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Proposed Federal Rule 37(e): Savior From Sanctions?

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A client reasonably anticipates litigation, and in-house counsel issues a litigation hold to ensure that no potentially relevant information is lost or destroyed. However, due to an oversight, some otherwise discoverable emails that are relevant, but not essential to the adversary's claims or defenses, are lost. Can the client ultimately be sanctioned in the litigation for spoliation? Currently, because of a circuit split, the answer may be different depending on the federal district where the litigation is pending.[1] If the litigation is in federal court in New York, the court might order sanctions for negligent failure to preserve.[2] If, however, the litigation is in federal court in Virginia, the court may very well not issue sanctions for such negligent conduct.[3]

To address this issue, the Federal Civil Rules Advisory Committee has been considering changes to the rules, amid widespread concern about the burdens of electronic discovery and sanctions for failure to preserve electronically stored data. The result is proposed Rule 37(e),[4] which would replace the current rule that applies only to electronic materials, and create a uniform national standard for imposing sanctions for failure to preserve discoverable information, whether electronically stored or not.

The Proposed Rule

Perhaps the most talked about change to Rule 37(e) is the more lenient provision on sanctions. The proposed rule would allow sanctions for failure to preserve only in cases of willfulness or bad faith, except where the failure to preserve "irreparably deprive[s] a party of any meaningful opportunity to present a claim or defense."[5] Thus, the proposed rule may provide certain protections for those who lose discoverable information inadvertently.

Proposed Rule 37(e) contemplates a three-step inquiry for determining whether to impose sanctions: (1) Was information lost? (2) Was it lost willfully or in bad faith? (3) Did the loss of the information cause substantial prejudice to the litigation? Technically, a failed attempt to destroy information cannot be sanctioned under the proposed rule. If discoverable information is not lost, the inquiry ends.[6] If information is lost, the question becomes whether the party who failed to preserve the information did so willfully or in bad faith. This analysis is guided by the factors in proposed Rule 37(e)(3). These factors include the extent of notice the failing party had, the reasonableness of preservation efforts, the presence or absence of a preservation request, the proportionality of preservation efforts in the context of the overall litigation, and whether the party sought court advice about ongoing discovery disputes.[7]

This list of factors is not meant to be exhaustive; a court may consider other relevant factors, but the touchstone of its inquiry should be "the reasonableness of the parties' conduct."[8] In evaluating preservation efforts, the use of a litigation hold is an important, but not a dispositive, factor. Also, though a preservation request bears on the reasonableness of the receiving party's actions, proposed Rule 37(e) does not require parties to comply with all preservation requests. A party may make its own determination as to what constitutes a reasonable preservation effort. In addition, the proposed rule is not meant to encourage parties to run to the court whenever there is a dispute.

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Though seeking court advice is a factor under 37(e)(3), the preference is still for parties to arrive at their own agreements regarding discovery.[9] A party must act reasonably based on the kind of material to be preserved and the cost of preservation. Given options, a party is free to choose the least costly method of preservation. In fact, the Rules Advisory Committee removed "the party's resources and sophistication in litigation" as a factor because it was hesitant to increase the burden of preservation on more sophisticated parties.[10] Thus, it is the reasonableness of the party's efforts, and not its ability to bear the cost of preservation, that is relevant.

Proposed Rule 37(e) also draws a distinction between "remedies" and "sanctions" for failure to preserve. For example, if a party loses discoverable information, the court may, as a remedy, "permit additional discovery, order the party to undertake curative measures, or require the party to pay the reasonable expenses, including attorney's fees, caused by the failure."[11] The availability of these remedies protects a party who is deprived of discoverable information, but also shields the opposing party from sanctions for an innocent failure to preserve.

Shifting From Harsh Regime?

The willfulness or bad faith requirement in proposed Rule 37(e) represents a change from the current state of the law in a number of federal circuits, including the U.S. Court of Appeals for the Second Circuit. Indeed, an express purpose of the amended rule is to overturn the Second Circuit's 2002 decision in *Residential Funding v. DeGeorge Fin.*[12] In that case, the court held that "sanctions, including an adverse inference instruction, may be imposed where a party has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence."[13]

Under current case law in the Second Circuit, to obtain an award of sanctions, a complaining party must show: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.[14] A litigant has an obligation to preserve information when the party "has notice that the evidence is relevant to litigation or when [the] party should have known that the evidence may be relevant to future litigation."[15] A party has a culpable state of mind if it acts in bad faith, with gross negligence, or with ordinary negligence.[16]

> The proposed rule may provide certain protections for those who lose discoverable information inadvertently.

