



Sanctions Under Amended FRCP 37(e): One Year In

Federal Rule of Civil Procedure (FRCP) 37(e), amended on December 1, 2015, permits a court to impose sanctions on a party for failing to preserve electronically stored information (ESI). The amended rule provides a roadmap for litigants and courts to assess whether sanctionable conduct has occurred and, if so, to craft an appropriate remedy. Decisions interpreting the amended rule since it became effective one year ago offer additional guidance on how courts are applying the new framework.



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Before the 2015 amendments to the FRCP, federal courts had developed significantly different standards for imposing sanctions under FRCP 37(e). Parties lacked consistent guidance on what a court would consider to be the routine, good faith operation of an electronic management system, which was the operative inquiry under the old rule. Moreover, parties were exposed to a wide range of potential sanctions across different jurisdictions. (See 2015 Advisory Committee Notes to FRCP 37(e).)

The amended rule attempts to remedy these problems by establishing a uniform federal standard for imposing sanctions for ESI spoliation in cases commenced after December 1, 2015 (see *Box, Retroactive Application of Amended FRCP 37(e)*). FRCP 37(e) now sets out the findings a court must make before imposing sanctions and enumerates the specific sanctions a court may impose when a party acts with the intent to deprive another party from using lost ESI in a litigation. Under the

amended rule, a court may award sanctions if the moving party shows that:

- The spoliating party had a duty to preserve ESI, because litigation was ongoing or reasonably anticipated.
- The spoliating party did not take reasonable steps to preserve the ESI.
- The ESI was lost as a result of the spoliating party's failure to use reasonable efforts to preserve the ESI, and cannot be restored or replaced through additional discovery.

If a court finds that these prerequisites are satisfied, the court may order:

- Relief that is "no greater than necessary" to cure any prejudice suffered for non-intentional or negligent spoliation (FRCP 37(e)(1)).
- Severe sanctions for situations in which the party acted with the intent to deprive its adversary of the lost ESI, in the form of a presumption or an adverse inference instruction to the jury that the lost ESI was unfavorable to the spoliating party, or case-terminating sanctions (FRCP 37(e)(2)).

DUTY TO PRESERVE ESI

When a party reasonably anticipates or becomes involved in litigation, its duty to preserve relevant evidence, including ESI, arises. Absent this duty, FRCP 37(e) does not apply. As a result, on a motion for sanctions under FRCP 37(e), a court must determine:

- Whether a duty to preserve arose, and if so, when.
- The scope of the preservation duty.

(2015 Advisory Committee Notes to FRCP 37(e); see, for example, *Marten Transp., Ltd. v. Plattform Advert., Inc.*, 2016 WL 492743, at *4-9 (D. Kan. Feb. 8, 2016).)

WHEN THE DUTY ARISES

The common law duty to preserve arises when a party reasonably anticipates a future litigation (or government investigation) or litigation is ongoing. A finding that a party could not have reasonably anticipated litigation when ESI was lost or destroyed ends the FRCP 37(e) inquiry. (2015 Advisory Committee Notes to FRCP 37(e) (noting that the rule "does not apply when information is lost before the duty to preserve arises").)

The 2015 amendments to the FRCP did not alter existing law on the circumstances that trigger the duty to preserve, and recent decisions confirm that pre-amendment case law on this issue remains controlling. If spoliation occurs during ongoing litigation, a court typically can find that a party had a duty to preserve relevant evidence with little analysis (see *Marten Transp.*, 2016 WL 492743, at *4-5 ("the duty to preserve definitely exists upon the filing of a lawsuit")).

