

**Amendments to the Federal Rules of Practice and Procedure:
Civil Rules 2015—Failure to Preserve Electronically Stored
Information (Video Transcript)¹**

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Hello, I am Judge Paul Grimm of the District Court of Maryland, and a former member of the Civil Rules Advisory Committee.

Given the information explosion and exponential growth in the use of computers and digital devices in the past decades, preservation of electronically stored information, or ESI, has become a major challenge facing parties and courts in litigation.

Part of the challenge arises from the sheer volume of information that parties must review and produce in litigation. Another part arises from significant splits within the circuits regarding the consequences of a party's failure to preserve ESI. Some circuits have held that an adverse inference or other serious sanction can be imposed on a party who negligently loses ESI. Others required a showing of bad faith. It is this uncertainty that has caused many parties to incur significant costs and burdens by overpreserving ESI out of fear that its loss might, in hindsight, be viewed as negligent, potentially subjecting them to very serious litigation sanctions on the basis of negligence alone.

To address this problem, the Advisory Committee drafted a revised version of Rule 37(e). The new rule applies when, quote, "electronically stored information that should have been preserved in the anticipation 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."

1. This is a transcript of a video available at <http://fjconline.fjc.dcn/content/309290/rules-amendments-2015-civil-overview>.

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Amended FRCP 37(e) Applies

When “electronically stored information that should have been preserved in the anticipation 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.”

Thus, four factors must be met for the rule to apply: first, a duty to preserve ESI must have arisen; second, the party must have failed to take reasonable steps to preserve the ESI; third, ESI must have been lost as a result of the failure to take reasonable steps; and fourth, the ESI must not be recoverable through additional discovery.

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Four Factors Must Be Satisfied

- A duty to preserve ESI must have arisen.
- The party must have failed to take responsible steps to preserve the ESI.
- ESI must have been lost as a result of a failure to take reasonable steps.
- The ESI must not be recoverable through additional discovery.

Let me make a few observations about these requirements.

The new rule does not create a duty to preserve ESI. Instead, it leaves in place the common law duty.

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The new rule does not create a duty to preserve ESI. It leaves in place the common law duty.

Federal cases uniformly hold that a duty to preserve relevant information arises when one reasonably anticipates litigation. In resolving ESI issues, courts may be

called upon to decide whether a duty to preserve ESI arose and when it arose. Because the rule incorporates the common law duty, courts should look to existing case law in resolving these questions. The Advisory Committee note to the new rule also provides some helpful guidance on this issue.

The former version of Rule 37(e) provided that, absent exceptional circumstances, sanctions under the federal rules could not be imposed on parties for failing to preserve ESI lost as a result of the routine, good-faith operation of an ESI system. It sought to create a safe harbor of sorts for the routine and good-faith operation of ESI systems. The new rule takes a different approach. It applies only when a party has failed to take reasonable steps to preserve ESI after a duty to preserve has arisen. Thus, parties who take reasonable steps will not be subject to its provisions.

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The new rule applies only when a party has failed to take reasonable steps to preserve ESI after a duty to preserve has arisen. Parties who have taken reasonable steps will not be subject to the new rule.

The Advisory Committee note states that the rule calls for reasonable steps, not perfection, in efforts to preserve ESI. If ESI is lost because of reasons beyond the party's control, the rule does not apply.

In addition, the former version of Rule 37(e) applied only to sanctions imposed under the federal rules of civil procedure, which left open the court's inherent power to impose sanctions for the loss of ESI. Because the new Rule 37(e) is designed to create a uniform national approach to the loss of ESI, the committee note stresses that it forecloses reliance on the inherent authority to impose consequences for the loss of ESI.

Finally, the rule applies only if the lost ESI cannot be restored or replaced through additional discovery. This requirement is included because, as you know, ESI is ubiquitous and often can be found in many locations. Before imposing measures for the loss of ESI, courts should first determine whether the ESI can be restored or replaced through additional discovery. This might include ordering discovery from sources that otherwise would be regarded as inaccessible because of excessive cost or burden, such as restoring or searching back-up tapes. In ordering additional discovery, the court could allocate some or all of the cost to the party that failed to take reasonable steps to preserve the ESI. If the additional discovery succeeds in restoring or replacing the lost ESI, then the rule would not permit any further actions to be taken against the party that failed to preserve it.

