Legal Backgrounder

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Not-so-New E-Discovery Amendments Are Making a Lasting Impression

by John J. Jablonski

The "E-Discovery" amendments to the Federal Rules of Civil Procedure are now past their fourth full year of utilization. Three previous *Legal Backgrounders* have tracked their implementation since the December 1, 2015 effective date.[1] We now have sufficient evidence to say that the Rules have made an impact on judicial analysis of spoliation motions. While some courts refuse to relinquish their inherent authority to address bad-faith discovery conduct, most e-discovery spoliation decisions now follow the framework set forth in the new amendments.

The amendments made two significant changes. First, the scope of discovery was narrowed by an amendment to Rule 26(b)(1). The intent of the change was to significantly reduce discovery costs and focus the parties on the merits of a case, including requiring courts and the parties to consider proportionality of discovery. Second, amended Rule 37(e) expressly swept away inconsistent federal spoliation decisions involving the failure to preserve electronically stored information (ESI). Creation of a rules-based spoliation standard marked a major shift. The new framework was intended to replace inconsistent spoliation caselaw that relied on courts' inherent powers to sanction parties for lost or destroyed ESI. A significant rewrite of Rule 37(e) was designed to prohibit sanctions when ESI is lost despite the use of reasonable steps during preservation.

As reported over the past three articles, some courts continue to eschew application of the Rules, choosing instead to rely on inherent authority to award e-discovery sanctions.[2] Such decisions are in the minority.[3]

Amended Rules Displace Inherent Authority

Over the last few years, a majority of reported decisions have determined that Rule 37(e), and not a court's inherent authority, governs ESI spoliation disputes. Nevertheless, counsel continue to argue that courts should punish parties who lose ESI under their inherent authority. An increasing body of case law,

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[1] Fed. R. Civ. P. 26(b)(1) and 37(e). *See* prior articles at http://www.wlf.org/upload/legalstudies/legalbackgrounder/052716LB_Jablonski.pdf; http://www.wlf.org/upload/legalstudies/legalbackgrounder/120216LB_Jablonski.pdf; and https://www.wlf.org/legalstudies/legalbackgrounder/042018LB_Jablonski.pdf.

[2] *See Colonies Partners L.P. v. Cty. of San Bernardino*, 2020 U.S. Dist. LEXIS 56922, at *5, n 2 (C.D. Cal Feb. 27, 2020) (collecting competing cases).

[3] *See Newberry v. Cty. of San Bernardino*, 750 F. App'x 534, 535 (9th Cir. 2018) ("the detailed language of Rule 37(e) [forecloses] reliance on inherent authority."); *Sosa v. Carnival Corp.*, 2018 U.S. Dist. LEXIS 204933 (S.D. Fla Dec. 4, 2018) (collecting 11th Cir. district court cases); *MB Realty Grp., Inc. v. Gaston Cty. Bd. of Educ.*, 2019 U.S. Dist. LEXIS 88899 (W.D.N.C. May 28, 2019) (Rule 37(e) has displaced inherent authority as a mechanism to sanction ESI spoliation); *Borum v. Brentwood Vill., LLC,* 332 F.R.D. 38, 41 (D.D.C. Jul. 18, 2019) (the loss of ESI falls squarely within Rule 37(e)); and *Brittney Gobble Photography, LLC v. Sinclair Broad. Grp, Inc.*, 2020 U.S. Dist. LEXIS 62708 (D. Md. Apr. 9, 2020) (Rule 37(e) forecloses reliance on inherent authority).

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however, flatly rejects such arguments. For example in *Nuvasive, Inc. v. Kormanis*, plaintiff cited to *Chambers v. NASCO* arguing that courts retain inherent authority to sanction ESI spoliation despite enactment of amended Rule 37(e).[4] *Nuvasive* addressed the argument head on, holding *Chambers* is more nuanced because the Supreme Court did not find enactment of the rule at issue abrogated inherent authority sufficient to compel reliance on the Federal Rules of Civil Procedure. The new amendments, however, are supported by an Advisory Committee Note that expressly confirms Rule 37(e) "forecloses reliance on inherent authority . . . to determine when certain measures [ ] should be used [to sanction ESI spoliation]."[5]

Rule 37(e) Avoids Harsh Sanctions

Amended Rule 37(e) has become a steadfast tool for avoiding spoliation sanctions when ESI is destroyed without an intent to deprive its use in litigation. The most striking example is Southern District of New York courts' adoption of new Rule 37(e).[6] The federal courts in New York are home to one of the most widely cited series of e-discovery sanctions cases—*Zubulake*[7] and the Second Circuit's *Residential Funding* case. The amended Rule 37(e) specifically rejected *Residential Funding*.[8]