By contrast, if the alleged spoliation occurred before litigation began, a court often must conduct a fact-intensive inquiry into when the alleged spoliator reasonably anticipated litigation. Courts have found that parties should have reasonably anticipated litigation in a variety of situations, including when the alleged spoliator:

- Received a letter from the plaintiff requesting that it preserve specific ESI (*O'Berry v. Turner*, 2016 WL 1700403, at *3 (M.D. Ga. Apr. 27, 2016)).
- Became aware of allegedly impermissible copyright use, and threatened to sue over that use years before filing the lawsuit, which triggered the party's own duty to preserve (*Virtual Studios, Inc. v. Stanton Carpet Corp.*, 2016 WL 5339601, at *2, *5-6, *10 (N.D. Ga. June 23, 2016)).
- Received notice that the plaintiff had filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) (see *Marshall v. Dentfirst, P.C.*, 313 F.R.D. 691, 695-97 (N.D. Ga. 2016) (finding that a preservation duty existed when an EEOC charge was filed, but denying sanctions where the plaintiff failed to show that the allegedly deleted evidence existed when the preservation duty arose)).

ESI SUBJECT TO PRESERVATION

Although a party may not selectively preserve only evidence that supports its position in a lawsuit, "a litigant has no duty to keep or retain every document in its possession." Instead, a party generally must preserve evidence that the party knows or should know is relevant to the ongoing or anticipated litigation, or is reasonably likely to be requested during discovery. (*Marten Transp.*, 2016 WL 492743, at *5.)

Additionally, statutes, regulations, case-specific procedures, or a party's own data retention protocols might dictate or provide clarity on a party's preservation obligations. For example, a court's scheduling order or the parties' discovery plan may detail the scope of what the parties must preserve (see 2015 Advisory Committee Notes to FRCP 37(e); FRCP 16(b)(3)(B)(iii) (pretrial conference scheduling order may provide for disclosure, discovery, or preservation of ESI); FRCP 26(f)(3)(C) (discovery plan must include the parties' views and proposals on disclosure, discovery, or preservation of ESI)).

When reviewing the scope of a party's preservation obligations, a court should examine the circumstances known to the party at the time the preservation decisions were made, rather than "by hindsight arising from familiarity with an action as it is actually filed" (2015 Advisory Committee Notes to FRCP 37(e)). Therefore, a court typically will not find spoliation where a party did not have a reason to believe that certain ESI would become relevant to issues in a case (see, for example, *Marten Transp.*, 2016 WL 492743, at *7-10 (declining to impose sanctions because ESI was lost before it became relevant in the litigation, and the party's preservation duty had not yet been triggered)).

Although not directly addressed in the text of FRCP 37(e), the concept of proportionate discovery, one of the hallmarks of the 2015 amendments, also may be relevant when assessing the scope of a preservation obligation (see 2015 Advisory Committee Notes to FRCP 37(e)). As of press time, no court has addressed proportionate preservation in the context of ESI. Until judicial guidance on proportionate preservation emerges, many parties are likely to continue to broadly preserve potentially relevant ESI, resulting in costly over-preservation.

Retroactive Application of Amended FRCP 37(e)

Although amended FRCP 37(e) became effective on December 1, 2015, courts may apply the amended rule to cases pending before that date where “just and practicable” (see *Cat3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 495-96 (S.D.N.Y. 2016)).

However, some courts have not applied the amended rule in cases that were pending before its effective date, despite issuing their decisions after that date (see, for example, *Barnett v. Deere & Co.*, 2016 WL 4544052, at *2 n.1 (S.D. Miss. Aug. 31, 2016) (declining to apply the amended rule because the movant raised the amended rule only on reply, but noting that the result “would not change” under that analysis); *Stinson v. City of N.Y.*, 2016 WL 54684, at *5 n.5 (S.D.N.Y. Jan. 5, 2016) (declining to apply amended FRCP 37(e) where the motion for spoliation sanctions was fully briefed before the amended rule became effective, and issuing an adverse inference instruction under common law)).

