court in the future.

In the event that you guessed wrong, you could say that we weren't just doing this willy nilly. We had a clear, articulated policy. We had a set of criteria that we had developed based upon our past experience. The policy was not randomly developed. We looked at our history of litigation and what types of incidents proceeded to litigation. We predicated our policy based on that. We adhered to the policy. And while we may have guessed wrong, because nobody has complete powers of clairvoyance, we were acting in good faith and reasonably.

Can I assure you you're not going to be sanctioned? No, I can't. Can I assure you that if you are sanctioned it's going to be a minimal sanction and not likely to be a case-dispositive sanction? I feel fairly confident giving you that prediction. My view in this preservation area is that parties are not only entitled to act in a reasonable and rational manner, but parties should act in a reasonable and rational manner. Otherwise the process gets completely out of hand.

JUDGE GREWAL: It's in your self-interest to have a consistent standard and process applied across the board. But the thought I had in listening to this question and thinking about it in a broader context is that we tend to get so defensive, for lack of a better phrase, about collection and we are all operating under the assumption that it can only hurt us. There are certain instances, clearly in this context, where it would actually be very helpful to have an affirmative strategy for preserving ESI to substantiate your response.

THIRD PARTY CONTROL OF DATA

JUDGE HEDGES: Let's assume one of you decides to have a third party host data, or collect the data for you. And the third party does something wrong. Let me ask you this: If one delegates to a vendor the obligation to maintain information that is within the possession, custody control of the party, correct? Who's responsible if the vendor screws up?

JUDGE GREWAL: You are. Plain and simple. This is not rocket science. This is a matter of contract law. There may be certain instances in which the fault truly lies with the vendor in a way that shouldn't be attributed to you. But, in the first instance, I think most judges are going to start from the premise that you picked the vendor, you own the contract, and you're responsible.

JUDGE SHAFFER: I have seen this in my courtroom. Everything that Paul said is right. The legal analysis is pretty straightforward. It is a matter of contract, but I would certainly want to include in my provision with a vendor that not only do you have the right to retrieve your information, but the vendor has an obligation to assist you if there is litigation.

PRESERVATION IN PARALLEL CIVIL AND CRIMINAL CASES

JUDGE HEDGES: Should preservation be handled differently if there are likely parallel criminal or civil proceedings?

JUDGE SHAFFER: I think as a legal matter, the standard is probably the same. And I've had situations like this where the SEC embarked upon an enforcement action on the civil side and, at the same time, a federal grand jury explored possible criminal acts. This is a very real situation.

The challenge is obstruction of justice. You can make some mistakes on the preservation side in a civil action and wrestle with sanctions. As we all know after the last couple of days, the court has a fair degree of latitude about what sanctions, if any, it would impose. But when the United States Attorney raises the specter of obstruction of justice, then you are dealing not only with civil sanctions, but penalties that could be imposed on a corporation and its employees.

JUDGE MAAS: But at least theoretically, if you destroy evidence in a civil case, that too can lead to criminal charges. Many of you may remember the "Obama "Hope" poster. Shepard Fairey pled guilty and was sentenced on obstruction charges that arose out of his destroying or altering data in a civil action. That was a fairly unusual prosecution and arguably came about because it was such a high-profile matter. In most civil cases, obviously, criminal prosecution does not grow out of misconduct, but you shouldn't assume that just because you're dealing with a civil case there's not that potential.

JUDGE SHAFFER: My observation would be, in a parallel proceeding situation, this is absolutely a situation where you want to cooperate. This is absolutely a situation where you want to have clear lines of communication, particularly with the United States Attorney. I would also carefully consider Federal Rule of Evidence 502(a) because this is a situation where, under 502(a), you may be able to intentionally disclose information to a government agency. And 502(a) says that the scope of any waiver is limited to what you've intentionally, and only what you've intentionally produced, save for some exceptions.

In a parallel proceeding, the real challenge is making early tactical decisions sometimes on incomplete information. This is one situation where you absolutely want to be ahead of the curve. You cannot sit back and watch things evolve and try to play catch-up after the fact.

SELF-COLLECTION BY CUSTODIANS

JUDGE HEDGES: I have a question that has to do with self-collection. We know it's not recommended by the Sedona Conference. We know Judge Scheindlin thinks self-collection is a bad thing. What do you think?

JUDGE GREWAL: I don't think it's a problem in situations where the cost of the case and the exposure is such that it doesn't make sense to bring in outside firms and vendors. I think there are circumstances where it's fair, reasonable and appropriate for clients to do their own collection.

