Spoliation Scrutiny: Disparate Standards For Distinct Mediums

By **Robin Shah** (December 21, 2017, 5:07 PM EST)

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On Dec. 1, 2015, Federal Rule of Civil Procedure 37(e) was amended with the intent of providing a clearer road map for courts analyzing whether to permit sanctions for the spoliation of evidence. The rules advisory committee noted that federal courts have historically applied varying standards for imposing spoliation sanctions, and the amended rule was supposed to "foreclose[] reliance on inherent authority or state law" to establish uniformity among the courts.

Two years later, it has established uniformity in many ways — but only for electronically stored information. Rule 37 does not apply to tangible or hardcopy evidence, and as a result, spoliation claims for nonelectronically stored information are still subject to the common law of each respective jurisdiction. In other words, rather than create uniformity in the standard governing spoliation claims, the advisory committee has arguably deepened the diversity in approaches by creating one standard for electronically stored information and leaving in place the existing varied approaches to tangible evidence.

Rule 37(e) sets out the sanctions that a court can impose for spoliation applying three main factors — duty, prejudice and culpability. Under Rule 37(e), if a party failed to take reasonable steps to preserve electronically stored information that it had a duty to preserve in anticipation of litigation and the information cannot be restored or replaced, the court can take one of two routes for sanctions.

The first set of potential sanctions is based on a finding of prejudice. If the court finds that the other party was prejudiced by the loss of information, it may order "measures no greater than necessary to cure the prejudice."[1] The exact type of sanction is up to the court's discretion, but some examples are the preclusion of evidence or monetary sanctions.

The second set of sanctions is based on culpability. If (and only if) the court finds that the party that lost documents acted with an "intent to deprive another party of the information's use in the litigation," it may order more severe sanctions such as default judgment or an adverse inference jury instruction even without a separate finding of prejudice. The advisory committee supported its decision to limit the most severe sanctions to cases of intentional loss by pointing out that negligence or even gross negligence fails to support the premise for more extreme sanctions. For example, with respect to an adverse inference jury instruction, negligent or grossly negligent behavior does not support a reasonable inference that any lost evidence was unfavorable to the party responsible for the loss or destruction because information lost as a result of

negligence could have been favorable to either party.

The culpability requirement is where Rule 37(e) most drastically deviates from the common law. The common-law approach, although it varies from one state to the next and even among federal courts, generally mirrors the requirements for a duty to preserve and prejudice in the federal rule. With respect to intent, however, some federal courts applying the common-law rule have found that negligence or gross negligence are sufficient to warrant the more extreme sanctions, such as an adverse inference instruction. See e.g. Residential Funding Corp. v. DeGeorge Financial Corp.[2] The new Rule 37(e) rejected this approach and ensured that the most severe sanctions could not be awarded for inadvertent or even reckless loss of information. But because Rule 37(e) only applies to electronic information, nonelectronic evidence is still subject to the varying common-law culpability standards in each respective federal circuit.

When does that become a problem? Cases in which the spoliation claim deals solely with electronic information or solely with tangible evidence are more straightforward because there is still a single standard to apply (at least within a particular circuit), whether it is Rule 37 or common law. However, there is currently no specific guidance for what courts should do if a request for spoliation sanctions relates to *both* electronically stored and nonelectronically stored information. In the two years since the amended rules were enacted, the few cases that have addressed this issue suggest that there are two potential approaches.

Under the first approach, some courts have concluded that their common law is identical or substantially similar to the standard under Rule 37(e), such that the same Rule 37 analysis can be applied to both electronic and tangible evidence. A district court in the Tenth Circuit took this approach in Mcqueen v. Aramark Corp., where the court found that the defendant failed to take reasonable steps to preserve work orders and related documents in both electronic and paper form after receiving a letter from plaintiffs requesting that the documentation be preserved.[2] The Utah District Court laid out the standard in Rule 37 that would apply to the electronic information and simply stated that "[t]he Tenth Circuit has applied the same Rule 37 analysis to non-ESI spoliation issues."[4] The court proceeded to apply Rule 37 and found that in forgetting to inform its employees about a litigation hold over a year after receiving the preservation letter, the defendants did not act with the intent to deprive but were grossly negligent. With respect to prejudice, the court noted that although the defendants could undertake a forensic effort to recover ESI, the paper records could not be restored at all, which resulted in prejudice to the plaintiffs. Ultimately, the court rejected an adverse inference instruction because the level of culpability did not rise to an intent to deprive, but allowed the parties to present evidence to the jury regarding the destruction of the work orders as a "curative measure" under Rule 37 because the plaintiffs were at least partially prejudiced.

