



## *The New Federal Rule of Civil Procedure 37(e): What Have The First Three Months Revealed?*

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### Introduction

It has been three months now since the amendments to the Federal Rules of Civil Procedure came into effect. Among the most significant changes was the new Rule 37(e), which governs failures to preserve electronically stored information (“ESI”). One of the primary motivations for the new Rule was to redress litigants’ expenditures of “excessive effort and money on preservation” caused by significant inconsistencies across the federal circuits in defining what conduct constitutes sanctionable spoliation.<sup>1</sup> In particular, as the Advisory Committee notes emphasize, the new Rule 37(e) was intended to “reject cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.”<sup>2</sup> Thus far, decisions applying new Rule 37(e) have led to a number of interesting and, in some respects, differing results that provide valuable insight into how courts are grappling with the Rule in fashioning appropriate spoliation remedies.

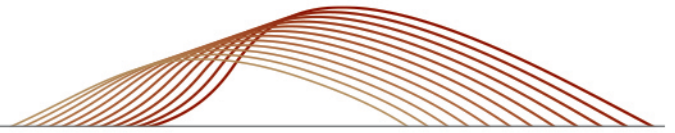
### Recap of The New Rule 37(e)

The new Rule 37(e) authorizes courts to issue sanctions where four conditions are met: (1) the ESI at issue should have been preserved in the anticipation or conduct of litigation; (2) the ESI is lost; (3) the loss is due to a party’s failure to take reasonable steps to preserve it; and (4) the ESI cannot be restored or replaced through additional discovery.

Once those four conditions are satisfied, the next step in the inquiry is to determine whether (1) the non-offending party has been prejudiced from the loss of ESI and/or (2) the offending party acted with the intent to deprive another party of the information’s use in the litigation. If there is prejudice, Rule 37(e)(1) allows the court to “order measures no greater than necessary to cure the prejudice.” If the offending party acted with intent, Rule 37(e)(2) allows the court to (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.

### The New Rule 37(e) In Action

While to date there have been only a handful of decisions interpreting new Rule 37(e), they demonstrate the immediate impact the new Rule is having both on pending litigation and on courts’ broader views of the application of the most severe sanctions remedies.



## CAT3, LLC v. Black Lineage, Inc.

In *CAT3, LLC v. Black Lineage, Inc.*,<sup>3</sup> defendants claimed that plaintiffs, in an effort to show that defendants had notice of the plaintiffs' trademark use, altered certain email domains in email messages before producing them in response to defendants' discovery demands. As a result, there were different versions of the same emails that contained inconsistent email addresses.<sup>4</sup> An evidentiary hearing was held after which the court determined that plaintiffs had intentionally altered the emails.<sup>5</sup>

The court then considered what sanctions it could impose. First, the court considered whether the new Rule 37(e) even applied since the case had been pending since 2014. Noting that the new Rule was to apply "insofar as just and practicable, [to] all proceedings then pending," the court determined that "because the amendment [to Rule 37(e)] is in some respects more lenient as to the sanctions that can be imposed for violation of the preservation obligation, there is no inequity in applying it."<sup>6</sup>

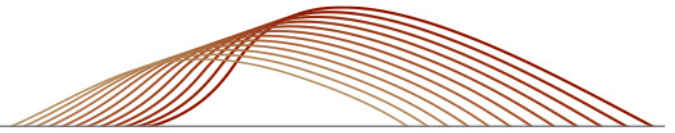
The court next examined whether the conduct alleged by defendants was sanctionable. Plaintiffs argued that sanctions were not warranted because there was no missing or destroyed evidence, only "an evidentiary dispute as to which email address versions are more accurate."<sup>7</sup> The court rejected this argument, reasoning that information had been lost because "the fact that there are near-duplicate emails showing different addresses casts doubt on the authenticity of both."<sup>8</sup> Critically, however, the court went on to explain that even if Rule 37(e) was inapplicable because the information was not lost or destroyed, the court could "exercise inherent authority to remedy spoliation under the circumstances presented."<sup>9</sup> The court reached this conclusion notwithstanding the fact that the Advisory Committee notes state that the new Rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used."<sup>10</sup> The court interpreted the Advisory Committee notes to mean only that it could not rely on inherent authority to impose sanctions expressly prohibited by the new Rule 37(e), such as dismissal of a case for merely negligent destruction of evidence.<sup>11</sup> However, the court held that it could still draw on its inherent authority to impose sanctions for bad faith spoliation "even if procedural rules exist which sanction the same conduct" as well as "where the conduct at issue is not covered by one of the other sanctioning provisions."<sup>12</sup>

