WHEN THE BOUGH BREAKS

On December 1, 2015, the most significant amendments to the Federal Rules of Civil Procedure became effective since the 2006 amendments that made the eDiscovery era official. Among the rules revised was Federal Rule of Civil Procedure 37, which governs discovery failures like spoliation and the associated sanctions. Among the changes made was the replacement of the 2006 version of FRCP 37(f) with the new 2015 version of FRCP 37(e).

The 2006 Version of FRCP 37(f)

In 2006, subdivision (f) was added to FRCP 37 in recognition of the new challenges being caused by the rapid expansion of ESI, the dynamic and complex nature of many ESI sources, and the widespread use of automated janitorial functions that delete old ESI to save storage space:

(f) Failure to Provide Electronically Stored Information. Absent 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.

This provision was intended to function as a kind of “safe harbor” to protect parties from sanctions for the inadvertent loss of ESI, under the right circumstances. As the 2006 Committee Notes stated:

Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. [emphasis added]

The notes also made clear, however, that preservation duties might obligate parties to alter or suspend normal computer system operations to accomplish preservation.

In 2007, additional rules amendments renumbered subdivision (f) as subdivision (e) due to the prior abrogation of old subdivision (e).
A Decade of Costs and Conflicts

Unfortunately, in the years that followed, that safe harbor provision was interpreted so narrowly and inconsistently that it never really worked as intended, and ESI preservation costs and conflicts continued to grow. Between 2006 and 2015, parties struggled with the preservation of ESI, and a circuit split developed over the level of culpability required for the application of severe spoliation sanctions like adverse inferences (i.e., negligence vs. intentionality):

Loss of electronically stored information has produced a significant split in the circuits. Some circuits, like the Second, hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent or grossly negligent loss of ESI. Other circuits, like the Tenth, require a showing of bad faith before adverse inference instructions can be given. [emphasis added]

This, and other jurisdictional variations, led to great uncertainty for organizations as they struggled to strike a balance between avoiding severe sanctions for inadvertent losses and avoiding costly over-preservation:

The public comments credibly demonstrate that persons and entities over-preserve ESI out of fear that some might be lost, their actions with hindsight might be viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence. [emphasis added]

The Civil Rules Advisory Committee sought to amend FRCP 37(e) in a way that would provide “greater uniformity in the ways in which federal courts respond to a loss of ESI” and would, to the extent possible, “relieve the pressures that have led many potential litigants to engage in what they describe as massive and costly over-preservation.”

The 2015 Version of FRCP 37(e)

After a “strikingly, perhaps uniquely, comprehensive and vigorous” public comment period, subdivision (e) of FRCP 37 was amended to read:

(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.

This amended version of the subdivision makes three primary changes from the version that preceded it:

- First, it eliminates the language regarding the “good-faith operation” of a computer system (and the confusion that came with it), and instead focuses on the more straightforward question of whether ESI has been “lost because a party failed to take reasonable steps to preserve it” [emphasis added].

- Second, it now requires a showing of irreplaceability and prejudice before the application of any consequences, and for unintentional losses, it limits those consequences to curative measures, thereby reducing the risks associated with minor ESI losses.

- Third, it creates a clear requirement that intentionality be found before severe sanctions can be applied (i.e., it adopts the higher of the standards from the circuit split).

In the four years since this amendment became effective, the amendment has increased consistency and predictability to some extent, but it has also created new areas of ambiguity and conflict. For example, what are “reasonable steps to preserve”? What is a sufficient basis for a finding of “intent to deprive,” and who makes the call? Can courts still act under their inherent authority as well?
The first of the new questions raised by the amended version of \textit{FRCP 37(e)} is what qualifies as “reasonable steps to preserve” ESI. The amended version of FRCP 37(e) limits the application of sanctions to situations where ESI that should have been preserved was lost “\textit{because a party failed to take reasonable steps to preserve it.”}

\textbf{Five Factors to Consider}

Unfortunately, the rule itself does not elaborate on what qualifies as reasonable steps, but the Advisory Committee Notes to the 2015 Amendments do provide some guidance. First and most importantly, the notes emphasize several times that, “[t]his rule recognizes that ‘reasonable steps’ to preserve suffice; it does not call for perfection.” In addition to reemphasizing this general principle of discovery, the Notes also provide a list of five specific factors that courts should consider when performing a post-hoc assessment of whether the steps taken in a given case were “reasonable”:

- The first factor is essentially the prior version of Rule 37(e), which had attempted to provide a narrow safe harbor for ESI loss:
  - “\textit{As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider . . . although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation.”} [emphasis added]

