Expert Q&A on Proving Intent for Spoliation Sanctions Under FRCP 37(e)(2): Developing Case Law

Federal Rule of Civil Procedure (FRCP) 37(e)(2) was amended in 2015 to allow courts to impose certain severe sanctions for the failure to preserve relevant electronically stored information (ESI), but only after finding that the spoliating party "acted with the intent to deprive another party of the information's use in the litigation." Although the amendment was designed to provide a uniform standard for the level of culpability required to warrant sanctions under FRCP 37(e)(2), recent cases demonstrate that determining whether the intent-to-deprive requirement is satisfied remains a highly fact-specific inquiry. In this expert Q&A, *David Lender*, *Eric Hochstadt*, and *Dani Kirsztajn* of *Weil, Gotshal & Manges LLP* provide an update on the growing body of case law that attempts to define the contours of the standard under amended FRCP 37(e)(2) and highlight the key takeaways for litigants seeking sanctions under the rule.

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What prompted the 2015 amendments to FRCP 37(e)?

FRCP 37(e) was amended in 2015 to provide a uniform standard for the imposition of spoliation sanctions on litigants who failed to preserve relevant ESI. The former rule provided little guidance in defining what constituted sanctionable spoliation, which caused federal circuits to adopt conflicting standards for imposing sanctions. (2015 Advisory Committee's Note to FRCP 37(e).)

One key difference was the level of culpability a court required to impose severe sanctions, such as adverse inference instructions or case-terminating sanctions. Some courts, relying on their inherent authority to manage discovery, imposed severe sanctions where a party negligently lost ESI, while other courts imposed these sanctions only where a party acted intentionally or in bad faith in failing to preserve ESI (compare, for example, *Residential Funding Corp. v. DeGeorge Fin. Corp.*,306 F.3d 99, 108 (2d Cir. 2002) (noting that an adverse inference instruction may be appropriate in some cases involving the negligent destruction of evidence) and *Osberg v. Foot Locker, Inc.*, 2014 WL 3767033, at *6-7, *9-10 (S.D.N.Y. July 25, 2014) (imposing an adverse inference instruction based on the "simple negligence" of two employees in failing to issue a litigation hold because each mistakenly thought that the other had taken responsibility for issuing the hold) with *Malibu Media, LLC v. Harrison*, 2014 WL 7366624, at *3 (S.D. Ind. Dec. 24, 2014) (explaining that "a showing of bad faith is a prerequisite to imposing sanctions for the destruction of evidence" and defining "bad faith" as "destruction for the purpose of hiding adverse information") (internal quotations omitted); see also *Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc.*, 2008 WL 4513696, at *4 (D.N.J. Oct. 1, 2008) (recognizing a split within the Third Circuit regarding the requisite culpability for an adverse inference instruction)).

These varying standards caused inefficiencies for litigants who were forced to expend significant effort and money on ESI preservation, particularly when litigating in jurisdictions where negligence was sufficient to warrant severe sanctions.

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How does amended FRCP 37(e) differ from its predecessor?

The 2015 amendments to FRCP 37(e), which apply in all civil proceedings commenced after December 1, 2015, and "insofar as just and practicable, all [proceedings] then pending," were designed in part to resolve the inconsistency described above (and limit a court's inherent authority to impose severe sanctions) (*Lokai Holdings LLC v. Twin Tiger USA LLC*, 2018 WL 1512055, at *8 (S.D.N.Y. Mar. 12, 2018) (internal quotations omitted)). Amended FRCP 37(e) rejects cases like *Residential Funding* and *Osberg*, which permitted adverse inference instructions based on negligent or grossly negligent loss of ESI, by adopting an intent-to-deprive standard that a court must apply before imposing severe sanctions.

Specifically, amended FRCP 37(e)(2) authorizes a court to impose certain severe sanctions if it finds a spoliating party "acted with the intent to deprive another party of the information's use in the litigation." If the intent-to-deprive standard is met, a court may:

- Presume that the lost information was unfavorable to the party.
- Instruct the jury that it may or must presume the lost information was unfavorable to the party.
- Dismiss the action or enter a default judgment.

