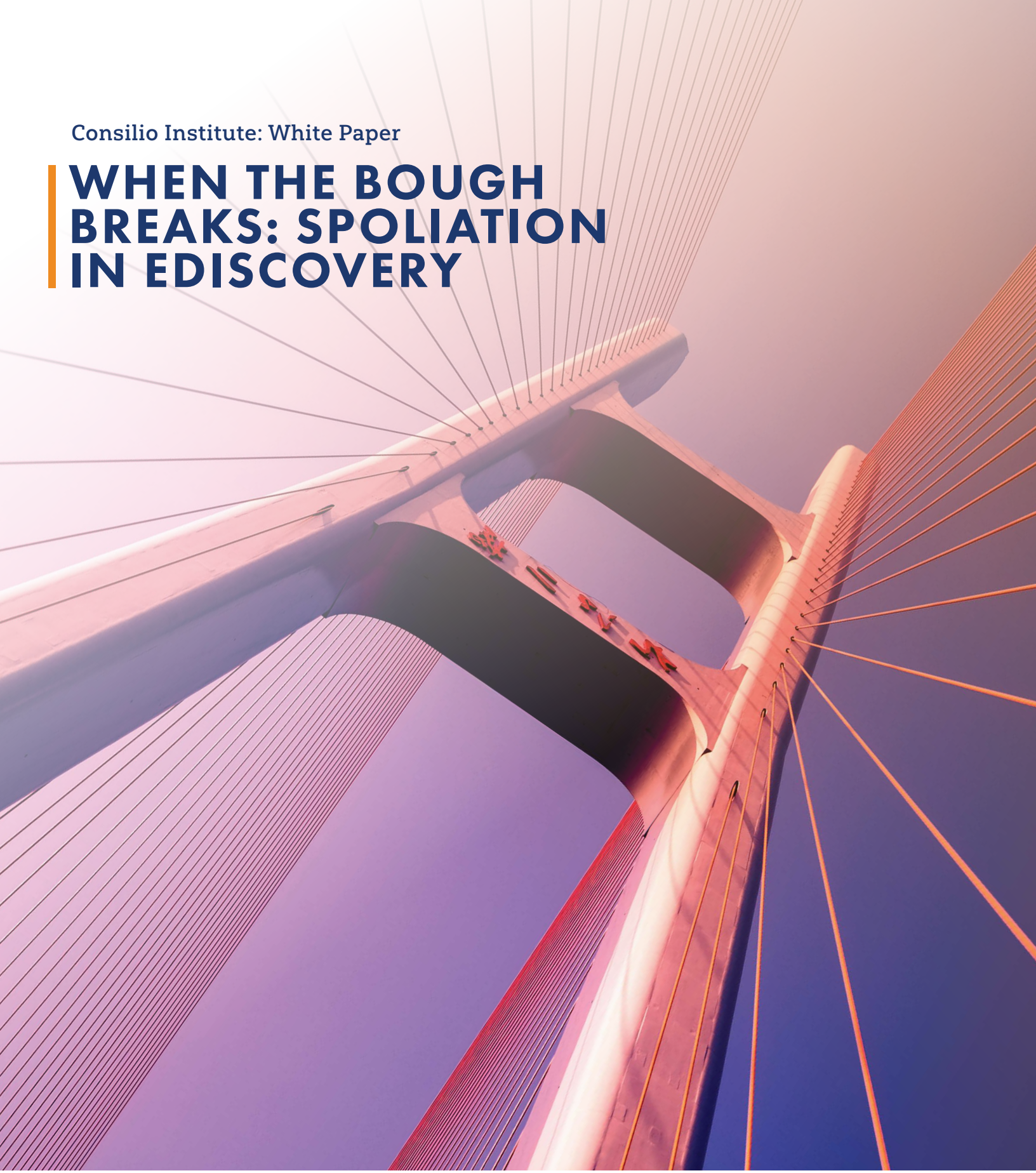
Consilio Institute: White Paper

WHEN THE BOUGH BREAKS: SPOLIATION IN EDISCOVERY



Matthew Verga
Director of Education

Consilio / ADVANCED LEARNING INSTITUTE

Consilio / ADVANCED LEARNING INSTITUTE

Consilio Institute: White Paper

WHEN THE BOUGH BREAKS: SPOLIATION IN EDISCOVERY

CONTENTS

Disclaimers

The information provided in this publication does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available in this publication are provided for general informational purposes only. While efforts to provide the most recently available information were made, information in this publication may not constitute the most up-to-date legal or other information.This publication contains links to third-party websites. Such links are only for the convenience of the reader; Consilio does not recommend or endorse the contents of the third-party sites.

