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What You Need to Know About the New Rule 37(e)

As the new federal rule on electronically stored information takes effect, plaintiff attorneys should pay careful attention to the text and the accompanying committee note to understand how the rule will affect their practices.

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The Federal Rules of Civil Procedure amendments, which went into effect on Dec. 1, 2015, include a new version of Rule 37(e) that sets out standards for imposing curative measures and sanctions for the loss or destruction of electronically stored information (ESI). The new rule emerged from a four-year process of discussion, drafting, public comment, and redrafting by the Advisory Committee on Civil Rules and its Discovery Subcommittee, beginning shortly after the Duke Conference on Civil Litigation in 2010. The rule was initially envisioned as a comprehensive framework, codifying the duty to preserve in litigation and the consequences for failing to do so. But obstacles, including the Rules Enabling Act, prevented this.

Even though many in-house and outside counsel had clamored for more substantial guidance on preservation, the proposal was reduced to a simpler and less ambitious rule designed to resolve a split among the federal circuits about the level of culpability required for sanctions for ESI spoliation. The new rule will likely affect few cases, and, in some, may lead to more onerous consequences for the spoliating party. Unlike earlier drafts that were considered and rejected, the final version of Rule 37(e) is only a modest adjustment in the developing law of preservation and spoliation.

The Rule's Evolution

According to the Advisory Committee's Report on the Duke Conference, "there was significant support across plaintiff and defense lines for more precise guidance in the rules on the obligation to preserve information relevant to litigation and the consequences of failing to do so."[1] A dominant theme at the Duke Conference was resolving a split among the federal circuits regarding the use of the most severe sanctions: Some courts authorized case-terminating sanctions or an adverse inference (a presumption that missing information would have been unfavorable to the party responsible for its loss) on a finding of bad faith, while others allowed adverse inferences based on negligent or grossly negligent conduct. Representatives of large corporations claimed that this split caused them to engage in expensive "over-preservation" to avoid the risk of severe sanctions—even for a mere negligent failure to preserve information.[2]

Based on input from the Duke Conference, the Discovery Subcommittee attempted to provide specific guidance on a broad range of preservation-related issues, such as when the duty to preserve arises, the scope of the duty, and the number of custodians who should be subject to a "litigation hold."[3] However, after two years of meetings, discussion, and many preliminary drafts, the subcommittee concluded that it faced insurmountable obstacles—including the Rules Enabling Act—in drafting such a comprehensive rule.[4] Instead, the subcommittee decided to draft a "consequences-only" rule limited to guidance for court action for failures to preserve ESI under the existing law.[5]

In August 2013, the Advisory Committee published a draft rule for public comment that was not well received—the proposed standards were criticized for being both too high and too low, and likely to create confusion. The draft rule distinguished between "curative measures" and "sanctions." If information that should have been preserved was lost, curative measures, such as ordering a party that lost information to obtain or develop substitute information, could be ordered. Sanctions could be imposed only if the information loss caused "substantial prejudice" *and* resulted from "willful" or "bad faith" actions, or if the loss "irreparably deprived a party of a meaningful opportunity" to present its claims or defenses.

Public comments highlighted that "the published proposal's approach of limiting virtually all forms of 'sanctions' to a showing of both substantial prejudice and willfulness or bad faith was too restrictive,"[6] unduly limiting district court judges' discretion to address the varied factual situations in which spoliation claims arise. After the public comment period closed in February 2014, the

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The New Rule 37(e): Failure to Preserve Electronically Stored Information

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Discovery Subcommittee concluded that the published draft rule needed an overhaul. It set about reshaping the proposal to resolve the circuit split while restoring the courts' flexibility to use other measures.[7]

Under pressure to produce a new draft for the next meeting, the subcommittee published a heavily revised proposal in the Agenda Book for the April 2014 meeting (the Agenda Book proposal). The Agenda Book proposal eliminated all references to sanctions and jettisoned the "willful or in bad faith" standard and the "irreparably deprived" provision.[8] The curative measures/sanctions duality was replaced with a three-level hierarchy for remedying a loss, with the type of loss dictating the remedy's severity.

In response to the earlier criticism that it had unwisely restricted judges' discretion, the subcommittee made significant additions to the committee note regarding the court's broad authority to act once a finding of prejudice is made. That note was included, with some alterations, in the final version.

The written comments criticizing the Agenda Book proposal focused on the absence of a clear culpability requirement for measures to cure information loss or to cure prejudice. The subcommittee again made substantial revisions between Apr. 10 and Apr. 11, and distributed by hand the new version to the Advisory Committee and present observers (including the authors of this article) just minutes before the Advisory Committee convened to consider the proposal. The committee note had not yet been revised to reflect these changes. The Advisory Committee unanimously adopted the proposal and decided against republishing the revised rule for public comment.[9]

Despite the brevity and simplicity of Rule 37(e) on its face—particularly compared with earlier versions—there will be no shortage of motion practice over its application.

