POTENTIAL ADVERSE INFERENCE INSTRUCTION FOR UNINTENDED ELECTRONICALLY STORED INFORMATION SPOLIATION MAY SUGGEST LIMITATIONS OF RECENTLY AMENDED RULE 37(e)

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Much writing about electronic discovery consists of horror stories, often about harsh sanctions for unintended loss of electronically stored information (ESI). The Federal Rules of Civil Procedure were amended in late 2015 to address concerns that parties, fearing such sanctions, were unnecessarily incurring burden and expense. The idea was to reserve severe sanctions for intentional spoliation. But parties may still have reason to fear since courts may enter such sanctions when "necessary" to cure prejudice from unintended ESI loss. In the example herein, a plaintiff faced the possibility of the jury being instructed that it may or must presume that the texts on her cell phone were unfavorable to her after she traded in the dying phone without any intent to deprive the defendant of the texts.[1]

This article discusses the facts of *Iron Rooster*, two competing interpretations of Rule 37(e), and what the case suggests about recent amendments to that rule for ESI sanctions.

Facts of *Iron Rooster*

In *Iron Rooster*, a plaintiff sought unpaid overtime wages from a restaurant where she previously worked. The restaurant argued that the plaintiff was a manager exempt from overtime laws, and, to show a managerial role, sought discovery of text messages between the plaintiff and its employees. However, the plaintiff's text messages had been lost when, after filing suit, she traded in her cell phone because of technical problems. By then, the plaintiff was working as a real estate broker and depending heavily on her cell phone for her new job. The texts on the old phone did not migrate to the new phone, as might be expected.[2]

Relying on the testimony of the plaintiff, the court found that, while the plaintiff knew that she had a duty to preserve ESI, she did not intend to deprive the restaurant of her texts because she did not know that the phone trade-in would cause the texts to be lost.

Nonetheless, the plaintiff faced the possibility of an adverse inference instruction about the lost texts. The court held that it would instruct the jury that the plaintiff had a duty to preserve the texts but failed to do so, and that it "may further instruct the jury as to any inference to draw from the plaintiff's failure to preserve texts on her phone," depending on the evidence about them. Thus, *Iron Rooster* contemplated a harsh sanction for unintended ESI loss based on its reading of Rule 37(e). This result might not be expected after recent amendments to that rule.

Rule 37(e) Sanctions for ESI Loss

Rule 37(e) addresses sanctions for failing to preserve ESI that cannot be restored or replaced through additional discovery. Before it was amended in 2015, Rule 37(e) was very brief, placing only one limit on the consequences for ESI spoliation: no sanctions for the loss

of ESI "as a result of the routine, good-faith operation of an electronic information system."[3] Otherwise, courts could (and did) issue varying sanctions as they saw fit.

On Dec. 1, 2015, amendments to Rule 37(e) went into effect that were "adopted to address concerns that parties were incurring burden and expense as a result of over-preserving data, which they did because they feared severe spoliation sanctions, especially since federal circuits had developed varying standards for penalizing the loss of evidence."[4]

Rule 37(e) now has two subsections connected by the word "or," with the first subsection providing sanctions for spoliation that was not found to be intentional. When such unintended ESI loss occurs, a court "may order measures no greater than necessary to cure the prejudice."[5] This first subsection gives no examples of what counts as a "measure no greater than necessary to cure the prejudice."

Shortcomings of the *Iron Rooster* Reading

Iron Rooster's reading of Rule 37(e) could be criticized from both textualist and purposivist perspectives.

The wording and structure of Rule 37(e) cuts against *Iron Rooster*'s reading. Changing its content illustrates the point. Imagine a parent telling a babysitter the following: "If the kids get hungry, feed them no more than necessary to curb their appetites; or, only if you find the kids are dying of hunger, you may or must feed them all the cookies in the house." Few babysitters would say (parents hope) that the cookies were "necessary to" curb appetites without the threat of starvation. Rule 37(e) gives judges—who may feel like babysitters with certain litigants—the same grammatical structure of authority.

Purposivists might say *Iron Rooster* is flatly inconsistent with the goals of the recent amendments, which sought to address concerns of over-preservation stemming from uncertainty.[12] Under the *Iron Rooster* reading, Rule 37(e) would fail to "provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve" ESI, as the committee hoped.[13] Whenever a court found such an instruction necessary to cure prejudice, it could bypass the intended uniform standard (i.e., intentionality).

Thus, the *Iron Rooster* reading faces some criticism and results in some of the very uncertainty that the recent amendments were, at least according to one source of legislative history, intended to address. However, the *Iron Rooster* reading would not leave gaps in the scope of regulated conduct in the way the approach of the advisory committee notes very well could.

