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## Finding Prejudice from Lost ESI: An Analysis of Courts' Standards Under Amended Federal Rule of Civil Procedure 37(e)

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# Finding Prejudice from Lost ESI: An Analysis of Courts' Standards Under Amended Federal Rule of Civil Procedure 37(e)

## *I. Introduction*

The steep rise in the use of electronic information has dramatically changed the landscape of the discovery stage of litigation. Much of the information exchanged during discovery now takes the form of electronically stored information (ESI). One of the drawbacks of ESI is that it is prone to spoliation—it is much easier for information contained in electronic files to be destroyed, either intentionally or inadvertently, before it can be produced for discovery. Federal Rule of Civil Procedure 37(e) was amended in December 2015 in response to the growing prevalence of ESI and to articulate a clearer standard for courts to apply when dealing with spoliation of ESI.<sup>1</sup>

This Note focuses on rule 37(e)(1), which relates to courts' ability to find and cure prejudice resulting from spoliation of ESI. Part II discusses how the 2015 amendment altered rule 37(e) and the goals that the Advisory Committee sought to pursue in making the changes. Part III explains the varying standards that district courts have applied when interpreting subdivision (e)(1)—specifically, how courts have allocated the burden of proof in showing prejudice and how litigants can satisfy this burden. Finally, this Note analyzes the advantages and drawbacks of each standard.

## *II. Background on Federal Rule of Civil Procedure 37(e)*

The previous version of rule 37(e), adopted in 2006, provided that, “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”<sup>2</sup> This language provided very little guidance for courts in determining when it was appropriate to impose sanctions. As a result, courts were inconsistent in the standards that they adopted for assessing claims of spoliated ESI.<sup>3</sup> As the amount of ESI

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1. See FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

2. *Id.*

3. *Id.*; see also Alexander Nourse Gross, *A Safe Harbor from Spoliation Sanctions: Can an Amended Federal Rule of Civil Procedure 37(e) Protect Producing Parties?*, 2015 COLUM. BUS. L. REV. 705, 720–22 (noting a circuit split regarding whether a showing of “bad faith” was necessary before a court could issue severe sanctions).

rapidly increased over the years, the courts' lack of clear guidance on the issue led litigants to take substantial efforts to preserve ESI out of fear of sanctions.<sup>4</sup> The rule thus incentivized the over-preservation of ESI, causing potential litigants to incur considerable expenses in doing so.<sup>5</sup> The Rules Committee amended rule 37(e) in 2015 to create greater uniformity among the courts in addressing spoliation of ESI.<sup>6</sup>

Following the 2015 amendment, rule 37(e) currently reads as follows:

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.<sup>7</sup>

Under the amended rule, three preliminary elements must be met before a court can impose any sanctions for spoliation of ESI. First, it must be shown that the lost information should have been preserved during

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4. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment; Gross, *supra* note 3, at 723.

5. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment; Gross, *supra* note 3, at 723; *see also* Charles Yablon, *Byte Marks: Making Sense of New F.R.C.P. 37(e)*, 69 FLA. L. REV. 571, 574–76 (2017) (arguing that the expenses of over-preservation result less from storage costs of electronic files and more from the costs of hiring people to sift through and retrieve ESI).

6. *See* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

7. FED. R. CIV. P. 37(e).

litigation or in anticipation of it.<sup>8</sup> Second, the party must have failed to take reasonable steps to preserve the information.<sup>9</sup> Finally, there must be no way to replace or restore the destroyed information.<sup>10</sup> Once it has been established that all three prerequisites are met, the court can then impose sanctions under either subdivision (e)(1) or (e)(2).

Subdivision (e)(1) allows a court to impose sanctions when the spoliation of ESI has resulted in prejudice to the opposing party.<sup>11</sup> Although the overall goal of the amended rule was to provide clearer guidelines for assessing spoliation claims, subdivision (e)(1) deliberately leaves judges with plenty of discretion both in determining whether prejudice exists and in deciding what type of sanctions to impose.<sup>12</sup> It “does not place a burden of proving or disproving prejudice on one party or the other.”<sup>13</sup> The Advisory Committee acknowledges that there are situations in which it might be unfair to place the burden of showing prejudice on the party seeking sanctions.<sup>14</sup> It would probably be reasonable though, the Committee suggests, for the non-spoliating party to bear this burden when the content of the lost information is evident, the information is relatively unimportant, or the remaining preserved information appears sufficient to meet all parties’ needs.<sup>15</sup> However, courts are not bound to these guidelines, and they ultimately have discretion to assess prejudice on a case-by-case basis.<sup>16</sup>

The Advisory Committee also distinguishes between a court’s analysis of prejudice under subdivision (e)(1) and an inquiry into bad faith under subdivision (e)(2).<sup>17</sup> The committee notes list a few possible curative measures that a court could impose if prejudice is found: forbidding a party from putting on certain evidence, permitting the parties to present evidence

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8. *Id.*; see also *Eshelman v. Puma Biotechnology, Inc.*, No. 7:16-CV-18-D, 2017 WL 2483800, at \*4 (E.D.N.C. June 7, 2017) (acknowledging that the duty to preserve evidence arises not just during litigation but also before litigation where it is reasonably anticipated); *Core Labs. LP v. Spectrum Tracer Servs., L.L.C.*, No. CIV-11-1157-M, 2016 WL 879324, at \*1 (W.D. Okla. Mar. 7, 2016) (recognizing a duty to preserve evidence when a party knew or reasonably should have known that litigation is imminent).

