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WHITE PAPER

February 2018

Courts Are Closely Following Amended Rule 37(e)'s Limits on Sanctions for Lost ESI

Within two years of its implementation, several cases show that amended Rule 37(e) is having its intended impact, as judges are carefully applying the criteria articulated in the Rule prior to ordering curative measures or imposing sanctions. This Jones Day *White Paper* examines Rule 37(e) cases decided over the past year and explains why proper litigation holds are the first step for minimizing the risk of sanctions.

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Our September 2015 *White Paper*, "Significant Changes to the Federal Rules of Civil Procedure Expected to Take Effect December 1, 2015: Practical Implications and What Litigators Need to Know," examined how the amended rules were designed to focus courts and litigants on substantive issues and on reducing motion practice, especially motions for sanctions for failure to preserve Electronically Stored Information ("ESI"). We discussed the actual impact of the amendments in our September 2016 *Commentary*, "Noteworthy Trends from Cases Decided Under the Recently Amended Federal Rules of Civil Procedure." This *White Paper* examines cases decided over the past year under Federal Rule of Civil Procedure 37(e). These cases show that the amendment is achieving its goals: judges are carefully applying the criteria articulated in the Rule before ordering curative measures or imposing sanctions.[1] Courts are not imposing severe sanctions when data is lost due to negligence and are using a fact-specific approach suggested by the Advisory Committee when evaluating the reasonableness of preservation efforts and whether a loss of ESI has caused prejudice.[2] Courts are also weighing proportionality factors when devising curative measures or sanctions to address spoliation.

Most Rule 37(e) cases fall into one of three general categories: (i) cases involving an intentional deprivation of evidence; (ii) cases where there was no intent to deprive, but the loss of ESI caused significant prejudice; and (iii) cases involving neither an intent to deprive nor significant prejudice. This *White Paper* highlights cases from these three categories and discusses how proper litigation holds are indeed the first step for minimizing the risk of sanctions.

COURTS IMPOSE THE MOST SEVERE SANCTIONS ON LITIGANTS WHO MANIFEST AN INTENT TO DEPRIVE THE OTHER PARTY OF EVIDENCE

Consistent with amended Rule 37(e)(2), courts are reluctant to levy the most severe spoliation sanctions—default judgment or dismissal—absent evidence of clear intent to deprive another party of information.[3] Although there is no clear standard for what constitutes an intent to deprive, courts have set the bar high.

Where a defendant deleted emails and files on his laptop despite multiple preservation letters from the plaintiff and a court order directing him to preserve data, default judgment and an award of $325,000 in attorneys' fees were warranted.[4] Similarly, where defendants intentionally destroyed evidence central to plaintiffs' case by "donating" a laptop to Goodwill, deleting thousands of documents from a personal computer, deleting and refusing to produce relevant emails from multiple email accounts, and destroying metadata, the court awarded default judgment.[5]

Where someone other than the named party manifests an intent to deprive despite a clear directive to the contrary, courts have stopped short of ordering default judgments but have not hesitated to impose other serious sanctions. For example, where a senior executive deleted thousands of emails and instructed others to do the same, in violation of the company's litigation hold policy, one court ordered attorneys' fees, $3 million in punitive sanctions, evidentiary sanctions, and an adverse jury instruction.[6] Another court found adverse inference instructions and payment of attorneys' fees were appropriate when a party failed to follow its own records retention policy, which required that it issue a legal hold in the event of an investigation or legal proceeding.[7]

Where there is an intent to deprive but the ESI's relevance—and, therefore, any resulting prejudice—is uncertain, courts may still issue adverse jury instructions if the spoliator's behavior supports an inference that the lost data was relevant. For example, a court found an adverse jury instruction warranted where a party repeatedly logged into her work email account and deleted emails throughout the litigation, showing "misdirection and deception" indicative of hiding unfavorable evidence.[8] Similarly, a court gave an adverse jury instruction when a party initially hid a personal email account and deleted emails well after the lawsuit commenced.[9] In both situations, it was unclear whether the intentional loss of ESI prejudiced the requesting party, but the courts viewed the egregiousness of the responding party's behavior as evidence of relevance and, therefore, prejudice.

