'Spoiler Alert': Amended Federal Rule 37(e) Addresses Standards and Sanctions for the Spoliation of Electronically Stored Information

On December 1, 2015, absent congressional action, a significantly revised version of Federal Rule of Civil Procedure Rule 37(e) will become effective. The revised rule is intended to harmonize the standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information ("ESI") and to specifically address the destruction of relevant ESI (or "spoliation").

The current Rule 37 provides the procedural framework for addressing many discovery failures, including a party’s failure to disclose that which it should or refusal to cooperate when it must. In some instances, Rule 37 enumerates sanctions for specific types of discovery failures, but prior to this revision, Rule 37 did not enumerate sanctions that may be available for destruction, or spoliation, of relevant ESI.

Obviously, ESI has proliferated in recent years. In late 2006, the first efforts to address ESI and the accompanying procedural challenges were added to the Federal Rules of Civil Procedure, including the introduction of a then-new Rule 37(e), which provided that "absent exceptional circumstances" a party could not be sanctioned for failing to provide ESI that was lost "as a result of routine, good faith operation. . . . ." Although this version of Rule 37(e) was sometimes known as a "safe harbor" because of its apparent leniency, it was subject to varying interpretations and the imposition of inconsistent standards throughout the federal courts, which led to unexpected, and in some cases, extraordinary compliance costs.

Revised Rule 37(e), if not amended by Congress prior to December 1, 2015, will provide:

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or,
(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation 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;
(C) dismiss the action or enter a default judgment.

Revised Rule 37(e) may have profound effects on the outcome of federal cases. For example, contrary to most existing federal case law precedent, revised Rule 37(e) does not appear to require a showing of prejudice, so long as there is a showing of intent, before an adverse inference instruction may be given. Also, while revised Rule 37(e) should not foreclose independent state law claims for spoliation, it may prevent a federal judge's reliance on the court's inherent authority or state law when determining the appropriate measures the judge may take when ESI that should have been preserved is lost.

It is also interesting to note what revised Rule 37(e) will not do:

- It will not apply to tangible evidence. Therefore, in some federal courts, absent further change, there may be a different standard applied to the spoliation of ESI (e.g. an electronically stored document) and tangible evidence (e.g. the hard copy of a document).
- It will not change the duty to preserve evidence.
- It does not appear to address whether sanctions will be allowable against a party who attempts to destroy ESI but fails because, for example, the information is later recovered from a third party.
- Finally, as stated in the Notes of the Advisory Committee on the Rules of Civil Procedure, which drafted Revised Rule 37(e), it "does not apply when information is lost before a duty to preserve arises."

Only after the federal courts begin applying revised Rule 37(e) will we know if the revised rule will resolve more issues than it creates.

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