Readers of this publication should contact their attorney to obtain advice with respect to any particular legal matter. No reader of this publication should act or refrain from acting on the basis of information in this book without first seeking legal advice from counsel in the relevant jurisdiction. Only your individual attorney can provide assurances that the information contained herein – and your interpretation of it – is applicable or appropriate to your particular situation.

Use of this publication, or any of the links or resources contained within, does not create an attorney-client relationship between the reader and the author or Consilio. All liability with respect to actions taken or not taken based on the contents of this publication is expressly disclaimed. The content of this publication is provided "as is." No representations are made that the content is error-free.

WHEN THE BOUGH BREAKS

An enormous volume and diversity of electronically-stored information ("ESI") may be relevant to a case, and this diversity and volume can make identification and preservation challenging. It is almost inevitable that some ESI will slip through the cracks. When that happens, Federal Rule of Civil Procedure 37(e)[1] ("FRCP") provides the framework for assessing the loss and its consequences.

This provision was added as part of the 2015 amendments,[2] after a "strikingly, perhaps uniquely, comprehensive and vigorous"[3] public comment period. It sought to bring predictability and consistency to a topic that had been plagued by unpredictability and inconsistent standards across jurisdictions.

FRCP 37(e)

The current subdivision (e) of FRCP 37 reads:

> (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:
>
> (1) upon finding prejudice to another party from loss of the information, may 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 may:
>
> (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.

This version of the subdivision made three primary changes from the version that preceded it:

- First, it eliminated old language regarding the "good-faith operation" of a computer system (and the confusion that came with it), and instead focuses on the more straightforward question of whether ESI has been "lost because a party failed to take **reasonable steps to preserve it**" [emphasis added].
- Second, it now requires a showing of **irreplaceability** and **prejudice** before the application of any consequences, and

[1] Fed. R. Civ. P. 37(e), available at https://www.law.cornell.edu/rules/frcp/rule_37.
[2] Order (U.S. Apr. 29, 2015), available at http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf.
[3] Report of Advisory Committee on Civil Rules (May 2, 2014), available at http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2014.
ut aliquip ex ea commodo consequat.

for unintentional losses, it limits those consequences to **curative measures**, thereby reducing the risks associated with minor ESI losses.

- Third, it creates a clear requirement that **intentionality** be found before severe sanctions can be applied (*i.e.*, it adopted the higher of the standards from the pre-existing circuit split).[4]

At a high level, courts' analyses of ESI spoliation issues now generally follow these steps:

1. Had a duty to preserve the ESI arisen?
    - If so, were reasonable steps to preserve it taken?
2. Can the missing ESI be recovered or replaced through additional discovery?
    - If so, what discovery should be directed and who should bear the cost?
3. If it cannot be recovered, does the loss of the ESI prejudice another party?
    - If so, what measures (e.g., procedural, evidentiary) would cure the prejudice?
4. Is there evidence that spoliating party acted with intent to deprive another party of it?
    - If so, are adverse inferences, dismissal or other severe sanctions warranted?

The points in this analysis where disputes most frequently arise are whether the steps taken to preserve were reasonable and whether there is evidence of intent to deprive.

ABOUT THIS WHITE PAPER

In this paper, we will review the analysis established by FRCP 37(e), as well as an assortment of cases applying it, to provide practitioners with the knowledge they need about: what qualifies as reasonable steps to preserve ESI, what qualifies as intent to deprive, and more.

REASONABLE STEPS TO PRESERVE ESI

FRCP 37(e) limits the application of sanctions to situations where ESI that should have been preserved was lost "because a party failed to take reasonable steps to preserve it." The rule itself does not elaborate on what qualifies as reasonable steps, but the Advisory Committee Notes to the 2015 Amendments do provide some guidance.

Five Factors to Consider

First and most importantly, the notes emphasize several times that, "[t]his rule recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection." In addition to reemphasizing this general principle of discovery, the Notes also provide a list of five specific factors that courts should consider when performing a post-hoc assessment of whether the steps taken in a given case were "reasonable":

1. The first factor is essentially the prior version of Rule 37(e), which had attempted to provide a narrow safe harbor for ESI loss:
    a. "As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider . . . although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation."

