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Early Returns on Amended Rule Regarding Spoliation of ESI

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One of the amendments to the Federal Rules of Civil Procedure that became effective on Dec. 1, 2015, modified Rule 37(e), which addresses possible sanctions a court may impose for a party's failure to preserve electronically stored information (ESI). The first published cases to deal with this change offer early guidance as to how courts will handle spoliation motions regarding ESI moving forward, and leave some questions remaining to be answered.

Prior to the amendment, Rule 37(e) was stated in the negative, placing a vague limit on a court's ability to impose sanctions for spoliation of ESI, providing: "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 rule offered safe harbor for parties that could show their actions were undertaken in good-faith, but it left it to the courts to determine the appropriate sanctions and when to impose sanctions on parties not covered by this safe harbor.

Amended Rule 37(e) provides clarity, stating that in regard to ESI, the court "upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or...upon finding that the party acted with the intent to deprive another party of the information's use...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."¹

While the amended rule did not alter the pre-existing requirement to preserve documents (electronically stored or otherwise) where litigation is reasonably foreseeable, it has impacted how courts deal with violations of this duty.

'CAT3 v. Black Lineage'

In *CAT3*,² the Southern District addressed the impact of amended Rule 37(e) and discussed spoliation law generally. The court interpreted the requirement that the court order corrective measures "no greater than necessary to cure the prejudice" to the non-offending party, the applicable burdens of proof on a spoliation motion, and the interplay between the court's inherent power to impose sanctions for abuse of judicial process with the limitations of Rule 37(e).

In *CAT3*, the plaintiffs claimed that the defendants were interfering with plaintiff's trademark rights in the mark "SLAMXHYPE" and the domain name www.SLAMXHYPE.com through defendants' use of the mark FLASHXHYPE and the domain name www.FLASHXHYPE.com. (both marks were used in connection with the sale of clothing and websites). Accordingly, a key issue was when the defendants became aware of the plaintiffs' mark and whether the defendants developed their mark independently or whether they sought to trade on the plaintiffs' reputation after learning of the plaintiffs' use of their mark.

An issue arose in discovery regarding the timing of the plaintiffs' mark. Each party produced copies of emails between the parties (each maintained the same emails in their respective systems). The same emails in the parties' respective productions contained different domain suffixes for the plaintiffs' employees' email addresses. While the emails produced by plaintiffs showed the domain suffix (the @name of the email address) of the plaintiffs' email addresses as @slamxhype.com, the emails produced

by defendants showed a different domain suffix for plaintiffs' email address—one that was unrelated to the disputed marks. Understandably, defendants were eager to explore whether plaintiffs had altered the emails in their possession prior to production to give the appearance that plaintiffs were using the SLAMXHYPE mark sooner than they actually were.

Plaintiffs' emails were produced in native form (the original production was in PDF) and defendants hired a forensic expert, who determined the documents were altered pre-production. The email domain suffixes on the original documents were deleted and changed, the expert contended. Plaintiffs countered with affidavits from employees stating they were unaware of any email alterations, together with expert testimony suggesting it was possible the suffixes could have changed without intentional alteration.

Under Rule 37(e), sanctions may be imposed if the ESI cannot be "restored or replaced." The plaintiffs argued that since the email alteration was identified and defendants had their own unaltered emails, it wasn't accurate to say the emails could not be restored or replaced; therefore, the plaintiffs should not be sanctioned. The court mocked this argument, noting that plaintiffs were essentially arguing that "they are the gang that couldn't spoliage straight..." It then pointed out that to the extent emails were altered, defendants would suffer prejudice because the existence of the duplicate emails would cast doubt on the authenticity of both.

The court further noted that even if plaintiffs were correct and Rule 37(e) did not apply to this situation, it was still within the court's inherent authority to impose sanctions if it found evidence was manipulated: "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."

