

The New Spoliation Rule in Action: Early Takeaways under Amended Federal Rule of Civil Procedure 37(e)

by John D. Haggerty

One year has passed since the most recent amendments to the Federal Rules of Civil Procedure took effect. Among other significant changes, Rule 37(e) was rewritten to provide a uniform federal standard for the imposition of sanctions due to a party's failure to preserve electronically stored information (ESI). Unlike the prior version of the rule, Rule 37(e) now identifies specific curative measures courts can impose to remedy spoliation and describes the findings necessary to justify those measures. Although the contours of the revised rule will continue to develop with time, the first several decisions addressing Rule 37(e) provide a number of notable takeaways.

Overview of Amended Rule 37(e)

The long-awaited amendments to the federal rules, including Rule 37(e), became effective on Dec. 1, 2015. Prior to that time, Rule 37(e) consisted only of a safe harbor that protected against the imposition of sanctions where ESI was lost as the result of the routine, good faith operation of an electronic information system. Because of concerns that this "limited rule" did not adequately address "the serious problems resulting from the continued exponential growth in the volume of" ESI—including the "significantly different standards" for imposing sanctions that had developed nationwide—the old version of Rule 37(e) was done away with entirely.¹

As revised, Rule 37(e) now provides a framework for addressing spoliation claims and describes the remedies courts can order to correct spoliation. To trigger application of the rule, three requirements must be met. The ESI at issue: 1) "should have been preserved in the anticipation or conduct of litigation"; 2) was "lost because a party failed to take reasonable steps to preserve it"; and 3) "cannot be restored or replaced through additional discovery."² If these requirements are met and another party is prejudiced by the loss of the ESI, a court "may

order measures no greater than necessary to cure the prejudice."³ But if the party that lost the ESI "acted with the intent to deprive another party of the information's use in the litigation," more severe sanctions are available.⁴ Specifically, when an intent to deprive is shown, Rule 37(e)(2) permits a court to: "(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."⁵

Application of Rule 37(e) to Pending Cases

When Chief Justice John Roberts transmitted the proposed amendments to Congress on April 29, 2015, he ordered that the new rules were to apply to both: 1) proceedings commenced on or after Dec. 1, 2015, and 2) all pending proceedings "insofar as just and practicable."⁶ Interpreting that directive, nearly all federal courts to date have applied the amended version of Rule 37(e) without hesitation to cases that were pending at the time the new rule was enacted.⁷

For example, Judge Gene E.K. Pratter, of the U.S. District Court for the Eastern District of Pennsylvania, recently addressed a motion *in limine* seeking an adverse inference instruction based upon a claim of spoliation.⁸ Although the briefing on the motion had been completed prior to the effective date of amended Rule 37(e), Judge Pratter determined it was nevertheless "just and practicable" to apply the new rule, noting that the rule change "does not appear to have substantively altered the moving party's burden, in [the Third] Circuit, of showing that ESI was destroyed in 'bad faith' when requesting an adverse inference."⁹

Chief Judge Leonard P. Stark, of the District of Delaware, similarly observed in a recent decision that "Rule 37(e), as amended, substantially reflects pre-existing Third Circuit law regarding sanctions for spoliation."¹⁰

It is not necessarily a given, however, that a court

will apply the amended version of Rule 37(e) to cases that were filed before Dec. 1, 2015. Addressing a sanctions motion in an action commenced over two years before the rule amendments took effect, a court in the District of Connecticut concluded that it would be “unjust to utilize the new Rule 37(e)” in rendering its decision.¹¹ The court emphasized that all of the conduct relevant to the sanctions motion had transpired well before the effective date of the rule change, and that the plaintiff had been prosecuting the case *pro se* for much of that period.¹² Application of the spoliation standard in use prior to Dec. 1, 2015, the court determined, was, therefore, appropriate.¹³

Rejection of Inherent Authority as Basis for Imposing Spoliation Sanctions

The advisory committee’s note to Rule 37(e) specifically “forecloses reliance on inherent authority or state law to determine when certain [sanctions or curative] measures should be used.”¹⁴ Notwithstanding this guidance, at least one court has concluded that the rule does not preclude courts from relying on their inherent power to remedy spoliation in some circumstances. In one of the first decisions addressing amended Rule 37(e), Magistrate Judge James Francis, of the U.S. District Court for the Southern District of New York, described “the authority to impose sanctions for the bad faith spoliation of evidence” as among the indispensable inherent powers that are “necessarily vested in courts.”¹⁵ Judge Francis reasoned, therefore, that even if Rule 37(e) were construed not to govern the motion before him, he “could nevertheless exercise inherent authority to remedy spoliation under the circumstances presented.”¹⁶

Limitations on Reach of Amended Rule 37(e)