[4]Ibid.

2. The second factor is akin to a force majeure clause in a contract that allows for uncontrollable outside events, although reasonable preventative measures may still be expected of parties (e.g., maintaining backups):
    a. ". . . information the party has preserved may be destroyed by events outside the party's control — the computer room may be flooded, a 'cloud' service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks."
3. The third factor courts are directed to consider is the relative sophistication of the parties, particularly with regard to the likely difference in sophistication between large organizations and individuals.
4. The fourth factor courts are directed to consider is the relative resources available to the parties, including financial and human resources. The Notes explicitly state that less-expensive but substantially-as-effective alternatives can be reasonable:
    a. "The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms."
5. The final factor that courts are directed to consider is proportionality itself, which is a foundational requirement for all discovery (and which implicates another multi-factor analysis similar to this one).

Decisions Discussing Reasonable Steps

A variety of courts have had the opportunity to issue orders on motions for spoliation sanctions and to consider whether a party had taken the required reasonable steps. Here is a sampling of those cases from the past five years:

- *Paisley Park Enters., Inc. v. George Ian Boxill, Rogue Music Alliance, LLC*, 330 F.R.D. 226 (D. Minn. 2019)[5] – failure to "suspend the auto-erase function on their phones" or to "put in place a litigation hold to ensure that they preserved text messages" found not to have been reasonable steps to preserve
- *Nuvasive, Inc. v. Kormanis*, No. 1:18CV282 (M.D. N.C. Mar. 13, 2019)[6] – failure to "investigate[] . . . what text messages his iPhone held, and [] whether any setting on his iPhone might cause the deletion of existing or future text messages" and failure to "obtain[] appropriate advice about saving back-up copies of his text messages" found not to have been reasonable steps to preserve
- *DriveTime Car Sales Company, LLC v. Pettigrew*, No. 2:17-cv-371 (S.D. Ohio Apr. 18, 2019)[7] – failure to preserve text messages prior to replacing phone with a new one found not to have been reasonable steps to preserve
- *Cruz v. G-Star Inc.*, 17-CV-7685 (PGG) (OTW) (S.D.N.Y. Jun. 19, 2019)[8] – failure to issue a timely legal hold or monitor hold compliance, leading to deletion of emails and SAP data, found not to have been reasonable steps to preserve
- *In re Google Play Store Antitrust Litig.*, No. 21-md-02981-JD (N.D. Cal. March 28, 2023)[9] – failure to suspend automated janitorial functions, giving "each employee carte blanche to make his or her own call about what might be relevant," and "intentionally deciding not to check up on employee decisions"

[5] *Paisley Park Enters., Inc. v. George Ian Boxill, Rogue Music Alliance, LLC*, 330 F.R.D. 226 (D. Minn. 2019), available at https://casetext.com/case/paisley-park-enters-inc-v-george-ian-boxill-rogue-music-alliance-llc-1.
[6] *Nuvasive, Inc. v. Kormanis*, No. 1:18CV282 (M.D. N.C. Mar. 13, 2019), available at https://casetext.com/case/nuvasive-inc-v-kormanis.
[7] *DriveTime Car Sales Company, LLC v. Pettigrew*, No. 2:17-cv-371 (S.D. Ohio Apr. 18, 2019), available at https://casetext.com/case/drivetime-car-sales-co-v-pettigrew-1.
[8] *Cruz v. G-Star Inc.*, 17-CV-7685 (PGG) (OTW) (S.D.N.Y. Jun. 19, 2019), available at https://casetext.com/case/cruz-v-g-star-inc.
[9] *In re Google Play Store Antitrust Litig.*, No. 21-md-02981-JD (N.D. Cal. March 28, 2023), available at https://storage.courtlistener.com/recap/gov.uscourts.cand.373179/gov.uscourts.cand.373179.469.0.pdf.

> (essentially "a 'don't ask, don't tell' policy for Chat preservation") found not to have been reasonable steps to preserve

This collection of cases suggests that what qualifies as reasonable steps includes steps like: issuing timely legal holds, monitoring compliance with those holds, suspending automated janitorial functions, and preserving through preemptive collection when needed.