Understanding the New Rule

The preamble section of the final rule includes three prerequisites before a court can take any action to address a preservation failure. The rule applies only when ESI that "should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." These provisions are significant changes from earlier drafts of the rule, but they do not represent substantial changes in the law. Spoliation is, by definition, the loss of information that should have been preserved.[10] Courts have long held that reasonableness is the standard against which efforts to preserve ESI are judged; perfect preservation is neither expected nor required.[11] If lost ESI can be restored or replaced through additional discovery, the court has the authority to order such discovery under Rules 16 and 26 and, thus, has no need to invoke Rule 37(e).[12] All three predicate conditions must be met; only then does the rule specify what the court *may* do.

In addition to satisfying the elements of the preamble, "prejudice" is required to obtain remedial or curative relief under Rule 37(e)(1). In contrast, under Rule 37(e)(2), which allows for the worst consequences for spoliation that are more akin to the formidable "sanctions" of the past, a showing of

"intent to deprive" is now required. The committee note explains that 37(e)(2) is designed to resolve the circuit split—it rejects the line of cases that allow adverse inference instructions for negligence or gross negligence.[13] This note is key to understanding 37(e)(1) and the extent to which, even under this prong, certain consequences might result:

> In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies.

The note also explains that subdivision (e)(2), requiring the "intent to deprive" finding, applies to

> any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. *For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision.* These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice (emphasis added).

In other words, it is possible that if a party satisfies the preamble and can show prejudice, the jury might make an adverse inference on its own, based on the arguments and evidence presented.

The bifurcation of available relief and the requisite showings under Rule 37(e)(1) and (2) raise intriguing possible outcomes. For example, it appears that if Party A is prejudiced by Party B's loss of ESI, but is unable to persuade the court that Party B acted with the intent to deprive Party A of the information's use in the litigation, Party A has at least

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two alternate routes that may result in an adverse inference drawn *by the jury*.[14]

Under 37(e)(1), if prejudice has been shown, both sides may present evidence and arguments to the jury about the information loss. The court may instruct the jury to evaluate the loss in light of the evidence and arguments. Alternatively, Party A may persuade the judge that the jury should decide whether Party B acted with an "intent to deprive" pursuant to 37(e)(2)—Party A need not show prejudice—in which case the jury will hear evidence from both sides about the information loss. The judge will instruct the jury that, if it finds that Party B acted with the intent to deprive, the jury may presume that the information was unfavorable to Party B. Regardless of whether the jury makes the inference, it will still have heard damaging evidence and arguments about the circumstances that caused the information loss.[15]

Open Questions

Despite the brevity and simplicity of Rule 37(e) on its face—particularly compared with earlier versions—there will be no shortage of motion practice over its application. Some of the issues are likely to include:

- What instructions may be given to a jury to "assist in its evaluation" of evidence and argument regarding the loss of information under 37(e)(1), such as when an "intent to deprive" finding has not been made? The committee note distinguishes between an inference based solely on the loss of information and an inference based on evidence about the loss of information. Is there necessarily a real distinction? How could a jury decide whether to draw an adverse inference without hearing evidence about the circumstances of the loss?[16]
- The committee note instructs that, under 37(e)(2), the court may permit the jury to decide, based on the evidence, whether a party acted with an "intent to deprive" and, if it makes that finding, the jury may "infer from the loss of the information that it was unfavorable to the party that lost it." In contrast, it appears that under 37(e)(1), the court may permit the jury to make any inference it finds appropriate based on the evidence without needing to first find an "intent to deprive," so long as there is a finding of prejudice and the court does not use the specific words of an adverse inference instruction. What is the substantive difference between these scenarios?
- What facts will courts find sufficient to infer an "intent to deprive," which often cannot be proved by direct evidence? The committee has said the intent requirement is "akin to bad faith, but is defined even more precisely."[17]
- If knowledge of litigation is restricted to management, while lower-level employees destroy ESI, can the "intent to deprive" showing be made?[18] Conversely, if a low-level employee acts with an intent to deprive, can that intent be imputed to the corporation?

Although the Advisory Committee intended to resolve the circuit split on applying the most severe sanctions, Rule 37(e) likely will have little effect on the preservation practices or expenses of large corporations. The notion that the circuit split forced over-preservation was dubious from the start, as it postulated that corporate counsel base preservation decisions on the possible severity of an unlikely sanction.

As Magistrate Judge James Francis IV observed in his written submission to the Advisory Committee: "The implicit assumption underlying the proposed rule—indeed, the rationale upon which it depends—is that lawyers think like criminals: they would adjust their behavior based on the penalty they might face for violating an obligation rather than on the obligation itself, so that a reduction in sanctions would, by itself, yield a reduction in preservation. This is a dim view of attorneys, and one for which there is no empirical evidence."[19]

Several corporate witnesses who testified before the committee said, with regard to preservation, that "they would actually not do anything different if the new rule were in effect."[20] In its final report on the proposed amendments, the Advisory Committee noted: "Given the many other influences that bear on

the preservation of ESI, however, it is not clear that a rule revision can provide complete relief on this front. . . . [T]he savings to be achieved from reducing over-preservation are quite uncertain. Many who commented noted their high costs of preservation, but none was able to provide any precise prediction of the amount that would be saved by reducing the fear of sanctions."[21]

The question remains, then, whether the claim that Rule 37(e) needed to be revised to solve the problem of over-preservation might have been a pretext to amend the rule to limit the duty to preserve and to insulate spoliating parties from just consequences for their actions. For those looking only at the final version of the new rule, the long and difficult drafting process may appear to have been much ado about little; in reality, the full story is that of a potentially disastrous amendment averted.