JUDGE HEDGES: But suppose an instance when you have the bad actor, and you know there's a bad actor. The bad actor should not be allowed to self-collect. Right?

JUDGE SHAFFER: I've looked at the self-collection cases and they stem not from just self-collection but invariably what happens if the self-collecting company doesn't audit its self-collection practices. I agree with Paul, I can envision situations where self-collection on a proportionality basis makes good sense but to cast your employees adrift and self-collect, and then make no diligent effort to audit what they're doing, that's where you run into problems.

JUDGE GREWAL: And I go back to the point I was making a few minutes ago. In some instances you would lose an opportunity by relying upon an employee to self-collect. There are offensive strategies as well as defensive strategies to consider. In certain instances, the last person you want looking for the winning document is the person working for your company.

JUDGE MAAS: Even if your client is not the malefactor in the case, if your client is a buffoon, do not let your client do the self-collection. I had a case three years ago where the client was a high-tech company that was peripherally involved in electronic discovery. Who better to self-collect? Except they screwed it up to a fair thee well. I've had clients who have been given search terms that say, A or B or C, and have decided that should be read A and B and C. If all three words did not appear, they didn't produce the document. And, there are other horror stories.

Also, if you're going to let your client self-collect, consider how they're going to go about it. I had one published case where a party was a relatively small entity called the United States Government. It self-collected, but did so in a manner that changed metadata because they were forwarding the emails to a paralegal who was in charge of production. Pay some attention to who's doing the collection and how they're doing it. I agree with Paul, it's not an absolute no but it can have problems.

DOES COMPANY SIZE OR AGE SHIFT PRESERVATION STANDARDS?

JUDGE HEDGES: A last question: To what standards do judges hold a company to when it comes to managing information so that data can be preserved? Just running a business can be an overwhelming task. Throw document management into the mix and it can be something that stops a company from growing. The more established the business, the better it should be managing information, correct, or does size or number of years in operation play a factor? What do you think companies should aspire to when they're in a position where they need to keep things?

JUDGE SHAFFER: I think that the standard to aspire to is the standard that the court would hold you to, which is reasonableness. In evaluating reasonableness, I'm looking at the totality of circumstances. If I've got, for instance, a party and it's a party that's frequently involved in litigation, or if it's a party that has a substantial in-house legal department, or if it's a party that has a very sophisticated IT department, those are factors that will weigh on the ultimate assessment of reasonableness.

Conversely, if it's a small company that doesn't have its own legal team or it's just been up and running for a short period of time, those are factors that I would consider. I can't give you a bright line test because it's going to vary from judge to judge and from court to court but, more importantly, every fact situation is going to be fundamentally different.

JUDGE GREWAL: I think Craig's absolutely right that we apply an objective standard, which requires a consideration of the totality of the circumstances. Would industry standards be an appropriate circumstance to consider? Absolutely. I will say that in my district I tend to see a lot young, fast-growing entities. A few of them make it, most don't. I am always struck by how shocked they are, in certain instances, when they come to appreciate what their obligations are in litigation. I'm not talking about pre-litigation. I'm talking about post-filing, where they have the services of reputable firms and substantial litigation budgets at their disposal.

In that situation, I'm not so moved by the fact that you only have 35 or 155 employees and you've been around for 18 months, particularly where the executive team or the founders themselves have been at two or three or four other companies and they have vast experience with the federal litigation system. Pleading ignorance and naiveté may be appropriate in certain situations, but my advice is no to try to fool the judge by focusing only on the here and now.

TAKEAWAYS FROM PREX13

AUDIENCE MEMBER: I'm really impressed that you guys have been here for two days, and have been engaged. I've enjoyed listening to what you've had to say and your questions. I'm really interested in what your takeaways are from being here?

JUDGE GREWAL: I'll start. I'll offer one or two takeaways. The first is as difficult as I find my job on a daily basis, I appreciate even more, frankly, how much more difficult your jobs are. Calling balls and strikes and setting standards is tough stuff – at least it is for me. Applying those standards in this kind of environment strikes me as an almost impossible task. I do empathize with the challenge that many of you face.

In terms of more specific takeaways, what I would say is this First and foremost, this group is somewhat self-selected. The main reason we're here, obviously, is we have a great academic and intellectual interest in the subject. One concern I always have in attending conferences like this is that perhaps we give the misimpression that what you're hearing form this group of judges, interested in this subject, is what you're going to hear and experience in courts across the country, even within the federal court system. I would just caution everyone that you are dealing with a very mixed and heterogeneous group of folks. One of the real takeaways I would urge upon you all is to focus on education – education of your courts and education of your outside counsel, early and often.