The court ultimately ordered that plaintiffs (1) be precluded from relying upon their version of the emails at issue to demonstrate notice to the defendants of use of the mark; and (2) bear the costs and reasonable attorneys' fees incurred by the defendants in establishing the plaintiffs' misconduct and in securing relief.<sup>13</sup> The court noted that this two-fold remedy was consistent with both subdivisions (e)(1) and (e)(2) of Rule 37 as well as the court's inherent authority.<sup>14</sup>

## NuVasive, Inc. v. Madsen Medical, Inc.

In *NuVasive, Inc. v. Madsen Medical, Inc.*,<sup>15</sup> the court, prior to the Rule amendments, granted in part defendants' motion for sanctions for plaintiff's alleged spoliation of text messages. The sanction was an adverse inference jury instruction.<sup>16</sup> The spoliation allegedly occurred because plaintiff unintentionally did not enforce compliance with a litigation hold.<sup>17</sup> After the new Rule 37(e) took effect, plaintiff moved under Rule 60(b) (relief from a judgment or order) to vacate the court's prior sanctions order, before a rescheduled trial date in February 2016.<sup>18</sup>

In granting the plaintiff's motion and vacating its prior order, the court held that, because there was no finding that plaintiff intentionally failed to preserve the text messages at issue, it would be improper for the court to give an adverse inference instruction under the new Rule 37(e)(2), since



that relief could be employed only “upon a finding of intent to deprive another party of use of the information in the litigation.”<sup>19</sup> Instead, the court ordered that it would allow the parties to “present evidence to the jury regarding the loss of electronically stored information and ... [would] instruct the jury that the jury may consider such evidence along with all other evidence in the case in making its decision,”<sup>20</sup> a remedy described in the Advisory Committee notes.<sup>21</sup>

### Sec. Exch. Comm’n v. CKB168 Holdings, Ltd.

In *Sec. Exch. Comm’n v. CKB168 Holdings, Ltd.*,<sup>22</sup> defendants provided the SEC with a hard drive that the SEC claimed was missing certain requested information about whether defendants had taken steps to explore a public offering. The SEC moved for sanctions. Prior to the Rule amendments, the court had held that sanctions against the defendants were warranted because they had acted with “a sufficiently culpable state of mind” such that either (1) the absence of information was a result of gross negligence, or (2) the materials never existed, a fact that defendants in bad faith refused to confirm.<sup>23</sup> As a sanction, the court recommended that the following two jury instructions be given:

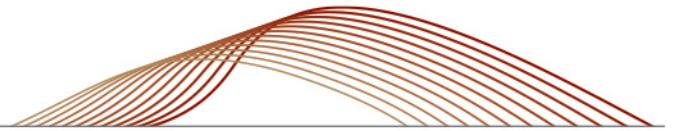
(1) From the fact that the [defendants] produced no evidence of any actual plans or preparations to take [the company] public, the jurors may infer that no such documents ever existed and that the [defendants] had no plan and made no preparations to take [the company] public. (2) To the extent that the jurors find that any unproduced evidence ever existed, they may infer that the unproduced evidence would support the SEC’s allegation that the [defendants] had no plan and made no preparations to go public.<sup>24</sup>

Once the Rule amendments took effect, the court directed the parties to address whether sanctions were still warranted, and the SEC filed an amended motion for sanctions.<sup>25</sup>

In response, the court modified its prior recommendation. First, the court observed that the first jury instruction, even if motivated so as to allow a jury to consider the possibility that the requested documents had never existed, could not be given independently of the second one because “[a] party cannot be sanctioned for spoliation without a finding that some spoliation occurred.”<sup>26</sup> For the second jury instruction, the court noted that under the new Rule 37(e) “a court may not now impose an adverse jury instruction as a sanction for the spoliation of ESI absent a showing of a loss of ESI ‘because a party failed to take reasonable steps to preserve it,’ as well as ‘intent to deprive another party’ of the use of that information.”<sup>27</sup> The court found that the record was insufficient to conclude that any evidence was intentionally spoliated.<sup>28</sup> To the contrary, the court said the record demonstrated that there was a “strong likelihood that the materials never existed.”<sup>29</sup> As such, the court denied without prejudice the SEC’s amended motion for sanctions, ruling that if the case proceeded to trial, the SEC could renew its motion for Rule 37 sanctions and “attempt to make the requisite showing of intent and lost ESI based on the evidence adduced at trial.”<sup>30</sup>

