

Standing Committee Approves Proposed Revised Rule 37(e)

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The Committee on Rules of Practice and Procedure (Standing Committee) [recently approved a revised Rule 37\(e\)](#), which is intended to establish greater uniformity in the ways federal courts respond to the loss of electronically stored information (ESI), and to relieve pressures on potential litigants to engage in costly over-preservation of ESI for fear of sanctions. The proposed, revised Rule 37(e) provides the following: (e) Failure to Preserve Electronically Stored Information. If electronically stored information 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 it cannot be restored or replaced through additional discovery, the court may: (1) upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment. Sanctions are not the primary focus of the proposed revision. Rather, the revision is layered with an initial focus on what occurred (or did not occur) and what can be done to restore lost ESI. That is not to say that sanctions are not part of revision. They certainly are, as discussed below. The first step is to determine whether reasonable steps were taken to preserve lost ESI. As the Advisory Committee on Civil Rules (Advisory Committee) noted in its report to the Standing Committee, the proposed revision does not require perfection but rather reasonable steps in preserving ESI, consistent with other civil rules on related subjects, such as Rule 502(b)(2) (addressing inadvertent disclosure of privileged or protected material). Determining the reasonableness of the steps taken includes consideration of resources and the proportionality of the efforts to preserve, and a party's litigation sophistication. If ESI is lost because a party failed to take reasonable steps to preserve it, then the focus shifts to whether the lost ESI can be restored through additional discovery. If the lost ESI cannot be restored through additional discovery, and if the court finds that a party is prejudiced by the loss, then pursuant to subsection (e)(1), the court may order measures "no greater than necessary to cure the prejudice." There is a limit to what the court may order, however. For example, even if a party is prejudiced by the loss of ESI, the court may not impose the severe measures set forth in subsection (e)(2) unless it also

finds that the party that lost it “acted with the intent to deprive another party of the information’s use in the litigation.” In such an extreme case, the court then has three additional options under subsection (e)(2), including presuming that the lost information was unfavorable to the party, instructing the jury accordingly, or dismissing the action or entering a default judgment. Subsection (e)(2) eliminates the circuit split on when a court may give an adverse-inference instruction for the loss of ESI. Some circuits permit adverse-inference instructions on a showing of negligence or gross negligence, while others require a showing of bad faith. Subsection (e)(2) of the proposed, revised rule clearly defines what is required, which is more akin to bad faith (i.e., “intent to deprive another party of the information’s use in the litigation”). It also bears emphasis that the Committee Note to the proposed, revised rule specifically states that the new rule would “not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.” The Advisory Committee reasoned that a bad-faith standard is more appropriate, in part because negligently lost information may have been favorable or unfavorable to the party that lost it and, as a result, requiring an adverse inference in that circumstance could tip the evidentiary balance in ways that the lost evidence never would have. In addition, the Advisory Committee reasoned that permitting an adverse inference for negligence creates powerful incentives to over-preserve, often at great cost, the avoidance of which is one of the goals for revising the rule. Following its approval by the Standing Committee, the revised Rule 37(e) will be considered by the Judicial Conference at its meeting in September 2014. *Originally published by the ABA Section of Litigation.*

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