The second part of Rule 37(e) provides for severe sanctions "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation."[6] Sanctions under this second subsection include presumptions, outright dismissal, default judgment, or the possibility that the court will "instruct the jury that it may or must presume the information was unfavorable to the party."[7]

Competing Interpretations of Rule 37(e)

Courts have read the text of the amended Rule 37(e) in two different ways, referred to herein as the "advisory committee notes approach" and the "*Iron Rooster* reading."

Some courts follow the approach of the advisory committee notes, under which Rule 37(e) "limits the ability of courts" to give adverse inference instructions to situations of intentional loss.[8] The committee considered adverse inference instructions to be a "very severe" measure not appropriate for negligence or even gross negligence.[9] However, the advisory committee notes do not provide a binding interpretation; they are akin to legislative history.[10]

Courts in other cases, like *Iron Rooster*, understand the first part of Rule 37(e) as essentially swallowing the second, so that an adverse inference instruction can be given without a finding of intent when that instruction is "necessary to cure the prejudice."[11]

While mutually exclusive, both interpretations have potential shortcomings, highlighting the limitations in the newly amended Rule 37(e) itself.

Problems With the Advisory Committee Notes Approach

The advisory committee notes, if heeded, may present two different problems.

First, the committee notes limit a court's ability to level an evidentiary playing field distorted by missing ESI. A trial court taking the committee notes as gospel would be barred from even giving the jury the option of presuming the information was unfavorable.[14] While the advisory notes suggest other ways of addressing prejudice, such measures cannot have the effect of permitting the jury to decide whether it should infer that the information was unfavorable because of the loss.[15] Perhaps a court could craft an instruction allowing it to infer something about the lost ESI from some other evidence adduced at trial about the loss, but not from the loss itself. However, a court doing so, or employing "other" options suggested by the advisory committee,

may create other appellate issues by further altering the evidentiary playing field or by issuing confusing instructions.

The advisory committee notes end up disconnecting the harm from the remedy for it: what is needed to address prejudice from ESI loss may have nothing to do with why it was lost. The missing ESI may indeed be very unfavorable to the party that unintentionally lost it, corroborate points of the other party's narrative, or be used against the credibility of the party that lost it. Yet without a finding that the party who lost the ESI "acted with intent," there can be—at least on a literal reading of the committee notes—no instruction about what the jury may presume about it. The result is an odd asymmetry, under which Rule 37(e) limits the court's ability to give a "traditional missing evidence instruction" with respect to ESI, but not other, traditional evidence.[16]

Second, requiring a finding of intent may fail to deter all but the most brazen spoliation of ESI. The advisory committee notes may make it too easy for unscrupulous litigants to plausibly deny that they had "acted with intent" when ESI is lost. Many instances of loss could be easily characterized, or even confused, as accidental because of how ESI is held and processed.

The advisory notes assume that a judge or jury can distinguish between intentional and unintentional loss of ESI in the same way they can with traditional evidence. There may be, however, no empirical support for that assumption. There are differences between ESI and traditional, corporeal evidence and how it is kept or not kept. Shredding a document, throwing away a piece of clothing, or trading in a car requires physical effort. Evidence of intent manifests in the action, justifying the inference from that action. One can make a reasonable assumption about why someone threw away a document. Most people have done just that. ESI is another story. While there will undoubtedly be easy cases of a party taking obvious and affirmative steps to delete an illicit recording, many fact patterns are less clear cut. Rather, as another recent opinion noted, conduct leading to ESI loss may fall along a "spectrum" ranging from negligence to intentionality.[17] The advisory committee notes approach would filter the gray facts on that spectrum through a black-and-white standard.

Even if intentional and unintentional ESI loss can be readily distinguished, inferences about the content of the ESI—and whether it was unfavorable—may not follow as they would with traditional evidence. The committee notes describe adverse inference instructions as rooted in behavioral assumptions about why parties lose evidence.[18] The theory goes as follows: one can infer from a party intentionally losing evidence that the evidence was bad for that party, but one cannot infer anything from a party negligently losing evidence. However, what can and cannot be inferred may differ with ESI, where the "action" consists of inaction. In a sense, a party must often opt in to dispose of traditional evidence, but a party must often opt out to dispose of ESI.

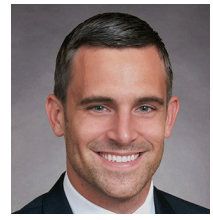
While a party might argue that doing nothing was itself intentional, proving it may be an expensive undertaking. It may well cost more than the litigation itself. Further, the party who lost the ESI may argue that a discovery issue should not devolve into a mini-litigation over that ESI, citing the pronounced emphasis on proportionality in the amended Federal Rules, generally.

