REDMON, PEYTON & BRASWELL LLP

WHITE PAPER SERIES 2014

THE LONG-AWAITED PROPOSED FRCP RULE 37(e), ITS WORKINGS AND ITS GUIDANCE FOR ESI PRESERVATION

James S. Kurz, Daniel D. Mauler and Jacquelyn A. Jones
Redmon, Peyton & Braswell, LLP

The FRCP rule-makers have sent to the U.S. Judicial Conference for consideration in September 2014 their electronically stored information (ESI) preservation rule, proposed Rule 37(e). Judge David Campbell, the chair of the Advisory Committee on Federal Rules of Civil Procedure, has said that "37(e) is the most challenging task any of us on the committee have ever undertaken."

The proposed rule presents a uniform process and standard which will resolve the split among the circuits on the availability of the most serious ESI spoliation sanctions. Proposed Rule 37(e) will replace entirely the current subpart, and, as stated in the Committee Note, "forecloses reliance on inherent authority or state law to determine when certain [curative or sanctioning] measures should be used." The new standard will permit the most serious sanctions only when there is proof of an "intent to deprive" the harmed party of the use of the ESI in its case.

The new Rule 37(e) will also be the only civil rule that speaks, albeit indirectly, to the duty to preserve ESI. The rule-makers provide for the first time a genuine safe harbor for those who take timely "reasonable steps" to preserve ESI. While this may appear to be only abbreviated guidance, the chosen wording taps into case law and literature that offer substantial definitions of the processes businesses should follow in ESI preservation.

Proposed Federal Rule 37(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 the information, and the information cannot be restored or replaced through additional discovery, the court may:

(1) Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice;

(2) Only upon a 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.

Section I of this commentary introduces proposed Rule 37(e). Section I.A maps the rule, while I.B offers a summary of the rule's history and of the road ahead. Section 1.C parses Rule 37(e) drawing on the Committee Note. In Section II, the coverage turns to the practical side of the safe harbor offering. Section III summarizes.

SECTION I: THE PROPOSED ESI PRESERVATION RULE

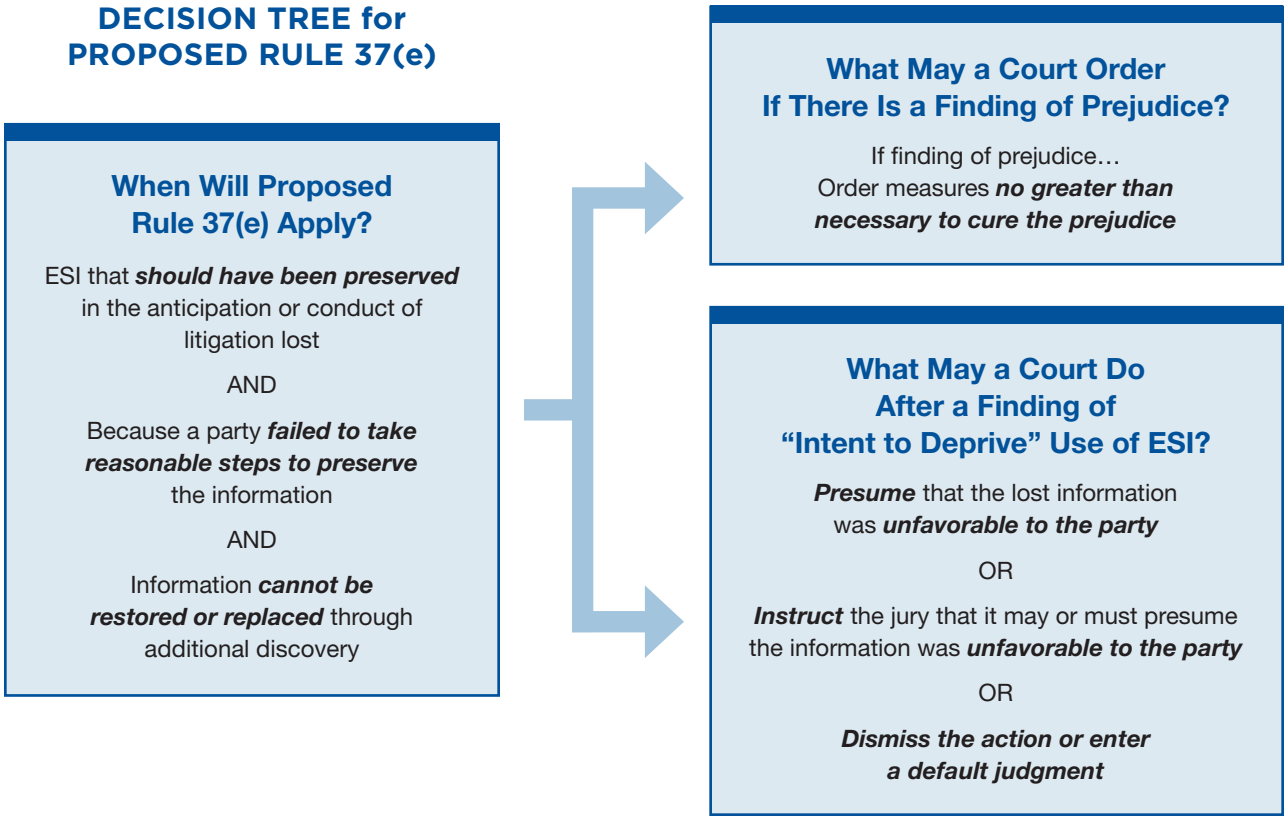
The U.S Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") approved in late May 2014 proposed Rule 37(e). The Advisory Committee's Judge Campbell explains that the proposal sent to the Standing Committee "moved toward a more simple and modest rule…."

