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I CAN SEE CLEARLY NOW: Proposed Rule 37(e) Creates Uniform Standard For Resolving ESI Destruction Issues

by Alex L. Rubenstein

After months of public comments and public hearings on proposed changes to the Federal Rules of Civil Procedure relating to electronic discovery, the Advisory Committee on Civil Rules (the Advisory Committee) went back to the drawing board on Federal Rule of Civil Procedure 37(e) and has returned with a new proposed rule that clearly spells out how courts should deal with spoliation of electronically stored information (ESI), potentially resolving a circuit split that has developed since Rule 37(e) was originally enacted in 2006. In its April 11, 2014, report, the Advisory Committee recommended approval of a new version of Rule 37(e) that creates a uniform standard for resolving issues arising out of the destruction of ESI, emphasizing proportionality and making clear that the most severe sanctions are reserved for the intentional destruction of ESI.

Rule 37(e) Background

Rule 37(e) was enacted in 2006 in order to protect parties that allege that they have inadvertently destroyed ESI through the good faith operation of a routine electronic information storage system (e.g., a standard procedure whereby all archived ESI is destroyed after two years). That rule does not allow sanctions for this type of data destruction "absent exceptional circumstances." In the years since the passage of the original Rule 37(e), courts have grappled with the scope of "exceptional circumstances," and in particular have widely disagreed on the level of culpability required to issue sanctions under Rule 37(e). Some courts have required proof of willfulness, while others have found mere negligence sufficient to issue sanctions, up to and including an adverse inference to the jury – frequently the case death knell of the party against which it is issued.

The August 2013 Proposed Rule

To expand upon and add clarity to Rule 37(e), the Advisory Committee in August of 2013 issued a proposed amendment to the rule for public comment, as part of a broader update of the Federal Rules of Civil Procedure. The August 2013 proposed rule significantly developed Rule 37(e), specifying that certain remedies were available when a party failed to preserve ESI in anticipation of litigation or during litigation. Under that proposed rule, a court could resolve a failure to preserve ESI by permitting additional discovery, ordering curative measures, ordering the at-fault party to pay reasonable expenses (including attorney's fees) caused by the failure to preserve or issuing an adverse inference instruction to the jury. The August 2013 version of Rule 37(e) limited adverse inference instructions to scenarios in which a litigant's failure to preserve "caused substantial prejudice in the litigation and [was] willful or in bad faith" or "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation."

While the August 2013 proposed rule generally was considered an improvement upon the rule promulgated in 2006, it still left a great deal of uncertainty. The structure of the rule made it unclear whether all sanctions required a finding of bad faith or only adverse inference sanctions. According to the public comments reviewed by the Advisory Committee, the August 2013 rule was widely read as limiting any sanctions to findings of

willfulness or bad faith. Further, the ambiguity of the "bad faith" standard for adverse inference sanctions was not ideal given the stakes involved.

The New Proposed Rule

The new proposed rule brings greater clarity to Rule 37(e) than the August 2013 version. Under the new proposal, the adverse inference sanction is limited to one discrete scenario, when a party destroys ESI with the intent to deprive another party of the ESI's use in the litigation. While this analysis may still require a fact-intensive inquiry, the focus on this specific question will simplify the court's determination. More important, this rule automatically eliminates adverse inference as a potential consequence when a failure to preserve is the result of negligence. In the case of negligence, and under all other circumstances besides intent to deprive another party of ESI for use in the litigation, the trial court has the discretion to take remedial, and only remedial, action. Specifically, the proposed rule emphasizes proportionality, providing that the court may take "measures no greater than necessary to cure" the harm caused by the failure to preserve. In this way, a litigant who accidentally destroys ESI will be obligated to do whatever can be done to remedy its error but will no longer run the risk of losing a case because it accidentally destroyed ESI.

Implications for Litigants

The new proposed rule makes clear that unless ESI is intentionally destroyed, the harmed party's remedy is limited to whatever is necessary to cure the harm, and nothing more. However, this new rule would not diminish the importance of preserving data. Even under the proposed rule, the negligent destruction of ESI can lead to numerous costs and headaches for a litigant, including conducting further discovery, attempting to recover information off backup tapes and even paying certain attorney's fees to the opposing party. Moreover, the question of whether destruction was negligent or intentional may itself still have to be litigated. That litigation should be more straightforward than it is under the current rule, but it nonetheless would still create additional costs.

Thus, the proposed Rule 37(e) set forth in the April 11, 2014, report of the Advisory Committee is not a license for litigants to destroy ESI without consequence. Instead, the rule places reasonable preservation obligations on litigants and imposes fair consequences where those obligations are not met.

The Standing Committee is scheduled to review the Advisory Committee's recommendations May 29-30, 2014. If approved, the proposed changes will be submitted to the Judicial Conference for review in September. If the Standing Committee approves the proposed rule, the Supreme Court will have through April 2015 to review, followed by a six-month window for congressional review. The earliest that this or any of the other proposed rules approved in the April 11, 2014, report could go into effect is Dec. 1, 2015. ▪


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