9. FED. R. CIV. P. 37(e).

10. *Id.*

11. FED. R. CIV. P. 37(e)(1).

12. See FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment (“The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.”).

13. *Id.*

14. *Id.*

15. *Id.*

16. See *id.*

17. See *id.*

and arguments to the jury regarding the loss of information, and giving the jury instructions to assist in its evaluation of the lost evidence.<sup>18</sup> However, any curative measures granted under subdivision (e)(1) should *not* have the effect of measures permitted only under subdivision (e)(2).<sup>19</sup> The purpose of this limitation is that the measures under subdivision (e)(2) are meant to be punitive, since they require a showing of intent to deprive the opposing party of the ESI.<sup>20</sup> Beyond these basic guidelines, when faced with spoliation of ESI, courts are given wide discretion in determining how to assess and cure prejudice.

### *III. Analysis—Courts' Application of Rule 37(e)(1)*

Since the amendment took effect in December 2015, district courts have adopted various approaches in addressing prejudice for spoliation of ESI. When examining pertinent cases across multiple district courts, most courts have adopted one of three broad positions in allocating the burden of proof for finding prejudice under subdivision (e)(1): (1) the non-spoliating party has the burden of proof to show that it has been prejudiced by the spoliation; (2) the spoliating party has the burden of proof to show lack of prejudice; and (3) the non-spoliating party has the burden of proof, but the burden shifts to the spoliating party if it is shown to have acted in bad faith in destroying the evidence. The cases discussed in this Note are not a comprehensive list of district court cases addressing rule 37(e)(1), but they are generally representative of the types of standards that courts have applied when examining prejudice under the rule.

#### *A. Burden on the Non-Spoliating Party*

The first position, which places the burden of proof on the party seeking sanctions under rule 37(e), is the most frequent approach taken by district courts.<sup>21</sup> The non-spoliating party generally must demonstrate what the destroyed information may have contained.<sup>22</sup> Sometimes a court requires an additional showing of how the lost information would have aided the

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18. *Id.*

19. *Id.*

20. *See id.*

21. *See, e.g.,* Eshelman v. Puma Biotechnology, Inc., No. 7:16-CV-18-D, 2017 WL 2483800, at \*5 (E.D.N.C. June 7, 2017); Matthew Enter., Inc. v. Chrysler Grp. LLC, No. 13-cv-04236-BLF, 2016 WL 2957133, at \*4 (N.D. Cal. May 23, 2016); Core Labs. LP v. Spectrum Tracer Servs., L.L.C., No. CIV-11-1157-M, 2016 WL 879324, at \*2 (W.D. Okla. Mar. 7, 2016).

22. *See Eshelman*, 2017 WL 2483800, at \*5; *Matthew Enter.*, 2016 WL 2957133, at \*4.

party's argument.<sup>23</sup> Although district courts have generally applied similar standards in addressing these two inquiries, they have employed very different language in articulating them, which results in minor, but not insignificant, variations across jurisdictions.<sup>24</sup>

For district courts that have adopted the first position, the non-spoliating party typically must come forward with some sort of idea as to what the destroyed evidence contained.<sup>25</sup> In determining the appropriate standard, an important consideration is not to place too heavy a burden on the non-spoliating party, in accordance with the policy goals of the Advisory Committee to the 2015 amendment.<sup>26</sup> The District Court for the Northern District of California has framed this threshold as requiring "plausible, concrete suggestions" on the part of the non-spoliating party.<sup>27</sup> In *Matthew Enterprise, Inc. v. Chrysler Group LLC*, the plaintiff car dealership sent a letter to a rival car dealership threatening litigation, but afterwards it made no efforts to preserve internal emails or customer communications, which were deleted automatically.<sup>28</sup> When the defendant sought sanctions for deletion of the emails, the court declined to grant the motion because the defendant did not "come forward with plausible, concrete suggestions" regarding what the internal emails could have contained.<sup>29</sup> Therefore, the defendant failed to show prejudice resulting from the lost emails.<sup>30</sup> In adopting this "plausible, concrete suggestions" standard, the court relied on language from a previous spoliation case decided prior to the 2015 amendment.<sup>31</sup>

Although the defendant in *Matthew Enterprise* could not show prejudice with regard to the deleted emails, the court nonetheless held that it did meet its burden of establishing prejudice for the lost customer communications.<sup>32</sup> The defendant identified several instances in which a salesperson for the

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23. See, e.g., *Living Color Enters., Inc. v. New Era Aquaculture, Ltd.*, No. 14-cv-62216, 2016 WL 1105297, at \*5–6 (S.D. Fla. Mar. 22, 2016).

24. Compare *Eshelman*, 2017 WL 2483800, at \*5 (requiring "some evidence regarding the particular nature of the missing ESI"), with *Matthew Enter.*, 2016 WL 2957133, at \*4 (requiring "plausible, concrete suggestions").

