New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 249—NO. 106
TUESDAY, JUNE 4, 2013

FEDERAL E-DISCOVERY

Proposed Rule 37(e): A Step in the Right Direction?


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Advancements in technology and communication have presented an over-preservation conundrum for forward-thinking companies determined to protect their reputations in the event of litigation. For example, at a recent conference on preservation and sanctions, a company that had no litigation pending, but anticipated such a dispute, noted that it had no adverse party with whom to negotiate regarding the scope of its preservation obligations. Still, the company reported spending $5 million on preservation and an additional $100,000 per month to separate and preserve information in the event that litigation ensues.[1] The company described another matter for which it estimated the amount in dispute to be less than $4 million, but nonetheless felt compelled to preserve documents from 57 custodians, resulting in expenditures on preservation alone of $3 million.[2]

The proliferation of electronic communication and electronically stored data has made such no-win situations commonplace for actual and prospective litigants. Should a potential litigant continue to pay $100,000 per month to preserve information for a litigation that may never happen? When is it safe for the client to stop paying to preserve the data? If the client does not continue to preserve the data, might it be branded a "spoliator" and subject itself to sanctions?

These were the issues confronting the Discovery Subcommittee of the Advisory Committee on Civil Rules during a mini-conference on preservation and sanctions held on Sept. 9, 2011. The perils of over-preserving electronically stored data were discussed from the perspectives of, among others, in-house counsel, judges, outside counsel and even a computer scientist. Some sought guidance. Others sought bright-line rules. With an abundance of information on the challenges created by over-preservation of electronically stored data and the effect of the threat of sanctions, the Advisory Committee on Civil Rules (Advisory Committee) submitted a Report to the Standing Committee unanimously approving a revised Rule 37(e)[3] of the Federal Rules of Civil Procedure that would address the issue.


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The Revised Rule 37(e)

Absent exceptional circumstances, the existing version of Rule 37(e) prohibits courts from imposing sanctions when "electronically stored information is lost as result of the routine, good-faith operation of an electronic information system."[4] The revised rule lays out three different scenarios and available responses for each scenario.

The first scenario addresses garden-variety failures to preserve discoverable information. Sanctions ordinarily are not

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available in this situation. Faced with such situations, courts may only "permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure."[5]

The second scenario contemplates a failure to preserve discoverable information that causes substantial prejudice and was willful or in bad faith.[6] Subdivision 37(e)(2) lists certain factors to be considered in assessing whether a party's actions were willful. Those factors include:

> (1) the extent to which the party was on notice that litigation was likely and that the information would be discoverable; (2) the reasonableness of the party's efforts to preserve the information; (3) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation; (4) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and (5) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.[7]

Not only does this provision require proof of willfulness or bad faith, it also requires a showing that substantial prejudice was caused as a result of the offending party's actions.[8] Sanctions may be available in these situations "whether or not there was a court order requiring such preservation."[9] However, the party seeking sanctions in this instance would be obliged to show that it has been substantially prejudiced by the loss. If curative measures laid out in Rule 37(e)(1)(B)(i) adequately address the prejudice, then sanctions would be inappropriate. The Committee Note adds that sanctions would be inappropriate in such circumstances "*even when* the court finds willfulness or bad faith."[10] The purpose here is to "employ the least severe sanction needed to repair the prejudice resulting from the loss of information."[11]

The third scenario focuses on failures to preserve discoverable information that "irreparably deprive a party of any meaningful opportunity to present or defend against the claims in the litigation."[12] The first step in the "irreparable prejudice" analysis requires careful examination of the apparent importance of the lost information. Of course, it is impossible to show with any degree of certainty what unavailable information would prove. The Advisory Committee appears confident, however, that damaged litigants will be able to make an adequate showing of the importance of the lost information.

The revised rule lays out three different scenarios for imposing sanctions and available responses for each scenario.

The next step is to explore whether curative measures can reduce the adverse impact.[13] Curative measures include "permitting additional discovery that would not [otherwise] have been allowed," such as discovery that would have been "precluded under the proportionality analysis of Federal Rule 26(b)(1)[14] and (2)(c)[15]."[16] Curative measures also might include "requiring the party that failed to preserve information to restore or obtain the lost information, or to develop substitute information," "pay another party's reasonable expenses, including attorney fees caused by the failure to preserve," "permit[] introduction at trial of evidence about the loss of information, or allow[] argument to the jury about the possible significance of lost information."[17] Finally, if curative measures "are not possible or fail to restore important information, [then] the court must determine whether the loss has irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation."[18]

The Note for the proposed version of Rule 37(e) would clarify that "[t]he 'irreparably deprived' test is more demanding than the 'substantial prejudice' [test] that permits sanctions under Rule 37(e)(1)(B)(i) on a showing of bad faith or willfulness."[19] For example, while "a plaintiff's failure to preserve an automobile claimed to have defects that caused injury without affording the defendant manufacturer an opportunity to inspect the damaged vehicle *may* be an example,"[20] the Committee Note states that "even such losses may not irreparably deprive another party of any meaningful opportunity to litigate." The Committee Note explains, "[r]emaining sources of evidence and the opportunity to challenge the evidence presented by the party who lost discoverable information that should have been preserved, along with possible presentation of evidence and argument about the significance of the lost information, should *often* afford a meaningful opportunity to litigate."[21]