(FRCP 37(e)(2).)

If the court does not find that the spoliating party acted with an intent to deprive, but determines that the loss of ESI prejudiced another party, it may still impose lesser sanctions in the form of "measures no greater than necessary to cure the prejudice" (FRCP 37(e)(1)).

Search Sanctions for ESI Spoliation Under FRCP 37(e): Overview and Sanctions Under Amended FRCP 37(e): One Year In for more on non-intentional spoliation under FRCP 37(e)(1) and the sanctions available for intentional spoliation under FRCP 37(e)(2).

Search Reasonable Anticipation of Litigation Under FRCP 37(e): Triggers and Limits for information on the factors for identifying when a party's duty to preserve relevant documents and ESI is triggered and the key steps counsel should take when handling preservation efforts to help protect a client from sanctions under FRCP 37(e).

How have courts interpreted the requirements of amended FRCP 37(e)(2)?

Despite efforts to achieve uniformity, a review of select post-amendment cases discussing spoliation sanctions reveals that new ambiguities have emerged, especially as to the type of proof required to demonstrate the requisite intent. This is in part because whether a spoliating party acted with the intent to deprive is fact-specific and depends on the totality of the circumstances. However, courts have increasingly focused on certain key factors when assessing whether the intent-to-deprive standard is met. These factors include:

- Whether the spoliating party selectively preserved relevant ESI.
- Whether the ESI was lost as a function of a routine automatic deletion protocol consistent with a party's document retention policy.
- When the relevant ESI was destroyed.
- The spoliating party's conduct in connection with litigating the spoliation dispute.

Additionally, several courts in post-2015 amendment decisions have observed that litigants seeking severe sanctions for the destruction of ESI now "face a tougher climb than in years past" (see, for example, *Scalpi v. Amorim*, 2018 WL 1606002, at *16 (S.D.N.Y. Mar. 29, 2018)). This increased challenge in showing the requisite level of culpability is particularly evident in cases where courts concluded that severe sanctions for ESI spoliation were warranted under former FRCP 37(e), but later vacated or reversed their earlier rulings after amended FRCP 37(e) became effective (see, for example, *Nuvasive, Inc. v. Madsen Med., Inc.*, 2016 WL 305096, at *2-3 (S.D. Cal. Jan. 26, 2016) (vacating

a pre-amendment decision to impose an adverse inference instruction against a party for not enforcing compliance with a litigation hold, because the record did not support intentional spoliation under amended FRCP 37(e)); see also *SEC v. CKB168 Holdings, Ltd.*, No. 13-5584 (E.D.N.Y. Sept. 28, 2016) (adopting a report and recommendation that was modified in light of the amended rule to recommend denial of a motion for sanctions requesting an adverse inference instruction), ECF No. 361).

What is selective preservation and how does it impact a court's analysis of a party's intent to deprive?

Courts are more likely to find that the intent requirement is satisfied where a party preserves certain ESI but does not preserve other ESI. For example, in *Ronnie Van Zant, Inc. v. Pyle,* the court imposed sanctions for the failure to preserve text messages based in part on selective preservation of other information on the phone, which was replaced after the action was filed and only partially backed up. (270 F. Supp. 3d 656, 670-71 (S.D.N.Y. 2017), rev'd in part and vacated in part on other grounds.)

The plaintiffs in *Ronnie Van Zant* sought to prevent the defendants from producing a film about a 1977 plane crash that killed two members of the Lynyrd Skynyrd rock band. One of the defendants, Artimus Pyle (who was a member of the band) was a signatory to a consent decree, which set out various restrictions on the use of the name Lynyrd Skynyrd and the use of the name, image, and likeness of the deceased band members. The plaintiffs alleged violations of the consent order and sought a permanent injunction to prevent the release of the film. (*Ronnie Van Zant*, 270 F. Supp. 3d at 660-62, 668.)