Given the complexity of the challenge, the rule on its surface is surprisingly simple—the following graphic maps the Decision Tree for the rule in three stages.

First, rather than generally dealing with lost evidence, the proposed rule addresses only lost ESI. The Rule applies only when a 3-part test is met, essentially providing a safe harbor. Second, if there is a finding of prejudice because the ESI has been lost, then a court may impose remedies to cure the prejudice, but no more. And third, the most serious remedies may only be utilized after a finding of "intent to deprive" the use of the lost ESI. Parts 2 and 3 are separate—a litigant does not have to satisfy the "prejudice" finding necessary for Part 2 to get to Part 3.

A. The Road to the Proposed Rule and the Way Ahead

Understanding the challenge of addressing ESI spoliation begins with recognizing that the volume of ESI files expands at warp speed. Businesses must manage their ESI or else be buried in their data. Routine deletion of ESI has become an accepted part of the ESI management process. The U.S. Supreme Court in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) recognized that these processes "which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business," and that it is "not



wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."

But one party may view the opposing party's ESI management as the destruction, of relevant evidence. A consequence of this conflict coupled with legal uncertainties as to the resolution has produced a series of high-stakes, high-cost spoliation battles. The ESI Preservation Rule must referee these battles, and hopefully defuse them.

During the consideration of the 2006 rules amendments, the fight over how to handle ESI preservation and spoliation was the greater part of the debate. As the debate raged on, the rule-makers appreciated that while they could defer for several years, eventually they would have to address head-on the ESI preservation and spoliation issue. Following the 2010 Duke Conference, which was convened primarily to start the process towards promulgation of a revised Preservation Rule, and a 2012 Dallas mini-conference, a package of proposals, including a proposed Rule 37(e), was published in August 2013. Since publication, these proposals have attracted more than 2,300 written comments.

The Advisory Committee met in April 2014 in Portland, Oregon to consider the revised rules package. An earlier version of proposed Rule 37(e) in the Agenda Book was by-passed on Day 1 of the meetings. This soon-to-be discarded version employed the terms "bad faith" and "willful," which had become the hot-button words in the debate, and offered a list of factors a court might consider. A substantially rewritten and shortened proposal appeared the next morning. It is the rewritten proposed rule with a later-added Committee Note that emerged.

The revised proposed Rule 37(e) went before the Standing Committee in late May 2014. The Standing Committee approved the proposed rule with just a few changes to the Committee Note. The proposal will soon be before the Judicial Conference. If approved, as expected, then the package will move to the Supreme Court and then to Congress. If the Court adopts the changes before May 1, 2015, and Congress leaves the proposed amendments untouched, the amendments will become effective December 1, 2015.

B. Proposed Rule 37(e) Parsed

The rule-makers see proposed Rule 37(e) as the single rule for dealing with lost ESI. As confirmed in the Committee Note, the proposed rule is intended to replace entirely current Rule 37(e) and eliminate analysis of ESI spoliation issues grounded on a court's inherent authority.

The rule will resolve the current split among the circuits, explicitly rejecting the Second Circuit's position.

> **Committee Note:** It rejects 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.

The Second Circuit's negligence analysis represents one end of the spectrum on the requisite showing to support an adverse inference instruction. In contrast, the Tenth Circuit rejects this approach, and requires proof of bad faith loss of the information. See, e.g., *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.")

