

ELECTRONIC DISCOVERY & INFORMATION GOVERNANCE

Tip of the Month



Recent Case Law Sheds Light on Application of Federal Rule of Civil Procedure 37(e)

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Scenario

After a lawsuit was initiated, the defendant company issued an internal litigation hold notice to its employees related to the plaintiff's claims. The hold notice directed the employees to preserve all potentially relevant documents, but it did not explicitly identify web browser histories as among the type of documents to be preserved, as this information was not deemed relevant based on the complaint and anticipated defenses. Many months later, the company was served with requests for production seeking the employees' web browser histories. The company's internet browser automatically deletes browser history after 120 days (unless instructed otherwise) and such information had already been deleted.

The company's general counsel wonders whether the company will be subject to sanctions due to the automatic deletion of the web histories under amended Rule 37(e) of the Federal Rules of Civil Procedure.

Overview of Amended Rule 37(e)

Under amended Rule 37(e), which became effective on December 1, 2015, a court may impose sanctions on an offending party "[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because [the] party failed to take reasonable steps to preserve it and it cannot be restored or replaced through additional discovery."

If these threshold elements are satisfied, Rule 37(e) establishes two different avenues parties can take to demonstrate sanctions are warranted. Under amended Rule 37(e)(1), if the court finds the party seeking the electronically stored information (ESI) has been *prejudiced*, the court may impose curative measures that are "no greater than necessary to cure the prejudice."

Further, under amended Rule 37(e)(2), regardless of prejudice, if the court determines that the offending party acted with *intent* to deprive the other of the information's use in litigation, the court may impose the harsher sanctions available, including presuming that the lost ESI was unfavorable to the offending party, instructing the jury that it may or must presume the information was unfavorable or entering default or dismissal.

Recent Case Law

The Duty to Preserve

Under Rule 37(e), a court may not impose sanctions for a failure to preserve ESI unless such ESI *should have been preserved*. Case law demonstrates that the duty to preserve under Rule 37(e) arises when a

party knows or should know that certain evidence is relevant to pending or future litigation. However, courts are interpreting amended Rule 37(e) as limiting this duty to preserve in a number of ways.

For instance, courts have interpreted this duty to preserve as being based on a “prospective standard.” It is simply far too easy to determine what ESI should have been preserved using hindsight. Thus, courts have held that the determination of what ESI should have been preserved under amended Rule 37(e) should be viewed from the point of view of the party who controls the ESI at the time litigation is anticipated or ongoing, not when it is discovered that ESI was lost.

Further, courts have interpreted amended Rule 37(e) as limiting this duty to preserve to relevant ESI. Although the rule does not use the word “relevant,” the Advisory Committee Notes do. The notes expressly acknowledge that the rule is based on a party’s common law duty to preserve relevant information when litigation is reasonably foreseeable. This limitation makes sense, as there would be no prejudice to a party from the loss of irrelevant information.

Establishing Prejudice

A court may impose sanctions under amended Rule 37(e)(1) if the court finds that a party was prejudiced from the loss of the ESI. According to recent case law, there must be some concrete evidence regarding the particular nature of the missing ESI to establish prejudice and support relief under the amended rule. Without such evidence, the court cannot adequately evaluate the prejudice that it is being requested to mitigate.

In a recent case in the Northern District of Illinois, the court acknowledged that establishing prejudice can be a “tricky business” in cases where no one knows precisely what was lost. When the ESI no longer exists and cannot be viewed, it is difficult for a court to determine prejudice, for the party that failed to preserve the ESI to show absence of prejudice and for the party that seeks the ESI to establish prejudice.

Nonetheless, the court ultimately concluded that the circumstances did not warrant a finding of prejudice under Rule 37(e)(1). In support of this conclusion, the court noted the lack of evidence regarding the particular nature of the missing ESI and that it was “pure speculation” that the lost ESI would have benefitted the party seeking the imposition of sanctions. The speculation alone was not enough to support the relief requested.

Intent to Deprive

With respect to Rule 37(e)(2), courts have been applying the language strictly and have refused to impose the harsher sanctions allowed absent a showing that the offending party acted intentionally and was not merely negligent with regard to the lost ESI.

For example, in a recent case in the Eastern District of North Carolina, the court held that the party seeking relief under Rule 37(e)(2) failed to establish that the offending party acted with the “intent to deprive” that is required to support the relief sought. In so holding, the court reasoned that the circumstances at most indicated that the ESI was lost due to the offending party’s negligence. Under Rule 37(e)(2), negligent conduct, even grossly negligent conduct, is insufficient.

Conclusion

As recent cases illustrate, courts are strictly applying the language of Rule 37(e) in determining whether to impose sanctions for the loss or destruction of ESI. Once the threshold requirements are met, before imposing sanctions under Rule 37(e)(1) or (e)(2), courts are requiring that there be some evidence that the loss resulted in prejudice or that the offending party acted with intent to deprive the other of the use of the lost ESI. A lack of such evidence is likely to be fatal to the other party’s request for sanctions.

For inquiries related to this Tip of the Month, please contact Gina Aiello Jordt at gjordt@mayerbrown.com or Ethan Hastert at ehastert@mayerbrown.com.

To learn more about Mayer Brown's [Electronic Discovery & Information Governance](#) practice, contact Michael E. Lackey at mlackey@mayerbrown.com, Eric Evans at eevans@mayerbrown.com or Ethan Hastert at ehastert@mayerbrown.com.

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