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Spoliation Standards Under The New Rule 37(e)

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On Dec. 1, 2015, long-anticipated amendments to the Federal Rules of Civil Procedure — including the new Rule 37(e) — will go into effect.[1] Under the current Rule 37(e), absent exceptional circumstances, a litigant is *not* sanctioned for the loss or destruction of relevant electronically stored information ("ESI") if the loss results from the "routine, good faith operation of an electronic information system." But the current rule leaves open the question of when courts *should* issue spoliation sanctions, as well as related issues such as when sanctions should be limited to remedial measures, and the level of culpability or intent required for imposing more serious adverse inference jury instructions or case-terminating sanctions. The proposed new Rule 37(e) overhauls the prior rule and provides a new framework for analyzing spoliation claims.

In this article, we discuss the amended rule and the guidance that the Advisory Committee Notes provides. We then analyze two sanctions cases decided under current Rule 37(e) — one, a high-profile case from 2013, and the second, a recent case, from 2015 — and consider whether the results might differ under the new Rule 37(e).

In sum, we conclude that the new rule's requirements that a court determine whether deleted ESI can be "restored or replaced," and whether the allegedly spoliating party acted with intent to deprive another party of evidence, might well change the result in these and other cases. That said, the precise contours of the new rule will only become clear over time.

New Rule 37(e)

Amended Rule 37(e) provides:

(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;

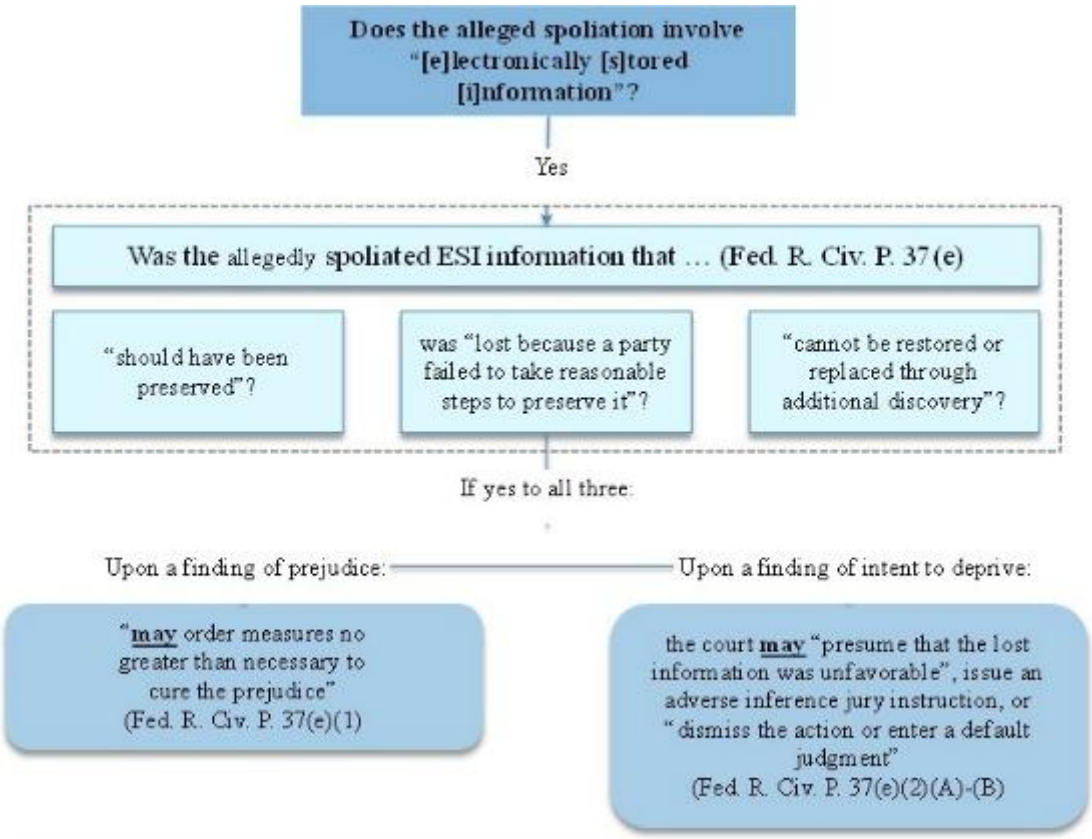
(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