Regarding reliance on a court's "inherent authority" as an alternative basis for imposing sanctions, the Committee Note reads:

> **Committee Note:** It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.

A court's inherent authority has become for some courts the source of the authority to deal with ESI spoliation, including the authority for imposing even the most serious spoliation sanctions.

For example, in *The Pension Committee of the University of Montreal Pension Plan. v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456, 464 (SDNY 2010), Judge Scheindlin writes that the "right to impose

sanctions for spoliation arises from a court's inherent power to control the judicial process and litigation." According to Judge Scheindlin, the court's inherent authority to punish spoliation arises from "the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth."

The rule-makers would eliminate entirely this "inherent authority" basis for spoliation sanctions.

The proposed rule has three parts: (1) The 3-step test for when the rule will apply, (2) "prejudice" and the middle ground remedies, and (3) proof of "intent to deprive" as the only route to the most serious sanctions.

1. When Does the Rule Apply? Is this the Safe Harbor Missing from the Current Rule?

The proposed rule addresses only lost ESI. Earlier versions of a replacement rule attempted much broader coverage. But on Day 2 of the Portland meetings, the proposal narrowed to just ESI, and further narrowed to only ESI lost because a party "failed to take reasonable steps to preserve." The rule begins with the 3-step test shown in the following graphic.

When Will Proposed Rule 37(e) Apply?

ESI that ***should have been preserved*** in the anticipation or conduct of litigation is lost

AND

Because a party ***failed to take reasonable steps to preserve*** the information

AND

Information ***cannot be restored or replaced*** through additional discovery

a. ESI Preservation Duty and Trigger.

The inquiry begins with the preservation trigger event —the proposed rule applies only to ESI "that should have been preserved in the anticipation or conduct of litigation…." The Committee Note confirms that this does not create a new duty to preserve, but draws on the existing common law duty:

> **Committee Note:** Many Court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

b. Reasonable Steps to Preserve.

The proposed rule next limits its application to ESI that was lost "because a party failed to take reasonable steps to preserve the information…." The Committee Note explicitly identifies that only "reasonable steps" should be required.

> **Committee Note:** This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection.

"Reasonable steps" stands as the safe harbor from spoliation sanctions that was heralded in the 2006 eDiscovery amendments, but which turned out to be an illusion. The pursuing party will show that ESI has been lost, and that the other party was on notice to preserve. The defense then likely centers, as least initially, on the preservation steps taken. If the defending party demonstrates that it took reasonable steps to preserve ESI, then the spoliation claim should fail.

The Committee Notes then adds proportionality as a factor:

> **Committee Note:** Another factor in evaluating the reasonableness of preservation efforts is proportionality.

By softening preservation requirements to what may be proportional to what is at stake, the rule-makers ratcheted downward the practical preservation requirements for routine litigation, including most employment cases. In the rule as drafted heading into the Portland meetings, proportionality was one of

five factors in assessing a party's conduct. The proposed rule makes no mention of proportionality; coverage is relegated to the Committee Note. The Note also recognizes that the party's sophistication should be considered when a court analyzes whether a party realized what should have been preserved.

c. Will Curative Measures Remedy the ESI Loss?

A court should not go any further in the analysis if the ESI loss can be "restored or replaced through additional discovery." The Committee Note repeats this point:

> **Committee Note:** Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery…. If the information is restored or replaced, no further measures should be taken.

In many ESI cases this third part will end the inquiry. What may appear to be lost often can be located elsewhere. For instance, a custodian's emails deleted from an Exchange database might be found on backup tapes, or possibly in another custodian's files. Before a court explores prejudice and searches for appropriate remedies, it must consider the possibility that seemingly lost ESI can be restored or replaced.

2. If There Is a Finding of Prejudice, What May a Court Order?

Only if the 3-step test described above is met does a court continue with its analysis. The question in subpart (e)(1) of proposed Rule 37(e) is whether there is a "finding of prejudice." If so, then a court may reach into its bag of remedies, but may "order measures no greater than necessary to cure the pre-judice." The remedies available at this stage do *not* include the most serious sanctions—the adverse inference instruction and dismissal. These sanctions may be imposed only under subpart (e)(2).

The Committee Note emphasizes that the proposed rule is purposefully vague on which party has the burden of proving or disproving prejudice.

> **Committee Note:** The rule does not place a burden of proving or disproving prejudice on one party or the other.

What May a Court Order If There Is a Finding of Prejudice?

If finding of prejudice…

Order measures ***no greater than necessary to cure the prejudice***.