- The second factor is akin to a \textit{force majeure} clause in a contract that allows for uncontrollable outside events, although reasonable preventative measures may still be expected of parties (e.g., maintaining backups):
  - “\textit{. . . information the party has preserved may be destroyed by events outside the party’s control — the computer room may be flooded, a ‘cloud’ service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to \textbf{assess the extent to which a party knew of and protected against such risks.”} [emphasis added]

- The third factor courts are directed to consider is the relative sophistication of the parties, particularly with regard to the likely difference in sophistication between large organizations and individuals:
“The court should be sensitive to the party’s sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.” [emphasis added]

The fourth factor courts are directed to consider is the relative resources available to the parties, including financial and human resources. The Notes explicitly state that less-expensive but substantially-as-effective alternatives can be reasonable:

“The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms.” [emphasis added]

The final factor that courts are directed to consider is proportionality itself, which is a foundational requirement for all discovery (and which implicates another multi-factor analysis similar to this one, which we have previously discussed):

“Another factor in evaluating the reasonableness of preservation efforts is proportionality.” [emphasis added]

Decisions Discussing Reasonable Steps

Over the past four years, a variety of courts have had the opportunity to issue orders on motions for spoliation sanctions and to consider whether a party had taken the required reasonable steps. Here is a sampling of those cases:

- **Stinson v. City of New York, No. 10 Civ. 4228 (S.D.N.Y. Jan. 2, 2016)** – failure “to make any effort to preserve text messages” found not to have been reasonable steps to preserve [emphasis added]

- **Shaffer v. Gaither, No. 5:14-cv-00106-MOC-DSC (W.D.N.C. Sep. 1, 2016)** – failure to take steps “such as printing out the texts, making an electronic copy of such texts, cloning the phone, or even taking possession of the phone and instructing the client to simply get another one” found not to have been reasonable steps to preserve [emphasis added]
- Ronnie Van Zant, Inc. v. Pyle, No. 17 Civ. 3360 (RWS) (S.D.N.Y. Aug. 28, 2017) – failure to attempt preservation of text messages in the possession of a non-party “working under contract for the Defendants, in close coordination with the defendants, and [with] a financial stake in the outcome of the case” found not to have been reasonable steps to preserve

- Barry v. Big M Transportation, Inc., No. 1: 16-cv-00167-JEO (N.D. Ala. Sept. 11, 2017) – failure to preserve a truck’s Electronic Control Module (ECM) data before it was overwritten found not to have been reasonable steps to preserve

- Leidig v. BuzzFeed, Inc., No. 16 Civ. 542 (VM) (GWG) (S.D.N.Y. Dec. 19, 2017) – failure to issue a timely legal hold followed by an “amateurish collection of documents leading to the destruction of perhaps critical metadata” found not to have been reasonable steps to preserve

- Western Power, Inc. v. TransAmerican Power Prods., Inc., No. H-17-1028 (S.D. Tex. June 7, 2018) – in this case, the Court raised the possibility of spoliation liability due to inadequate steps being taken to protect against data loss due to cyberattack (e.g., maintaining security, backups, etc.); the case settled before the question could be further explored or decided

- Paisley Park Enter., Inc. v. Boxill, No. 17-cv-1212 (WMW/TLN), (D. Minn. Mar. 5, 2019) – failure to “suspend the auto-erase function on their phones” or to “put in place a litigation hold to ensure that they preserved text messages” found not to have been reasonable steps to preserve

- Nuvasive, Inc. v. Kormanis No. 1:18CV282 (M.D. N.C. Mar. 13, 2019) – failure to “investigate[ ] . . . what text messages his iPhone held, and [ ] whether any setting on his iPhone might cause the deletion of existing or future text messages” and failure to “obtain[] appropriate advice about saving back-up copies of his text messages” found not to have been reasonable steps to preserve

- DriveTime Car Sales Company, LLC v. Pettigrew, No. 2:17-cv-371 (S.D. Ohio Apr. 18, 2019) – failure to preserve text messages prior to replacing phone with a new one found not to have been reasonable steps to preserve

- Cruz v. G-Star Inc. et al, No. 17-CV-7685 (S.D.N.Y. June 19, 2019) – failure to issue a timely legal hold or monitor hold compliance, leading to deletion of emails and SAP data, found not to have been reasonable steps to preserve
Takeaways

This collection of orders considering what qualifies as reasonable steps reveals that common preservation failures are viewed the same way under the amended rule as they were before. The likelihood and severity of resulting sanctions have both been reduced by other parts of the rule, but for this part of the analysis, the expectations remain largely the same: **issuing timely legal holds, monitoring compliance with those holds, suspending automated janitorial functions, and preserving through preemptive collection when needed.** It is also worth noting that these expectations now extend to encompass preservation of things like metadata, text messages, vehicle data, and SAP data and that, of these, parties seem to be struggling most often with taking reasonable steps to preserve text messages on smartphones.
As we noted above, one of the things the amendments to FRCP 37(e) were intended to do was resolve a circuit split that had arisen regarding the level of culpability that must be shown for the application of severe spoliation sanctions. The amendments resolved that split in favor of the higher standard but, in so doing, created new questions about establishing intent to deprive.