I'm amazed at how many parties really blow the opportunity to educate a judge early in a case when they come into court for one of the one or two conferences that will happen before a case settles or before a motion is granted, let alone if you go to trial. Take advantage of that opportunity to educate the court on what your problems are. We can hypothesize and anticipate whether you've got a BYOD issue or whether you've got an international collection problem and a European directive conflict. But until we hear from you and what your actual problems are, we can't help you and that's what we really want to do. We want to help avoid the problems. We don't like issuing sanctions. We don't want to teach through that mechanism. We'd much prefer to teach through the process of the early meet-and-confers and case management conferences. That's what I hope you take away.

JUDGE MAAS: One thing we've learned today, and at every other conference I've been to like this is, is that preservation is complicated stuff at times. Preservation is very fact intensive and it's very important to understand the facts accurately in order for a judge to decide what the results should be in terms of things like spoliation sanctions. But because it is so complex, because it is so fact-bound, even people who are reasonably knowledgeable, as the *Sekisui* case shows, can reach diametrically opposite results.

You're in the uncomfortable area where you may not know what the right answer is. As several of the judges and others have remarked, even when you get a dispute between judges about whether sanctions should or should not be imposed on a fact pattern like *Sekisui*, the odds are that a sanctions order will never be appealed. So there frequently is not a final answer to some of the difficult questions you face.

JUDGE SHAFFER: The takeaways that Paul and Frank gave you are great. I would echo all of their comments. If I were going to try to come up with my own takeaways, the first thing I would say is that I do not hold myself to a standard of perfection. I make probably more than my fair share of mistakes and I remember that when people come in front of me on preservation spoliation motions. You are allowed to make mistakes. No court is going to hold you to a standard of infallibility.

What I have observed, however, in the spoliation context, is that a lot of the mistakes that ultimately end up appearing in motions are mistakes which were wholly avoidable. I urge you to go back to your various employers or firms and ask for policies and procedures that are reasonable and are appropriate for your business. You are not in the business of litigating, unless you're a law firm. You are in the business of doing business, whether as an educational institution or a government agency, your first and foremost priority is not litigating. Come up with a preservation policy that supports your primary mission and then be able to document how and why you came up with that position and adhered to it.

If you make a mistake, and you will, once you identify that mistake don't compound the problem by getting yourself embroiled in peripheral disputes. Meet the problem head on and talk with the other side. You may have to eat a little crow. You may have to spend a little money. But once a problem develops, get in front of it and resolve it quickly. Bringing the problem to me, or Paul, or Frank, is not going to make the problem less significant. You've immediately elevated the problem and, to some extent, you've eliminated my creative ability to help you solve the problem.

JUDGE HEDGES: Building on what Craig just said, my suggestion would be, number one, you obviously need processes. As much as having processes you need to follow them. One of the big problems we often see is that businesses keep information beyond the scope of a records retention policy. Unless you're required to keep it by law, I suppose the question is, why do you keep this stuff? It only costs you more money.

JUDGE WAXSE: There clearly is a problem in how much money preservation costs and how long it takes to get things resolved. When we start looking at solutions, there are a whole series of things we've got to do. One we've already heard referenced many times, is we've got to do a better job of getting competent judges and lawyers in the e-discovery world. I still run into judges and lawyers who don't get it.

I had a lawyer the other day who said, when I raised in my scheduling conference the ESI production issues, he said, "No, Judge, we're just going to print it all out and exchange it in paper." And I said, well, you know, there are lots of reasons, including environmental reasons, why you don't do that if there's very much ESI. But I said, you're going to lose the ability to search it, and the one lawyer said, "Oh no, Judge, we've thought about that. We're going to scan in the printed material so we can search it." Competence is the one thing to consider.

The other is what we've also been talking about for two days: Cooperation. It is amazing how much less time and less money can be spent if lawyers will cooperate in trying to find a solution. Most clients are fully behind getting a just, speedy and inexpensive determination of an action. I've referenced yesterday that there are a lot of lawyers that don't have that as their goal. We've got to make sure as courts and as clients that we get lawyers onboard with that being the goal. That was one of the reasons why the Duke Conference came up with a suggestion that just, speedy and inexpensive language be applied to courts and lawyers. We'll see if that gets adopted and added. I think if we had more competence and more cooperation, those of you who are clients would be wasting a lot less time and money.

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