The court turned to the issue of burdens, noting that courts "appear to be divided with respect to the appropriate standard of proof to apply to a claim of spoliation[]" with some applying a preponderance standard, and others requiring clear and convincing evidence. The court held the "appropriate standard of proof depends in part on the specific issue to be decided." It explained where bad faith is alleged or the sanctions requested are case-terminating or punitive, a clear and convincing standard is appropriate. But, the court went on, to establish prejudice, a preponderance standard is more appropriate lest the violating party be rewarded for withholding the information needed to prove prejudice.

Since defendants were seeking dismissal or other punitive measures, the court found they had to show plaintiffs acted intentionally by clear and convincing evidence, a burden defendants easily met. The court relied on defendants' expert testimony and analysis, noting that all plaintiffs' expert provided was speculation. In determining the appropriate remedy, the court noted the limitation in Rule 37(e) that a court impose "measures no greater than necessary to cure the prejudice."

Accordingly, it denied defendants' request for dismissal, but ruled that plaintiffs could not use their version of the emails at issue to support their claim that the defendants had notice of plaintiffs' use of the

mark in dispute. It further held that the plaintiffs would bear all costs incurred by defendants in establishing the plaintiffs' misconduct. The court noted this remedy was sufficiently punitive of the plaintiffs' conduct without preventing the plaintiffs from presenting other evidence that might substantiate their potentially legitimate claims.

Modifying Previous Order

[*NuVasive v. Madsen Medical*](#)³ (S.D. Cal.), provides a concrete example of the change that amended Rule 37(e) made to existing law regarding spoliation with respect to the new requirement of a showing of intent to support an adverse inference instruction. There, upon application of the sanctioned party, the court modified a previous order which it entered prior to the Rule 37(e) amendment going into effect so that the order comported with the amended rule.

In an order entered July 2015, which was several months before the scheduled trial date, the court granted that part of the defendants' motion requesting an adverse inference instruction for plaintiff's failure to preserve certain text messages. The planned jury instruction stated, "you may, but are not obligated to, infer that the evidence destroyed was favorable to MMI and unfavorable to NuVasive."

Based on the amended rules, after that order was entered, plaintiff moved for relief from that order under FRCP 60(b). Over the defendants' protest, the court ruled that since the trial had not yet taken place and it had not yet given the adverse jury instruction, amended Rule 37(e) applied to those parts of the proceedings and it would reexamine its prior ruling.

The court found both the language of amended Rule 37(e) and the committee notes to the rule made clear that "the adverse inference instruction that the court was going to give falls within the measures that are not permissible absent a showing of intent." It specifically looked at subsection (2) of Rule 37(e), which states that "only upon finding that the party acted with the intent to deprive another party of the information's use" may the court order a mandatory or permissive adverse inference instruction. It further held that the record did not support a finding of intentional spoliation, so there could be no adverse inference instruction.

Ultimately, the court held that the parties could present evidence to the jury regarding the loss of ESI and that it would instruct the jury that it may consider such evidence in making its decision.

Analyzing Prejudice

In *Best Payphones v. City of New York*,⁴ the Eastern District of New York analyzed what prejudice means in the context of Rule 37(e) and, without explicitly addressing it, questioned whether the change to rule 37(e) may also lead to a change in jurisprudence regarding the spoliation of physical records, or non-ESI.

In *Best Payphones*, defendants requested, but did not receive, emails between the plaintiff and third parties, particularly third parties allegedly interested in purchasing plaintiff's business, certain revenue and activity statements, and bank statements. Defendants claimed they were prejudiced by plaintiff's failure to retain and provide this information because without it defendants were limited in their ability to disprove plaintiff's claimed damages.

The court discussed the law regarding spoliation and found plaintiff had a duty to preserve evidence and negligently failed to meet that duty. It noted that plaintiff's principal improperly unilaterally determined that certain evidence was not relevant and negligently destroyed other evidence because he did not understand the features of his email account. Although the court noted there was no excuse for plaintiff's failure to preserve and produce certain documents, it found that defendants had not suffered any prejudice from this failure. Thus, it awarded defendants attorney fees connected with the spoliation motion, but refused to grant an adverse inference instruction or to limit what evidence plaintiff could present.