It should also be noted here that the range of sources to which these expectations apply continues to expand. In recent years, parties have been sanctioned for spoliation of Slack messages, Google Vault documents, Basecamp project files, ephemeral Signal messages, and more (e.g., *Red Wolf Energy Trading, LLC v. BIA Cap. Mgmt., LLC*[10]; *Drips Holdings, LLC v. Teledrip LLC*[11]; *Ace Am. Ins. Co. v. First Call Envtl.*[12]; and *Fed. Trade Comm'n v. Noland*[13]). To avoid inadvertent spoliation due to simple lack of awareness, it's important to stay informed about newer tools and communication options that may become sources of relevant ESI if your clients or custodians have chosen to use them.

INTENT TO DEPRIVE

Before the amendments to FRCP 37(e), a circuit split had arisen regarding the question of whether adverse inference instructions or dismissal could be based merely on some level of negligence or if intentional misconduct was required. As noted above, one of the things the amendments were intended to do was to resolve that split, because the jurisdictional variations created uncertainty for litigants and, allegedly, increased preservation costs. The Advisory Committee on Civil Rules explained in its May 2014 Report[14]:

> Some circuits, like the Second, hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent or grossly negligent loss of ESI. Other circuits, like the Tenth, require a showing of bad faith before adverse inference instructions can be given. The public comments credibly demonstrate that persons and entities over-preserve ESI out of fear that some might be lost, their actions with hindsight might be viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence.

The amended version of FRCP 37(e)(2) resolved this split in favor of the higher standard by requiring a showing that "the party acted with the intent to deprive another party of the information's use in the litigation" for the application of adverse inference instruction, dismissal, or default judgment sanctions.

Although this rule change increased predictability and reduced the frequency of severe spoliation sanctions, it created new ambiguity around what level of evidence is sufficient to support a finding of intent to deprive. Can intent be inferred or is direct evidence needed?

Decisions Discussing Intent to Deprive

A variety of courts have had the opportunity to issue orders on motions for spoliation sanctions considering whether a party had "acted with the intent to deprive another party of the information's use in the litigation."

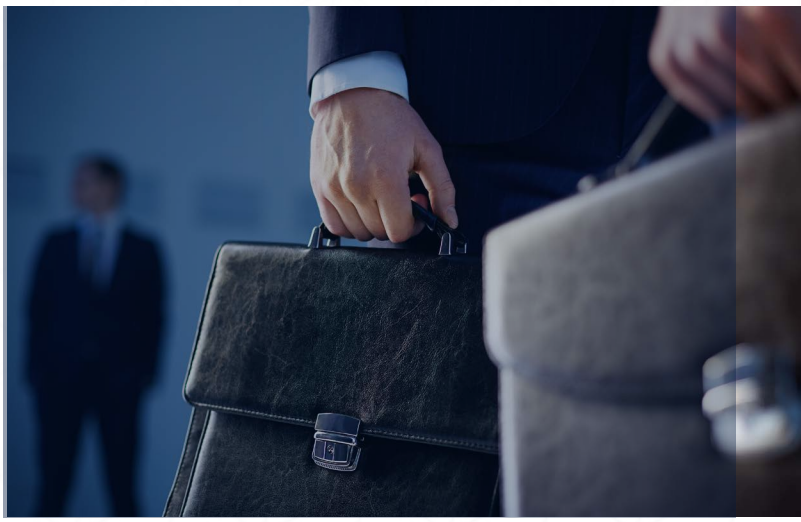
[10] *Red Wolf Energy Trading, LLC v. BIA Cap. Mgmt., LLC*, 2022 WL 4112081 (D. Mass. Sept. 8, 2022), available at https://app.ediscoveryassistant.com/case_law/44507-red-wolf-energy-trading-llc-v-bia-capital-mgmt-llc.
[11] *Drips Holdings, LLC v. Teledrip LLC, Sept.* 8, 2022 WL 4545233 (N.D. Ohio Sept. 29, 2022), available at https://app.ediscoveryassistant.com/case_law/44997-drips-holdings-llc-v-teledrip-llc.
[12] *Ace Am. Ins. Co. v. First Call Envtl.*, LLC, 2023 WL 137456 (E.D. Pa. Jan. 9, 2023), available at https://app.ediscoveryassistant.com/case_law/46858-ace-am-ins-co-v-first-call-envtl-llc.
[13] *Fed. Trade Comm'n v. Noland*, No. CV-20-00047-PHX-DWL (D. Ariz. Aug. 30, 2021), available at https://app.ediscoveryassistant.com/case_law/36010-fed-trade-comm-n-v-noland.
[14] Report of Advisory Committee on Civil Rules, *supra* note 3.

