

## Technology Today

## FEDERAL E-DISCOVERY

## Federal Rule 37(e) Applies to Content and Metadata of ESI

By Christopher Boehning and Daniel J. Toal

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Federal Rule of Civil Procedure 37(e) was intended to address some unique challenges surrounding the preservation of electronically stored information (ESI). Since 2015, courts frequently have utilized the rule when deciding motions for sanctions for ESI spoliation. One key question rarely addressed, though, is whether, in addition to the content of ESI, Rule 37(e) also applies to its metadata—the properties and other information about electronic files. In a recent decision, where spoliated metadata would have provided details relevant to a party’s claims, a court determined that it does.

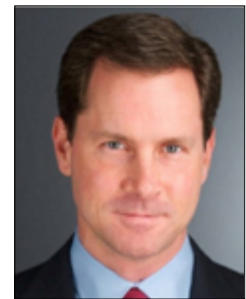
**‘Taylor Made Express’**

In *Taylor Made Express v. Kidd*, 2024 WL 197231 (N.D. Ill. Jan. 18, 2024), Plaintiff Taylor Made Express (TME) sought sanctions against Defendant Brandy Kidd for her deletion of key evidence in file hosting service Dropbox. TME alleged the evidence was relevant to its claims against Kidd for misappropriation of trade secrets.

TME, a trucking company, hired Kidd in October 2012. Kidd “eventually took on overall management



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and supervisory responsibilities for TME’s Illinois office.” While still employed by TME, “[b]eginning in October 2020, Kidd intended to start a separate freight broker company, which would become Defendant Top Shelf, and to quit her job at TME.”

For months, Kidd recruited several other TME employees to join her new company; she also built IT systems for Top Shelf that had access to TME’s systems and documents. For example, Kidd directed her personal IT professional to set up Top Shelf laptops that had access to TME’s email system and to “copy several customer distribution lists from TME’s email system to Top Shelf’s email system.” In addition, the email address associated with TME’s Dropbox account was changed from a TME address to a Top Shelf address.

Kidd also ensured that Top Shelf would have access to the industry software system, Sylectus. As the court

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explained, in January 2021, Kidd entered into a “cbroker agreement between [co-defendant] Hurley and Top Shelf related to the Sylectus system” as a means to “circumvent Sylectus’ rules preventing Kidd and Top Shelf from registering with Sylectus for six months following termination by TME.”

On April 9, 2021, Kidd and her colleagues resigned from TME. The next day, TME staff visited the Illinois office and found, “four computers present, but could not access TME’s Office 365 email system due to it being password-locked.” Even after requesting the password information from Kidd and others, TME did not receive it until the court ordered it provided.

The court, on June 4, 2021, “issued a Temporary Restraining Order that required Kidd to surrender computers.” Just a few days later, on “June 8, 2021, Kidd deleted from her Dropbox account all files now alleged by TME to be trade secrets, including information related to TME’s contracted rates, marketing information, Sylectus reports, and customer and account lists.”

### **Motion for Spoliation Sanctions**

TME moved for a finding of contempt and for sanctions under Federal Rule 37(e) for Kidd’s ESI. Specifically, “Kidd permanently deleted TME-related files in a Dropbox cloud account that were subject to the court’s Temporary Restraining Order requiring her to surrender ‘all computer devices, cellphones and other electronic devices, email and cloud accounts...to determine the manner in which [Defendants] retained, accessed, used and/or disseminated any of TME’s files claimed or alleged to be proprietary and trade secret information.’”

Rule 37(e) requires that specific “threshold requirements” are met before a court can impose curative measures or sanctions: “(1) the information must be ESI; (2) there must have been anticipated or actual litigation that triggers the duty to preserve ESI; (3) the relevant ESI should have been preserved at the time of the litigation was anticipated or ongoing; (4) the ESI must have been lost because a party failed to take reasonable steps to preserve it; and (5) the lost ESI cannot be restored or replaced through additional discovery” (citation omitted).



