

SPOLIATION OF ELECTRONIC EVIDENCE: Concerns Over Counsel's Responsibilities

By John M. Toth



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As amended in December 2006, the Federal Rules of Civil Procedure set forth a duty to preserve all electronic documents and data for trial. Since these rules were first proposed several years earlier, an increasing number of lawsuits have hinged on the issue of spoliation—whether defendants and their counsel failed to carry out this duty to preserve, not only in actual lawsuits but in situations where the mere possibility of litigation exists. If a court's finding of spoliation equates to a finding of fraud, it can be extremely injurious to defendants and their counsel.

Looking for Nonexistent Documents

"As a lawyer defending *Fortune* 500 companies against allegations of negligence and product liability, I am very concerned about recent efforts by the plaintiffs' bar to expand spoliation claims," asserts Robert L. Massie, litigation partner with Huddleston Bolen LLP. Massie defines this recent trend as "looking for electronic documents that no longer exist, rather than documents that do exist." By raising the possibility that

electronic documents material to their case—even those whose existence is merely hypothetical—might have been intentionally deleted or otherwise made unavailable, plaintiff lawyers hope to secure a finding that evidence which should have been preserved cannot be produced. If this leads to an adverse inference instruction, the trial judge instructs the jury to assume that the missing evidence would have been harmful to the defense—a *de facto* finding that fraud has been committed upon the court. An adverse inference instruction removes the safe harbor afforded by the amended Rules

of Procedure that sanctions cannot be imposed for data lost due to "routine, good-faith operation" of a data system. Although newly amended Rule 37(f) provides that, absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system, the problem lies in defining "routine, good-faith operation" and when such a routine must halt due to a litigation hold. There is also the possibility that plaintiffs will intentionally seek out the costliest information to produce in order to increase their leverage during settlement negotiations.

Massie believes that computer technology and the vast amount of electronic data that it creates and stores has created a form of spoliation litigation that places an especially great burden on large companies, which in effect may have to preserve years of documentary and technical evidence relating to any accident or other situation if it hypothetically could result in litigation.

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The *Zubulake* Effect

Huddleston Bolen litigation attorney Matthew R. Rawlings singles out an important 2004 case in the U.S. District Court for the Southern District of New York as the foundation for much of the current procedural requirements involving electronic spoliation. In *Zubulake v. UBS Warburg*, the defendant's employees had deleted numerous emails relevant to the case after the defendant's legal counsel had issued a litigation hold. The court penalized this conduct and asserted that both in-house and outside counsel must actively monitor discovery compliance.

"The *Zubulake* decision puts the onus upon counsel not just to institute a litigation hold, but to make sure that the litigation hold is put into effect by the client to retain, identify and produce the relevant evidence," Rawlings asserts. *Zubulake* created a primer

Staying Proactive

The amended e-discovery rules and the *Zubulake* decision have supported aggressive spoliation tactics by the plaintiff bar. For example, when suing a railroad in a personal injury case, plaintiffs' counsel may request the rail carrier's complete system maintenance records and all electronic signal recordings even though these are preserved for only a short period of time.

Massie believes that such conduct constitutes a major and substantial change in the entire discovery process. Corporate counsel need to take two proactive steps to fulfill their responsibilities to prevent e-discovery spoliation. First, Massie recommends making the information technology function an integral part of any company's litigation preparation and accident investigation strategies. IT professionals must both take an active role

communication process for a litigation hold: covering what clients are required to do; ascertaining what electronic documents they have; and ensuring that all electronic evidence is preserved. "In the past, a litigation hold essentially alerted clients to preserve documents, but the massive expansion of discovery for electronic data in effect creates a duty to preserve everything that is even remotely relevant, not merely what is easiest or most convenient to preserve." This creates a definite challenge for corporate counsel, who must play an increasingly active role in defining what litigation might occur and ensuring that any electronic documentation relevant to it is preserved. Judge Shira Scheindlin, the presiding judge in *Zubulake*, recommended in a recent interview that in-house counsel recommend to their employers that they immediately form litigation hold committees and enact policies to successfully identify who might have relevant electronically stored information, how to most efficiently implement and monitor a litigation hold, etc. In the wake of severe sanctions and staggering jury verdicts related to e-discovery spoliation, the duty to preserve must be taken so seriously that there seems to be little alternative to comprehensive data preservation in order to avoid allegations of spoliation. ●

The New Rules for Electronic Discovery

The December 2006 amendments to the Federal Rules of Civil Procedure made changes to six specific rules, in ways that govern the discovery of electronically stored information:

- Rule 16:** The key change here is the explicit inclusion of electronically stored information as part of the information to be included in initial disclosures.
- Rule 26:** The biggest change in this rule is that opposing counsel must hold an early pre-discovery conference to agree on what data is not reasonably accessible.
- Rule 33:** The change to this rule clarifies that the e-discovery equivalent to a traditional interrogatory is to provide access to electronically stored data.
- Rule 34:** The major change in this rule defines electronic document production requirements in terms of the duty to provide electronic data in "reasonably usable" form.
- Rule 37:** This rule is changed significantly to restrict imposition of sanctions for failing to provide electronic data lost due to "routine, good-faith operation" of a data system.
- Rule 45:** The changes here expand the subpoena power to specify the production of electronically stored information and the form in which it is to be produced.

for what constitutes spoliation of electronic evidence, and in-house counsel should review the case to better understand their responsibilities. "The decision was rational and reasonable in terms of law," Rawlings adds, but it clearly extended—in advance of the new e-discovery rules—counsel's duty to preserve and produce electronic evidence.

in the discovery process and educate counsel to understand the technological basics of data storage and retrieval.

Second, Massie urges in-house and outside counsel to communicate more fully with their respective clients on the fundamentals of document retention. He sees a three-step

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Article Participants:

Robert L. Massie
Partner, Litigation
rmassie@huddlestonbolen.com
Peer Review Rated

Matthew R. Rawlings
Associate, Litigation
mrawlings@huddlestonbolen.com