Other courts have proceeded under the amended rule even where the case pre-dated the amendment (see, for example, *Living Color Enters., Inc. v. New Era Aquaculture, Ltd.*, 2016 WL

1105297, at *3 n.1 (S.D. Fla. Mar. 22, 2016) (applying amended FRCP 37(e) after requesting supplemental briefs addressing the applicability of the amended rule); *Best Payphones, Inc. v. City of N.Y.*, 2016 WL 792396, at *3 n.2 (E.D.N.Y. Feb. 26, 2016) (applying amended FRCP 37(e) to a motion submitted before the amended rule’s effective date where applying the rule did “not create issues of feasibility or injustice”); *Cat3*, 164 F. Supp. 3d at 495-96 (finding that applying the amended rule was not inequitable “because the amendment is in some respects more lenient as to the sanctions that can be imposed for violation of the preservation obligation”).

At least one court has revisited a prior sanctions ruling in light of the amended rule and reduced the sanction as a result (see *Nuvasive, Inc. v. Madsen Med., Inc.*, 2016 WL 305096, at *2-3 (S.D. Cal. Jan. 26, 2016) (vacating a prior order awarding an adverse inference instruction sanction and permitting the parties to present evidence on the ESI loss, where the spoliating party had not intentionally failed to preserve ESI and the trial would not commence until after the effective date of the amended rule)).



Search [APB to Requesting Parties: Prepare for Proportionality](#) and [The FRCP Amendments: Small Step or Giant Leap?](#) for more on the FRCP’s proportionality requirements.

FAILURE TO TAKE REASONABLE STEPS TO PRESERVE ESI

FRCP 37(e) does not call for perfection in preservation. Indeed, the ever-increasing volume of ESI and the multitude of devices and sources of ESI make “perfection in preserving all relevant [ESI] often impossible.” Instead, the amended rule requires a party to employ reasonable preservation efforts in light of the circumstances that existed at the time the efforts were commenced. (2015 Advisory Committee Notes to FRCP 37(e).)

When assessing whether a party’s steps to preserve ESI were reasonable, a number of factors may be relevant to the court’s analysis, including a party’s:

- **Available resources.** A court should evaluate a party’s resources and understand that parties might have limited staff and resources to devote to preservation efforts. A party might act reasonably by choosing a less costly form of preservation if it is substantially as effective as more costly methods.
- **Level of sophistication.** The reasonableness of a party’s preservation efforts might depend on the party’s level of sophistication. A court might be more lenient on individuals who have little experience with litigation and are not familiar with the duty to preserve relevant information.
- **Level of control over ESI.** A court might be required to determine the extent to which a party had control over lost

ESI, or knew of and protected against risks of loss, such as a flooded computer room, a failed cloud service provider, or a cyberattack. (For more information, search [Possession, Custody, and Control of ESI](#) on Practical Law.)

- **Pre-existing document retention policy, schedule, and system.** When assessing reasonableness, a court might view a party’s adherence to a pre-existing retention policy and schedule favorably where the ESI is lost as a result of the party’s “routine, good-faith operation of an electronic information system.” However, a party should intervene to prevent routine destruction by suspending auto-delete or other data purging functions once it anticipates litigation to ensure relevant information is preserved. (For more information on managing e-discovery and document storage, search [Records Management Toolkit](#) on Practical Law.) (2015 Advisory Committee Notes to FRCP 37(e).)

Courts determining the reasonableness of the steps a party took to preserve ESI under the amended rule have permitted the moving party to conduct additional discovery on the timing of and circumstances surrounding the preservation efforts (see, for example, *Konica Minolta Bus. Sols., U.S.A. Inc. v. Lowery Corp.*, 2016 WL 4537847, at *5-6 (E.D. Mich. Aug. 31, 2016)).



Search [Practical Tips for Preserving ESI](#) and [First Steps for Identifying and Preserving Electronic Information Checklist](#) for key issues companies should consider when preserving and producing ESI.

Search [Litigation Hold Toolkit](#) for a collection of resources to help counsel preserve documents and implement a litigation hold.

