

An Update On Spoliation Sanctions Under Rule 37(e)

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On Dec. 1, 2015, the latest amendments to the Federal Rules of Civil Procedure went into effect. Those amendments included changes to Rule 37(e), which addresses the sanctions for failure to preserve electronically stored information. Before amended Rule 37(e) became effective, legal commentators predicted that litigators would have a harder time obtaining sanctions under the amended rule because the proposed amendments would raise the standard for sanctions in many jurisdictions. In this article, we describe the rule change and explore how federal district courts have dealt with the amended rule during its first six months, including whether courts have applied the amended rule to actions filed before the amendments went into effect and the incidence and types of sanctions that courts have awarded when applying the amended rule. We also provide practice tips for parties seeking or defending against motions for sanctions.



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Rule Amendment

Under Amended Rule 37(e), if a party fails to take reasonable steps to preserve ESI that should have been preserved and the ESI is lost as a result, the first inquiry is to determine whether the lost information can be restored or replaced through additional discovery. If the ESI can be restored or replaced, no sanctions are to be awarded under amended Rule 37(e). If the ESI cannot be restored or replaced, the next inquiry is to determine whether there is prejudice to another party from the loss of ESI. If there is prejudice, the court may only order measures no greater than necessary to cure the prejudice.

Amended Rule 37(e) also limits the availability of an adverse inference jury instruction and default judgment to instances where there is a finding that the party acted with the intent to deprive another party of the information's use in the litigation. The Advisory Committee notes explain that this provision "rejects cases ... that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."^[1]

Applicability of Amended Rule to Actions Filed Before Amendment

Under 28 U.S.C. § 2074(a) and order^[2] of the U.S. Supreme Court, amended Rule 37(e) governs all civil cases commenced after Dec. 1, 2015, and "insofar as just and practicable, all proceedings then pending." This language gives district courts discretion to determine whether to apply amended Rule 37(e) to actions that were filed before the amendments went into effect. To explore how district courts have

exercised this discretion, we searched for published opinions deciding motions for spoliation of electronically stored information during the first six months of amended Rule 37(e) and examined which version of the rule the district courts applied and the rationale underlying that decision.

Between Dec. 1, 2015, and May 31, 2016, we located 17 published opinions deciding motions for spoliation of electronically stored information. District courts in two of the 17 opinions (11.8 percent) found that it would be unjust or impracticable to apply amended Rule 37(e). One court declined to apply the amended rule because the action had been filed more than two and a half years before change to Rule 37(e) took effect, the party seeking prosecutions prosecuted the action pro se for nearly two years of that period, and all actions/inactions relevant to the motion took place before the amendments went into effect.[3] The other court concluded that it would fall short of justice and practicability to apply the amended Rule 37(e) because the motion for sanctions had been briefed before the new rules came into effect.[4]

In the remaining 15 of the 17 published opinions (88.2 percent), district courts applied amended Rule 37(e). In doing so, several courts concluded that it would be just and practicable to apply amended Rule 37(e) because the amended rule does not create a new duty to preserve evidence and is in some respects more lenient as to the sanctions that can be imposed for violation of preservation obligations.[5]

Sanctions Under Amended Rule

In the 15 published opinions applying amended Rule 37(e), district courts granted spoliation sanctions in 40 percent of the cases. This is higher than the incidence of sanctions awarded before Rule 37(e) went into effect. A study conducted before amended Rule 37(e) became effective found that spoliation sanctions were granted in nearly one-third (28 percent) of the sampled cases in which at least one party moved for sanctions and the court ruled on that motion.[6]

The most common sanction that district courts awarded under amended Rule 37(e) was monetary fees, which was granted in 50 percent of the cases where a spoliation sanction was imposed.[7] This was followed by an adverse inference jury instruction, which was granted in 33 percent of the cases.[8] Default judgment was not awarded in any of the published opinions where spoliation sanctions were granted. This is different from the time period before Rule 37(e) became effective. During that time, the most common sanction was an adverse inference jury instruction (granted in 40 percent of the cases).[9]

Practice Tips

Given that courts seem more reluctant to impose sanctions under amended Rule 37(e) than under the previous rule, parties seeking sanctions in actions that were pending when amended Rule 37(e) became effective should try to argue that it would be unjust or impracticable to apply amended Rule 37(e). Facts that may help in making such argument include pro se representation of the party seeking sanctions, an action that was filed years before the amended Rule 37(e) became effective, and spoliation conduct that occurred prior to the rule amendment. Parties defending against motions for sanctions in actions that were pending when amended Rule 37(e) became effective should try to argue that it would be just and practicable to apply amended Rule 37(e) because the amended rule does not create a new duty to preserve evidence.

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[1] Fed. R. Civ. P. 37(e) Advisory Committee's Notes to 2015 Amendment (citing Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002)).

[2] [http://www.supremecourt.gov/orders/courtorders/frcv15\(update\)_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf).

[3] Tye Thomas v. Dave Butkiewicz, No. 3:13-CV-747 (JCH), 2016 WL 1718368, at *8 (D. Conn. Apr. 29, 2016).

[4] McIntosh v. U.S., No. 14-CV-7889 (KMK), 2016 WL 1274585, at *32 (S.D.N.Y. Mar. 31, 2016).

[5] Marshall v. Dentfirst, P.C., No. 1:14-cv-2421-WSD, 2016 WL 1222270, at*2 (N.D. Ga. Mar. 24, 2016); Brown Jordan Int'l, Inc. v. Carmicle, No. 0:14-CV-60629-ROSENBERG/BRANNON, 2016 WL 815827, at *37 (S.D. Fla. Mar. 2, 2016); CAT3, LLC v. Black Lineage, Inc., 14 Civ. 5511 (AT) (JCF), 2016 WL 154116, at *11 (S.D.N.Y. Jan. 12, 2016).

[6] Emery G. Lee III, Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases, Report to the Judicial Conference Advisory Committee on Civil Rules, Federal Judicial Center (2011) at 8.

[7] Matthew Enter., Inc. v. Chrysler Group LLC, No. 13-cv-04236-BLF, 2016 WL 2957133, at *3-6 (N.D. Cal. May 23, 2016); Ericksen v. Kaplan Higher Educ., No. RBD-14-3106, 2016 WL 695789, at *2 (D. Md. Feb. 22, 2016); CAT3, LLC v. Black Lineage, Inc., 14 Civ. 5511 (AT) (JCF), 2016 WL 154116, at *11 (S.D.N.Y. Jan. 12, 2016).

[8] O'Berry v. Turner, No. 7:15-CV-000064-HL, 2016 WL 1700403, at *4 (M.D. Ga. Apr. 27, 2016); Brown Jordan Int'l, Inc. v. Carmicle, No. 0:14-CV-60629-ROSENBERG/BRANNON, 2016 WL 815827, at *37 (S.D. Fla. Mar. 2, 2016).

[9] Emery G. Lee III, Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases, Report to the Judicial Conference Advisory Committee on Civil Rules, Federal Judicial Center (2011) at 8.
