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Georgetown Panelists Spar Over Proposed Rule for Preservation

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It might be a stretch to compare the 2013 Georgetown Advanced eDiscovery Institute to the "Hunger Games" sequel. But Robert Owen, a litigation partner at Sutherland Asbill & Brennan, tried his best.

"There are a lot of similarities," said Owen, who debated Millberg partner Ariana Tadler over the proposed Rule 37(e) of the Federal Rules of Civil Procedure. "We were drafted without our consent and we're here to fight for your pleasure!"

The debate took place on Friday—the second, and final day of the institute. While the debate (which was moderated by Thomas Allman of the Sedona Conference) was staged between

friends, the controversial nature of the proposed new rule laid bare some fundamental differences between the two, as well as members of the plaintiff and defense bar, in general.

Speaking on behalf of defendants, Owen argued that the proposed new rule was necessary to promote uniformity throughout the country. "We need one national standard, I don't think anyone disagrees with that," said Owen. "Having many different standards is obviously inefficient." That level of certainty will allow businesses to implement better document retention policies without having to save anything and everything for fear of getting sanctioned by the court, he argued. "What my clients tell me is that this rule, if adopted, will allow them to make good faith judgments about which custodians to put on a litigation hold, as well as the time and scope of that hold," said Owen. "They won't have to put entire departments on holds anymore."

Tadler, who represented the plaintiffs bar, didn't buy Owen's arguments and said that the proposed rule would not have much of an effect on a company's retention policies. "Many companies appeared at [public comment] hearings and specifically spoke in favor of the rule, but admitted it wouldn't change their practices," said Tadler. Instead, it was incumbent on individual companies to come up with strong, defensible policies that they could stand behind in court. "If they take good, reasonable efforts and put together a plan and can support it before a judge, then there won't be much of a fight from me," argued Tadler.

The other major provision of the proposed new rule dealt with sanctions, and Owen had a mixed reaction. He argued that the rule, which limited a judge's ability to impose sanctions to situations where a party's actions caused substantial prejudice in the litigation and "were willful or in bad faith," was unclear as to what constituted "willful" conduct. "Willful is a word with many meanings," said Owen. "Some definitions require bad faith, some don't. We desperately need clarification." Otherwise, Owen was a fan of the proposed limitation to judicial authority. "You can do something intentionally that doesn't carry the presumption that you were trying to hide bad evidence," argued Owen. "If you sever the link between consciousness of guilt and a sanction, then you severely alter the balance of the case."

Tadler, however, was unmoved. "I'm concerned about the emphasis on limiting a judge's authority," said Tadler. "We have phenomenal judges who sit on the bench and see all types of cases and have certain experience that enables them to look at these situations."

Several of those judges were in attendance and mostly refrained from comment. Nan Nolan, a retired U.S. Magistrate Judge for the Northern District of Illinois, however, challenged Owen's view that the rule's proposed limitation on judicial discretion was a good thing. "I'm troubled by the non-trust of judges and the lack of confidence in their abilities," said Nolan. "The judges in this room have helped all sides, plaintiffs, defendants, everyone in developing all areas of the law of ESI."

The current judges, instead, spoke about general issues relating to proposed rule. Judge Shira Scheindlin, a U.S. District Court Judge for the Southern District of New York, echoed Owen's point about "willful" being ambiguous—although she arrived at the opposite conclusion by arguing that the word should be interpreted broadly. "Courts have found that willful can mean knowingly or recklessly—that's the most common definition," said Scheindlin, who noted that

she is writing a law review article on the topic. "I think the rule should include reckless behavior. If people have an obligation to preserve and they don't care to try, then I think it should be sanctionable, even without bad faith."

Scheindlin's colleague at the Southern District of New York, U.S. Magistrate Judge Frank Maas, warned that the rules had to be clearer. "If you have a rule where you have to interpret it with a footnote to a law review article, it's a problem," said Maas.

Nevertheless, no matter how clear the rules are, two judges can always read the same set of facts differently and come to opposing conclusions. "That happened in Sekisui," said Maas referring to an August decision where Scheindlin reversed Maas and imposed sanctions on a party for deleting emails.

If the proposed rule was designed to bring certainty, Georgetown proved that the rule's drafters might need to go back to the drawing board.

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