

Apple, Terrorism & Electronically Stored Information in Today's Advanced Technological Age



By David J. Oberly

Federal rules of civil procedure respond and adapt to the increasingly important and central role that ESI plays in civil litigation with wholesale amendments to Civil Rule 37(e) regarding ESI preservation requirements and spoliation sanctions

Introduction

The newest big data battle emerged recently when Apple was ordered by a federal court in California to assist the FBI in bypassing security features to access electronically stored information—commonly known as ESI—contained on the mobile device of one of the assailants in the San Bernardino terrorist attack. This high-profile dispute involving one of the world's most skilled governmental agencies and the largest technology enterprise on the planet highlights and exemplifies the central importance and vital role that ESI plays in today's highly digital age. While garnering much less media attention, similar battles are being fought today in courthouses across the nation between civil litigants seeking to obtain ESI from their adversaries through the course of discovery. Fortunately, the Advisory Committee for the Federal Rules of Civil Procedure has taken note of the fundamental role that ESI plays in all aspects of our lives today, and its imperative and indispensable function in civil lawsuits, where a select few pieces of electronic evidence can make or break a litigant's ability to establish his or her case. As a result, part of the December 2015 amendments to the Federal Civil Rules—which Supreme Court Chief Justice John Roberts has proclaimed to be a “big deal”—Rule 37(e) was completely rewritten to provide a framework for the duty of litigants to preserve ESI and a specific, express standard applicable to litigation in the federal courts for determining the appropriate remedies and sanctions where a party fails to preserve ESI.

Rule 37(e): Preservation of ESI and Sanctions in Connection with Spoliation Overview

The explosion of technology in recent years has brought about wholesale change to almost every facet of our everyday lives. In the legal world, no aspect of litigation has been impacted more by technology than the area of discovery. In fact, modern technology has had such a profound influence on the discovery process that an entire field of law, known simply as “e-discovery,” has emerged to address the myriad of issues that arise at the intersection of technology and discovery. Today, e-discovery remains a relatively primitive area of law that presents a minefield of potential perils and traps, even for seasoned litigators. Every attorney has heard horror stories of the draconian sanctions imposed by courts for failing to properly preserve relevant ESI. Often, the failure to preserve such information was the result of mere carelessness or oversight, and in the absence of even the slightest amount of malice. However, courts in those situations have not hesitated to drop the hammer on offending parties with severe sanctions including adverse inference instructions, monetary penalties, and even the entry of judgments in favor of the aggrieved litigant. To make matters worse, over time the federal courts have developed widely divergent standards for issuing sanctions, resulting in penalty schemes that were vastly varied from court to court. The amendments to Rule 37(e) were designed to address these growing problems and provide a uniform, standard approach to ESI sanctions in federal court. As a result, Rule 37(e) was completely

re-tooled to modernize the federal court system's treatment of e-discovery matters, and to more clearly define the scope of responsibility for preserving ESI and remedies for the failure to reasonably preserve electronic information that "should have" been maintained.

Rule 37(e) addresses the power of courts to take action and remedy situations where a party neglects to properly retain ESI, and establishes a new framework of requirements that must be satisfied before a court is able to issue sanctions against a litigant resulting from a failure to preserve ESI. The amendments to the rule are intended to address the consequences flowing from the rapidly expanding volume of electronically stored information and the steep trajectory with which it is increasing. Rule 37(e) does

not, however, create a new duty to preserve, but rather codifies the existing common law duty to preserve relevant information when litigation is reasonably foreseeable. In doing so, these amendments were aimed at curtailing the runaway costs of electronic discovery by injecting the concepts of reasonableness and proportionality into the duty to preserve electronic evidence. Revised Rule 37(e) also attempts to ensure that cases are decided on their merits, as opposed to which party can stand to stomach higher discovery expenses. In addition, the rule is intended to provide a uniform analysis and standard for determining sanctions for violating the duty to preserve ESI across all federal courts. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.

Amended Rule 37(e) can be broken down into three principle aspects: (1) the initial three-part test for determining when the rule is applicable; (2) "prejudice" and the lesser sanctions available to cure prejudice arising out of less malicious failures to preserve electronically stored information; and (3) "intent to deprive" and the more severe sanctions available to remedy the most flagrant violations of ESI preservation requirements.