By its terms, amended Rule 37(e) applies only to the failure to preserve ESI. When a court is confronted with a spoliation claim involving non-ESI—such as tangible documents or evidence—the standard the court applies may, therefore, be different than that mandated by Rule 37(e). The consequences of this distinction can be significant. For example, several courts have concluded that the new rule’s rejection of Second Circuit precedent that authorized adverse inference instructions on a finding of negligence alone is “expressly cabined only to ESI.”¹⁷ In other words, amended Rule 37(e) neither prohibits such an instruction in the case of non-ESI nor requires a showing of intentional loss or destruction.¹⁸

Conclusion

As courts continue to grapple with the scope and application of Rule 37(e), it will become increasingly clear whether the changes to the rule have resulted in the consistent body of law they were intended to foster. If these early decisions prove to be an accurate preview, courts still maintain considerable leeway in crafting appropriate remedies for spoliation, but amended Rule 37(e) goes a long way in enhancing the predictability of the sanctions that will be imposed for a party’s failure to preserve ESI. ■

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Endnotes

1. Fed. R. Civ. P. 37(e) advisory committee’s note to 2015 amendment.
2. Fed. R. Civ. P. 37(e).
3. Fed. R. Civ. P. 37(e)(1).
4. Fed. R. Civ. P. 37(e)(2).
5. Fed. R. Civ. P. 37(e)(2)(A)-(C).
6. 2015 U.S. Order 0017; *see also* 28 U.S.C. § 2074(a).
7. *CAT3, LLC v. Black Lineage, Inc.*, 2016 WL 154116, at *5 (S.D.N.Y. Jan. 12, 2016) (“because the amendment is in some respects more lenient as to the sanctions that can be imposed for violation of the preservation obligation, there is no inequity in applying it.”); *Matthew Enter., Inc. v. Chrysler Grp. LLC*, 2016 WL 2957133, at *3 n.40 (N.D. Cal. May 23, 2016) (same); *see also* *Marshall v. Dentfirst, P.C.*, 313 F.R.D. 691, 695 (N.D. Ga. 2016); *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*, 2016 WL 1105297, at *3-4 (S.D. Fla. March 22, 2016); *Brown Jordan Int’l, Inc. v. Carmicle*, 2016 WL 815827, at *36 (S.D. Fla. March 2, 2016).

8. *Accurso v. Infra-Red Servs., Inc.*, 2016 WL 930686, at *3 n.6 (E.D. Pa. March 11, 2016); *see also Lexpath Techs. Holdings, Inc. v. Welch*, 2016 WL 4544344, at *4 (D.N.J. Aug. 30, 2016) (“This case commenced in September 2013, and the alleged act of spoliation occurred about a month earlier. That being said, the Rule does not seem to have altered the burden on the party moving for sanctions in this Circuit, as any adverse inference still requires a showing that ESI was destroyed in ‘bad faith.’”) (citing *Accurso*, 2016 WL 930686, at *3 n.6).
9. *Id.* (citing *Mead v. Travelers Indem. Co. of Connecticut*, 71 F.Supp.3d 516, 518 (E.D. Pa. 2014); *Bull v. United Parcel Serv., Inc.*, 665 F.3d 68, 79 (3d Cir. 2012) (“A finding of bad faith is pivotal to a spoliation determination.”)).
10. *GN Netcom, Inc. v. Plantronics, Inc.*, 2016 WL 3792833, at *5 (D. Del. July 12, 2016).
11. *Thomas v. Butkiewicz*, 2016 WL 1718368, at *8-9 (D. Conn. April 29, 2016).
12. *Id.*
13. *Id.*
14. Fed. R. Civ. P. 37(e) advisory committee’s note to 2015 amendment.
15. *CAT3, LLC*, 2016 WL 154116, at *6-7 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)).
16. *Id.*
17. *Coale v. Metro-N. R.R. Co.*, 2016 WL 1441790, at *4 n.7 (D. Conn. April 11, 2016) (the Advisory Committee Notes make clear that the amended rule “rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002)” but “does not disturb the present application of the *Residential Funding* rule” to non-ESI); *see also In re Bridge Constr. Servs. of Florida, Inc.*, 2016 WL 2755877, at *11 (S.D.N.Y. May 12, 2016); *Best Payphones, Inc. v. City of New York*, 2016 WL 792396, at *4 (E.D.N.Y. Feb. 26, 2016).
18. *See U.S. v Safeco Ins. Co. of Am.*, 2016 WL 901608, at *7 n.3 (D. Idaho March 9, 2016) (“Rule 37(e), however, applies only to electronically stored information. It therefore does not impact the Court’s inherent sanctioning authority when spoliation of tangible evidence is at issue.”); *see also Federico v. Lincoln Military Housing, LLC*, 2014 WL 7447937, at *10 (E.D. Va. Dec. 31, 2014) (addressing the earlier version of Rule 37(e) and determining that it “does not affect sanctions on the court’s inherent power because it only bars sanctions for lost electronically stored information”).

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