Answered and Asked

Specifically, a circuit split had arisen regarding the question of whether adverse inference instructions or dismissal could be based merely on some level of negligence or if intentional misconduct was required. The jurisdictional variations created uncertainty for litigants and, allegedly, increased preservation costs. The Advisory Committee on Civil Rules explained in its May 2014 Report:

> Some circuits, like the Second, hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent or grossly negligent loss of ESI. Other circuits, like the Tenth, require a showing of bad faith before adverse inference instructions can be given. The public comments credibly demonstrate that persons and entities over-preserve ESI out of fear that some might be lost, their actions with hindsight might be viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence. [emphasis added]

The amended version of FRCP 37(e)(2) resolves this split in favor of the higher standard by requiring a showing that “the party acted with the intent to deprive another party of the information’s use in the litigation” for the application of adverse inference instruction, dismissal, or default judgment sanctions. As explained in the Advisory Committee Notes to the 2015 Amendments:

> This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information’s use in the litigation. . . . It rejects cases . . . that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence. [emphasis added]
Although this rule change answered one question (and reduced the frequency of severe spoliation sanctions), it created two new questions. First, what showing of intent to deprive is sufficient to satisfy the rule? And, second, who should make the determination?

Decisions Discussing Intent to Deprive

Over the past four years, a variety of courts have had the opportunity to issue orders on motions for spoliation sanctions and to consider whether a party had “acted with the intent to deprive another party of the information’s use in the litigation.” Here is a sampling of those cases:

- **Brown Jordan Int’l, Inc. v. Carmicle, Nos. 0:14-CV-60629, 0:14-CV-61415 (S.D. Fla. Mar. 2, 2016)** – in this case, a party’s locking, losing, wiping, and resetting of a variety of computers, tablets, and smartphones containing relevant evidence combined with the party’s “lack of candor concerning these actions unquestionably constitute[d] bad-faith,” leading to a finding of intent to deprive under FRCP 37(e)(2) [emphasis added]

- **Cahill v. Dart, No. 13-cv-361 (N.D. Ill. Dec. 2, 2016)** – in this case, the court declined to make a finding itself on the question of intent to deprive, and instead, it allowed the presentation of evidence regarding the spoliation and alleged intent to the jury, so that the jury could determine intent and apply a mandatory adverse inference if it found intent to deprive

- **Omnigen Research et. al. v. Wang et. al., No. 16-00268 (D. Oregon, May 23, 2017)** – in this case, defendants “made their desktop computer unavailable by "donating" it. . . intentionally deleted thousands of document . . . intentionally deleted and refused to produce relevant emails from multiple email accounts . . . intentionally destroyed metadata,” and provided implausible explanations and excuses for these activities, leading to a finding of intent to deprive under FRCP 37(e)(2)

- **Barry v. Big M Transportation, Inc., No. 1: 16-cv-00167-JEO (N.D. Ala. Sept. 11, 2017)** – in this case, a party failed to preserve electronic vehicle data but “offered a plausible explanation for why it did not preserve the data,” which “even if mistaken, [was] consistent” with the party’s “insistence that it did not act in bad faith and had no intention of depriving,” leading to no finding of intent to deprive under FRCP 37(e)(2) [emphasis added]
• *Eaton-Stephens v. Grapevine Colleyville Indep. Sch. Dist.*, No. 16-11611 (5th Cir. Nov. 13, 2017) – in this case, relevant ESI was lost despite retention “policy and rules” that should have prevented it, but “violation of a rule or regulation pertaining to document retention is not per se bad faith,” and no other evidence of intention was presented, leading to affirmation of the trial court’s decision not to find bad faith or apply an adverse inference sanction [emphasis added]

• *Leidig v. BuzzFeed, Inc.*, No. 16 Civ. 542 (VM) (GWG) (S.D.N.Y. Dec. 19, 2017) – in this case, the plaintiffs negligently allowed and caused a variety of ESI spoliation but provided explanations the court found plausible; the defendant argued that intent could be inferred from the actions taken, but the court was unpersuaded, leading to no finding of intent to deprive under FRCP 37(e)(2):