Here is a sampling of those cases from the past five years:

- *DriveTime Car Sales Company, LLC v. Pettigrew*, No. 2:17-cv-371 (S.D. Ohio Apr. 18, 2019)[15] – in this case, a party failed to take reasonable steps to preserve relevant ESI, but no evidence of intention to deprive beyond the failure itself was shown, leading to no finding of intent to deprive under FRCP 37(e)(2)
- *GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76 (3rd Cir. 2019)[16] – in this case, "the District Court reasonably concluded that Plantronics acted in bad faith" based on the facts that a Senior VP "deliberately deleted an unknown number of emails in response to 'pending litigation' and urged others to do the same," that "executives, including its CEO, were not truthful during depositions," and that "the company was not willing to spend a nominal fee for its expert, Stroz, to fully assess the spoliation and create a final report," each of which "was an intentional step to interfere with GN's prosecution of its claims against Plantronics"
- *GMS Indus. Supply, Inc. v. G&S Supply, LLC*, No. 2:19-cv-324 (RCY) (E.D. Va. Mar. 22, 2022)[17] – in this case, the court found intent to deprive based on the defendant's decision, after receiving hold notices, to download an application called File Shredder and use it to permanently delete all user created files on his computer
- *Jennings v. Frostburg State Univ.*, No. ELH-21-656 (D. Md. June 27, 2023)[18] – in this case, the court declined to infer intent to deprive from defendant's failure to implement a litigation hold in a timely manner or from the erasure of two relevant custodians' phones when their employment ended
- *Skanska USA Civil Se. Inc. v. Bagelheads, Inc.*, 75 F.4th 1290 (11th Cir. 2023)[19] – in this case, the Second Circuit affirmed a finding of intent to deprive that was based on a party's systemic preservation failures without more direct evidence of bad faith:

> The court found a "lack of any cogent explanation" for Skanska's complete failure to make any effort to preserve the destroyed cell phones. It focused in particular on how the company "took no action" to educate its custodians and administrators about the litigation hold and "made no effort" to collect its custodians' cell phone data until at least seven months after the litigation hold was in place. . . . In the district court's view, bad faith was the only thing that explained the company's actions. [internal citations omitted]
>
> The court noted however, that were its review *de novo* rather than for clear error, it would have been a "close question" whether to find bad faith or merely gross negligence.

These decisions considering intent to deprive show a bit more variation than the decisions we reviewed



[15] *DriveTime Car Sales Company, supra* note 7.
[16] *GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76 (3rd Cir. 2019), available at https://www2.ca3.uscourts.gov/opinarch/181287p.pdf.
[17] *GMS Indus. Supply, Inc. v. G&S Supply, LLC*, No. 2:19-cv-324 (RCY) (E.D. Va. Mar. 22, 2022), available at https://app.ediscoveryassistant.com/case_law/40609-gms-indus-supply-inc-v-g-s-supply-llc.
[18] *Jennings v. Frostburg State Univ.*, No. ELH-21-656 (D. Md. June 27, 2023), available at https://app.ediscoveryassistant.com/case_law/50818-jennings-v-frostburg-state-univ.
[19] *Skanska USA Civil Se. Inc. v. Bagelheads, Inc.*, 75 F.4th 1290 (11th Cir. 2023), available at https://casetext.com/case/skanska-us-civil-se-v-bagelheads-inc.

regarding reasonable steps. As with many aspects of discovery, courts' decisions in these cases are very fact-specific. In general, courts seem reluctant to infer intent solely from a lack of reasonable steps or other circumstantial evidence, but some are willing to draw that inference – particularly when the failures have been egregious or the explanations implausible.

OTHER FACTORS TO REMEMBER

In addition to reasonable steps and intent to deprive, there are other factors related to spoliation sanctions worth remembering. First, there must have been irretrievable loss of some ESI for sanctions to be applied under the rule. Second, there must also have been prejudice to another party from that loss. Third, sanctions need not be proportional to the value of the case. Finally, courts are not always limited to the terms of the rule.

