New Best Practices Under E-Discovery Spoliation Rule

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As the volume of electronically stored information, or ESI, subject to discovery has exploded, allegations of spoliation have multiplied. Before the 2015 amendments to the Federal Rules of Civil Procedure, courts relied on their inherent authority to control litigation before them as well as on Rule 37(e), which provided only that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules 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.”
But the prior rule did not adequately address the challenges brought by the explosion of ESI, leading to a lack of predictability and guidance. Courts’ exercise of their inherent authority was similarly unpredictable. The amended Rule 37(e) provides explicit criteria for imposing sanctions when ESI has been lost and forecloses reliance on inherent authority. However, recent cases show that courts are still not consistently applying the new rule, with some simply ignoring it in favor of inherent authority.

**Litigation Costs Drove the Development of the 2015 Amendments**

The advisory committee on civil rules sponsored a symposium on civil litigation that confirmed that “in many cases civil litigation has become too expensive, time-consuming, and contentious” and identified the need for procedural reforms that would “address serious new problems associated with vast amounts of electronically stored information.”

In its notes to the 2015 amendments, the advisory committee explained that the existing Rule 37(e) had “not adequately addressed the serious problems resulting from the continued exponential growth in the volume of [ESI]” and that inconsistent standards had “caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.”

The new Rule 37(e), by contrast, “authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures.” Pursuant to Rule 37(e)(1), a court must find that the loss of ESI caused prejudice to another party before it may order sanctions no greater than necessary to cure that prejudice. Rule 37(e)(2) requires that the court find that a party intended to deprive another of the use of ESI before it can order the more severe sanctions of an adverse presumption, an adverse inference instruction or termination of the action.

Crucially, the committee note makes clear that the rule forecloses reliance on inherent authority or state law to determine when certain measures should be used. Sanctions imposed pursuant to Rule 37(e)(1), however, should not have the effect of the more severe sanctions authorized under Section (e)(2). By requiring specific findings before sanctions can be imposed, the new rule provides predictability that should reduce aberrant rulings as well as the cost of preservation. Those benefits are lost if courts ignore the rule or rely instead on inherent authority.
Cases Finding That Rule 37(e) Does Not Displace Inherent Authority

The court in *Cordova v. Walmart of Puerto Rico Inc.* addressed the defendant’s motion for sanctions based on the plaintiff’s deletion of her Facebook account, without citation to Rule 37(e). Walmart Inc. sought the plaintiff’s social media as relevant to her claims of physical and psychological injuries. While the plaintiff claimed that she lost access to her Facebook account when she lost her cellphone and was unable to remember her password, Walmart found an account bearing the plaintiff’s photo and her first name spelled backwards. That account became unavailable the same day. Evaluating spoliation, the court relied largely upon preamendment case law that granted it “broad discretion in choosing an appropriate sanction.”

Despite the requirement in Rule 37(e)(1) that prejudice be found in order for sanctions to be imposed, the court found only that the plaintiff’s deletion of her Facebook account may have prejudiced Walmart by depriving it of relevant metadata, and imposed an adverse inference instruction as a sanction. An adverse inference, however, is limited by Rule 37(e)(2) to circumstances where a court finds intent to deprive, which the court here did not do. Without a finding of intent to deprive, the court arguably imposed a more severe sanction than that authorized by Rule 37(e)(1).

Cases Finding That Rule 37(e) Forecloses Reliance on Inherent Authority

Other courts, however, have recognized the advisory committee’s intent to replace, not supplement, inherent authority with Rule 37(e). *Blazer v. Gall* is a civil rights case brought by a former prisoner for failure to be provided medical care while detained. While Blazer was still detained in Walworth County Jail, supervised by Sheriff Josh Boll, Blazer’s attorney requested copies of all medical records and, as all common areas and cells were subject to video and audio surveillance, requested that he either be provided copies of any recordings or that the recordings be preserved. No such recordings were produced. When deposed, Boll admitted he had taken no action to preserve any video or audio recordings as requested and in fact, had never been asked to do so by anyone.

Blazer moved for sanctions, requesting default judgement on the issue of liability or, in the alternative, an adverse jury. The court noted that the “court’s power to impose spoliation sanctions stems from either the Federal Rules of Civil Procedure, or when the Rules are inapplicable, the court’s inherent authority under common law.” The court found that Rule 37(e) applies and thus “forecloses reliance on inherent authority.”
The court held that the defendants had a duty to preserve, that no steps had been taken to preserve the recordings, and that the recordings could not be replaced or duplicated. The court found that Walworth County and Boll had demonstrated intent to deprive Blazer of evidence and the measures available through Rule 37(e)(1) did not sufficiently redress the loss. The court denied Blazer’s request for default judgment on liability but ordered that an adverse jury instruction be given.

In Williford v. Carnival Corp., Diane Williford filed a spoliation sanctions motion arising from Carnival’s inability to locate and produce X-rays taken after she slipped and fell on board a cruise ship. The medical staff misread her X-rays as showing a fractured hip, and Williford was evacuated from the ship at great expense.

Williford requested that Carnival produce the X-rays, but Carnival was unable to find them. In response to Williford’s motion for sanctions, Carnival provided an affidavit stating that the X-rays taken on board are saved in a digital format on the hard drive of a dedicated computer, but that the computer attached to the X-ray machine at the time of Williford’s fall had been replaced with a new computer and that Carnival’s vendor could not locate the X-rays on either computer.