  *In other words, the intent contemplated by Rule 37 is not merely the intent to perform an act that destroys ESI but rather the intent to actually deprive another party of evidence. BuzzFeed has shown only the former type of intent.* [emphasis added]

• *Schmalz v. Village of North Riverside*, No. 13-cv-8012, 2018 WL 1704109 (N.D. Ill. Mar. 23, 2018) – in this case, the defendant failed “to take any steps to identify and preserve the text messages in question,” behavior “certainly constituting gross negligence,” and the plaintiff argued that “intent and bad faith can be demonstrated by failing to take reasonable steps to preserve ESI,” but the court explains that “additional factors” demonstrating intent to deprive must also be shown, leading to no finding of intent to deprive under FRCP 37(e)(2) [emphasis added]

• *BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc.*, No. 15 C 10340 (N.D. Ill. April 4, 2018) – in this case, the magistrate judge recommended that the court decline to make a finding itself on the question of intent to deprive and, instead, allow presentation of evidence regarding the spoliation and alleged intent to the jury, so that the jury could determine intent (or, in the alternative, apply a permissive adverse inference)

• *Goldrich v. City of Jersey City*, No. 2:2015cv00885 (D.N.J. Sept. 19, 2018) – in this case, expert forensic analysis demonstrated that the plaintiff had lied about a virus causing ESI loss and had deliberately turned over the wrong laptop computer for forensic evaluation, and the court found that this “circumstantial evidence strongly support[ed] a finding that Plaintiff acted in bad faith,” leading to a finding of intent to deprive under FRCP 37(e)(2) [emphasis added]
- **Univ. Accounting Serv., LLC v. Schulton, June 7, 2019 (D. Or. 2019)** – in this case, a party admitted during his deposition to deleting materials so he “could legitimately say [he had] no access” and “because it’s exactly the type of damning information that UAS wants to catch me with,” leading to a finding of intent to deprive under FRCP 37(e)(2) [emphasis added]

- **DriveTime Car Sales Company, LLC v. Pettigrew, No. 2:17-cv-371 (S.D. Ohio Apr. 18, 2019)** – in this case, a party failed to take reasonable steps to preserve relevant ESI, but no evidence of intention to deprive beyond the failure itself was shown, leading to no finding of intent to deprive under FRCP 37(e)(2)

- **GN Netcom, Inc. v. Plantronics, Inc., No. 18-1287 (3rd Cir. Jul. 10, 2019)** – in this case, “the District Court reasonably concluded that Plantronics acted in bad faith” based on the facts that a Senior VP “deliberately deleted an unknown number of emails in response to ‘pending litigation’ and urged others to do the same,” that “executives, including its CEO, were not truthful during depositions,” and that “the company was not willing to spend a nominal fee for its expert, Stroz, to fully assess the spoliation and create a final report,” each of which “was an intentional step to interfere with GN’s prosecution of its claims against Plantronics” [emphasis added]

- **Wilmoth v. Deputy Austin Murphy, No. 5:16-CV-5244 (W.D. Ark. Aug. 7, 2019)** – in this case, defendant and defendant’s attorney allowed the spoliation of relevant ESI and also engaged in “conduct which might readily be viewed as intentional deception,” including a “history of incomplete, evasive, or untrue discovery responses,” leading to a finding of intent to deprive under FRCP 37(e)(2) [emphasis added]

- **Woods v. Scissons, No. CV-17-08038-PCT-GMS (D. Ariz. Aug. 14, 2019)** – in this case, the court declined to make a finding itself on the question of a non-party’s intent to deprive, and instead, it allowed the presentation of evidence regarding the alleged ESI spoliation and intent to the jury, so that the jury could determine intent and apply a permissive adverse inference if it found intent to deprive
Takeaways

These decisions considering “intent to deprive” show a bit more variation than the decisions we reviewed regarding “reasonable steps.” Most of these decisions decline to infer intent solely from a lack of reasonable steps or other circumstantial evidence, but some are willing to draw that inference – particularly when failures have been egregious or when the explanations for them have been implausible, unbelievable, or untrue. Additionally, some courts prefer to allow the presentation of evidence regarding spoliation and intent to the jury so that they can answer the question of intent, especially when that evidence may also be relevant to other questions before the jury.
As we discussed above, one of the primary goals of the December 2015 Amendments to the Federal Rules of Civil Procedure was to increase predictability and consistency for litigants by eliminating jurisdictional variations in ESI spoliation standards, their application, and the associated penalties. Ensuring predictability and consistency, however, would require foreclosing other alternatives for addressing ESI spoliation.