During the litigation, the plaintiffs sought sanctions against the defendants for spoliation of text messages between Pyle and non-party Jared Cohn, a director and screenwriter whom the defendants had hired to work on the film. Cohn purchased a new phone after the plaintiffs filed the lawsuit and backed up certain content from his old device, but failed to preserve the text messages with Pyle, which were relevant to the dispute. Finding that Cohn's text messages were within the defendants' control, and that Cohn's selective preservation of ESI on his phone "evince[d] the kind of deliberate behavior that sanctions are intended to prevent," the court granted the plaintiffs' request for an adverse inference instruction against the defendants, after also finding that the plaintiffs made sufficient attempts to obtain the text messages directly from Pyle as well (*Ronnie Van Zant*, 270 F. Supp. 3d at 668-70; see also *Lokai,* 2018 WL 1512055, at *16 (holding that the record did not support an intent-to-deprive finding, but noting that evidence of selective deletion of emails "could be telling")).

How have courts treated requests for severe sanctions based on loss of ESI due to a routine deletion policy?

As demonstrated in *Lokai Holdings LLC v. Twin Tiger USA LLC*, courts likely will not find an intent to deprive where the spoliation occurred as part of routine deletion efforts and no evidence of selective deletion exists. *Lokai* involved an action for trade dress infringement, unfair competition, and false advertising that was filed in November 2015, six months after the plaintiff sent the defendants a cease-and-desist letter. During discovery the defendants were unable to produce all relevant emails, in part because the defendants' web-based email service plan provided limited storage space, which meant the defendants had to "routinely" delete their emails to avoid exceeding storage limits. (2018 WL 1512055, at *1-2.)

The plaintiff first raised the issue of spoliation in August 2016 after concluding the defendants' discovery responses were deficient. The defendants then sought to recover the deleted emails, but were told by the email service provider that "they could not recover much." The service provider agreed to upgrade the defendants' email plan to begin archiving all remaining active mailboxes on their system going forward. The defendants believed that the service provider set up archiving as of September 2016 and continued their practice of deleting old emails to remain within storage limits. In May 2017, however, the defendants learned that their service provider had never set up the archiving system. (*Lokai*, 2018 WL 1512055, at *3-4.)

After discovering continued deficiencies in the defendants' document production, the plaintiff sought spoliation sanctions under FRCP 37(e). The court held that although the plaintiff had been prejudiced by the defendants' failure to preserve ESI (and therefore sanctions were appropriate under FRCP 37(e)(1)), the overall evidence did not warrant a finding that the defendants acted with the requisite intent to deprive under FRCP 37(e)(2). The court relied in part on the fact that the defendants regularly deleted emails and would have been "unable to keep more than about one month's worth of old emails in [their] mailboxes without running up against storage limits." The court also noted the record did not support a finding of selective deletion, which could have evidenced the defendants' intent to deprive. (*Lokai*, 2018 WL 1512055, at *5, *15-16.)

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How does the timing of ESI spoliation influence a court's finding on whether a party acted with an intent to deprive?

Courts appear to be more willing to find circumstantial evidence of an intent to deprive where ESI is destroyed shortly after any of the following occurs:

- The ESI's disclosure is either:
  - requested by another party; or
  - ordered by a court.
- A plaintiff decides to file suit (if the plaintiff is the alleged spoliator).
- The lawsuit is filed (if the defendant is the alleged spoliator).

In *DVComm, LLC v. Hotwire Communications, LLC*, for example, the court found that a party had met the intent-to-deprive standard based in part on when the spoliating party deleted the relevant ESI. As a result, the court imposed an adverse inference instruction. (2016 WL 6246824, at *1-3, *8 (E.D. Pa. Feb. 3, 2016).)

DVComm involved an action for breach of the parties' non-disclosure agreement (NDA), which covered the plaintiff's business plan to create a fiber optics network in the Atlanta, Georgia area. The plaintiff claimed the defendant breached the NDA by using the plaintiff's business plan and not paying the plaintiff for the net profits generated based on the business plan. (*DVComm*, 2016 WL 6246824, at *1.)