LOSS OF ESI

FRCP 37(e) requires a court to carefully assess whether ESI has been truly lost, because the amended rule does not apply if the ESI can be restored or replaced (see 2015 Advisory Committee Notes to FRCP 37(e); see also, for example, *FiTeq Inc. v. Venture Corp.*, 2016 WL 1701794, at *3 (N.D. Cal. Apr. 28, 2016) (denying the plaintiff's motion for a spoliation instruction against the defendant where deleted emails were later restored and produced, and the plaintiff failed to show that other responsive documents existed and were destroyed)). Since the amended rule took effect, courts have found that ESI is "lost" if:

- The ESI is not available through third-party discovery (see, for example, *Living Color Enters.*, 2016 WL 1105297, at *5-6 (declining to award sanctions where another party produced the majority of lost text messages); *Best Payphones*, 2016 WL 792396, at *5 (declining to award sanctions where the movant did not request copies of the deleted ESI from third parties)).
- The restored or replaced ESI is altered in a way that calls its authenticity into question, even if the ESI is not lost in the strictest sense of the word (see *Cat3*, 164 F. Supp. 3d at 497 (finding that lost ESI had not been restored or replaced where the near-duplicate emails showed different email addresses, which "cast doubt" on the emails' authenticity)).

As part of analyzing whether ESI is lost, a court may permit additional discovery to determine whether lost ESI can be restored or replaced (see, for example, *Konica*, 2016 WL 4537847, at *5-6). However, a court must weigh the burden and expense of efforts to restore or replace lost ESI through discovery against the importance of the lost ESI, and should not order substantial discovery measures to restore or replace ESI that is marginally relevant or duplicative (see 2015 Advisory Committee Notes to FRCP 37(e)).

NON-INTENTIONAL SPOLIATION

If the moving party makes the predicate showing for sanctions under FRCP 37(e) but cannot show that the spoliating party acted with a specific intent to deprive (see below *Intentional Spoliation*), the court must determine if the movant was prejudiced by the loss of ESI. If so, the court "may order measures no greater than necessary to cure the prejudice." (FRCP 37(e)(1).)

PREJUDICE TO ANOTHER PARTY

FRCP 37(e)(1) does not impose the burden of establishing prejudice on a particular party. Instead, the amended rule provides courts with discretion to determine how best to assess whether prejudice exists based on the circumstances of the case. (See 2015 Advisory Committee Notes to FRCP 37(e)(1).)

However, to support a finding of prejudice, a court may initially require a party seeking sanctions to identify "plausible, concrete suggestions as to what the lost evidence might have been," and demonstrate that the loss of the evidence had a material, adverse impact on the moving party's ability to present or defend its case (*GN Netcom, Inc. v. Plantronics, Inc.*, 2016 WL 3792833, at *6 (D. Del. July 12, 2016)).

A court's analysis of prejudice is driven by the importance of the lost ESI to the case (see, for example, *Matthew Enter., Inc. v. Chrysler Grp., LLC*, 2016 WL 2957133, at *4 (N.D. Cal. May 23, 2016) (finding that the defendant was prejudiced by the plaintiff's loss of customer communications in a case that hinged on customer negotiations and decisions, but not by the plaintiff's deletion of internal emails where the defendant did not provide plausible, concrete suggestions about what information the internal emails might have contained); *Living Color Enters.*, 2016 WL 1105297, at *5-6 (finding that the movant suffered no prejudice where it failed to establish a direct nexus between missing texts, which appeared to be unimportant, and the complaint's allegations)).

SANCTIONS AVAILABLE FOR NON-INTENTIONAL SPOILIATION

A court has broad discretion to impose remedial measures as sanctions for non-intentional, but prejudicial, spoliation under FRCP 37(e)(1), if the measures are no greater than necessary to cure the prejudice caused by the spoliation and do not have the effect of the severe measures listed under FRCP 37(e)(2). (FRCP 37(e)(1); 2015 Advisory Committee Notes to FRCP 37(e)(1); *O'Berry*, 2016 WL 1700403, at *3; *Nuvasive*, 2016 WL 305096, at *1, *3; see below *Sanctions Available for Intentional Spoliation*.)