By proposing the amended rule, the Rules Advisory Committee sought to raise the general threshold for imposing sanctions, but also to provide a remedy when the prejudice of losing information is both irreparable and "exceptionally severe."[17] The committee commended the U.S. Court of Appeals for the Fourth Circuit's approach in *Silvestri v. General Motors.*[18] In that case, the plaintiff filed a products liability action against GM, claiming that he had suffered more substantial injuries than he otherwise would have when he crashed because the vehicle's airbag did not deploy. The plaintiff waited three years to file the action, during which time he failed to notify GM about the vehicle or to preserve it. When GM finally was able to inspect the car, there was nothing wrong with the airbag system; but because the car had been repaired and resold, there was no way to tell if the original airbag system was still in place.

The issue in *Silvestri* was whether to uphold the district court's dismissal of the claim based on plaintiff's spoliation of evidence. Applying federal law on spoliation, the Fourth Circuit noted that any "sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine."[19] The court went on to state that in order to impose sanctions, the party to be sanctioned must be at least somewhat at fault, although there are rare cases when dismissal is appropriate absent bad faith, when "the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case."[20] Applying these principles, the court upheld the district court's dismissal of the case for spoliation of evidence.

This is the balance that proposed Rule 37(e) seeks to strike: To be sanctioned, the party who fails to preserve evidence must do so willfully or in bad faith, but in extremely rare cases, like *Silvestri,* where the loss irreparably damages the opposing party, sanctions may be appropriate.

Impacts Going Forward

Proposed Rule 37(e) could have several impacts on litigation within the Second Circuit and other jurisdictions where the law permits sanctions for negligent conduct. Most obviously, the proposed rule would mean that sanctions—including an adverse inference—could no longer be imposed for mere negligence (absent irreparable injury to the other party). Thus, proposed Rule 37(e) would impact that subset of cases where a party loses discoverable information negligently, but the loss does not prevent the adversary from presenting its claims or defenses.[21]

In addition, the remedies for unintentional spoliation could result in court

orders to produce discovery that would not otherwise be required under a Rule 26(b)(2)(C) proportionality analysis, or to restore or produce a substitute for lost electronically stored information.

The new rule also might encourage a general shift toward more lenient sanctions for failure to preserve. The Rules Advisory Committee noted that proposed Rule 37(e)(2)(A) authorizes sanctions "in the expectation that the court will employ the least severe sanction needed to repair the prejudice resulting from loss of the information."[22] In addition, though proposed Rule 37(e)(2)(B) allows for the imposition of sanctions absent willfulness or bad faith when the spoliation "irreparably deprive[s] a party of any meaningful opportunity to present a claim or defense," the Advisory Committee cautioned that the provision should be used only in "extremely rare" cases.[23] Examples include the loss of an object that caused an injury before the other party can inspect it, and losing the only evidence of a very important event. In this way, the proposed rule is consistent with those cases that have imposed sanctions where a party loses a piece of evidence that is crucial to the determination of the case, negligently or otherwise.

Injecting a reasonableness inquiry into the new rule may help lessen those burdens and protect clients and counsel from the sometimes harsh results of the current law in certain federal circuits.

As always, it will be crucial for counsel to be familiar with clients' information systems and mechanisms for storing digital media, in order to advise clients to take all appropriate steps to preserve discoverable information. Issuing a document hold as soon as litigation is reasonably anticipated will remain a best practice; a written litigation hold will be helpful in proving that preservation attempts were reasonable. The Rules Advisory Committee has demonstrated a sensitivity to the ballooning costs and burdens of discovery when vast amounts of electronically stored information are involved. Injecting a reasonableness inquiry into the new rule may help lessen those burdens and protect clients and counsel from the sometimes harsh results of the current law in certain federal circuits.

After the November 2012 meeting, the Discovery Subcommittee forwarded the proposed rule to the Standing Committee, with a recommendation that it be published for public comment. The proposed rule is expected to be published in August 2013. The general response has been positive, and the proposed rule could be approved as early as 2015. Its adoption would end the current circuit split, creating greater certainty in the area of document preservation.

