

Tug of War over Authority for ESI Spoliation Sanctions

By Brian A. Zemil, *Litigation News* Associate Editor

In 2015, Federal Rule of Civil Procedure 37 was amended to establish a consistent, predictable standard for remedying failures to preserve electronically stored information (ESI). To that end, the committee note to that rule explicitly “forecloses” a court’s ability to sanction ESI spoliation misconduct based on its inherent authority. Over the past five years, courts have interpreted that language differently, thereby creating a split among the courts and uncertainty for parties facing potentially case-ending sanctions. Counsel can set the best course for a client only by identifying a specific court’s stance on the inherent authority debate.

Rule 37(e) provides that if ESI “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,” then a court can consider remedial measures or sanctions. Subsection (e)(2) provides that a court may impose severe sanctions, such as an adverse inference jury instruction, “only upon a finding that the party acted with the intent to deprive another party of the information’s use in the litigation.”

In *Chambers v. NASCO, Inc.*, the Supreme Court explained that “the exercise of the inherent power of lower federal courts [to sanction misconduct] can be limited by statute and rule, [but] the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct.” The Court cautioned that a judge “ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.”

As demonstrated by the cases found at <http://bit.ly/LN451-zemil>, courts attempting to balance Rule 37 exclusivity with their inherent authority have adopted three approaches. California, Delaware, Florida, Illinois, and New Jersey federal courts have recognized Rule 37 as the sole source of authority to sanction ESI spoliation. The D.C. Circuit and some New York district courts have recognized a “gap” exception—inherent authority to remedy ESI misconduct when Rule 37 is not “up to the task.” The Second Circuit Court of Appeals and other federal district courts in New York, Pennsylvania, and Tennessee have adopted a blended approach that allows ESI spoliation sanctions based on Rule 37 but does not exclude the use of inherent authority.


When Rule 37 does not cover the misconduct, the court’s inherent power fills the “gap.” In *Hsueh v. N.Y. State Department of Financial Services*, the “gap” existed because Rule 37 does not address *intentional* ESI spoliation, and the ESI was ultimately not lost. There, the plaintiff destroyed a


recording of a conversation with the defendant’s affirmative action officer because it was purportedly “not very clear” and not “worth keeping” to pursue her sexual harassment claims. After the defendant filed a spoliation motion, the plaintiff was able to recover and produce an audio file that she claimed to be the complete recording.

The court held that Rule 37 did not apply to this audio recording. Whereas the amended rule curtails the excessive burden and costs associated with over-preservation of ESI, the plaintiff “took specific action to delete” the recording. Because Rule 37(e) did not apply, the court relied on its inherent power to sanction via an adverse inference. Several other cases follow similar reasoning and hold that, where Rule 37(e) is not applicable, inherent authority sanctions are in play.

Other courts have employed a blended approach that relies on either or both Rule 37(e) and inherent authority to sanction ESI spoliation. *DeCastro v. Kavadia* declared that the authority to resolve spoliation of evidence disputes “arises jointly under [the Federal Rules] and the court’s own inherent authority.” *DVComm v. Hotwire Commc’ns* commented that it can exact an appropriate sanction under its inherent authority “without limitation” and “regardless whether a party suffered prejudice” by the misconduct.

Such broad discretion was approved in *Klipsch Group v. EPRO Ecommerce*, in which the Second Circuit affirmed monetary sanctions for spoliation of ESI and relied on *Chambers* to seemingly avoid deciding whether Rule 37 applied. *EPAC Technologies, Inc. v. Harper Christian Publishing Inc.* is another example of a blended approach. There, the defendant publisher lost or deleted books, emails, and inventory data. The court found that the books were not considered ESI under Rule 37 and relied on its inherent authority to make a rebuttable presumption that the missing evidence would have established the plaintiff’s case. The court addressed the remaining lost emails and data under a Rule 37 analysis and awarded various sanctions, including fees and a limiting jury instruction.

The differing court approaches to Rule 37 require counsel to conduct a jurisdiction-by-jurisdiction assessment of whether inherent-authority-based sanctions exist. If Rule 37(e) applies to the loss of discoverable ESI, courts might permit, prevent, or be silent on whether their inherent authority provides an alternative ground for relief. Be prepared by understanding the issues and crafting arguments accordingly. 

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