Depending on the circumstances of the case, courts have found that permissible sanctions under the amended rule include:

- Excluding a specific item of evidence that the lost ESI would have contradicted to offset the prejudice that the failure to preserve the ESI caused (2015 Advisory Committee Notes to FRCP 37(e)(1)).
- Allowing the parties to introduce evidence or make arguments to the jury about the ESI's loss (see, for example, *Nuvasive*, 2016 WL 305096, at *3).
- Giving instructions to the jury to assist it in evaluating the evidence introduced or arguments made about the lost ESI, so long as the instructions are not tantamount to an adverse inference instruction (see *O'Berry*, 2016 WL 1700403, at *3).
- Requiring the spoliating party to pay the reasonable attorneys' fees and costs incurred by the plaintiff to uncover the ESI's loss and make the spoliation motion (see, for example, *Matthew Enter.*, 2016 WL 2957133, at *5).

However, examples of sanctions that are impermissible under FRCP 37(e)(1) include:

- Striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case.
- Issuing an adverse inference instruction directing the jury that it may or must presume the lost ESI was unfavorable to the spoliating party.

(2015 Advisory Committee Notes to FRCP 37(e)(1).)

INTENTIONAL SPOILIATION

FRCP 37(e)(2) enumerates certain severe sanctions that a court may impose if it finds that a spoliating party acted with the intent to deprive another party of using the lost ESI in litigation. Under this provision, a court need not separately find prejudice to the

party deprived of the lost or destroyed ESI because prejudice is inherent in the finding of the requisite intent (FRCP 37(e)(2); 2015 Advisory Committee Notes to FRCP 37(e)(2)).

INTENT TO DEPRIVE

A court's determination of whether a party acted with the requisite intent to deprive is fact-specific and depends on the totality of the circumstances. Generally, a spoliating party's mere negligence or gross negligence is insufficient to justify the severe sanctions under FRCP 37(e)(2) (2015 Advisory Committee Notes to FRCP 37(e)(2); see, for example, *Living Color Enters.*, 2016 WL 1105297, at *6; but see *O'Berry*, 2016 WL 1700403, at *4 (issuing an adverse inference instruction as a sanction against a party for "irresponsible and shiftless" behavior that went beyond mere negligence, including printing only a single paper copy of ESI it had a duty to preserve, lacking a document preservation policy, and failing to maintain documents while they were in the party's possession)).

Specific factors that courts have taken into consideration when examining whether a party had an intent to deprive under the amended rule have included:

- The spoliating party's level of sophistication and whether the party was represented by counsel (see, for example, *Brown Jordan Int'l, Inc. v. Carmicle*, 2016 WL 815827, at *36 (S.D. Fla. Mar. 2, 2016), appeal docketed, No. 16-11350 (11th Cir. Mar. 25, 2016)).
- The spoliating party's level of deceitfulness (see, for example, *Global Material Tech., Inc. v. Dazheng Metal Fibre Co.*, 2016 WL 4765689, at *9-10 (N.D. Ill. Sept. 13, 2016)).
- The timing surrounding the spoliation and the method of deletion used, such as double deletion of emails (see, for example, *GN Netcom*, 2016 WL 3792833, at *7-8 (finding an intent to deprive based on the timing, the method of deletion, the supervisor's repeated instructions to employees to delete emails, and the use of code words relating to the plaintiff); see also *DVComm, LLC v. Hotwire Commc'ns, LLC*, 2016 WL 6246824, at *8 (E.D. Pa. Feb. 3, 2016), appeal docketed, No. 16-1873 (3d Cir. Apr. 14, 2016)).