What *Iron Rooster* May Suggest

The facts of *Iron Rooster* are a reminder that, even in today's cloud-based environment, upgrades to technology can result in lost ESI. Lawyers and clients cannot just assume that all the relevant ESI will survive a technology upgrade. Cell phones are obviously not the only technology where such loss can occur as part of an upgrade or other routine procedure. As decisional examples bear out, computers and other hardware, whether leased or owned, may be recycled or traded in for a rebate, or they may require operating system upgrades or maintenance.[19] Of course, producing the relevant ESI from the lost device may avoid a sanction, but that may not always be an option, as it was not in *Iron Rooster* and other cases.[20]

Iron Rooster shows how the recent amendments to Rule 37(e) may have failed to ensure uniform sanctions for unintended ESI loss, at least without creating other issues. If the amendments are understood as the advisory committee suggests, the result is a sanctions regime that, while uniform, may fail in remedying and deterring ESI loss. If, on the other hand, the amended Rule 37(e) is read as it was in *Iron Rooster*, there will be a sanctions regime that, while less certain and varying, may be more capable of remedying highly prejudicial, but unintentional loss, and deterring dubious cases of ESI loss. Put differently, the recent amendments could result in a Rule 37(e) that is either under-inclusive (the advisory committee notes) or over-inclusive (*Iron Rooster*). But, to be fair, the same could be said of any rule and, even with its limitations, the amended Rule 37(e) provides far more guidance than its predecessor.

Still, the competing interpretations suggest that uncertainty about sanctions for ESI will persist in some form. E-discovery horror stories will probably continue as long as a case can be made that a harsh sanction is necessary to cure prejudice from unintended loss. Unless and until appellate guidance is provided (which may be procedurally unlikely), the amended Rule 37(e) can be expected to lead to at least some of the over-preservation issues it was intended to correct. ⊙



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Endnotes

[1]*See Montgomery v. Iron Rooster-Annapolis LLC*, No. 16-cv-3760, 2017 WL 1902699, at *2 (D. Md. May 9, 2017), *adopted by* 2017 WL 4868918 (D.Md. May 26, 2017). The parties have since moved to settle the case. *See Motion for Settlement Approved, Montgomery v. Iron Rooster-Annapolis LLC,* No. 16-cv-3760. ECF No. 81.

[2]*See, e.g.*, *Hawkins v. Gresham*, No. 3:13-cv-00312, 2015 WL 11122118, at *3 (N.D. Tex. Jan. 16, 2015) (denying request for adverse inference instruction where texts could be reproduced without discrepancies).

[3]Fed. R. Civ. P. 37(e) (2013) (amended 2015).

[4]*Cat3 LLC v. Black Lineage Inc.*, 164 F. Supp. 3d 488 (S.D.N.Y. Jan. 12, 2016) (citing Fed. R. Civ. P. 37(e) advisory committee's note (2015)).

[5]*Distefano v. Law Off. of Barbara H. Katsos PC*, 11-cv-2893, 2017 WL 1968278 (E.D.N.Y. May 10, 2017). In *Distefano*, the defendant was an attorney sued in malpractice and was determined to have

negligently spoliated evidence by, among other things, having certain computer hardware replaced after her office's computer systems stopped working. *Id.* at *21. The court found that attorney "at the very least, acted with 'a pure heart and an empty head.'" *Id. Distefano* reached that conclusion by considering a "continuum of fault ranging from innocence through the degrees of negligence to intentionality" and finding that the attorney's conduct "falls somewhere between 'negligent' and 'grossly negligent' on the continuum (and closer to the 'negligent' end.)." *Id. Distefano* ultimately issued a sanction of an award of attorney's fees, noting that an "adverse inference instruction is 'an extreme sanction [that] should not be imposed lightly.'" *Id.* at *26 (internal citations omitted).

[6]Fed. R. Civ. P. 37(e)(2) (emphasis added).

[7]*Id.*

[8]*See, e.g., Accurso v. Infra-Red Servs. Inc.*, No. CV 13-7509, 2016 WL 930686, at *3 (E.D. Pa. Mar. 11, 2016) (citing Fed. R. Civ. P. 37(e)(1)-(2) advisory committee notes (2015)).

[9]*Id.*

[10]*See, e.g., United States v. Hayes*, 983 F.2d 78, 82 (7th Cir. 1992).

[11]*See, e.g., Core Labs. LP v. Spectrum Tracer Servs. LLC*, No. CIV-11-1157-M, 2016 WL 879324, at *2 (W.D. Okla. Mar. 7, 2016) (providing adverse inference instruction for the loss of emails due to a "not unreasonable" switch of internet service provider during litigation).

[12]*See, e.g., Accurso*, 2015 WL 930686, at *3 ("The new rule, however, makes explicit that an adverse inference is appropriate *only* on a finding that the party responsible for the destruction of the lost information *acted with the intent to deprive another party of access to the relevant information.*") (emphasis in original) (discussing 2015 amendments).