1. There is currently a circuit split as to whether negligence is enough to impose sanctions for spoliation. Compare *United States v. Laurent*, 607 F.3d 895, 902-3 (1st Cir. 2010); *Residential Funding v. DeGeorge Fin.*, 306 F.3d 99 (2d Cir. 2002) (negligence may suffice to support adverse inference instruction); (*Beaven v. United States DOJ*, 622 F.3d 540, 554 (6th Cir. 2010) (negligence may suffice to support adverse inference instruction); *Glover v. The BIC*, 6 F.3d 1318 (9th Cir. 1993) (bad faith is not required for a presumption that lost evidence is unfavorable to the party who fails to preserve it); and *Talavera v. Shah*, 638 F.3d 303, 312 (D.C. Cir. 2011) (non-accidental but negligent spoliation may suffice to support adverse inference instruction); with *Dalcour v. City of Lakewood*, No. 11-1117, 2012 U.S. App. LEXIS 16303 (10th Cir. Aug. 6, 2012) (negligence insufficient to support adverse inference instruction, but sufficient to support sanction of allowing questioning about the missing evidence); *Hodge v. Wal-Mart Stores*, 360 F.3d 446 (4th Cir. 2004) (willful or deliberate action is necessary to impose sanctions); *Russell v. Univ. of Tex. of Permian Basin*, 234 F. App'x 195, 208 (5th Cir. 2007) (negligence insufficient to support adverse inference instruction); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008) (negligence insufficient to support an adverse inference instruction); *Sherman v. Rinchem Co.*, 687 F.3d 996 (8th Cir. 2012) (negligence insufficient to support adverse inference instruction); and *Rutledge v. NCL (Bahamas)*, 464 Fed. App'x 826 (11th Cir. 2012) (adverse inference requires bad faith). The U.S. Court of Appeals for the Third Circuit has not spoken on sanctions for negligent failure to preserve, but district courts within the circuit have ordered sanctions for negligent failure to preserve evidence. See, e.g. *Klett v. Green*, No. 3:10-cv-02091, 2012 U.S. Dist. LEXIS 89115 (D. N.J. June 27, 2012).

2. See, e.g. *Essenter v. Cumberland Farms*, No. 1:09-CV-0539 (LEK/DRH), 2011 U.S. Dist. LEXIS 3905 at *1 (N.D.N.Y. Jan. 14, 2011).

3. *Simms v. Deggeller Attractions*, Nos. 7:12-cv-00038; 7:12-cv-00039; 7:12-cv-00161, 2013 U.S. Dist. LEXIS 448 at *1, *17 (W.D. Va. Jan. 2, 2013) (holding that sanction of dismissal was inappropriate for negligent failure to produce temporarily-stored photographs from theme park's electronic photo system).

4. (e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION. If a party failed to preserve discoverable information that reasonably should have been preserved in the anticipation or conduct of litigation,

(1) The court may permit additional discovery, order the party to undertake curative measures, or require the party to pay the reasonable expenses, including attorney's fees, caused by the failure.

(2) The court may impose any of the sanctions listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction only if the court finds:

(A) that the failure was willful or in bad faith, and caused substantial prejudice in the litigation; or (B) that the failure irreparably deprived a party of any meaningful opportunity to present a claim or defense.

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, 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 discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request that information be preserved, the clarity and reasonableness of the request, and whether the person who made the request and the party engaged in good-faith consultation regarding the scope of preservation;

(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E) whether the party sought timely guidance from the court regarding any unresolved disputes concerning the preservation of discoverable information.

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

6. However, the committee noted that it "did not want to appear to limit the court's authority in responding to such conduct." Draft Committee Note to 37(e)(2)(A) n. 2. If sanctions were imposed in cases of extreme conduct, though, they would not be imposed pursuant to Proposed Rule 37(e).

7. Committee Materials at 127.

8. FED. R. CIV. P. 37(e)(3) (proposed) advisory committee's note.

9. Id.

10. See Advisory Committee on Civil Rules, 127 (Nov. 1-2, 2012) ("Committee Materials").

11. Committee Materials at 127.

12. Committee Materials at 124; 306 F.3d 99 (2d Cir. 2002).

13. Id. at 101.

14. *Augstein v. Leslie*, No. 11 Civ. 7512 (HB), 2012 U.S. Dist. LEXIS 149517, at *1, *9 (S.D.N.Y. Oct. 17, 2012).

15. See id.

16. See *Augstein*, No. 11 Civ. 7512 (HB), 2012 U.S. Dist. LEXIS 149517 at *13; *GenOn Mid-Atl. v. Ston & Webster*, No. 11 Civ. 1299 (HB), 2012 U.S. Dist. LEXIS 70750, 2012 WL 1849101 (S.D.N.Y. May 21, 2012); *Short v. Fair Housing Justice Center*, No. 11 CV 5989 (KMW), 2012 U.S. Dist. LEXIS 150141, at *1, 11 (Oct. 10, 2012) (internal citations omitted).

17. Committee Materials at 125.

18. 271 F.3d 583 (4th Cir. 2001).

19. Id. at 590.

20. Id. at 593.

21. See e.g., *Essenter v. Cumberland Farms*, No. 1:09-CV-0539 (LEK/DRH), 2011 U.S. Dist. LEXIS 3905 at *1 (N.D.N.Y. Jan. 14, 2011) (ordering an adverse inference sanction where defendant negligently lost relevant surveillance footage).

22. FED. R. CIV. P. 37(e)(2)(A) (proposed) advisory committee's note.

23. FED. R. CIV. P. 37(e)(2)(B) (proposed) advisory committee's note.