As to the available remedies, Judge Campbell explains that "one of our intentions is to preserve broad remedial powers for judges in (e)(1)." The Committee Note provides:

> **Committee Note:** The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

The available remedies are not listed, but case law identifies financial penalties, payment of attorneys' fees, evidentiary limitations, and maybe that certain facts are deemed proved. A close reading of the proposed rule and the Committee Note identifies these actions as remedies, not "sanctions."

3. A Court May Give an Adverse Inference Instruction or May Dismiss Claims or Enter Default Judgment *Only* After a Finding of an "Intent to Deprive" the Use of the ESI.

The center of the ongoing debate has been the required showing before a court may give an adverse inference jury instruction, dismiss claims, or enter a default judgment. As noted above, some courts have required proof of black-hearted destruction of ESI, while the Second Circuit has authorized giving an adverse inference instruction based on a finding of negligence or gross negligence. The rule-makers intend a uniform standard, and they reject the Second Circuit's approach. And, as explained above, the "inherent authority" avenue would be blocked.

The Committee Note could not be clearer on this:

> **Committee Note:** It is designed to provide a uniform standard in federal court for the use of these serious measures when addressing failure to preserve electronically stored information. It rejects 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.

What May a Court Do After a Finding of "Intent to Deprive" Use of ESI?

Presume that the lost information was ***unfavorable to the party***

OR

Instruct the jury that it may or must presume the information was ***unfavorable to the party***

OR

Dismiss the action or enter a default judgment

The chosen test centers on proof of "an intent to deprive." The proposed rule language reads: "Only upon a finding that the party acted with the intent to deprive another party of the use of the information in the litigation." If there is any confusion in this language, the Committee Note emphasizes the restriction:

> **Committee Note:** Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

Only if this hurdle is cleared does the door open to the serious sanctions.

SECTION II: THE PRACTICAL SIDE — THE "REASONABLE STEPS" SAFE HARBOR

If approved, then proposed Rule 37(e) will be the only federal civil rule that speaks to the scope of a party's duty to preserve. While the rule might appear threadbare, the debate history and literature provide guidance on "reasonable steps." Key in this history is the Sedona Conference's 2010 *Commentary on Legal Holds: The Trigger and the Process*.[i]

The rule-makers chose to provide only general directions for ESI preservation, not detailed rules. The Committee's Comments from the 2010 Duke Conference reveal that the Committee considered three approaches to answering the preservation issue. One was an explicit preservation rule that detailed when and how ESI must be preserved. A second option considered a general preservation rule, but still a "front-end" solution, that is, fairly explicit directions or guidelines for the ESI preservation process. The third option, a "back end" approach, focuses on the availability of a genuine safe harbor and the consequences for failure to preserve. The rule-makers pursued this last option, stating that a party should not be sanctioned if it has taken "reasonable steps to preserve the information."

The critical question then becomes what are the reasonable steps contemplated in the rule? The Sedona *Commentary* includes Guidelines for defensible preservation processes. From these Guidelines it is a fairly small step to specifying processes that provide an ESI preservation solution that should meet the proposed Rule 37(e) "reasonable steps" standard.[iii]

The Sedona *Commentary* distills the requirements to "reasonableness and good faith" with recognition of proportionality.

The keys to addressing these issues, as with all discovery issues, are *reasonableness* and *good faith*. Where ESI is involved, there are also practical limitations due to the inaccessibility of sources as well as the volume, complexity and nature of electronic information, which necessarily implicates the proportionality principles, found in Rule 26(b)(2)(C)(iii).

If the *Commentary* stopped after this recitation, then the assistance would be far too general. The *Commentary* goes on to offer its Guidelines for a sufficient Legal Hold, documentation of the preservation processes, and regular review.[iii]

The *Commentary*, and in particular Guidelines 8, 9 and 10, are seen as identifying the "reasonable steps" in proposed Rule 37(e). In other words, implementing and following the Guidelines will show that a party has taken the reasonable steps to navigate to the safe harbor described in the rule.

SECTION III: SUMMARY

The process leading to proposed Rule 37(e) began with the 2010 Duke Conference. If the amendment process stays on course, the replacement rule will become effective on December 1, 2015.

Proposed Rule 37(e) has an appearance of simplicity. This design is so the proposed rule will be the sole authority for federal courts to impose ESI spoliation remedies or sanctions; the court's "inherent authority" as a basis for spoliation sanctions is pushed aside. In practice, the proposed rule may well be relatively simple to apply. But appreciation of the rule comes only with an understanding of the issues, the history, and the ongoing debate.