Under the second approach, some courts have conducted separate sanctions analyses for the electronic and nonelectronic evidence. As two recent cases illustrate, these separate analyses sometimes lead to the same result — and sometimes not.

For example, in Best Payphones Inc. v. City of New York[5], plaintiff Best Payphones, a company that installs and maintains public pay telephones ("PPTs"), alleged that the city of New York and other defendants violated its First and Fourteenth Amendment rights by placing certain requirements on operating PPTs that led to a loss of business and asset value. Best Payphones further alleged that the defendants created additional requirements that hurt its business in retaliation for Best Payphones' complaints about the initial restrictions.

The defendants filed a motion for spoliation sanctions claiming that the plaintiff failed to produce documents necessary to refute Best Payphones' damages claims related to its alleged loss of business and overall business devaluation including (i) emails between Best

Payphones and third parties that sought to buy their business; (ii) revenue information and daily activity reports from each payphone; (iii) certain bank statements; and (iv) contracts and agreements between Best Payphones and service providers. As a result, the defendants sought several sanctions including an adverse inference instruction, the preclusion of evidence related to the value of Best Payphones, the striking of certain defenses and/or monetary damages. Since the material that was alleged to have been destroyed consisted of both electronic information (emails) and tangible evidence (bank statements and daily activity reports), the court acknowledged that "as the law currently exists in the Second Circuit, there are separate legal analyses governing the spoliation of tangible evidence versus electronic evidence."[6] Specifically, the failure to preserve electronically stored information was governed by Federal Rule of Civil Procedure 37(e), and the preservation of tangible evidence remained subject to common law.

The court first examined culpability and found that Best Payphones had a legitimate misunderstanding as to the retention of emails and believed that the daily activity reports were actually inaccurate for determining business value. Therefore, the court held that the plaintiff's conduct was negligent, but not willful or grossly negligent. The court acknowledged that negligence was not enough to warrant an adverse inference instruction under Rule 37 for the loss of emails, but that it "may issue an adverse inference instruction with regard to the tangible evidence (i.e., the bank statements and daily activity reports) on a finding that Plaintiff acted negligently."[7] However, the court ultimately rejected an adverse inference instruction for the tangible evidence as well upon finding that the defendants were not prejudiced. Therefore, even with the separate analysis and the separate standard for culpability, the court came to the same conclusion for both the electronic and nonelectronic evidence.

By contrast, the Eleventh Circuit addressed the same situation just last month but came to different conclusions for the electronic and nonelectronic evidence. In United States Equal Employment Opportunity Commission v. GMRI Inc., the EEOC alleged that the defendant intentionally destroyed paper applications, interview booklets and relevant emails that would have supported its allegations of intentional age discrimination.[8] The EEOC sought several sanctions including an adverse inference, permission to introduce the evidence of loss to the jury and prohibiting the defendants from introducing evidence related to the content of the lost documents. The court immediately established that it would need to conduct two separate analyses because "[t]he Eleventh Circuit's common law of spoliation concerns the paper applications and interview booklets [and] Rule 37(e)(2) governs the email evidence (because it is electronically stored information)."[9]

Under Eleventh Circuit common law governing tangible evidence, the court found that for severe sanctions such as an adverse inference instruction, the EEOC had the burden of proof to demonstrate "first, that the missing evidence existed at one time; second, that the alleged spoliator had a duty to preserve the evidence; and third, that the evidence was crucial to the movant being able to prove its prima facie case or defense."[10] Although the court acknowledged that the loss of paper applications and interview booklets caused "some prejudice," it pointed out that neither the applications nor the interview booklets could have actually assisted the age discrimination analysis because they did not contain the candidates' birth dates and the interview booklets were rarely actually used during interviews. Moreover, the court noted that the missing documents were clearly not crucial because the EEOC's expert was still able to provide a thorough analysis. As a result, the court rejected the EEOC's request for a jury instruction with respect to the tangible evidence, but permitted the parties to present arguments to the jury regarding the loss and potential relevance of the applications and interview booklets.