COURTS ISSUE CURATIVE MEASURES NO GREATER THAN NECESSARY TO COUNTER PREJUDICE WHEN THERE IS NO INTENT TO DEPRIVE

Under the current rule, where there is no intent to deprive, courts must take "measures no greater than necessary to counter prejudice."[10] In these circumstances, courts typically

remedy the loss by levying an adverse jury instruction, awarding attorneys' fees, or prohibiting the admission of specific evidence in trial.

For example, a court gave an adverse jury instruction when a party failed to preserve a highly relevant video that was overwritten days after the duty to preserve began. However, because the evidence did not support a finding that the defendant acted with intent to deprive, more severe sanctions were unwarranted.[11] In contrast, where there was no intent to deprive and the data lost was only tangentially related to the case, the court declined to order an adverse inference instruction and instead awarded attorneys' fees and costs.[12]

COURTS DECLINE TO ORDER CURATIVE MEASURES WHERE THERE IS NO INTENT TO DEPRIVE AND THE LOSS DOES NOT CAUSE SIGNIFICANT PREJUDICE

Where a loss of ESI does not cause significant prejudice—for example, where replacement data is available—and where there is no finding of intent to deprive, courts generally conclude that no curative measures are warranted. For example, no remedial measures were imposed when plaintiff wiped an employee's laptop after his employment ended but the defendant declined the opportunity to review backup tapes of emails kept on the laptop. Despite the defendant's suggestion that there was likely other material on the laptop, the court was not willing to make a finding of prejudice based on speculation.[13]

Courts also decline to impose curative measures when the requesting party fails to provide sufficient evidence that spoliation occurred. In one such case, a requesting party failed to prove that evidence beyond back-up material was destroyed.[14] In another, the requesting party failed to show that the responding party's explanation for the data loss was not credible.[15] Even if a party could have been more proactive in preservation, but ultimately preserves and produces sufficient information, courts generally decline to find prejudice that warrants a remedy.[16] In addition, a court may consider how long the requesting party took to complain about spoliation as evidence of a lack of prejudice.[17] These cases show that courts are implementing the fact-specific approach outlined by Rule 37(e) when deciding whether remedial measures may be appropriate, and what kind. Courts also place the burden of proof on the party alleging spoliation.[18] Just as the amended rule envisioned, the mere filing of a spoliation motion is unlikely to have the dramatic impact it once did.

Courts, of course, continue to impose sanctions under Rule 37(b)(2) when warranted. For example, where evidence had not yet been destroyed but the defendant withheld it in bad faith and "refus[ed] to accept responsibility" for its misconduct, a court ordered a full forensic examination of the defendant's servers, granted plaintiff leave to amend its complaint to reopen discovery, and awarded $73,550.83 in attorneys' fees.[19]

LITIGATION HOLD NOTICES—DEMONSTRATING COMPLIANCE WITH THE PRESERVATION REQUIREMENTS OF AMENDED RULE 37(E)

A party's first defense against spoliation allegations is proving that it took reasonable measures to preserve evidence. An adequate litigation hold plan is critical to showing reasonable efforts under Rule 37(e). Whether a hold was adequate in a given case is a highly fact-specific inquiry, but analysis of recent cases does yield some general best practices.

Courts Consider Whether a Litigation Hold Was Written, Timely, and Specific when Determining whether Reasonable Preservation Efforts were Made

Generally speaking, written litigation holds are preferred by courts to oral ones.[20] Relying solely on an oral request to preserve documents is risky and, according to some courts, "borders on recklessness."[21] However, this does not mean that an oral litigation hold *always* violates a party's duty to preserve.[22] There may be circumstances in which an oral litigation hold fulfills the duty to preserve, such as when a party is a small company with relatively few employees.[23]

In addition, litigation hold notices that are given in a timely manner are more likely to be found reasonable.[24] As soon as the duty to preserve begins, litigation holds should be executed. However, simply notifying employees of a litigation hold is insufficient. Rather, parties must take affirmative steps to monitor compliance.[25] Affirmative steps may include in-house counsel talking to key employees about the litigation hold and periodically following up to ensure they are preserving relevant information.[26]

Courts have also provided guidance on the mechanics of litigation holds. For example, courts tend to favor litigation holds

that suspend auto-delete functions of relevant data.[27] This includes functions known as "email jails" that require users to delete emails when they run out of space. Companies that choose not to suspend auto-delete functions should generally do so only if they have replication capabilities that continue to preserve email behind the scenes.