The magistrate judge acknowledged Rule 37(e)’s exclusive application if the X-rays were ESI. Further the court acknowledged that Rule 37(e) “significantly limits a court’s discretion to impose sanctions for ESI spoliations.” The court determined that Carnival had a duty to preserve the digital X-rays, that it had not taken reasonable steps to preserve them, that the digital images could not be restored or replaced through additional discovery, and that Williford had been prejudiced.

Accordingly, the court found the criteria under Rule 37(e)(1) had been established, and evidentiary remedial measures were offered to Williford. However, the court held that Williford had not met her burden to establish that Carnival acted with the intent to deprive Williford of the evidence and denied sanctions pursuant to Rule 37(e)(2).

In Cruz v. G-Star Inc., the defendants failed to impose a litigation hold until July 2017, 10 months after Christine Cruz filed her first complaint with the human resources department and the defendants responded to the complaint. By that time, the defendants had deleted Cruz’s email account. Further, five months after the litigation hold was issued, the defendants deleted Cruz’s systems, applications and products, or SAP, account. Despite the defendants’ in-house counsel learning of the deletions in February 2018, and outside
counsel being informed of the deletions in March 2018, the defendants did not advise the court or Cruz of the deletions until July 2018.

When analyzing Cruz's motion for sanctions, the court recognized that Rule 37(e) "governs sanctions for failure to preserve ESI," and that “[d]istrict courts in the Second Circuit have recognized that Rule 37(e) replaces the prior framework for spoliation claims for failure to preserve ESI.”

Applying the threshold elements required by Rule 37(e), the court determined that the defendants' duty to preserve Cruz's ESI arose no later than when the defendants responded to her first HR complaint, that the defendants failed to take reasonable steps to preserve Cruz's ESI, and that the ESI could not be restored or replaced. Proceeding to Rule 37(e), Subsection (1), the court determined that the plaintiff had been prejudiced.

Further, the court determined that sanctions pursuant to Rule 37(e)(2) were warranted because the defendants' actions supported an inference that they had acted with the intent to deprive Cruz of the ESI. “Defendants' failure to impose a litigation hold before July 2017 was 'so stunningly derelict as to evince intentionality.'” Despite meeting the threshold requirement for sanctions under Rule 37(e) subsection (2), the court refused to grant Cruz's request to strike the defendants' answer or affirmative defenses, granting instead her request for an adverse inference instruction.

**Best Practices**

Rule 37(e) was amended with the express intention of clarifying the findings necessary before sanctions for the loss of ESI can be imposed, thereby reducing the crippling costs of defensive over-preservation. Those benefits are lost, however, if courts disregard the rule in favor of inherent authority. To ensure that courts properly apply the analysis required by the rule, we suggest the following best practices:

1. *Throw away the form book.* Arguments based on the state of the law before Dec. 1, 2015, are obsolete and should not be recycled in the name of efficiency. The amended Rule 37(e) states explicit requirements that counsel must address to inform the court. Similarly, cases decided under the prior rule have little persuasive effect and so counsel should support their arguments with citations to cases applying the new rule.
2. **Marshall authority from the applicable jurisdiction making clear that Rule 37(e) forecloses reliance on inherent authority.** Courts have long relied on their inherent authority to manage the matters before them and so counsel can best serve their clients’ interests by making clear, by citation to applicable, post-amendment case law, that Rule 37(e) displaces that authority when addressing the loss of ESI.

3. **Make clear on the record that the subject matter at issue is ESI and thus subject to 37(e).** Rule 37(e) applies only to ESI, leaving spoliation of other types of evidence to be governed by pre-2015 authority. In cases where it may not be immediately clear from the description that the evidence at issue is ESI — for example, when dealing with “videotape” surveillance, which is in reality a digital data file — counsel should take care to make the evidence’s electronic nature clear to the court.

4. **Invoke Rule 37(e) at the earliest possible moment if a party raises spoliation claims and carefully couch all discussion and negotiations in the rule’s provisions.** The amended rule sets forth straightforward guidance for the findings necessary to support sanctions for the loss of ESI, which should inform the parties’ negotiations. The rule incentivizes all parties to work together to determine what can be recovered or replaced, and whether the loss was intentional or merely negligent.

**Endnotes**


2 Fed. R. Civ. P. 37(e), Advisory Committee Note to 2015 amendment.

3 *Id.*

4 *Id.*

5 *Id.*

6 **Cordova v. Walmart of Puerto Rico, Inc.,** No. 16-2195, 2019 U.S. Dist. LEXIS 120003 (D.P.R. July 15, 2019)
See also *Borum v. Brentwood Village, LLC*, No. 1601723, 2019 U.S. Dist. LEXIS 119681, at *10 (D.D.C. July 18, 2019) (court noted that Rule 37(e) governs inquiry in deciding whether to impose sanctions for failure to preserve ESI, but also cited its “inherent power to impose sanctions for abusive litigation practices” when the Federal Rules of Civil Procedure alone do not provide the court with “sufficient authority to protect the integrity of the judicial system.”).


*Id.* at 5-6.

*Id.* at 8-9.

*Id.* at 10-16.


*Id.* at *9-10.

*Id.* at *13, quoting Advisory Committee notes to 2015 amendment.

*Id.* at *13-14.


*Id.* at *27 (citations omitted).

*Id.* at *36-40.

*Id.* at *41.

*Id.* at *46-47.