Concerned "that the proposed rule language would permit imposition of litigation sanctions whenever the loss of information prevented a party from presenting '*a* claim or defense' even when the claim or defense is of minor significance in the litigation,"[22] the Advisory Committee further narrowed Rule 37(e). The revised Rule 37(e)(1)(B)(ii), authorizes "sanctions in the absence of a finding of willfulness or bad faith only when the court finds that the opponent party's actions irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation."[23] This requires the court to look to all of the claims in the action rather than considering whether loss of information irreparably deprives a party from presenting or defending against one specific claim. To that end, the Committee notes, "[l]ost information may appear critical to litigating a particular claim or defense, but sanctions should not be imposed—or should be limited to the affected claims or defenses—if those claims or defenses are not central to the litigation."[24] "A party seeking sanctions under this revised provision must show that it was disabled from

presenting its side in the litigation."[25]

Take Away Lessons

If adopted, the proposed amendments to Rule 37 would make it clear that sanctions are disfavored and that any attempt to prove that sanctions are appropriate will be an uphill battle. Curative measures are, by far, the preferred approach to redressing failures to preserve. It appears that the Advisory Committee's overarching goal is to redress any prejudice created by preservation failures rather than to punish offenders.

In the wake of Super Storm Sandy and other recent natural disasters, one might ask how the revised Rule 37(e) would apply to discoverable information lost as result of an Act of God. The revised Rule expressly provides that catastrophes such as floods, earthquakes, fires, or malicious computer attacks would not warrant sanctions. Curative measures would be the only appropriate response in these circumstances because the loss was not caused by the "party's actions."

The revised Rule 37(e) also limits sanctions to cases in which there is a finding of willfulness or bad faith leading to substantial prejudice to a party or in which a failure to preserve irreparably deprives a party of any meaningful opportunity to present a claim or defense."[26] The Committee Note acknowledges that a party's actions that would result in such irreparable prejudice are "very rare."[27]

Significantly, the revised Rule would not permit sanctions for negligence or even gross negligence. As a result, actual or potential litigants would no longer need to fear that a court's hindsight review of their preservation efforts would subject them to sanctions merely because those efforts were found wanting in some respect. While reasonableness of efforts would still be a factor to be considered in the sanctions analysis, more than negligence would have to be shown. Furthermore, the damaged party—not the party who failed to preserve—would bear the burden of proving that the offending party's actions were willful or in bad faith, and that the actions resulted in a substantial prejudice. Absent willful or bad faith conduct, the damaged party would face the even more daunting task of demonstrating irreparable prejudice. And even then, courts are only permitted to impose sanctions that are narrowly tailored to the prejudice created.

The existing version of Rule 37(e) prohibits courts from imposing sanctions when "electronically stored information is lost as result of the routine, good-faith operation of an electronic information system."

Conclusion

The revised Rule 37(e) is no panacea. For example, the five factors to be considered in determining whether a failure to preserve was willful or in bad faith are far from concrete. Moreover, the potential for widely varied application of those factors remains. The revised Rule will, however, moderate—if not eliminate—many of the concerns of litigants that lead to chronic over-preservation. The amendments and Committee Note make clear that curative measures are favored, and that sanctions may not be imposed absent substantial prejudice to the adverse party. The revisions also make clear that sanctions generally will not be available for negligence or gross negligence in a party's preservation efforts. As a result, the revised Rule 37(e) is almost certainly a step in the right direction.

1. See Minutes from Mini-Conference on Preservation and Sanctions, 2, Sept. 9, 2011 at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Notes%20from%20the%20Mini-Conference%20on%20Preservation%20and%20Sanctions.pdf.

2. Id.

3. Proposed Fed. R. Civ. Proc. Rule 37(e):

Failure to Preserve Discoverable Information. (1) Curative measures; sanctions. If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may (A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and (B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions: (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.

(2) Factors to be considered in assessing a party's conduct. The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include: (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable; (B) the reasonableness of the party's efforts to preserve the information; (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation; (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

4. Fed. R. Civ. Proc. Rule 37(e)

5. Proposed rule 37(e)(1)(A) as noted in Memorandum, Civil Rules Advisory Committee, 43 (May 8, 2013) (Committee Memorandum).

6. Proposed Rule 37(e)(1)(B)(i).

7. Proposed Rule 37(e)(2)(A-E) as noted in Committee Memorandum, supra note 5 at 43-44.

8. This subdivision of Rule 37 underscores the Committee's disapproval of courts that have imposed sanctions—rather than curative measures—for negligence or gross negligence and acknowledges that "[d]espite reasonable efforts to preserve, some discoverable information may be lost." Committee Memorandum, supra note 5 at 46.

9. Id.

10. Id. at 47 (emphasis added).

11. Id.

12. Proposed Rule 37(e)(1)(B)(ii) as noted in Committee Memorandum, supra note 5 at 43.

13. Id.

14. Fed. R. Civ. Proc. Rule 26(b)(1):

Discovery Scope and Limits. (1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

15. Fed. R. Civ. Proc. Rule 26(b)(2)(C):

When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

16. Committee Memorandum, supra note 5 at 46.

17. Id.

18. Id. at 37.

19. Id. at 38.

20. Id. at 48 citing *Silvestri v. General Motors*, 271 F.3d 583 (4th Cir. 2001) (finding no abuse of discretion and affirming dismissal of case where the plaintiff filed a products liability action related to a car accident but failed to notify the car manufacturer about the vehicle for three years and failed to preserve it in its post-accident condition) (emphasis added).

21. Committee Memorandum, supra note 5 at 38 (emphasis added).

22. Id. at 37.

23. Id.

24. Id.

25. Id.

26. Draft Minutes, Civil Rules Advisory Committee, 4-5 (Nov. 4, 2012).

27. Committee Memorandum, supra note 5 at 45.