In addition, courts also consider how much discretion is given to employees to determine what data to retain. For example, litigation holds should describe clearly the forms and subject matter of documents to be retained and the consequences for failure to preserve.[28] The cases do not draw a bright-line rule for the level of specificity required, as that can depend on the nature of the topics covered by the hold and the complexity of the party's business operations. For example, a large company may not be able to get away with giving total discretion to employees to search and select what type of information to be retained, without specific and detailed guidance from counsel as to relevance. A court also may hesitate to approve a litigation hold that allows the individual custodians to control the entire preservation and retention process on their own, although we have found no case treating that approach as *per se* inappropriate.

As a practical matter, a process that starts with custodians identifying where potentially relevant documents reside or selecting emails to be isolated and preserved may be the best way to gather materials for a particular case, as custodians often are best able to identify relevant locations and information. But reliance on custodians should be supplemented with safeguards, such as behind-the-scenes backing up of email and other data or temporary suspension of individuals' deletion rights, before the hold is issued, to close the door to future assertions that evidence the custodian perceived as harmful was deleted by the custodian.

As these cases illustrate, courts consider a variety of factors in determining the adequacy of litigation holds and in assessing the reasonableness of preservation efforts. Although the inquiry is highly fact-intensive, courts generally look favorably on litigation holds that are written, timely, and specific.

The Content of a Litigation Hold is Generally Protected from Disclosure, but Basic Details Surrounding the Imposition of a Hold are Discoverable

Only a handful of cases specifically address when a litigation hold is discoverable. The general rule to be drawn from these cases is that litigation hold notices typically are *not* discoverable, at least when they contain substantive attorney-client communications and were issued at or near the time that work product protection was triggered.[29] However, the general categories of information employees were instructed to preserve and collect, and what specific actions they were instructed to undertake, generally are subject to discovery. Thus, although a litigation hold notice itself may be privileged, "the basic details surrounding the litigation hold are not."[30] These details may include "whether a notice was actually issued and what steps were thereafter taken to collect and preserve relevant documents and data."[31]

The dearth of cases on this point may reflect the fact that, as a practical matter, parties find it difficult to show they took reasonable steps to preserve without producing the litigation hold notice itself. To prepare for the possibility of disclosure, it makes sense to draft litigation hold notices with an eye toward including enough detail to show that sufficient instructions were provided to recipients (such as general topics that are covered by the hold) while avoiding nuances of strategy (such as why a particular topic is relevant to the pending litigation). Ultimately, the primary objective should be documenting that a reasonable process was followed.

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ENDNOTES

1 Sanctions are warranted only when: (i) the party had a duty to preserve; (ii) failed to take reasonable steps to preserve; (iii) information was lost; and (iv) the information could not be restored. Fed R. Civ. P. 37(e).

2 Fed R. Civ. P. 37(e) 2015 Committee Notes (providing several factors for courts to consider when evaluating the reasonableness of a party's preservation efforts and when determining whether a party is prejudiced by the loss).

3 Fed R. Civ. P. 37(e)(2).

4 *Roadrunner Transp. Servs. Inc. v. Tarwater*, Nos. 15-55448 and 14-55529 (9th Cir. Mar. 18, 2016).

5 *Omnigen Research v. Wang*, No. 6:16-cv-00268, 2017 WL 2260071 (D. Or. May 23, 2017).

6 *GN Netcom, Inc. v. Plantronics, Inc.*, No. 12-1318-LPS, 2016 WL 3792833 (D. Del. July 12, 2016).

7 *CTB, Inc. v. Hog Slat, Inc.*, No. 7:14-CV-157-D (E.D.N.C. Mar. 23, 2016).

8 *Morrison v. Veale*, No. 3:14-cv-1020, 2017 WL 372980 (M.D. Ala. January 25, 2017).

9 *Edelson v. Cheung*, No. 2:13-cv-5870, 2017 WL 150241 (D.N.J. Jan. 12, 2017); *see also Core Labs. LP v. Spectrum Tracer Servs., L.L.C.*, No. CIV-11-1157-M, 2016 WL 879324, at *1 (W.D. Okla. Mar. 7, 2016) (sanctioning a company for failing to preserve relevant emails when it transitioned to a new email service provider).