Jackson v. E-Z-GO Div. of Textron, Inc. is an example of Rule 37(e) preventing harsh e-discovery sanctions.[9] On the eve of trial Textron asked the court to reconsider a prior ruling allowing plaintiffs to present evidence and testimony of defendant's alleged spoliation to the jury. Defendant migrated data from its law department's matter-management system years prior to plaintiff's lawsuit. Allegedly relevant data was destroyed pursuant to defendant's records management policy. The prior ruling was reversed, and plaintiffs were prevented from presenting spoliation evidence at trial. The court noted Rule 37(e) permits it to order measures no greater than necessary to cure the prejudice *only* if ESI 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* there is a finding of prejudice. The court held there was no reason to anticipate the *Jackson* litigation when defendant destroyed the data years earlier. The court also held plaintiffs failed to establish prejudice.

Rule 37(e) prevented an adverse inference charge in *Man Zhang v. City of New York*, even though defendant lost digital surveillance footage.[10] Plaintiff failed to establish defendant's intent to deprive plaintiff of the use of information. As a result, the court limited plaintiff's relief to no more than additional measures under the Rule. The United States lost a surveillance video of a violent attack in *Bistrian v. Levi*.[11] Although the court was disturbed by the loss of ESI under the circumstances, the evidence presented did not establish an intent to deprive.

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[4] 2019 U.S. Dist. LEXIS 40195, at *5 (M.D.N.C.) (*citing Chambers v. NASCO*, 501 U.S. 32 (1991))("*Chambers* thus bolsters (not undermines) the conclusion that the [c]ourt should look exclusively to Rule 37(e) in resolving [ESI discovery motions]").

[5] *Id*. at *7 (*quoting* Fed. R. Civ. P. 37 Advisory Comm.'s Note, 2015 Amend., Subdiv. (e)).

[6] *Fashion Exch. LLC v. Promotions*, 2019 U.S. Dist. LEXIS 218286, at *10 (S.D.N.Y. Dec. 16, 2019) ("District courts in the Second Circuit have recognized that Rule 37(e) replaces the prior framework for claims regarding a failure to preserve ESI."); *Lokai Holdings LLC v. Twin Tiger USA LLC*, 2018 U.S. Dist. LEXIS 46578 (S.D.N.Y. Mar. 12, 2018) ("Rule 37(e) [ ], as amended in 2015, governs sanctions for failure to preserve ESI."); *Leidig v. Buzzfeed, Inc.*, 2017 U.S. Dist. LEXIS 208756 (S.D.N.Y. Dec. 19, 2017) ("Rule 37(e) amended the traditional spoliation rule as it related to ESI in a number of ways" and requiring clear and convincing evidence to prove "intent to deprive.").

[7] *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (duty to issue a legal hold) and 229 F.R.D. 422 (S.D.N.Y. 2004) (sanctions for negligent failure to preserve ESI).

[8] The Advisory Committee Notes in support of Rule 37(e)(2) expressly rejects *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002) (which authorized the giving of adverse-inference instructions on a finding of negligence or gross negligence).

[9] 2018 U.S. Dist. LEXIS 130661 (W.D. Ky. Aug. 3, 2018).

[10] 2019 U.S. Dist. LEXIS 141229 (S.D.N.Y. Aug. 20, 2019).

[11] 2020 U.S. Dist. LEXIS 50467 (E.D. Pa Mar. 24, 2020).

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In *Karsch v. Blink Health Ltd.*,[12] a Southern District of New York court conducted a thorough analysis using Rule 37(e) in a commercial dispute. Plaintiff allowed employees to destroy a server containing relevant evidence. The court admonished plaintiff and his counsel for failing to take reasonable steps to preserve contents of the server but placed the burden on defendant to demonstrate plaintiff acted with the intent to deprive defendant of the information's use in litigation. The court also required clear and convincing evidence. Ultimately, defendant could show no such intent and the court did not award sanctions under Rule 37(e)(2). The court did allow defendant to present evidence of spoliation to the jury under Rule 37(e)(1).[13]

In *Cruz v. G-Star Inc.*, Rule 37(e) prevented an adverse inference charge, despite a magistrate judge's recommendation that it should be given.[14] Relying on Rule 37(e) the district court judge held that defense counsel's failure to familiarize herself with her client's document retention policies and technology (to properly preserve evidence) was a failure to take reasonable steps. Although the court deemed defendants' failure negligent, the court held defendant possessed no intent to deprive plaintiff of the information's use in litigation.