Unlike most procedural rules, this proposed rule has substantial business implications. As demands to manage ESI increase, businesses are seeking guidance on what must be preserved to avoid spoliation claims and sanctions. The circuit split and vague directions have led to costly over-preservation. Proposed Rule 37(e) will be the single rule to provide ESI preservation guidance, including at least the identification of the "reasonable steps" that define a safe harbor.

---

[i] The Sedona Conference published a 2007 version of the *Commentary* which was revised in 2010.

[ii] As an example of a real-world solution designed based on the *Commentary* Guidelines, the article turns to J. Kurz, *A Trial Lawyer's Wish List: A Legal Hold and Data Preservation Management Solution* (accessed from the eDiscovery page on Redmon, Peyton & Braswell website (www.RPB-law.com).

[iii] Guidelines 8, 9 and 10 from the 2010 Sedona *Commentary* read:

Guideline 8:
In circumstances where issuing a legal hold notice is appropriate, such a notice is most effective when the organization identifies the custodians and data stewards most likely to have relevant information, and when the notice:

(a) Communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective

(b) Is in an appropriate form, which may be written

(c) Provides information on how preservation is to be undertaken

(d) Is periodically reviewed and, when necessary, reissued in either its original or an amended form, and

(e) Addresses features of relevant information systems that may prevent retention of potentially discoverable information.

Guideline 9:
An organization should consider documenting the legal hold policy, and, when appropriate, the process of implementing the hold in a specific case, considering that both the policy and the process may be subject to scrutiny by opposing parties and review by the court.

Guideline 10:
Compliance with a legal hold should be regularly monitored.

ABOUT REDMON, PEYTON & BRASWELL LLP

Redmon, Peyton & Braswell LLP is, by design, a boutique law firm in Alexandria, Virginia, less than seven miles from the U.S. Capitol. Many of the Firm's attorneys practiced previously with AmLaw 100 firms. Our goal is to provide the same quality representation that clients expect from a large law firm but at substantially lower costs. We strive to solve our clients' problems in economically sensible ways.

Our lawyers are recognized as SuperLawyers and Rising Stars, listed among the Legal Elite and the Best Lawyers in America, and rated AV® Preeminent by their peers. We include among us a former U.S. Supreme Court law clerk and law professor, and federal Courts of Appeals and District Court law clerks. Attorneys from the Firm have served as presidents of the Alexandria Bar Association, the Federal Bar Association (Northern Virginia Chapter), and the Northern Virginia Bankruptcy Bar Association. Our lawyers practice across the Washington, D.C. metropolitan area, primarily in Northern Virginia.

The Firm's Commercial Litigation practice takes us into areas of eDiscovery, ESI Preservation and Information Governance. We advise our clients, including many smaller and mid-sized businesses, on compliance with ESI preservation duties. Our web-based ESI Preservation management solution, HOLD•PRESERVE•COMPLY, provides a low-cost method to meet increasing preservation obligations in both federal and state court litigation. In the broader field of Information Governance, we counsel businesses regarding email and record retention policies, legacy and cloud data management, and social media and BYOD practices.

THE AUTHORS

James S. Kurz

James Kurz's law practice builds on his experience as a litigation partner with two AmLaw 100 firms, his time as a federal prosecutor, and his work as a federal government antitrust attorney. He has extensive courtroom experience (including more than 180 trials to verdict) that include computer, software and communications technologies cases. Central to his law practice today are the challenges of eDiscovery and the complexities of Information Governance.

Daniel D. Mauler

As a trial lawyer with a background in information technology systems, Dan Mauler gravitates to technology-intensive cases. Mr. Mauler graduated *cum laude* from the Georgetown University Law Center where he served as an Articles Editor for *The Georgetown Law Journal* and as a Section Editor for *The Thirty-Fourth Annual Review of Criminal Procedure*. He developed his litigation skills as a competitor and coach in Georgetown Law's trial advocacy program, and as an intern for Judge Richard Roberts in the U.S. District Court for the District of Columbia.

Jacquelyn A. Jones

Jacqui Jones joined the Firm in 2014 following her clerkship with Judge Irene Burger in the U.S. District Court for the Southern District of West Virginia. She is a *magna cum laude* graduate of Vanderbilt University and earned her law degree from the University of Virginia School of Law.

REDMON, PEYTON & BRASWELL LLP
510 King Street • Suite 301 • Alexandria, VA 22314
(703) 684-2000 • www.rpb-law.com
Visit the EDVA Update Blog at www.rpb-law.com/EDVAUpdate