The court took a different approach with respect to emails. Applying the amended Rule 37 (e)(2), the court focused on the prejudice factor and noted that an adverse inference instruction could be awarded (even if the missing documents are not critical) if it can be shown that the defendants acted with the intent to deprive the EEOC of the evidence. The

court allowed the EEOC to argue to the jury that it may find an adverse inference about the missing electronically stored information if the jury also concludes that the defendants acted in bad faith and with the intent to deprive.

These conflicting approaches and results raise several questions not yet resolved by the case law.

First, does it really make sense to treat tangible and electronically stored evidence differently? The advisory committee certainly thought so when it suggested that the new Rule 37 applies only to electronically stored information because perfection in preserving all electronic information is often impossible and "[b]ecause electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere."[11] However, many hardcopy documents have alternative sources as well. For instance, many hardcopy documents exist only because someone printed the electronic version of a document. In addition, hardcopy documents that exist from a pre-computer filing system are often scanned into an electronic system to ensure that all files pertaining to a particular category are stored in one place. The one instance in which it does make sense to treat certain types of evidence differently is in the case of nondocument tangible evidence, e.g., the car in a car accident case, which more obviously cannot be substituted with an alternative source. But suffice it to say, the advisory committee's rationale extends to a broad swath of tangible evidence, especially of the documentary sort.

Second, if the culpability standard is less stringent in common law — i.e., more severe sanctions may be imposed without a showing of the highest culpability — should Rule 37 (e)'s culpability standard apply to both types of evidence? In Best Payphones, the court said no and considered granting an adverse inference instruction for the tangible evidence even though it determined that the plaintiff did not act in bad faith. But that approach raises several problems. For one thing, it could encourage parties in jurisdictions with a negligence standard to strategically focus spoliation claims on hardcopy documents in order to at least get some type of extreme sanction granted. More importantly, it allows courts to perpetuate a lower culpability standard for severe sanctions. That approach seems to contradict one of the aims of the Rule 37(e) amendments, namely to prevent courts from granting extreme sanctions in cases of inadvertent loss.

Third, how will the potentially different outcomes as a result of two separate analyses affect the trial? In EEOC, the jury will hear about the circumstances surrounding the loss of the interview booklets and applications, but will not receive an adverse inference instruction, leaving the jurors with no guidance as to what to do with the evidence about document loss. For emails, the jury will have the option of finding an adverse inference if it determines that the defendants acted in bad faith. In other words, it will have to conduct two distinct spoliation analyses that will distract from the merits of the case. Moreover, even though the jurors may technically find an adverse inference for the emails but not the tangible evidence, that distinction may not hold much weight with respect to the overall verdict, because any adverse inference instruction with respect to document loss will inevitably frame the alleged spoliating party in a negative way.

As these issues suggest, leaving hardcopy evidence out of the amended rule does more harm than good. If the advisory committee were to at least amend the rule to apply to electronically stored *and* hardcopy or paper documentation, it would eliminate the vast majority of inconsistency and confusion created by applying different culpability requirements and further the goal of awarding extreme sanctions only in cases of intentional loss. The rule could still exclude tangible, nonpaper evidence, which is often unable to be replaced and yet most critical to the parties. In the meantime, it will be interesting to watch more courts grapple with the issue of applying disparate standards to a single spoliation claim to see if the lack of uniformity catches the advisory committee's

attention.

Robin Shah is an associate in the New York office of Skadden Arps Slate Meagher & Flom LLP.

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[1] Fed. R. Civ. P. 37

[2] See e.g. Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 101 (2d Cir. 2002)

[3] No. 2:15-CV-492-DAK-PMW, 2016 WL 6988820, at *3 (D. Utah Nov. 29, 2016)

[4] Id.

[5] Best Payphones Inc. v. City of New York, No. 1-CV-3924 (JG) (VMS), 2016 WL 792396, at *3 (E.D.N.Y. Feb. 26, 2016)

[6] Id. at *3

[7] Id. at *4

[8] No. 15-20561-CIV, 2017 WL 5068372, at *1 (S.D. Fla. Nov. 1, 2017)

[9] Id. at *2

[10] Id. at 22 (citation omitted)

[11] Fed. R. Civ. P. 37