### Stinson v. City of New York

In contrast to both the *NuVasive* and *CKB168* decisions, the court in *Stinson v. City of New York*<sup>31</sup> chose not to apply the new Rule 37(e) in a case where the plaintiffs moved for sanctions for defendants’ alleged spoliation of both hard copy documents and ESI. Even though the Rule amendments apply to pending cases “insofar as just and practicable,” the court stated that under the circumstances, including that the allegedly spoliated information was both ESI and hard copy evidence, it was unclear whether the Rule “must apply retroactively.”<sup>32</sup> The court ruled that because the motion was fully submitted before the Rule amendment and because the parties had not briefed the retroactivity and hard-copy issues, it would not be “just and practicable” to apply the new Rule.<sup>33</sup>



## *Ericksen v. Kaplan Higher Education, LLC*

In *Ericksen v. Kaplan Higher Education, LLC*,<sup>34</sup> defendants moved for dismissal of plaintiff's employment discrimination case when a third-party forensic examination of plaintiff's computer revealed that she had run several data destruction programs that had destroyed at least some data. In particular, defendants claimed that because of the plaintiff's actions, defendants could not determine the authenticity of "a letter ... purporting to show that [plaintiff] was entitled to a raise, and an email ... allegedly indicating that [plaintiff] was terminated as retaliation."<sup>35</sup> In adopting the Report and Recommendation of the Magistrate Judge, the court held that the appropriate sanctions should be (1) precluding plaintiff from introducing the letter and email into evidence; (2) permitting defendants to present evidence related to the loss of evidence at trial; and (3) awarding defendants reasonable attorney's fees incurred from the discovery dispute.<sup>36</sup> The court, however, observed that even though plaintiff willfully destroyed data, dismissing the case would be too harsh a sanction under the "high standard" of the new Rule 37(e), which directs that the court impose "measures no greater than necessary to cure the prejudice."<sup>37</sup>

## **Ramifications**

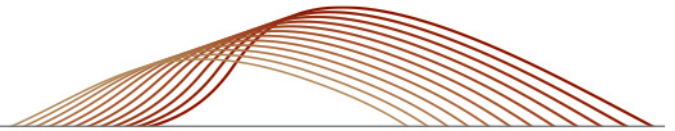
The foregoing decisions provide a number of important takeaways for litigants as the jurisprudence under the new Rule 37(e) begins to take shape.

First, the *CAT3* decision demonstrates that in the world of ESI spoliation, Rule 37 may not always have the last word in defining the range of sanctions available to a court. Indeed, *CAT3* expressly holds that the court's inherent power to sanction litigants remains even if the standards of Rule 37(e) are not met. Accordingly, parties facing or bringing potential spoliation motions must be mindful that where the alleged wrongful conduct does not fall within the scope of Rule 37(e), sanctions may still be a threat.

Second, the decisions illustrate that pending cases can change, perhaps dramatically, because of the Rule amendments. For example, in *NuVasive*, the plaintiff was able to vacate an adverse inference ruling approximately one month before trial based on the new Rule's restrictions on sanctions in the absence of a finding that the offending party intended to deprive its adversary of the use of the allegedly lost information.<sup>38</sup> A similar outcome occurred in *CKB168*. These types of rulings show that spoliation and related relevance issues may be increasingly left in the hands of the jury under the new Rule without the sanction of an adverse instruction.

Third, as the *Stinson* case shows, if pre- and post-amendment spoliation issues are not properly before a court, the new Rule 37(e) may not apply retroactively. Therefore, if counsel wishes to argue for a different sanctions ruling because of the new Rule 37(e), it must make sure that the issue is properly before the court to better ensure that the new Rule's application is found to be "just and practicable."<sup>39</sup>

Finally, the cases to date make clear that intentional spoliation under the new Rule 37(e) may not necessarily lead to dismissal of a case, a default judgment, or even an adverse jury instruction. Preliminary experience indicates that courts appear to be adhering closely to the new Rule's mandate that the court impose "measures no greater than necessary to cure the prejudice."<sup>40</sup> In both *CAT3* and *Ericksen*, for instance, the courts declined to dismiss cases where there was intentional spoliation that resulted in the loss of what could be considered key evidence.<sup>41</sup> This is in line with the *CAT3* court's observation that the new Rule 37(e) is "in some respects more lenient as to the sanctions that can be imposed for violation of the preservation obligation."<sup>42</sup>