Exclusivity Envisioned

To accomplish the desired standardization, amended FRCP 37(e) would need to become the only source of authority for the application of ESI spoliation sanctions, to prevent the rule from being bypassed and predictability from being destroyed. As articulated in the Advisory Committee Notes to the 2015 Amendments, the Rules Advisory Committee intended for the new version of FRCP 37(e) to preclude the use of inherent authority to assess ESI spoliation sanctions:

*New Rule 37(e) . . . 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. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used.* [emphasis added]

Advisory notes are only advisory, however, and in the years since, courts have been inconsistent in their responses to this intended effect. Some have treated the amended rule like their sole option, while others have issued decisions expressly relying on – or expressing a willingness to rely on – inherent authority for ESI spoliation sanctions.

Decisions Discussing Inherent Authority

Over the past four years, a variety of courts have had the opportunity to issue orders on motions for spoliation sanctions and to consider whether they retain any inherent authority to issue ESI spoliation sanctions beyond that provided by FRCP 37(e). Here is a sampling of those cases:
CAT3 LLC v. Black Lineage 164 F. Supp. 3d 488 (S.D.N.Y. Jan. 12, 2016) – in this case, the court imposed sanctions under amended Rule 37(e) but asserted explicitly that inherent authority would still have been an option for imposing the sanctions, if the result provided by the amended rule had been inadequate:

Where exercise of inherent power is necessary to remedy abuse of the judicial process, it matters not whether there might be another source of authority that could address the same issue. In Chambers, the Supreme Court rejected the argument by the party opposing the sanctions motion that provisions of the Federal Rules of Civil Procedure foreclosed resort to inherent power. [citation omitted; emphasis added]

DVComm, LLC v. Hotwire Commun., LLC, No. 14-5543 (E.D. Pa. Feb. 3, 2016) – in this case, the court imposed sanctions under amended Rule 37(e) but asserted explicitly that inherent authority would still have been an option for imposing the sanctions, if the result provided by the amended rule had been inadequate:

Without limitation, litigation misconduct may also be otherwise sanctioned by the inherent power of the court. This court is vested with broad discretion to fashion an appropriate sanction pursuant to its inherent powers to sanction and redress litigation abuse. This is so regardless of whether any party suffered prejudice as a result of the activity. [emphasis added]

Hsueh v. N.Y. State Dep’t of Fin. Servs., No. 15 Civ. 3401 (PAC) (S.D.N.Y. Mar. 31, 2017) – in this case, the court declared intentional spoliation to be beyond the scope of the amended rule and relied on inherent authority to impose sanctions: “Because Rule 37(e) does not apply, the Court may rely on its inherent power to control litigation in imposing spoliation sanctions” [emphasis added]

Goodyear Tire & Rubber Co. v. Haeger, 137 S.Ct. 1178 (Apr. 18, 2017) – in this case, the District Court relied on its inherent authority to award all attorney’s fees and costs incurred by the plaintiffs from the date of discovery misconduct forward, and the award was affirmed on appeal to the Ninth Circuit; the Supreme Court reversed and remanded on other grounds (i.e., limiting the fee award to what is compensatory, rather than punitive), but it reaffirmed courts’ inherent authority to impose sanctions for discovery misconduct:
Federal courts possess certain “inherent powers,” not conferred by rule or statute, “to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” That authority includes “the ability to fashion an appropriate sanction for conduct which abuses the judicial process.” [internal citations omitted; emphasis added]

- **Omnigen Research et. al. v. Wang et. al., No. 16-00268 (D. Oregon, May 23, 2017)** – in this case, intentional spoliation led the court to impose the sanction of default judgment, which the court held could be justified “pursuant to FRCP Rule 37(b)(2), FRCP Rule 37(e), and this Court’s inherent authority” [emphasis added]:

  *The Court has inherent power to impose terminating sanctions “when a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings” because this power permits dismissal “when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.”* [citation omitted; emphasis added]

- **EPAC Technologies, Inc. v. HarperCollins Christian Publishing, Inc. No. 12-cv-00463 (M.D. Tenn. Mar. 29, 2018)** – in this case, the court distinguished between its inherent authority to impose spoliation sanctions related to physical evidence and its authority under FRCP 37(e) to impose sanctions related to ESI evidence:

  *The failure to preserve ESI is addressed by Federal Rule of Civil Procedure 37(e). Measures to address the loss of physical evidence are available pursuant to a court’s “broad discretion” to manage discovery.*

  ...  

