



THE LOSS OF ESI AND THE ADVERSE INFERENCE INSTRUCTION: HOW NEW FRCP 37(E) MIGHT (AND MIGHT NOT) BE A PRUDENT CHANGE

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BACKGROUND

Today, there is an enormous volume of electronically stored information, or “ESI,” on company hard drives, backup tapes, and cloud storage systems, and the volume of data will only continue to grow. Such data is also contained in social media postings and within a number of devices, such as cell phones and automobile event data recorders. Experts believe that, within six years, there will be 26 billion devices on the Internet, more than three for every person on earth.

When it comes to complying with existing discovery rules, preserving such ESI has been problematic. Relevant documents are

sometimes deleted during routine purging carried out pursuant to a company’s data retention protocols. Other times, methods used to locate discoverable, electronically stored documents fail to locate key items. In short, ESI has become a digital haystack within which some needles will invariably become lost.

When this occurs, a party may claim “spoliation” – the destruction, significant alteration or failure to preserve evidence for another’s use in pending or reasonably foreseeable litigation. As discussed in the USLAW NETWORK’s Compendium of Law on the Spoliation of Evidence,¹ some jurisdictions recognize spoliation of evidence as

an independent tort, while the majority prefer to impose remedies to sanction the wrongdoer and cure prejudice.

The most commonly debated remedy today is that of an adverse inference, a potentially powerful game changer that allows a jury to presume that the lost evidence is harmful to the one who lost it and helpful to the innocent party. The issue most often discussed is whether, and to what extent, the intent of the spoliator should be considered as a factor when imposing this remedy.

UNCERTAINTY PREVAILS

There is a glaring lack of uniformity among the federal courts regarding the

level of culpability required before an adverse inference should be imposed against one who spoliates evidence. Some circuits will impose the remedy upon proof of willfulness, gross negligence, or even ordinary negligence, while others insist upon nothing less than a showing of bad faith.² In short, one who is sanctioned for losing relevant evidence in one circuit might go unsanctioned in a different circuit for the same conduct.

NEW RULE 37(E)

The dissimilarity among the circuits has caused concern to businesses that manage large amounts of ESI. Acting out of fear that they might be sanctioned for innocently losing relevant information, these companies often incur great expense in the over-preservation of massive amounts of data that might become needed in future litigation, even litigation which is never ultimately commenced.

Motivated both to alleviate this concern and to eliminate the split in authority, the Standing Committee on the Rules of Practice and Procedure approved a proposed amendment to rule 37(e) of the Federal Rules of Civil Procedure which, if adopted by the Supreme Court and Congress, will go into effect on December 1, 2015. When ESI is lost, the new rule will prohibit federal courts from imposing adverse inferences or dismissing cases except when there is a “finding that the party acted with the intent to deprive another party of the information’s use in the litigation.”³ No longer will negligence, gross negligence, or even willfulness suffice to justify an adverse inference at the federal level.

WILL THE NEW RULE PROMOTE UNIFORMITY?

While the new rule will certainly promote harmony *among* the circuits, it may actually create inconsistency *within* many circuits. This is because the new rule applies only to the loss of ESI, leaving federal courts

free to follow existing precedent to the loss of all *other* types of evidence.

To illustrate the issue, consider the second circuit cases of *Osberg v. Foot Locker, Inc.*⁴ and *Taylor v. City of New York*,⁵ where both courts applied existing law to impose adverse inference instructions against defendants who negligently destroyed evidence. In *Osberg*, the plaintiff sued his employer, claiming that it miscalculated his pension benefits. The employer failed to promptly issue a litigation hold to preserve documents related to the claim, and relevant paper records were negligently destroyed. In *Taylor*, an inmate claimed that the New York City Department of Corrections wrongfully allowed him to be assaulted by other inmates while in custody. The assault involved two separate incidents three hours apart, and footage of all three hours was digitally captured. However, the officer in charge only saved clips of the two separate incidents, negligently allowing the rest of the footage to be deleted.