There Must Have Been Irretrievable Loss

The language of FRCP 37(e) specifies that, in order to apply sanctions under the rule, ESI that should have been preserved has been "lost . . . and [] cannot be restored or replaced through additional discovery." So, even in cases where reasonable steps to preserve weren't taken, sanctions may not apply if no ESI was lost or if any lost ESI can be recovered or replaced (e.g., *Globus Med., Inc. v. Jamison*[20]). The availability of alternate forms of the lost evidence (e.g., screen captures, testimony) or alternate sources of the lost evidence (e.g., third parties or service providers) may be sufficient to preclude a finding of loss (e.g., *Envy Hawaii LLC v. Volvo Car USA LLC*[21]), but alternate forms (including screen captures) are not always sufficient (e.g., *Edwards v. 4JLJ, LLC*[22]).

It should also be noted here that, technically, you can have spoliation without irretrievable loss in those rare cases where someone has altered or fabricated evidence. Those too are sanctionable forms of spoliation, and such intentional misconduct receives the harshest penalties (e.g., *Gunter v. Alutiiq Advanced Sec. Sols., LLC*[23]; *Rossbach v. Montefiore Med. Ctr.*[24]).

There Must Have Been Prejudice

The language of FRCP 37(e) also specifies that, in order to apply even curative measures under the rule, the court must find "prejudice to another party from loss of the information." So, even in cases where reasonable steps to preserve weren't taken and ESI was irretrievably lost, sanctions may not apply if no prejudice from the loss can be shown (e.g., *Hernandez v. Tulare County Correction Center*[25]; *Sinclair v. Cambria Cnty.*[26]).

Sanctions Can Exceed Case Value

It is important to remember that discovery sanctions need to be pegged to the prejudice they are curing or the conduct they are deterring rather than to the value of the overall case:

- *Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620 (2d Cir. 2018)[27] – in this case, the Second Circuit approved discovery sanctions – including a $2.7 million award of fees and costs in a case with a value of around $20,000 – over the Defendant's objection that such sanctions were "impermissibly punitive, primarily because they are disproportionate to the likely value of the case," because as the court explained:

[20] *Globus Med., Inc. v. Jamison*, 2023 WL 2127410 (E.D. Va. Feb. 10, 2023), available at https://app.ediscoveryassistant.com/case_law/47832-globus-med-inc-v-jamison.
[21] *Envy Hawaii LLC v. Volvo Car USA LLC*, No. 17-00040 HG-RT (D. Haw. Mar. 20, 2019), available at https://scholar.google.com/scholar_case?case=13587045757304291469.
[22] *Edwards v. 4JLJ, LLC*, No. 2:15-CV-299 (S.D. Tex. Jan. 11, 2019), available at https://casetext.com/case/edwards-v-4jlj-llc-2.
[23] *Gunter v. Alutiiq Advanced Sec. Sols., LLC*, No. 1:20-CV-03410-JRR (D. Md. March 2, 2023), available at https://app.ediscoveryassistant.com/case_law/48019-gunter-v-alutiiq-advanced-sec-sols-llc.
[24] *Rossbach v. Montefiore Med. Ctr.*, No. 21-2084 (2d Cir. August 28, 2023), available at https://app.ediscoveryassistant.com/case_law/52134-rossbach-v-montefiore-med-ctr.
[25] *Hernandez v. Tulare County Correction Center*, No. 16-CV-00413 (E.D. Cal. Feb. 8, 2018), available at https://casetext.com/case/hernandez-v-tulare-cnty-corr-ctr-2.
[26] *Sinclair v. Cambria Cnty.*, No. 3:17-cv-149 (W.D. Pa. Sept. 28, 2018), available at https://scholar.google.com/scholar_case?case=8414468043782276336.
[27] *Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620 (2d Cir. 2018), available at https://casetext.com/case/klipsch-grp-inc-v-epro-e-commerce-ltd-1.

> . . . discovery sanctions should be commensurate with the costs unnecessarily created by the sanctionable behavior. A monetary sanction in the amount of the cost of discovery efforts that appeared to be reasonable to undertake ex ante does not become impermissibly punitive simply because those efforts did not ultimately uncover more significant spoliation and fraud, or increase the likely damages in the underlying case.

Courts Are Not Limited to FRCP 37(e)

One of the primary goals of the December 2015 Amendments to the Federal Rules of Civil Procedure was to increase predictability and consistency for litigants by eliminating jurisdictional variations in ESI spoliation standards, their application, and the associated penalties. To accomplish the desired standardization, amended FRCP 37(e) would need to become the only source of authority for the application of ESI spoliation sanctions, to prevent the rule from being bypassed and predictability from being destroyed.