10 Fed R. Civ. P. 37(e)(1).

11 *Jenkins v. Woody*, No. 3:15-cv-355, 2017 WL 362475 (E.D.Va. Jan. 21, 2017); *see also Muhammad v. Mathena*, No. 7:14-cv-00529, 2017 WL 395225 (W.D. Va. Jan. 27, 2017) (finding an adverse jury instruction and barring certain evidence where warranted where there was no intent to deprive plaintiff of a highly relevant video).

12 *Mazzei v. The Money Store*, No. 14-2054, 2016 WL 3902256 (2d Cir. July 15, 2016).

13 *Wal-Mart Stores, Inc. v. Cuker Interactive, LLC*, No. 5:14-CV-5262, 2017 WL 239341 (W.D. Ark. Jan. 19, 2017); *see also Simon v. City of N.Y.* No. 14-CV-8391, 2017 WL 57860 (S.D.N.Y. Jan 5, 2017) (finding that defendants had no knowledge of whether the discovery requested would help their case, rendering their prejudice argument speculative and sanctions inappropriate).

14 *FiTeq Inc. v. Venture Corp.*, No. 13-cv-01946-BLF, 2016 WL 1701794 (N.D. Cal. Apr. 28, 2016).

15 *Robinson v. Renown Reg'l Med. Ctr.*, No. 3:16-cv-00372, 2017 WL 2294085 (D. Nev. May 24, 2017).

16 *FTC v. Directv, Inc.*, No. 15-cv-01129-HSG, 2016 WL 7386133 (N.D. Cal. Dec. 21, 2016).

17 *Id.*

18 *See also Baher Abdelgawad v. Mark Mangieri, et al.*, No. CV 14-1641, 2017 WL 6557483, at *3 (W.D. Pa. Dec. 22, 2017) (declining to impose sanctions, despite defendant's failure to take reasonable steps to preserve ESI, because plaintiff did not request a specific measure to cure prejudice).

19 *Crossfit, Inc. v. Nat'l Strength & Conditioning Ass'n*, No. 14-cv-1191 JLS (KSC) (S.D. Cal. May 26, 2017).

20 *First Am. Title Ins. Co. v. Nw. Title Ins. Agency, LLC*, 2016 WL 4548398, at *2 (D. Utah Aug. 31, 2016) (finding that oral litigation holds are "problematic and depending on circumstances, may fail to fulfill a party's discovery obligations.").

21 *Scentsy, Inc. v. B.R. Chase, L.L.C.*, 2012 WL 4523112, at *8 (D. Idaho Oct. 2, 2012).

22 *First Am. Title Ins. Co*, 2016 WL 4548398, at *2.

23 *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 42 (2012); *see also Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 441 (S.D.N.Y. 2010) ("[I]n a small enterprise, issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be.").

24 In addition, litigation hold notices that are given in a timely manner are more likely to be found reasonable." *See Leidig v. Buzzfeed, Inc.*, No. 16CIV542VMGWG, 2017 WL 6512353, at *12 (S.D.N.Y. Dec. 19, 2017) (finding that plaintiffs failed to take reasonable steps to preserve data because they did not issue a litigation hold until after the lawsuit began).

25 *Martinez v. Salazar*, 2017 WL 4271246, at *5.

26 *Id. See also Hefter Impact Techs., LLC v. Sport Maska, Inc.*, 2017 WL 3317413 at *6 (D. Mass. Aug. 3, 2017) (explaining that in-house counsel and other business leaders "would issue verbal and written reminders concerning the [litigation hold] memorandum as necessary.").

27 *See Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, No. EDCV141926JAKSPX, 2016 WL 6609208, at *11 (C.D. Cal. July 12, 2016) (finding that once a preservation duty attaches, a party must suspend existing policies that relate to deleting or destroying files).

28 *VOOM HD Holdings*, 93 A.D.3d at 41-42.

29 *See Ingersoll v. Farmland Foods, Inc.*, 2011 WL 1131129; *see also Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116, 1123 (N.D. Ga. 2007) ("Not only is [a hold] likely to constitute attorney work-product, but its compelled production could dissuade other businesses from issuing such instructions in the event of litigation.").

30 *In re Ebay Seller Antitrust Litig.*, 2007 WL 2852364, at *6-7 (N.D. Cal. Oct. 2, 2007).

31 *Bagley v. Yale Univ.*, 318 F.R.D. 234, 241 (D. Conn. 2016).