As discussed above, new rule 37(e) only allows for an adverse inference when evidence is destroyed with intent to deprive, and evidence in both *Osberg* and *Taylor* was only negligently destroyed. However, since the lost footage in *Taylor* was digital (ESI) and the lost documents in *Osberg* were paper (non-ESI), the new rule would only prevent an adverse inference in the *Taylor* case, leaving the jury in *Osberg* free to assume that the defendants destroyed the documents because they were harmful to their defense.

Should different standards be applied in cases like *Osberg* and *Taylor* simply because of the way we classify the lost evidence? Some think not. As expressed by one source, “ESI may be the biggest issue in discovery today, but the destruction or loss of documents and tangible things is just as important as the destruction or loss of ESI.”⁶

The Advisory Committee acknowledges that “the dividing line between ESI and other evidence may in some instances be unclear.” Given the explosion of ESI,

however, it reasons that “courts are well-equipped to deal with this dividing line on a case-by-case basis, and that the reasons for limiting the rule to ESI outweigh the potential complication presented by the issue.”⁷

WILL THE NEW RULE REDUCE THE OVER-PRESERVATION OF ESI?

New Rule 37(e) will have no immediate impact at the state level, where courts will continue to use their own standards when imposing adverse inference instructions. States like Texas will continue to insist upon proof of bad faith, while states like New York can still impose such sanctions upon a finding of mere negligence.⁸

Whether state courts will voluntarily adopt standards similar to new rule 37(e) is unknown. One thing is fairly certain: they won’t do so any time soon. Thus, for those entities exposed to litigation at the state level, new Rule 37(e) may do little to take the edge off, and the motivation to over-preserve ESI will remain.

CONCLUSION

Proposed amended rule 37(e) represents a praiseworthy effort to address valid concerns by sophisticated entities burdened with the often insurmountable task of preserving massive amounts of ESI in a way that complies with the demands of existing discovery rules. It is also a significant step in establishing uniformity among the federal circuits by setting forth a single standard to use when dealing with the loss of relevant ESI.

However, the debate will continue among those who feel that the new standard should apply to the spoliation of all evidence, not just that which is electronically stored, and state courts will continue to follow their own rules when imposing adverse inferences. Thus, managers of ESI should remain diligent in their preservation efforts of not only ESI, but all documentation and evidence which is reasonably anticipated to become relevant in future litigation.

¹ USLAW NETWORK, Fall 2014, which can be found at http://www.uslaw.org/files/Compendiums2014/Spoliation/USLAW_2014_Spoliation_of_Evidence_Compndium_of_Law.pdf.

² See, *Dalour v. City of Lakewood*, 492 Fed. Appx. 924 (10th Cir. 2012) (bad faith required); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. Conn. 2002) (negligence can be sufficient); *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001) (substantial prejudice alone can justify dismissal).

³ Report to the Standing Committee, Advisory Committee on Civil Rules, May 2, 2014, at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf> (hereinafter, “the May Report”).

⁴ 2014 U.S. Dist. LEXIS 104538 (S.D.N.Y. July 25, 2014).

⁵ 293 F.R.D. 601 (S.D.N.Y. 2013).

⁶ As expressed by Wilbur A. Glahn, III and set forth in the Summary of Rule 37(e) Comments, May Report, page 74.

⁷ May Report at page 40.

⁸ *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 118 A.D.3d 428 (1st Dep’t 2014) (using standard identical to that used in second circuit in case where ESI was lost through ordinary negligence); *Squiti v. New York*, 248 AD2d 201 (1st Dep’t, 1998) (dismissal for negligent disposal of allegedly defective street sweeper); *Kirkland v. New York City Hous.*, 236 AD2d 170 (1st Dep’t, 1997) (dismissal for unintentional disposal of allegedly defective stove); *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014) (finding of bad faith required for adverse inference).



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