
March 25, 2014

"No Greater Than Necessary" – Advisory Committee Releases Updated Proposed Rule 37(e) on Sanctions in E-Discovery

In the Agenda Book for its upcoming April meeting, the Advisory Committee on Civil Rules has for the first time publicly released the updated version of proposed Federal Rule of Civil Procedure 37(e) concerning sanctions in e-discovery. Agenda Book for Meeting of the Advisory Committee on Civil Rules, Portland Oregon, April 10-11, 2014 ("Agenda Book"), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf>.

From August 2013 until February 2014, the Advisory Committee accepted public comments and held three public hearings on the proposed amendments to the Federal Rules of Civil Procedure relating to e-discovery, the most controversial of which was the proposed new text of Rule 37(e). Under the public comment version of 37(e), a court could issue sanctions only upon finding that a party's actions in failing to preserve discoverable information "(i) caused substantial prejudice in the litigation and were willful or in bad faith; or (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." Agenda Book at 377.

The public comments, according to the report in the Agenda Book by the Discovery Subcommittee of the Advisory Committee, "caused the Subcommittee to conclude that its previously recommended approach of limiting virtually all forms of 'sanctions' to a showing of substantial prejudice and willfulness or bad faith is too restrictive. It does not afford trial courts the flexibility they will need to deal with the wide range of ESI issues they will confront in the coming years." *Id.* at 371.

The new version of proposed Rule 37(e) is a substantial rewrite of the public comment version, and, comparatively, grants courts significantly more leeway in determining the appropriate sanctions or curative measures following a failure to preserve electronically stored information ("ESI"). The rule does, though, incorporate the requirement that such measures should be "no greater than necessary" and explicitly places limits on the use of more severe sanctions such as issuing an adverse inference jury instruction.

In addressing new Rule 37(e), the Discovery Subcommittee writes that "[t]wo goals have inspired this work. One has been to establish greater uniformity in the ways in which federal courts respond to a loss of ESI.... The other goal has been to relieve the pressures that have led many potential litigants to engage in what they describe as massive and costly over-preservation." *Id.* at 369-70. Proposed Rule 37(e) attains the first goal by resolving the current circuit split over whether simple negligence or bad faith should trigger sanctions for failure to preserve ESI. The second goal, however, has had to yield in some

measure to the reality of the "uncertain" cost savings to be realized and the need for "broad trial court discretion" considering the "wide variety of situations faced by trial courts and litigants when information is lost[.]" *Id.* at 371-2.

Key aspects of the updated proposed Rule 37(e), the full text of which is below, are:

- References to "sanctions" are removed, with the Discovery Subcommittee noting that "labeling any measure as a 'sanction' generates overtones of professional responsibility and of censure." *Id.* at 377.
- The inherent authority of the court to issue sanctions, preserved under the existing Rule 37(e), is taken away under the new proposed Rule. "The amended rule authorizes and specifies a graduated series of measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used." *Id.* at 385-6.
- The Rule is limited to a failure to preserve ESI, as opposed to the more expansive "discoverable information" in the public comment version. *Id.* at 372.
- Subsection (e)(1) focuses on what the Discovery Subcommittee says is "the court's first concern," which is "to cure the loss of the ESI that should have been preserved." *Id.* at 375. Only "measures no greater than necessary to cure the loss of information" may be ordered by the court. *Id.* at 383.
- Subsection (e)(2) allows, upon a finding of prejudice due to the loss of information, "measures no greater than necessary to cure the prejudice." The proposed Committee Note suggests that if measures under subsection (e)(1) are effective, measures under (e)(2) "should be unnecessary" and clarifies that the "rule does not place a burden of proving prejudice on one party or the other." *Id.* at 387. The Discovery Subcommittee explains that this subsection "preserves the trial court's ability to use some of the Rule 37(b)(2)(A) measures to cure prejudice. For example, in cases of serious prejudice, a court may preclude a party from presenting evidence or deem some facts as having been established." The trial court "may not," however, "impose the severe measures limited by (e)(3)" unless it makes the scienter finding set forth therein. *Id.* at 376-77.
- Subsection (e)(3) restricts a court's ability to issue the more severe sanctions of dismissal, entering a default judgment, and issuing an adverse inference jury instruction to situations in which a court has found that a party "acted with the intent to deprive another party of the information's use in the litigation." *Id.* at 383. It is a rejection of Second Circuit cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 239 (2d Cir.2002) and *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities*, 685 F.Supp.2d 456 (S.D.N.Y. 2010), "that have authorized the giving of adverse-inference instructions on a finding of negligence or gross negligence." *Id.* at 388.

- Subsection (e)(4) provides a non-exclusive list of factors for a court to consider in applying the Rule, such as "the reasonableness of the party's efforts to preserve the information" and "the proportionality of the preservation efforts to any anticipated or ongoing litigation." *Id.* at 383. The Discovery Subcommittee included this subsection in brackets for the Advisory Committee, noting in its report that the Committee, at its April meeting, should decide whether to include these factors in the text of the Rule or demote them to a Committee Note. *Id.* at 373.

An additional public comment period for the updated text of Rule 37(e) is not suggested by the Discovery Subcommittee's report; it recommends adoption of this new form of the Rule. *Id.* at 369.

Proposed Rule 37(e)

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

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e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If a party failed to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, the court may:

- (1)** Order measures no greater than necessary to cure the loss of information, including permitting additional discovery; requiring the party to produce information that would otherwise not be reasonably accessible; and ordering the party to pay the reasonable expenses caused by the loss, including attorney's fees.
- (2)** Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice.
- (3)** Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation:
 - (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.

[(4)] In applying Rule 37(e), the court should consider all relevant factors, including:

- (A)** the extent to which the party was on notice that litigation was likely and that the information would be relevant;
- (B)** the reasonableness of the party's efforts to preserve the information;
- (C)** the proportionality of the preservation efforts to any anticipated or ongoing litigation; and
- (D)** whether, after commencement of the action, the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.]

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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