  *A different standard for imposing sanctions, set by Rule 37(e), applies when the lost information is in electronic form. This separate standard addresses the ways in which electronic information differs from physical evidence.* [internal citations omitted; emphasis added]

- **Lawrence v. City of New York, No. 15-CV-8947 (S.D.N.Y. July 27, 2018)** – in this case, the court found that “Rule 37 does not apply” to a situation in which evidence was fabricated and instead relied upon its “inherent power to correct a fraud upon the court” [emphasis added]
• **Malone v. Weiss, No. 17-1694 (E.D. Pa. Aug. 1, 2018)** – in this case, the court found that the alteration and fabrication of evidence went beyond the intended scope of FRCP 37(e) and required redress pursuant to the court’s inherent authority:

As an initial matter, the parties disagree as to whether sanctions, if they are appropriate, would flow from the Court’s inherent power to sanction or pursuant to rule 37 of the Federal Rules of Civil Procedure. . . . The Rule, however, does not speak to the current dispute. The Rule, by its very terms, only applies when a party has “failed to take reasonable steps to preserve” electronically stored information and “it cannot be restored.” The facts of this case are much more serious. We deal, here, with the intentional manipulation of emails and contracts in order to gain an advantage in litigation. Thus, the Court’s inherent power to sanction is a more appropriate rubric to analyze this matter. [citation omitted; emphasis added]

• **Edwards v. 4JLJ, LLC, No. 2:15-CV-299 (S.D. Tex. Jan. 11, 2019)** – in this case, egregious discovery conduct led the court to shift the burden of proof (and to later add an award of almost $100,000 in fees and costs) pursuant to its inherent authority to sanction misconduct:

Defendants argue that there can be no sanctions under Rule 37 because the production of FleetMatics data will have been made in its entirety prior to trial. Defendants cite Moody v CSX Transportation, Inc., 271 F. Supp. 3d 410, 425 (W.D.N.Y. 2017), as holding that changes to Rule 37 with respect to electronic evidence rejected sanctions for negligent or grossly negligent behavior. That argument misses the point. First, the case addresses the spoliation presumption, which has been eliminated here. Sanctions are still available for intentional acts to deprive a party of discovery. And as the Court has made clear, Defendants' acts were intentional, willful, in bad faith, and contumacious. [emphasis added]
Takeaways

These decisions considering “inherent authority” show more variation than the decisions we reviewed considering “reasonable steps” or even than those we reviewed considering “intent to deprive.” Some courts view amended FRCP 37(e) as their only option, while most seem to believe that inherent authority remains an alternative in at least some situations. Of those, some courts seem to think that the inherent authority alternative is available whenever the result dictated by FRCP 37(e) would be inadequate, while others seem to think that the inherent authority alternative is available only in cases of egregious, bad-faith behavior. Other courts think that certain types of intentional misconduct – particularly the fabrication of evidence – exist beyond the bounds of FRCP 37(e) and can only be addressed using inherent authority.
OTHER LIMITATIONS ON SANCTIONS

So far, we have discussed the major questions of what qualifies as reasonable steps to preserve, what is a sufficient showing of intent to deprive, and whether courts can opt for inherent authority in place of relying on FRCP 37(e). Beyond those major questions, there are others, of which practitioners should be aware, that affect whether and what sanctions are imposed, including: whether there has been irremovable loss, whether there has been prejudice, and other factors.

Whether There Has Been Irretrievable Loss

The language of amended FRCP 37(e) specifies that, in order to apply sanctions under the rule, “electronically stored information that should have been preserved . . . [was] lost . . . and [] cannot be restored or replaced through additional discovery” [emphasis added]. So, even in cases where reasonable steps to preserve weren’t taken, sanctions may not apply if no ESI was lost or if any lost ESI can be recovered or replaced. The availability of alternate forms of the lost evidence (e.g., screen captures of lost posts) or alternate sources of lost evidence (e.g., third parties or service providers) may be sufficient to preclude a finding of loss:

- **Barcroft Media, Ltd. et al. v. Coed Media Grp., LLC, No. 16-CV-7634 (JMF) (S.D.N.Y. Sept. 28, 2017)** – in this case, plaintiffs moved for spoliation sanctions “on the ground that CMG failed to preserve the webpages on which it had displayed the Images,” but the court found undisputed screenshots of the webpages to be sufficient, meaning nothing had been “lost” within the meaning of the rule:

  Given the plain language of the Rule, *Plaintiffs’ motion borders on frivolous, for the simple reason that they cannot even show that the evidence at issue was “lost.” Several of the Images are still hosted on CMG’s websites. And the record makes clear that Plaintiffs themselves possess copies of the other Webpages — in the form of screen captures taken when they displayed the Images (the “Screenshots”). In fact, Plaintiffs themselves list the Screenshots as trial exhibits. Given that (plus the fact that [Defendant does not dispute the authenticity of the Screenshots or deny that it hosted and displayed the Images]), there is no foundation to impose sanctions under Rule 37(e).* [internal citations omitted; emphasis added]
- **World Trade Ctrs. Assoc., Inc. v. Port Auth. of N.Y. & N.J., No. 15 Civ. 7411 (LTS) (RWL) (S.D.N.Y. Apr. 2, 2018)** – in this case, failure to issue a legal hold until more than a year after the duty to preserve arose did not result in spoliation sanctions, since there was no evidence that any relevant, unique material had actually been lost:

  “In sum, the Port Authority has not shown that any ESI, let alone any relevant ESI, was actually destroyed. I therefore recommend denying the Port Authority’s motion for sanctions relating to ESI.” [emphasis added]

- **Envy Hawaii LLC v. Volvo Car USA LLC, No. 17-00040 HG-RT (D. Haw. Mar. 20, 2019)** – in this case, the defendant sought spoliation sanctions against the plaintiff without first attempting to obtain the desired discovery from relevant third-parties, leading to a finding that the defendant had not shown irretrievable loss:

  Volvo Car USA LLC concedes that it has not subpoenaed any records from CDK Drive. It has not attempted to retrieve the information from any other third-parties.

  Volvo Car USA LLC also has not demonstrated that it is not in possession or does not otherwise have access to any information due to its own use of the Electronic Dealer Management System.

  Rule 37(e) sanctions are not available when the information may be sought from third-parties and Volvo Car USA LLC has not demonstrated that the information is irretrievable.

  ... 

  Defendant has not sought any e-mails or discovery directly from Google and cannot demonstrate that the e-mails are otherwise lost. [emphasis added]

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**Whether There Has Been Prejudice**

The language of amended FRCP 37(e) also specifies that, in order to apply even curative measures under the rule, the court must find “prejudice to another party from loss of the information.” So, even in cases where reasonable steps to preserve weren’t taken and ESI was irretrievably lost, sanctions may not apply if no prejudice from the loss can be shown:
• **Eshelman v. Puma Biotechnology, Inc., No. 7:16-CV-18-D (E.D.N.C. June 7, 2017)** – in this case, the plaintiff offered no adequate showing of what would have been shown by lost ESI, leading to a conclusion that prejudice had not been shown and sanctions should not be awarded:

\[
\ldots \text{Eshelman has} \text{ failed to make a sufficient showing of prejudice} \text{ to support relief under Rule 37(e)(1). In order to impose a sanction under Rule 37(e)(1), the court must have some evidence regarding the particular nature of the missing ESI in order to evaluate the prejudice it is being requested to mitigate.} \ldots \text{ Based on what has been presented to the court at this point, it is difficult to gauge the amount of prejudice to Eshelman due to the lost ESI and what type of remedy would be no greater than necessary to cure that prejudice. Similar to other cases, further discovery may inform the extent of the prejudice if any.} \quad [\text{internal citations omitted}]\]

• **Hernandez v. Tulare County Correction Center No. 16-CV-00413 (E.D. Cal. Feb. 8, 2018)** – in this case, because certain facts were undisputed, other documents and photos were available, and an eye-witness was available, the court concluded that “\text{[t]hese factors ameliorate[d] the prejudice suffered by Plaintiff as a result of the loss of the information at issue}” [emphasis added] and that requested sanctions should not be awarded because:

\[
\text{Even if there were still some remaining prejudice to Plaintiff after evaluation of these factors, the Court finds any remaining prejudice was sufficiently cured by the Court’s January 31, 2018 Order directing the defendants to produce additional information to Plaintiff} \ldots \quad [\text{emphasis added}]\]

• **Sinclair v. Cambria Cnty., No. 3:17-cv-149 (W.D. Pa. Sept. 28, 2018)** – in this case, the defendants made an adequate showing of what the lost ESI may have contained, leading to a finding of prejudice and an award of sanctions:

\[
\text{In sum, Sinclair violated Rule 37 by failing to preserve her text messages. The deletion of the text messages between Sinclair and her former co-workers prejudiced Defendants because the text messages were relevant to the litigation and because Defendants offer a plausible, good-faith explanation of what the missing text messages may have contained. Therefore, sanctions are appropriate in this case.} \quad [\text{emphasis added}]\]
Other Factors

Finally, there are other factors to bear in mind. First, it is important to remember that discovery sanctions need to be pegged to the prejudice they are curing or the conduct they are deterring rather than to the value of the overall case:

- **Klipsch Group, Inc. v. ePRO E-Commerce Ltd., Case No. 16-3637 (2d Cir. Jan. 25, 2018)** – in this case, the Second Circuit approved discovery sanctions – including a **$2.7 million award of fees and costs** in a case with a value of around **$20,000** – over the Defendant’s objection that such sanctions were “impermissibly punitive, primarily because they are disproportionate to the likely value of the case,” because as the court explained:

  . . . discovery sanctions should be commensurate with the costs unnecessarily created by the sanctionable behavior. A monetary sanction in the amount of the cost of discovery efforts that appeared to be reasonable to undertake ex ante does not become impermissibly punitive simply because those efforts did not ultimately uncover more significant spoliation and fraud, or increase the likely damages in the underlying case. [emphasis added]

Second, it is important to raise spoliation concerns promptly to avoid having the motion denied as untimely filed:

- **Travelers Prop. Cas. Ins. Co. of Am. v. Mountaineer Gas Co., No. 2:15-cv-0959 (S.D.W. Va. Mar. 16, 2018)** – in this case, one party tried to raise spoliation as an issue more than four years after the underlying incident and more than six months after the end of discovery, shortly before the start of trial, but since the issue had never been raised during discovery and no motion to compel had been filed, the Court denied the motion as untimely filed and opined that it would be suspicious of “any spoliation motion raised on the eve of trial” where the facts had been known for years.

Third, it is important to remember that courts have great discretion in fashioning appropriate remedies and sanctions, particularly when acting based on inherent authority rather on the terms of FRCP 37(e). For example, in combination with more common sanctions like fee awards and adverse inference instructions, a court might also shift a burden of proof or preclude the calling of specific witnesses:

- **Edwards v. 4JLJ, LLC, No. 2:15-CV-299 (S.D. Tex. Jan. 11, 2019)** – in this case, egregious discovery conduct led the court to proceed under its inherent authority to craft a remedy, and it concluded that shifting the burden of proof (and later adding an award of almost $100,000 in fees and costs) was the right sanction:
The next available sanction in order of severity is the switching of the burden of proof. While this is not a common sanction in case law, it is not as harsh as other more common sanctions, such as stipulating that a fact is established or striking a defense in its entirety. . . So while Defendants complain of the punitive effect of this sanction, it is not on the severe side of the spectrum, considering the conduct here.

. . . There must be consequences for the type of conduct evidenced in this case. It is inconsistent with the dignity of judicial proceedings to suggest that the recovery of highly relevant data after the failure to produce it has any deterrent effect. That would signal to litigants that if they want to interfere with discovery, it is worth a try – there is nothing to lose. The shifting of the burden of proof on the issue to which the discovery applies is the least severe of the effective options available to the Court. [internal citation omitted; emphasis added]

- Wilmoth v. Deputy Austin Murphy, No. 5:16-CV-5244 (W.D. Ark. Aug. 7, 2019) – in this case, defendant and defendant’s attorney allowed the spoliation of relevant ESI and also engaged in “conduct which might readily be viewed as intentional deception,” leading the court to impose not only a permissive adverse inference sanction but also witness preclusion sanctions:

  Given his direct involvement in viewing and in failing to ensure preservation of these photographs, the Court finds that his actions demonstrate bad faith and that it would be appropriate to prevent the defendant from calling him as a witness in his case. The same sanction will also apply to Deputy Hale. . . . Although the Court recognizes that this sanction at first blush may seem harsh, it would be against the interests of justice to allow an official to testify about pictures which were not preserved, in part, because of that same official's failure to follow county policy.

  Second, under Rule 37(e)(2)(B) and in light of the Court’s earlier finding that defendant and his counsel have willfully acted to prevent Wilmoth from accessing this documentary evidence that he claims would support his case, the Court will instruct the jury that it may, but is not required to, presume . . .
Takeaways

Beyond the major questions of reasonable steps, intent to deprive, and inherent authority, there are others that affect whether and what sanctions are imposed, including: whether there has been irretrievable loss, whether there has been prejudice, and other factors:

- Even in cases where reasonable steps to preserve weren’t taken, sanctions may not apply if no ESI was lost, or if any lost ESI can be recovered from alternate sources or replaced with alternate forms.

- Even in cases where reasonable steps to preserve weren’t taken and ESI was irretrievably lost, sanctions still may not apply if no prejudice from the loss can be shown based on what the contents of the missing ESI would have been.

- Finally, there are other factors to bear in mind: sanctions are pegged to the prejudice or the misconduct rather than to the value of the case, spoliation concerns should be raised promptly to avoid untimeliness, and courts have great discretion in fashioning remedies and sanctions, particularly when acting on inherent authority rather than FRCP 37(e).
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