[13]Fed. R. Civ. P. 37(e) advisory committee's note (2015).

[14]*See* Fed. R. Civ. P. 37(e)(2) advisory committee's note (noting that the finding of intent may be made by either the court or jury, but that the finding is required in either case); *id.* (Rule 37(e)(2) "covers any instruction that directs or permits the jury to infer from the loss of the information that it was in fact unfavorable to the party that lost it.") (emphasis added); *id.* (describing "measures which would not involve instructing a jury it may draw an adverse inference") (emphasis added).

[15]*Id.*

[16]*Id.* (Rule 37(e) "applies only to electronically stored information").

[17]*See, e.g., Distefano*, 2017 WL 1968278, at *8.

[18]"Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have." Fed. R. Civ. P. 37(e)(2) advisory committee's note (2015).

[19]*See, e.g., Distefano*, 2017 WL 1968278, at *8 (imposing sanction for ESI loss after "blue screen of death" on computers that required maintenance); *Felman Prod. Inc. v. Industrial Risk Insurers*, No. 3:09-cv-0481, 2011 WL 4547012 (S.D. Va. Sep. 29, 2011) (sanctioning party for ESI lost in computer system upgrade).

[20]*See, e.g., Barrette Outdoor Living Inc. v. Michigan Resin Representatives,* No. 11-cv-13335, 2013 WL 3983230, at *13 (E.D. Mich. Aug. 1, 2013) (imposing sanction for ESI lost on cell phone turned in for recycling); *First Mariner Bank v. Resolution L. Grp. PC*, No. 12-cv-1133, 2014 WL 1652550, at *10 (D. Md. Apr. 14, 2014) (sanctioning for recycling a laptop and smartphone that rendered "*any* and *all* information on either device unrecoverable") (emphasis in original).

Escobar *continued from page 47*

infra note 9, and accompanying text.

[13]Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, 123 Stat. 1617; 31 U.S.C. §§ 3729(a)(1)(G), 3729(b)(2)(A)(ii), 3730(h), 3731(c).

[14]Patient Protection and Affordable Care Act, Pub. L. 111-148, § 6402(a), 124 Stat. 755 (Mar. 23, 2010).

[15]*Id*. at § 1128J(d)(1); *Kane v. Healthfirst Inc.*, 120 F.Supp.3d 370 (S.D.N.Y., 2015).

[16]*United States ex rel. Vigil v. Nelnet Inc*., 639 F.3d 791, 796 (8th Cir. 2011).

[17]*Id*.

[18]*Costner v. URS Consultants Inc.*, 153 F.3d 667, 677 (8th Cir. 1998) (quoting *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997)).

[19]*United States ex rel. Spay v. CVS Caremark Corp.* 913 F.Supp.2d 125, 169 n.30 (E.D. Pa. Dec. 20, 2012).

[20]*United States ex rel. Wilkins v. United Health Grp. Inc.,* 659 F.3d 295, 305 (3d Cir. 2011) (quoting *United States ex rel. Schmidt v. Zimmer Inc.*, 386 F.3d 235, 242 (3d Cir. 2004); *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 182 (3d Cir. 2001)).

[21]*See In re Genesis Health Ventures Inc.*, 112 F. App'x 140, 143 (3d Cir. 2004) (recognizing various types of false claims); *Wilkins*, 659 F.3d at 305 (relaying legally false and factually false claims theories).

[22]S. Rep. No. 99-345 at 9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274 (emphasis added).

[23]*Mikes v. Straus*, 274 F.3d 687, 696-97, 699-700 (2d Cir. 2001).

[24]*Wilkins*, 659 F.3d at 305.

[25]*Id.* (*quoting Mikes*, 274 F.3d at 699).

[26]42 C.F.R. § 424.510(d)(3).

[27]647 F.3d 377 (1st Cir. 2011).

[28]652 F.3d 103 (1st Cir. 2011).

[29]*Universal Health Servs. Inc. v. United States ex rel. Escobar*.

[30]*Id*. at 1995.

[31]*United States ex rel. Petratos, et al. v. Genentech Inc.*, 855 F. 3d 481, 492 (3d Cir. 2017).

[32]*Id*. at 488. (internal citations omitted).

[33]*United States ex rel. Carla Crockett v. Complete Fitness Rehab. Inc.*, Case No. 16-2544 2018 WL 327Y35Y (6th Cir. 2018) (indicating that "[a]lthough Crockett's three FCA claims about Complete Rehab's billing were subject to dismissal, she is entitled to proceed on her FCA retaliation claim, because such claims are not subject to Rule 9(b)'s heightened standards, and Crockett otherwise sufficiently pleaded that she was fired because of her efforts to stop what Crockett reasonably believed was fraud on the government. The FCA protects