According to the Advisory Committee Notes, "The new rule applies only to electronically stored information ..." In other words, if the alleged spoliation relates to tangible evidence, the new rule will not apply. Additionally, any relief pursuant to the new Rule 37(e) requires findings that "the lost information should have been preserved" and that the party "failed to take reasonable steps to preserve the information," as well as "whether the lost information can be restored or replaced through additional discovery." These matters are objective; they do not turn on the party's state of mind.

Even if these threshold requirements are satisfied, any relief pursuant to the new Rule 37(e) requires one of two further findings. If there is "prejudice [to the other party] from the loss of information," then pursuant to subdivision (e)(1), the court may employ a measure "no greater than necessary to cure the prejudice." In this respect, "[m]uch is entrusted to the court's discretion."

If the spoilating party acts with an "intent to deprive another party of the information's use," then pursuant to subdivision (e)(2), the court may award sanctions, including "very severe measures," such as an adverse inference. Notably, where a party acts with intent to deprive, the new rule "does not require any further finding of prejudice." In short, analysis under the new Rule 37 likely will follow this sequence:



The Advisory Committee Notes also addresses several additional features of Rule 37(e) analysis. Preliminarily, according to the Note, the new rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used."[2] In addition, the proposed rule only applies where a duty to preserve already attaches; it "does not attempt to create a new duty to preserve." And the rule requires only that a party take "reasonable" steps to preserve ESI; "it does not call for perfection." Finally, "[i]f the information is restored or replaced, no further measures should be taken;" no relief is appropriate if the information can be obtained "from other sources." All of these factors appear to serve as prerequisites to awarding any relief at all. But even if these requirements are met, the court "*may*" award the remedies in subsections (e)(1) and (e)(2); none is mandatory.

Analysis of recent spoliation sanctions decisions under the rubric of the proposed Rule 37(e) illuminates its possible impact.

Sekisui v. Hart

In *Sekisui America Corp. v. Hart*, 945 F. Supp. 2d 494 (S.D.N.Y. 2013), the court applied current Rule 37 (and circuit precedent) in awarding an adverse inference sanction for failure to preserve evidence. The court found that defendants had belatedly implemented a litigation hold and that potentially relevant ESI, including the emails of several individuals, had been permanently deleted. Applying *Residential Funding Corp. v. DeGeorge Financial Corp.*, which holds that spoliation sanctions can be awarded with a showing of mere negligence, the court concluded that, where the destruction of evidence is willful or grossly negligent, prejudice "may be presumed."[3]

The *Sekisui* court went on to hold that the failure to issue a timely litigation hold constituted gross negligence, and that the related destruction of ESI was "intentional." On that basis, the court further

held that "prejudice is therefore presumed" and awarded an adverse inference jury instruction against the defendants.

Conceivably, the result in *Sekisui* could remain unchanged under the new Rule 37(e): The court found that the defendants' destruction of evidence was "intentional," which could support an adverse inference under the new Rule 37(e)(2)(B). But the new rule would appear to require a more specific finding. In particular, while the court in*Sekisui* found only an intent to delete the ESI, the new rule, in contrast, requires an intent "*to deprive another party of the information's use in the litigation*."
In *Sekisui*, the court wrote, "[t]hat Sekisui provides a good faith explanation for the destruction of Hart's ESI — suggesting that Taylor's directive was given in order to save space on the server — does not change the fact that the ESI was willfully destroyed."[4] But if the ESI was destroyed to "save space on the server," and not (as the new rule requires) to "deprive [the other party] of the information's use," then under the new Rule 37(e), relief would not be appropriate — even if the act of deletion was intentional. Under the new rule, absent additional findings, an adverse inference sanction likely would not be issued.