SANCTIONS AVAILABLE FOR INTENTIONAL SPOILIATION

If a court finds the requisite intent under FRCP 37(e)(2), it may:

- Issue specific evidentiary sanctions.
- Order certain case-terminating sanctions.
- Impose lesser sanctions.

Evidentiary Sanctions

A court may presume that the lost ESI was unfavorable to the spoliating party when ruling on a pretrial motion or bench trial. Alternatively, a court may issue a permissive or mandatory adverse inference instruction, directing the jury that it may or must presume the ESI was unfavorable to the spoliating party. Courts have routinely issued these adverse inference instructions under the amended rule where, for example, a party:

- Made no preservation efforts after receiving a preservation notice from its adversary (*O'Berry*, 2016 WL 1700403, at *3-4).
- Repeatedly deleted emails after litigation holds were implemented and trainings on preservation were held, at

least partly out of concern that the emails would be used in litigation if not deleted (*GN Netcom*, 2016 WL 3792833, at *6, *12-14 (awarding punitive monetary sanctions, attorneys' fees and costs, and a permissive adverse inference instruction to the jury that it could presume the missing ESI was unfavorable to the defendant)).

- Replaced a computer without backing up or imaging its contents while the ESI was under a litigation hold (*InternMatch, Inc. v. Nxtbigthing, LLC*, 2016 WL 491483, at *10-14 (N.D. Cal. Feb. 8, 2016)).

Case-Terminating Sanctions

As an alternative to evidentiary sanctions, a court may impose the more drastic sanctions of dismissing the action or entering a default judgment against the spoliating party under FRCP 37(e)(2). Courts have tended to order these case-terminating sanctions where a spoliating party's conduct was particularly egregious, such as where the party:

- Intentionally deleted ESI from a laptop computer after receiving multiple preservation demands from the court and an adversary (*Roadrunner Transp. Servs., Inc. v. Tarwater*, 642 F. App'x 759, 759-60 (9th Cir. 2016) (affirming default judgment)).
- Liquidated computers with relevant ESI as part of a business wind-down while litigation was pending, failed to search and preserve emails from subsequently deleted email accounts, lied about its control over cloud-based employee email accounts, and committed other discovery violations (*Global Material Tech.*, 2016 WL 4765689, at *3-4, *7, *9-11 (noting that lesser, curative sanctions "would not adequately reflect the seriousness of defendants' wrongs," because the spoliating parties had been "affirmatively deceitful" to the plaintiff and the court)).

Lesser Sanctions

Significantly, the amended rule does not require the court to impose the severe sanctions enumerated in FRCP 37(e)(2). Instead, a court may impose a lesser sanction as appropriate under FRCP 37(e)(1), especially if the lost or destroyed ESI was relatively unimportant or lesser measures would be sufficient to redress the loss. (2015 Advisory Committee Notes to FRCP 37(e)(2).) For example, in *Cat3*, the court found that the plaintiff had intentionally falsified emails and determined that the requirements for sanctions under both FRCP 37(e)(1) and (2) were met. However, the court awarded less severe sanctions tailored to cure the specific prejudice that the defendants suffered by precluding the plaintiff from relying on its version of the altered emails. (164 F. Supp. 3d at 501-02 (acknowledging the reluctance to award terminating sanctions where the plaintiffs' underlying claims might be legitimate); see also, for example, *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 2016 WL 4224964, at *18-19 (E.D. Va. Aug. 8, 2016), appeal docketed, No. 16-1972 (4th Cir. Aug. 24, 2016) (concluding that lesser measures were sufficient despite a finding of intentional spoliation).)



Search [Motion for Sanctions Under FRCP 37\(e\): Motion or Notice of Motion and Motion for Sanctions Under FRCP 37\(e\): Memorandum of Law](#) for a sample motion for sanctions for ESI spoliation, with explanatory notes and drafting tips.