If, however, there has been a failure to preserve ESI that should have been preserved under the common law duty, the party failed to take reasonable steps to preserve it, the ESI is lost as a result of that failure, and it cannot be restored or replaced

through additional discovery, the new Rule 37(e) applies. Rule 37(e)(1) then provides that if the opposing party has suffered prejudice from the loss of the information, the court may take measures, no greater than necessary, to cure that prejudice. The “measures” allowed under this provision are not specified in Rule 37(e) because the intent is to preserve broad trial court discretion to determine what measures are needed to cure the prejudice. Some examples identified in the Advisory Committee note include ordering that specific evidence may not be introduced by the party responsible for the loss of the ESI, allowing the party prejudiced by its loss to introduce evidence or make argument to the jury regarding the effect of its loss, or giving instructions to the jury to assist them in evaluating the evidence introduced or arguments made regarding the loss of the ESI.

In summary, Rule 37(e)(1) allows a court great flexibility in ordering measures to address a party’s failure to take reasonable steps to preserve ESI, subject to three limits: First, the court must find that the loss of the ESI resulted in prejudice to an opposing party; second, the measures ordered by the court must be no greater than necessary to cure the prejudice; and third, the court may not impose the severe measures addressed in Rule 37(e)(2).

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- The court must find that the loss of the ESI resulted in prejudice to an opposing party.
- The measure ordered by the court must be no greater than necessary to cure the prejudice.
- The court may not impose the severe measures addressed in Rule 37(e)(2).

Rule 37(e)(2) allows a court to impose specific and very severe measures for a party’s failure to take reasonable steps to preserve ESI. It provides a uniform, national standard that replaces the prior, conflicting circuit standards, and rejects those that allowed sanctions based only on negligence or gross negligence. Rule 37(e)(2) allows a judge to impose three specific measures only upon finding that a party that failed to preserve ESI, “acted with the intent to deprive another party of the information’s use in the litigation.” The three measures that may be imposed on such a finding are: (1) presuming or inferring that the lost ESI was unfavorable to the party, such as when ruling on a pretrial motion or in a bench trial; (2) instructing the jury that it may or must presume that the information that was not preserved was unfavorable to the party that failed to preserve it; and (3) dismissing the action or entering a default judgment against the party that failed to preserve the ESI.

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Rule 37(e)(2) Penalties

- Presuming or inferring that the lost ESI was unfavorable to the party such as when ruling on a pretrial motion or in a bench trial.
- Instructing the jury that it may or must presume that the information was unfavorable to the party that failed to preserve it.
- Dismissing the action or entering a default judgment against the party that failed to preserve the ESI.

There are some important aspects of Rule 37(e)(2) to keep in mind. First, unlike Rule 37(e)(1), there is no requirement that the court find that the loss of the ESI resulted in prejudice, because prejudice may be inferred from the party's intent to deprive another party of the use of the ESI in the litigation. Second, the determination that the party failed to preserve ESI with the intent to deprive another party of its use in the litigation usually will be made by the judge, but may be made by the jury if there are disputed facts that must be resolved before the finding may be made. Third, even though Rule 37(e)(2) permits imposition of severe measures when there is intent to deprive another of the use of the ESI in the litigation, the judge is not *required* to impose any of those measures listed in subdivision (e)(2)—the remedy imposed must fit the wrong to be redressed.

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- There is no requirement in Rule 37(e)(2) that the court find the loss of ESI resulted in prejudice.
- Judge will usually make determination if party failed to preserve ESI with intent to deprive another party of its use in the litigation, but jury may make the determination if there are disputed facts to be resolved before making the finding.
- Even though Rule 37(e)(2) permits imposition of severe measures where applicable, the judge is not *required* to impose any of the measures listed there.

ESI presents unique challenges to courts in civil litigation. Those challenges will continue to grow, and will affect all parties to civil litigation: plaintiffs and defendants, large entities and small, sophisticated IT consumers, and everyday users of cell phones and social media. We hope that the revisions to Rule 37(e) help courts in addressing these problems by creating a uniform rule that addresses failures to take reasonable steps to preserve ESI by giving clear guidance to litigants and courts as to what must be done in response to the loss of the information.