Proportionality Analysis Adoption Slow; Often Cursory

While some litigants, especially business defendants, hoped that judges would deploy proportionality more frequently to reduce costly e-discovery, courts remain reluctant to rely on proportionality to curb e-discovery. Courts' textbook citation to the six proportionality factors continues: 1) the importance of the issues at stake in the action; 2) the amount in controversy; 3) the parties' relative access to relevant information; 4) the parties' resources; 5) the importance of the discovery in resolving the issues; and 6) whether the burden or expense of the proposed discovery outweighs its likely benefit.[15] A review of cases since 2018 reveals few instances where judges actually undertake a detailed analysis of proportionality to curb discovery.

A very recent example of a detailed proportionality analysis is *Lawson v. Spirit Aerosystems*.[16] The *Lawson* court analyzed plaintiff's request for production of residual documents not produced following the use of technology assisted review (TAR). The court noted that the burden and expense of additional ESI discovery was not relevant to the case, citing to the $600,000 defendant already paid. The court further found quite telling plaintiff's refusal to pay an estimated $40,000 to conduct the requested production. The court rejected an argument that the amount in controversy and resources of defendant were determinative, holding that if these factors were determinative "they would eradicate proportionality considerations in every case against high-profile litigation targets with substantial resources."[17]

In *Vallejo v. Amgen, Inc.*, the Eighth Circuit rejected plaintiff's argument that an objection on proportionality grounds must be supported by an affidavit showing plaintiff's discovery requests were unduly burdensome.[18] In *Virginia Dept. of Corr. v. Jordan* the Fourth Circuit held that a "more demanding variant of the proportionality analysis" applies when considering relevancy in the context of the burden on a third-party subject to subpoena under Rule 45.[19] Starting with a Rule 26(b)(1) analysis, the court held that the purpose of proportionality is to consider, among other things, whether the burden or expense of the proposed discovery outweighs its likely benefit. The court noted that the proportionality analysis "relieves

[12] 2019 U.S. Dist. LEXIS 106971 (S.D.N.Y. Jun. 20, 2019).
[13] *Id*. at *76 (holding that a jury instruction on evidence that does not include a mandatory or permissive adverse inference is permitted under Rule 37(e)(1)).
[14] 2019 U.S. Dist. LEXIS 169445 (S.D.N.Y. Sep. 30, 2019).
[15] Fed. R. Civ. P. 26(b)(1); *In re Arby's Rest. Group Litig.*, 2018 U.S. Dist. LEXIS 233650 (N.D. Ga Aug. 16, 2018) (using the proportionality factors to limit the number of custodians subject to ESI discovery).
[16] 2020 U.S. Dist. LEXIS 64381 (D. Kan. Apr. 9, 2020).
[17] *Id*. at *27 (internal citation omitted).
[18] 903 F.3d 733 (8th Cir. 2018).
[19] *Virginia Dept. of Corr. v. Jordan*, 921 F.3d 180, 189 (4th Cir. 2019).

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parties from the burden or expense of taking unreasonable steps to ferret out every relevant document."[20]

In *Washtenaw Cty. Emples. Retirement Sys. v. Walgreen Co.*, proportionality caused the court to weigh the needs of the case against the burden of proposed discovery on public polices (such as the chilling effect of disclosing settlement materials) underlying Federal Rule of Evidence 408 (which addresses the inadmissibility of settlement discussions).[21] Using Rule 26(b)(1), the court denied plaintiff's motion, holding "[n]othing about the needs of this case suggests any compelling reason why [p]laintiffs must have the [settlement materials] to prosecute their claims, even if the materials are relevant to those claims and might well be very useful to [p]laintiffs in proving them."[22]

One dissent is notable due to its use of an imaginary "proportionality scale." In *Jones v. Johnson*, the Sixth Circuit reversed the district court's refusal to grant additional discovery (although the district court did not address proportionality).[23] The dissent argued that Rule 26(b) requires the district court to conduct some line-drawing. The dissent went on to analyze each item of discovery, noting whether the item ranked high or low on the proportionality scale.

Conclusion

After four years, the not-so-new E-Discovery Rules are working as intended. Harsh sanctions are avoidable when litigants take "reasonable steps" to preserve evidence. Not only is more-than-negligent conduct required for a court to award an adverse-inference jury instruction, courts have declined to award spoliation sanctions in circumstances that would have led to harsh sanctions before amendment of Rule 37(e). The routine application of proportionality remains less than hoped for, but courts continue to use proportionality to limit the burden and expense of discovery.

[20] *Id*. at 189.

[21] 2019 U.S. Dist. LEXIS 198978 (N.D. Ill. Nov. 15, 2019).

[22] *Id*. at *24-25.

[23] 2020 U.S. App. LEXIS 875 (6th Cir. Jan. 9, 2020).

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