As articulated in the Advisory Committee Notes to the 2015 Amendments,[28] the Rules Advisory Committee intended for the new version of FRCP 37(e) to preclude the use of inherent authority to assess ESI spoliation sanctions:

> New Rule 37(e) . . . authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used.

Advisory notes are only advisory, however, and in the years since, courts have generally followed the rule but continued to assert the inherent power to sanction as needed to manage their proceedings and ensure just resolutions. For example, in *CAT3 LLC v. Black Lineage*,[29] the court imposed sanctions under Rule 37(e) but asserted explicitly that inherent authority would still have been an option for imposing the sanctions, if the result provided by the rule had been inadequate:

> Where exercise of inherent power is necessary to remedy abuse of the judicial process, it matters not whether there might be another source of authority that could address the same issue. In Chambers, the Supreme Court rejected the argument by the party opposing the sanctions motion that provisions of the Federal Rules of Civil Procedure foreclosed resort to inherent power. It stated that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." [internal citations omitted]

Moreover, this inherent authority also gives courts great discretion in fashioning appropriate remedies and sanctions. For example, in combination with more common sanctions like fee awards and adverse inference instructions, a court might also shift a burden of proof (e.g., *Edwards v. 4JLJ, LLC*[30]) or preclude the calling of specific witnesses (e.g., *Wilmoth v. Deputy Austin Murphy*[31]).

[28] Fed. R. Civ. P. 37(e), Committee Notes on Rules—2015 Amendment, available at https://www.law.cornell.edu/rules/frcp/rule_37.
[29] *CAT3 LLC v. Black Lineage*, 164 F. Supp. 3d 488 (S.D.N.Y. Jan. 12, 2016), available at https://casetext.com/case/cat3-llc-v-black-lineage-inc-2.
[30] *Edwards, supra* note 22.
[31] *Wilmoth v. Deputy Austin Murphy*, No. 5:16-CV-5244 (W.D. Ark. Aug. 7, 2019), available at https://casetext.com/case/wilmoth-v-murphy-1.

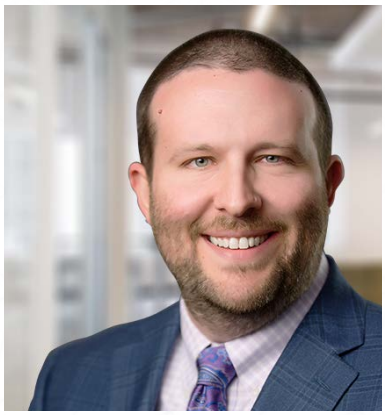
KEY TAKEAWAYS

There are five key takeaways from this white paper to remember:

1. Under FRCP 37(e), reasonable steps to preserve ESI includes steps like: issuing timely legal holds, monitoring compliance with those holds, suspending automated janitorial functions, and preserving through preemptive collection when needed.
2. If the prejudicial loss was accidental, only curative measures can be imposed, but if there was intent to deprive another party, severe sanctions can be imposed.
3. Some courts decline to infer intent solely from a lack of reasonable steps or other circumstantial evidence, but some are willing to draw that inference – particularly when the failures have been egregious or the explanations implausible.
4. Even in cases where reasonable steps to preserve weren't taken, sanctions may not apply if the ESI can be recovered elsewhere or if no prejudice from the loss can be shown based on what the contents of the missing ESI would have been.
5. When necessary to manage their affairs or to craft an appropriate remedy, courts may go beyond the letter of FRCP 37(e) and rely on their inherent authority to apply sanctions at a time or of a type not dictated by the rule.

ABOUT THE AUTHOR

Matthew Verga is an attorney, consultant, and eDiscovery expert proficient at leveraging his legal experience, his technical knowledge, and his communication skills to make complex eDiscovery topics accessible to diverse audiences. A nineteen-year industry veteran, Matthew has worked across every phase of the EDRM and at every level, from the project trenches to enterprise program design. As Director of Education for Consilio, he leverages this background to produce engaging educational content to empower practitioners at all levels with knowledge they can use to improve their projects, their careers, and their organizations.



Matthew Verga, Esq.
Director of Education
m +1.704.582.2192
e matthew.verga@consilio.com
consilio.com