The defendant sought discovery from the plaintiff on the drafting process of the business plan to support its theory that the plan was part of the public domain and therefore not protected under the NDA when the plaintiff disclosed the plan to the defendant. In response to the defendant's discovery requests and subsequent court orders, the plaintiff produced only limited correspondence regarding the development of the business plan and represented several times that it had produced all documents in its possession, including documents that may have shown whether an agent of the plaintiff gave the plan to anyone other than the defendant. (*DVComm*, 2016 WL 6246824, at *1.)

After a third party (the employer of the plaintiff's agent) produced almost 1,000 pages of emails and other documents related to the development of the business plan in response to the defendant's subpoena, the court again ordered the plaintiff to produce all drafts of the business plan. The court also permitted the defendant's forensic consultant to image and review the electronic devices of the plaintiff's agent. The forensic consultant discovered that the plaintiff's agent had "double-deleted" and permanently destroyed hundreds of documents responsive to the defendant's discovery requests three to ten weeks after the court ordered the third party to produce documents. (*DVComm*, 2016 WL 6246824, at *2-3.)

The court granted the defendant's motion for spoliation sanctions and imposed an adverse inference instruction on the plaintiff, despite testimony of the plaintiff's agent that "he did not intentionally delete" the responsive documents. Relying on the fact that the plaintiff's agent deleted the responsive documents from his computer soon after it became known that the defendant would obtain the third-party production, the court noted that the timing was "instructive" and held that the plaintiff intended to deprive the defendant of using the deleted information in the litigation. (*DVComm*, 2016 WL 6246824, at *4, *7-8; accord *Lexpath Techs. Holdings, Inc. v. Welch*, 2016 WL 4544344, at *5 (D.N.J. Aug. 30, 2016) (finding that the timing of the defendant's deletion of responsive documents a few days after the plaintiff sent a cease-and-desist letter was "especially telling" and supported a finding of an intent to deprive), aff'd, 744 F. App'x 74 (3d Cir. 2018); *GN Netcom, Inc. v. Plantronics, Inc.*, 2016 WL 3792833, at *7 (D. Del. July 12, 2016) (granting the plaintiff's motion for sanctions and relying in part on the fact that the company's executive instructed others to delete emails "just one month after [the] lawsuit was filed" and again "just one week after [the defendant's] motion to dismiss was denied — at which point the commencement of fact discovery was imminent").)

How does a party's litigation conduct affect the intent analysis?

In addition to examining a spoliating party's preservation efforts and the circumstances surrounding the spoliation itself, courts might also consider a party's conduct (including its candor and cooperation or a lack thereof) in connection with litigating the spoliation dispute when analyzing the intent-to-deprive standard.

For example, in *GN Netcom, Inc. v. Plantronics, Inc.*, the court granted the plaintiff's motion for sanctions based in part on the spoliating party's litigation conduct. The defendant in *GN Netcom* had promptly issued a litigation hold after receiving a demand letter from the plaintiff. After the plaintiff filed suit, the defendant issued several additional litigation holds, conducted training sessions with key custodians, and sent quarterly reminders to employees requiring acknowledgement of their compliance with the holds. Despite these measures, after the lawsuit was filed, an executive at the defendant company double-deleted more than 40% of his emails and suggested that his subordinates similarly delete their emails. (2016 WL 3792833, at *2, *14.)

When the defendant's counsel discovered the email deletion, the defendant retained a forensic expert to recover as many of the deleted emails as possible. The expert presented its preliminary findings but indicated that it would cost an additional $2,000 to $5,000 to "finish up" and "get the numbers" needed. The defendant declined to pay for the additional work, and the emails that were previously restored were "unrestored" after the expert's engagement ended. (*GN Netcom*, 2016 WL 3792833, at *3.)

Despite the defendant's attempt to ameliorate the improper behavior of certain employees and recover the deleted ESI, the court noted that the defendant's conduct in litigating the deletion issue was relevant in finding an intent to deprive. Among other things, the court pointed to the following facts:

Courts that find an intent to deprive appear to be more willing to impose adverse inference instructions rather than case-terminating sanctions.

- The defendant's counsel told the plaintiff's counsel that it was "incorrect to assume deletion" even after the defendant's counsel knew that the executive and at least two other employees had deleted emails.
- The defendant avoided disclosing to the plaintiff that it had retained a forensic expert to recover the executive's emails until after the court ordered additional discovery related to the issue.
- The executive repeatedly refused to acknowledge his misconduct.
- The defendant failed to pay for the additional forensic work.