If met, the court may then consider curative measures under subsection (e)(1) upon a finding that the loss of information caused prejudice to another party or more severe sanctions under subsection (e) (2) upon a finding that the party acted with intent to deprive the other party of the use of the lost ESI.

Of these threshold requirements, the only one disputed by Kidd was “whether the Dropbox files at issue here could be restored or replaced. According to

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Kidd, the deleted information, including the Sylectus reports, were in TME’s possession, and only the files’ contents, rather than their metadata, are the subject of Rule 37(e).”

### **The Court’s Findings**

The court disagreed with Kidd’s arguments. First, it noted that while the Sylectus reports and some other files that Kidd deleted may be reproduced, “many other files were deleted and Kidd does not satisfactorily explain that all relevant deleted files—rather than merely the Sylectus reports—are replaceable. Second, “[d]ue to Kidd’s conduct, the metadata related to the

Sylectus reports is now gone[.]” TME had claimed that the Sylectus reports were among the trade secrets misappropriated by Kidd; metadata in Dropbox would have shown, for example, when and how often Kidd accessed those reports “and thus [would] be relevant to Kidd’s alleged misappropriation of those claimed trade-secrets.”

Rejecting Kidd’s interpretation of Rule 37(e), the court found that “Kidd further is mistaken in believing that metadata is not ESI covered by Rule 37(e), when in fact metadata ‘may be just as critical, if not more so, as the content’ and is within the purview of ESI covered by the rule.” Since the metadata was not recoverable, the court found Rule 37(e)’s threshold requirements to be satisfied.

Next, the court addressed “whether Kidd had the necessary intent to warrant sanctions under Rule 37(e)(2), or whether TME was prejudiced to warrant curative measures under Rule 37(e)(1).” With Kidd explaining “that she did not understand that the Dropbox account was a ‘cloud account’ for purposes of the TRO, and that she ‘did not understand at the time that the deletions [of Dropbox files] would remove the information from Dropbox so no one could access it from anywhere,” the court found that Kidd’s deletion of the Dropbox files amounted to negligence rather than intent to deprive.

The court did find, though, “that TME was prejudiced by Kidd’s deletion of evidence that she was ordered to maintain.” It explained that “the deleted ESI included metadata that would at least indicate whether, and how much, Kidd used the Sylectus reports and other deleted files—which would of course inform TME’s trade-secrets claims” and that “TME was prevented from developing certain aspects of those claims and was forced to investigate and seek remediation due to Kidd’s spoliation of relevant evidence.”

As a curative measure to account for Kidd’s spoliation of the Dropbox ESI, the court ordered, as requested by TME, “an award of its costs and expenses incurred

in uncovering and proving the destruction of evidence, including forensic costs and attorney’s fees.”

### Takeaways

The court’s decision in *Taylor Made Express* highlights some significant e-discovery practice issues. First, the court reiterated the importance of all aspects of ESI,

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including content and metadata in the preservation and discovery context, and as part of Rule 37(e). ESI evidence, whether in the form of email, documents in cloud storage, or wearable device data, differs from paper in large part due to the metadata, that may, as in *Taylor Made Express*, be as or more important than the text of the documents.

Second, the decision highlights that it is critical to understand the nature and potential impact of electronic evidence. Here, the defendant claimed that her ignorance of the nature of the ESI led to the spoliation. By contrast, the plaintiff understood the importance of the metadata of the Dropbox ESI, which enabled it to successfully move for spoliation sanctions.

And third, although the plaintiff prevailed in its sanctions motion, the decision still raises the question whether the game was truly worth the candle. Here, a lack of clear evidence of intent, even in the context of a series of other elaborate efforts by the defendant, limited the relief available to the plaintiff under Rule 37(e).

In the end, the plaintiff will, at best, be reimbursed for its costs relating to uncovering and addressing the defendant’s spoliation. While other avenues, such as Rule 37(b), are also available to parties seeking discovery-related sanctions, it is worth considering the extent to which Rule 37(e), in its current form, can fully right such spoliation wrongs.