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Notes

1. Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, *Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation* 8 (hosted at Duke U. Law School, May 10–11, 2010), www.uscourts.gov/file/reporttothechiefjusticepdf. To access reports and other documents from the Rules Committee, visit http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees.
2. As discussed below, claims that the cost of document preservation can be significantly reduced by amending the Federal Rules have been strongly disputed.
3. *Advisory Committee on Civil Rules* (Agenda Book) 370–73 (Apr. 10–11, 2014).
4. The Rules Enabling Act, passed by Congress in 1934, gives the Supreme Court the power to make rules of practice and procedure for U.S. courts provided they do not "abridge, enlarge, or modify any substantive right." A more comprehensive Rule 37(e)—to the extent it would have included pre-litigation preservation—would have exceeded the Act's parameters.
5. *Advisory Committee on Civil Rules*, *supra* note 3, at 371–72.
6. Memorandum Report of the Advisory Committee on Civil Rules from David G. Campbell, Advisory Committee on Civil Rules, to Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure 249 (May 2, 2014).
7. *Advisory Committee on Civil Rules* (Agenda Book), at 371; "It would be good to deal with the circuit disagreements, even if nothing else can be accomplished." Mar. 12, 2014, Subcommittee Call.
8. Many big data commenters stressed the purportedly undeserved and prejudicial "branding" that follows once a data producer is sanctioned for failure to preserve, which they claimed could affect future litigation.
9. The authors, who had been active observers and commenters throughout the process, shared the opinion that given the substantial changes to the rule and the yet-to-be-confirmed Committee Note, a new round of public comment should have been conducted.
10. "Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silvestri v. GMC*, 271 F.3d 583, 590 (4th Cir. 2001).
11. "Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*." *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010); "Courts cannot and do not expect that any party can meet a standard of perfection." *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 716 F. Supp. 2d 236 (S.D.N.Y. Jan. 15, 2010).
12. *See, e.g.,* Fed. R. Civ. P. 16(c)(2)(F) (authorizing the court to take actions "controlling and scheduling discovery"); Fed. R. Civ. P. 26(b)(2)(A) (authorizing the court to permit additional depositions or interrogatories).
13. This standard is exemplified by *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002).
14. In addition, the Committee Note says 37(e)(2) "does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial."
15. *See generally* Thomas Y. Allman, *The Civil Rules Package as Approved by the Judicial Conference (Sept. 2014)*, Dec. 22, 2014 (quoting Jamie S. Gorelick et al., *Destruction of Evidence* §2.4 (Wolters Kluwer 2014) ("[A]s noted, after Subdivision (e)(2) goes into effect, adverse inferences will not be available to courts unless the heightened level of culpability is affirmatively shown. . . . However, this intended effect many be undermined if Subdivision (e)(1) is routinely invoked to authorize a jury to consider evidence of spoliation in the absence of such intent. 'Once a jury is informed that evidence has been destroyed, the jury's perception of the spoliator may be unalterably changed.'")).
16. The Second Circuit has held that certain forms of adverse inference instructions are not sanctions at all; they "simply explain to the jurors inferences they are free to draw in considering circumstantial evidence" and may be given in the absence of the predicate findings required for sanctions. *Mali v. Fed. Ins. Co.*, 720 F.3d 387, 394 (2d Cir. 2013). A *Mali*-type instruction may be available under 37(e)(1) without an "intent to deprive" finding, so long as all fact-finding is left to the jury. *See* Shira A. Sheindlin & Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 Fordham L. Rev. 1299 (2014), ir.lawnet.fordham.edu/flr/vol83/iss3/5.
17. Memorandum Report of the Advisory Committee on Civil Rules, *supra* note 6, at 253.
18. *See Wiginton v. Ellis*, 2003 WL 22439865 at *7 (N.D. Ill. Oct. 27, 2003) (holding that documents were destroyed "in bad faith" where company failed to inform those in charge of document retention that litigation was anticipated).
19. Ltr. from James C. Francis IV, to Committee on Rules of Practice and Procedure 4 (Jan. 10, 2014), tinyurl.com/oebnoz7; *see Advisory Committee on Civil Rules*, *supra* note 3, at 424 ("We should downplay any strong justification in terms of reducing over-preservation. Now we see that our rule will not much affect that behavior, so the tradeoff in lost judicial latitude is too costly.") (notes of Feb. 20, 2014, Discovery Subcommittee Conference Call).
20. *Advisory Committee on Civil Rules*, *supra* note 3, at 409 (notes of Feb. 8, 2014, Subcommittee Meeting).
21. Memorandum Report of the Advisory Committee on Civil Rules, *supra* note 6, at 247, 249.