It may be notable, however, that the spoliating culprits in *CAT3* and *Ericksen* were the plaintiffs.<sup>43</sup> Whether defendants could avoid sanctions like adverse jury instructions or default judgments under similar circumstances remains to be seen, as does the extent to which these initial cases ultimately turn out to be accurate previews of the evolution of spoliation jurisprudence under the new Rule 37(e). In the meantime, however, they provide a useful preview of issues that will unavoidably recur as courts wrestle with the problem of appropriately enforcing e-discovery responsibilities.

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<sup>1</sup> Fed. R. Civ. P. Rule 37(e) Advisory Committee notes to 2015 amendment.

<sup>2</sup> *Id.*

<sup>3</sup> No. 14 Civ. 5511 (AT) (JCF), 2016 WL 154116 (S.D.N.Y. Jan. 12, 2016).

<sup>4</sup> *Id.* at \*2.

<sup>5</sup> *Id.* at \*8.

<sup>6</sup> *Id.* at \*5 (quoting Proposed Amendments to the Federal Rules of Civil Procedure, 2015 U.S. Order 0017 (Apr. 29, 2015)).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at \*6.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (quoting Fed. R. Civ. P. 37(e) advisory committee notes to 2015 amendment).

<sup>11</sup> *Id.* at \*6.

<sup>12</sup> *Id.* at \*7.

<sup>13</sup> *Id.* at \*11.

<sup>14</sup> *Id.*

<sup>15</sup> No. 13-cv-2077 BTM (RBB), 2016 WL 305096 (S.D. Cal. Jan. 26, 2016).

<sup>16</sup> *Id.* at \*1.

<sup>17</sup> *Id.* at \*2.

<sup>18</sup> *Id.* at \*1.

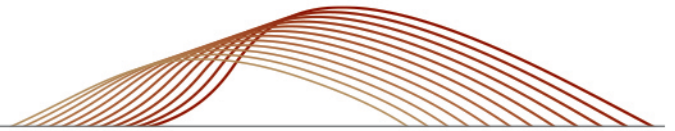
<sup>19</sup> *Id.* at \*1-2 (quoting Fed. R. Civ. P. 37(e)(2)).

<sup>20</sup> *Id.* at \*3.

<sup>21</sup> See Fed. R. Civ. P. 37(e)(2) advisory committee notes to 2015 amendment (“The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its

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decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice.”).

<sup>22</sup> No. 13-CV-5584 (RRM), 2016 U.S. Dist. LEXIS 16533 (E.D.N.Y. Feb. 2, 2016).

<sup>23</sup> *Id.* at \*4.

<sup>24</sup> *Id.* at \*5.

<sup>25</sup> *Id.* at \*6-8.

<sup>26</sup> *Id.* at \*12.

<sup>27</sup> *Id.* at \*13 (quoting Fed. R. Civ. P. 37(e)(2)).

<sup>28</sup> *Id.* at \*13-14.

<sup>29</sup> *Id.* at \*13-14.

<sup>30</sup> *Id.* at \*14.

<sup>31</sup> No. 10 Civ. 4228 (RWS), 2016 WL 54684 (S.D.N.Y. Jan. 5, 2016).

<sup>32</sup> *Id.* at \*5 n.5 (quoting 2015 U.S. Order 0017).

<sup>33</sup> *Id.*

<sup>34</sup> No. RDB-14-3106, 2016 WL 695789 (D. Md. Feb. 22, 2016).

<sup>35</sup> *Id.* at \*1-2.

<sup>36</sup> *Id.* at \*2-4.

<sup>37</sup> *Id.* at \*3-4.

<sup>38</sup> *NuVasive, Inc.*, 2016 WL 305096, at \*2-3.

<sup>39</sup> 2015 U.S. Order 0017.

<sup>40</sup> Fed. R. Civ. P. 37(e)(1).

<sup>41</sup> *CAT3*, 2016 WL 154116, at \*10-11; *Ericksen*, 2016 WL 695789, at \*2.

<sup>42</sup> *CAT3*, 2016 WL 154116, at \*5.

<sup>43</sup> *Id.* at \*11; *Ericksen*, 2016 WL 695789, at \*1.