ESI Loss Requirement

At the outset, it should be noted that this rule does not apply to all evidence generally, but rather only electronically stored information. Rule 37(e) is only triggered 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." Thus, there are three basic requirements to Rule 37(e) that must be satisfied before a court can even consider sanctions. First, the relevant ESI "should have been preserved in the anticipation or conduct of litigation." Second, the ESI was lost because the of-

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fending party "failed to take reasonable steps to preserve the information." Third, the ESI "cannot be restored or replaced through additional discovery." Of note, the second requirement provides that a court must conduct a reasonableness analysis when determining whether to impose sanctions for ESI preservation failures. While the amended rule's language recognizes that reasonable steps to preserve suffice, it does not call for perfection. Importantly, a significant factor in evaluating the reasonableness of preservation efforts is proportionality. Accordingly, this factor allows litigants to take into account time, effort, and expense when crafting preservation methods. Moreover, courts will look at the litigants' sophistication, their relative resources, and the importance of the ESI to the claim or defense when determining whether efforts were reasonable. Furthermore, the third step also implements a "no harm, no foul" principle that makes sanctions unavailable where no resulting harm occurred and the evidence at issue can be obtained by other means. If the ESI is restored or replaced, no further measures under Rule 37 should be taken. Furthermore, efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation, and substantial

measures need not be taken to restore or replace information that is marginally relevant or duplicative.

Prejudice Requirement

If the court finds that sanctions or other remedial measures are applicable pursuant to the three-pronged test, then under subdivision (e)(1) the court "upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice." Subsection (e)(1) allows the court discretion to determine how to best assess prejudice in particular cases, and does not place the burden of proving or disproving prejudice on either party, as

it may be difficult for the allegedly wronged party to determine the contents of the lost information.

Once a finding of prejudice is made, the court may impose remedies to cure that prejudice, but nothing more. However, under the rule serious measures are still allowed under subsection (e)(1) where they are necessary to cure the prejudice, and may include measures such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument. With that said, courts are warned that they must be cautious to ensure that any remedial steps taken under subsection (e)(1) do not have the effect of measures that are only permitted under subsection (e)(2).

Intent to Deprive Requirement for Severe Sanctions

For the most draconian measures to apply under Rule 37(e)(2), the court must find that the alleged offending party "acted with the intent to deprive another party of the information's use in the litigation." Upon a finding that a party deliberately destroyed evidence, prejudice to the other party is presumed. The intent requirement was crafted to form a uniform national

standard in the federal courts that allowed the most severe sanctions to be imposed only for the most egregious failures to preserve ESI. The standard here is a high bar to clear, and raises the standard for severe sanctions in many jurisdictions. “Intent to deprive” in this respect is akin to bad faith, and applies only in limited instances of intentional loss or destruction. Accordingly, ordinary negligence, and even grossly negligent or reckless conduct, no longer suffices to trigger sanctions for the failure to fulfill a party’s duty to preserve ESI. When subsection (e)(2) is triggered, the severe sanctions available to a court are limited to entering default judgment, dismissing a lawsuit, presuming the lost information was unfavorable to the party (in the case of a bench trial), or instructing the jury that it may or must presume the information lost was unfavorable to the offending party (in the case of a jury trial). Notably, however, a court is not compelled to issue any of these remedies even where the specific intent standard is established, as these sanctions are not mandatory and lesser sanctions may be imposed. Here, courts are admonished that the remedy should fit the wrong, and the severe measures authorized should not be used

when the information lost was relatively unimportant or lesser measures would be sufficient to redress the loss.

Conclusion

The amendments to Rule 37(e) were implemented to allow for the development of a homogeneous, dependable body of federal law imposing predictable sanctions for failures to preserve ESI. Ultimately, Rule 37(e)’s revisions should allow for a more uniform, harmonized process for e-discovery in the federal courts, as well as for when sanctions are appropriate for violations of the duty to preserve ESI. In addition, the revised rule should resolve at least a portion of the uncertainty and inconsistency surrounding spoliation violations that has caused the cost of ESI preservation to skyrocket in recent years, and should provide some advance guidance on the potential sanctions that are to be imposed as a result of spoliation violations. Equally as important, both counsel and their clients should take time to reassess the way they store, preserve, and collect electronically stored information in light of the modifications to Rule 37(e). In particular, companies should

ensure that they have effective documentation retention and litigation hold policies in place, keeping in mind that the duty to preserve ESI should be assessed based on the concepts of reasonableness and proportionality, as opposed to perfection. A good rule of thumb is to incorporate as stringent preservation protocols and procedures as possible in light of a party’s economic resources. In addition, because revised Rule 37(e) provides for sanctions only where efforts to preserve were unreasonable, documentation of the party’s retention and preservation methods, and how electronic discovery is conducted and produced, also remains vital to ensuring that ESI preservation sanctions are avoided. Done in the proper manner, effective ESI preservation policies, procedures, and techniques can help both individuals and businesses steer clear of being on the receiving end of Rule 37(e) spoliation sanctions.

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