In support of its finding of no prejudice, the court focused on defendants' own conduct. The court noted the emails that defendants claimed were critical were between plaintiff and third parties, yet defendants never sought to discover those communications from third parties either through document requests or through seeking to depose the principals of those entities. According to the court "[d]efendants' decision not to pursue obvious non-party discovery leads is not a reason to grant the serious spoliation sanctions requested."

The court similarly held that defendants were not prejudiced by plaintiff's failure to produce certain activity statements and bank records since there were other documents containing the same, and sometimes more reliable information, and again, defendants did not take other available steps during the course of discovery to seek out that information—the lack of which they claimed caused them prejudice.

The court also referenced the current inconsistency in the law of spoliation regarding the treatment of ESI and physical evidence, noting that prior to the amendment to Rule 37(e), spoliation sanctions could be applied if "the records were destroyed with a culpable state of mind[]" and that willfulness or gross negligence had been found to constitute a culpable state of mind. The court opined that amended Rule 37(e) "specifically rejected the giving of adverse inference instructions on a finding of negligence or gross

negligence" with respect to the loss of ESI, but that the rule did not change the state of the law with regard to the spoliation of non ESI.

Since the court found that the plaintiff merely acted with negligence as opposed to gross negligence, and that defendants were not meaningfully prejudiced, it did not have cause to write a divergent opinion—reaching one ruling with respect to ESI and another with respect to non-ESI. However, the issue of inconsistent standards does call into question whether courts may be inclined to adapt the law regarding spoliation of physical records to be consistent with the law regarding ESI, or if we will remain with a framework where the destruction of one type of evidence is treated with more leniency than the destruction of another type.

Conclusion

Disputes regarding preservation of ESI are not going away any time soon and courts will have no shortage of opportunities to continue to weigh in on the meaning of amended Rule 37(e) and the law regarding spoliation generally. Still, these early cases provide some interesting insights and guidelines.

Among the takeaways are: (1) the law regarding preservation of records has not changed—parties still must preserve potentially relevant information when litigation is foreseeable; (2) there may be tension between the limits of Rule 37(e) and the inherent power of courts to impose sanctions for abuse of the judicial process, but it is unclear that these two principles cannot comfortably co-exist; (3) the burden of proof in spoliation motions remains somewhat unsettled; generally, though, it is a sliding scale with a higher burden required to prove more egregious conduct, and a lower burden to prove the harm emanating from such egregious conduct; (4) parties must demonstrate they have availed themselves of all avenues for discovering information before they can successfully claim prejudice for the opposing party's loss of that information; and (5) adverse inference instructions will likely become less common and courts will have to create, and parties will be wise to devise and advocate for, more creative, tailored sanctions to alleviate prejudice where the destruction was not willful.

Open issues in the wake of amended Rule 37(e) and the early cases applying it include: (1) Will courts alter the law regarding spoliation of physical records or use different standards for ESI and non-ESI?; (2) Will prospective movants change their cost-benefit analysis of moving for spoliation sanctions since adverse inference instructions are likely to become less common, or is the potential benefit of lesser sanctions and recovery of fees a sufficient reward to pursue these motions?; and (3) Will courts develop a uniform set of burdens of proof on spoliation motions or will they continue to be set on a sliding scale and case-by-case basis?

Endnotes:

1. Fed. R. Civ. Pro. 37(e).
2. No. 14 Civ. 5511, 2016 WL 154116 (SDNY Jan. 12, 2016).
3. No. 13cv2077, 2016 WL 305096 (SD Cal., Jan. 26, 2016).
4. 1-CV-3924, 1-CV-8506, 3-CV-0192, 2016 WL 792396 (EDNY, Feb. 26, 2016).

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