The court concluded that the defendant's "repeated obfuscation and misrepresentations related to [the executive's] email deletion and its [subsequent] investigation of it" demonstrated that the defendant acted in bad faith, "intending to impair the ability of the other side to effectively litigate its case." (*GN Netcom*, 2016 WL 3792833, at *8 (internal quotations omitted).)

The court also determined that, although the defendant's conduct did not warrant a default judgment or a mandatory adverse inference instruction, other severe sanctions, including $3 million in punitive sanctions, a permissive adverse inference instruction, and attorneys' fees and costs, were appropriate (*GN Netcom*, 2016 WL 3792833, at *13-14).

Similarly, in *Goldrich v. City of Jersey City*, the plaintiff failed to produce certain relevant ESI due to an alleged virus on his home computer. The defendants demanded that the plaintiff preserve the virus-afflicted computer so they could attempt to retrieve the responsive information, and eventually obtained a court order requiring the plaintiff to produce the laptop for inspection by the defendants' forensic expert. After reviewing the laptop produced by the plaintiff, the forensic expert concluded that the plaintiff had not used the device during the events giving rise to the action and that the laptop had never been infected with a virus. (2018 WL 4489674, at *1-2 (D.N.J. Sept. 19, 2018).)

Following the defendants' motion for spoliation sanctions, the court determined that an adverse inference jury instruction under FRCP 37(e)(2) was appropriate because the evidence strongly supported a finding that the plaintiff intentionally deprived his adversaries of ESI. In reaching its decision, the court noted the plaintiff's "decision to provide a computer he never used in connection with [the] lawsuit," which "essentially ensured that [the defendants] would not have an opportunity to attempt to recover the lost ESI." (*Goldrich*, 2018 WL 4489674, at *2.) The court, however, found that the defendants' requested dismissal sanction was "too severe" because the withheld information, while important, was not so central to the plaintiff's claims or so prejudicial to the defendants that an adverse inference jury instruction would not suffice (*Goldrich*, 2018 WL 4489674, at *3).

What are the key takeaways for parties seeking to obtain or oppose sanctions under amended FRCP 37(e)(2)?

The cases discussed above offer practical guidance for litigants seeking to prove an intent to deprive under amended FRCP 37(e)(2). These cases demonstrate that counsel should focus on:

- How the ESI was lost.
- When the ESI was lost.
- Once there is a potential issue, whether the spoliating party and its counsel were forthright or obstructionist when:
  - litigating the discovery dispute; or
  - attempting to mitigate the prejudice.

Courts recognize that they cannot "specifically examine [a party's] head" to confirm that the party acted with an intent to deprive another party of the information's use in the litigation (*DVComm*, 2016 WL 6246824, at *8). Therefore, circumstantial evidence of the alleged wrongdoer's intent typically is critical to establishing the requisite intent (*Lokai*, 2018 WL 1512055, at *16). In some cases, courts may allow spoliation discovery specifically on the issue of intent (see, for example, *Konica Minolta Bus. Sols., U.S.A. Inc. v. Lowery Corp.*, 2016 WL 4537847, at *5-6 (E.D. Mich. Aug. 31, 2016) (allowing spoliation discovery to "illuminate" certain elements of FRCP 37(e) before it imposed sanctions for the alleged destruction of ESI)).

Notably, courts that find an intent to deprive appear to be more willing to impose adverse inference instructions rather than case-terminating sanctions. In *GN Netcom*, for example, the court noted that dispositive sanctions are "a last resort and should be imposed if no alternative remedy is available" (2016 WL 3792833, at *14 (internal quotations omitted); see also *Goldrich*, 2018 WL 4489674, at *3 (holding that dismissal "would be too severe of a sanction," and instead imposing an adverse inference instruction on the spoliating party)).

Search Document Discovery Case Tracker: Sanctions and Cost Recovery for a table of cases involving alleged document discovery misconduct and related requests for sanctions and other monetary relief.