NuVasive v. Madsen Medical

More recently, in *NuVasive Inc. v. Madsen Medical Inc.* (S.D. Cal. July 22, 2015), the district court awarded adverse inference sanctions against NuVasive for failure to preserve text messages. *NuVasive* involved a business dispute in which MMI contended that NuVasive had wrongfully terminated its contract with MMI and hired away MMI's employees. MMI sought sanctions for NuVasive's failure to preserve the text messages of four individuals. MMI had specifically notified NuVasive of its obligation to preserve the text messages of two of the individuals, and NuVasive did not dispute that some text messages from the four individuals were missing.

The court concluded that, "In light of all of the text messages that were lost or deleted ... NuVasive was at fault for not enforcing compliance with the litigation hold." Based on the text messages that MMI did obtain, the court inferred that "the MMI sales representatives were talking to NuVasive about plans to terminate MMI and have the sales representatives work directly for NuVasive." Therefore, the missing texts "might have furthered MMI's claims."[5]

If *NuVasive* were litigated post-amendment, the outcome might differ in any of several ways. First, the court's analysis would be governed by Rule 37(e), rather than inherent authority and circuit precedent. Second, the court would have to address affirmatively the threshold questions described above before awarding relief. Here, the court's opinion supports findings that NuVasive "should have ... preserved" the text messages and "failed to take reasonable steps to preserve it," as the new rule requires. But the court said, only in passing, "NuVasive argues that Defendants have obtained most of the deleted/lost text messages through other individuals. But NuVasive cannot provide any assurance that Defendants have all of the relevant text messages."[6] Under the new rule, if the text messages were or could be "recovered or replaced," no relief would be available.

Under the new Rule 37(e), assuming the court found that some data could *not* be "recovered or replaced," the court would have to find either prejudice to MMI (to award a lesser curative measure) or an intent to deprive on NuVasive's part (to award harsher sanctions, including an adverse inference). Thus, if *NuVasive* were litigated post-amendment, the court likely would determine: (1) how much of the allegedly spoliated data could be obtained through other sources; (2) whether the alleged spoliator had an intent to deprive, which would be a prerequisite to awarding an adverse inference; and (3) whether there was prejudice, if an intent to deprive was not present (because any (e)(1) curative

measures would need to be proportional to the prejudice).

Conclusion

If amended, Rule 37(e) had been in place before *Sekisui* and *NuVasive* were decided, it may well have changed the result of those and other high-profile sanctions cases. First, the new Rule 37(e) requires a court to determine if the lost evidence can be recovered or replaced as a precondition to *any* curative measures at all. Second, more severe sanctions — including adverse inferences — can only be imposed upon a finding of an intent *to deprive* the other party of evidence, not merely an intent to delete ESI. But additional questions remain, including how the new Rule 37(e) will interact with unchanged subsections of Rule 37 (which may also allow for sanctions). In any case, though, the new rule seems to foreclose reliance on inherent authority and creates a uniform framework for analyzing alleged spoliation of ESI. Though its parameters will only develop over time, the proposed Rule 37(e) certainly appears destined to alter the landscape of spoliation litigation.

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[1] On April 29, 2015, U.S. Supreme Court Chief Justice John Roberts transmitted to Congress the proposed rule amendments that were adopted by the Supreme Court pursuant to 28 U.S.C. § 2075. The package of materials transmitted is available at http://www.uscourts.gov/file/document/congress-materials (last visited Oct. 19, 2015). Technically, the rule amendments may be modified by Congress. It seems unlikely, however, that Congress will take any action before Dec. 1.

[2] All quotations are from the Advisory Committee's Note to Rule 37(e) unless otherwise noted.

[3] 306 F.3d 99 (2d Cir. 2002).

[4] 945 F. Supp. 2d at 506.

[5] *Id.* at *2.

[6] *Id.* at *2.