25. See *Eshelman*, 2017 WL 2483800, at \*5; *Matthew Enter.*, 2016 WL 2957133, at \*4.

26. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

27. See *Matthew Enter.*, 2016 WL 2957133, at \*4.

28. *Id.* at \*1.

29. *Id.* at \*4.

30. *Id.*

31. See *Hynix Semiconductor Inc. v. Rambus Inc.*, 897 F. Supp. 2d 939, 981 (N.D. Cal. 2012).

32. *Matthew Enter.*, 2016 WL 2957133, at \*4.

plaintiff offered a written price quote in its communications with customers.<sup>33</sup> Additionally, the principal owner of the plaintiff dealership testified that the only way that he oftentimes knew that potential customers were choosing his company based on price was because he talked with the customer in person.<sup>34</sup> The dealership's negotiating process and the reasons why customers chose other dealerships were directly probative to the issues of the case.<sup>35</sup> Because the defendant could show that customer communications would sometimes reveal relevant information, the court found that the defendant had sufficiently brought forward "plausible, concrete suggestions" regarding the contents of the lost ESI.<sup>36</sup> The court therefore held that the defendant met its standard for showing prejudice.<sup>37</sup> This case thus shows how one court has required the non-spoliating party to present specific facts in order to give some sort of plausible idea as to what kind of information the destroyed evidence contained.<sup>38</sup>

Some courts have adopted a stricter standard than the court in *Matthew Enterprise*, requiring the non-spoliating party to show a higher degree of specificity in describing the contents of the destroyed information.<sup>39</sup> In *Eshelman v. Puma Biotechnology, Inc.*, the District Court for the Eastern District of North Carolina explained that there must be "some evidence regarding the particular nature of the missing ESI" before the court can impose sanctions.<sup>40</sup> The court rejected the non-spoliating party's "cursory" argument that lost web browser history would likely be the most important evidence for showing that the spoliating party acted with malice in making a defamatory investor presentation against the non-spoliating party.<sup>41</sup> Because it was too difficult for the court to gauge the amount of prejudice and the appropriate curative measures based on this argument alone, the

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33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *See also* TLS Mgmt. & Mktg. Servs. LLC v. Rodriguez-Toledo, No. 15-2121 (BJM), 2017 WL 1155743, at \*2 (D.P.R. Mar. 27, 2017) (finding prejudice where the non-spoliating party "plausibly suggest[ed]" that [the destroyed ESI] "might have" contained documents or information relevant to this action" (quoting *Micron Tech., Inc. v. Rambus*, 645 F.3d 1311, 1328 (Fed. Cir. 2011))).

39. *See, e.g.*, *Eshelman v. Puma Biotechnology, Inc.*, No. 7:16-CV-18-D, 2017 WL 2483800, at \*5 (E.D.N.C. June 7, 2017).

40. *Id.*

41. *Id.* at \*3, \*5.

evidence produced by the non-spoliating party was insufficient to show prejudice.<sup>42</sup>

In contrast with the court in *Eshelman* imposing a relatively high standard, the District Court for the Western District of Oklahoma has been considerably more generous in accepting evidence that the non-spoliating party has met its burden.<sup>43</sup> While still requiring the non-spoliating party to present some evidence regarding the content of the destroyed information, the court has nonetheless freely permitted inferences to be made based on the evidence produced.<sup>44</sup> In *Core Laboratories LP v. Spectrum Tracer Services, L.L.C.*, the plaintiff brought two allegations of spoliation against the defendant: (1) lost emails as a result of the defendant changing its email provider; and (2) deleted files from an employee's computer.<sup>45</sup> The court found that the plaintiff did not meet its burden of showing prejudice for the deleted computer files because the plaintiff "presented no evidence of the possible documents that could have been on the hard drive."<sup>46</sup> With respect to the lost emails though, all emails had been created prior to a specific date shortly after litigation had commenced.<sup>47</sup> Based on this information, the court inferred that some of the emails must have related to the relevant issues in the case.<sup>48</sup> The court therefore found that there was prejudice resulting from the lost emails.<sup>49</sup> On its face, the court's decision seems somewhat inconsistent—the non-spoliating party did not produce much evidence with respect to either the lost emails or the deleted computer files. However, the court could better infer what kind of information was contained within the emails, which was not true of the computer files. In this case, the court gave considerable weight to reasonable inferences, thereby making it easier for the plaintiff to meet its burden regarding the contents of the lost information.<sup>50</sup>

Even if the non-spoliating party can show some idea regarding the content of the destroyed information, courts sometimes require the party to

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42. *Id.* at \*5.

43. *See* *Core Labs. LP v. Spectrum Tracer Servs., L.L.C.*, No. CIV-11-1157-M, 2016 WL 879324, at \*2 (W.D. Okla. Mar. 7, 2016).

44. *See id.*

45. *Id.* at \*1.

46. *Id.* at \*3.

47. *Id.* at \*2.

48. *Id.*

49. *Id.*

50. *See id.*



go one step further in showing that the contents are relevant to the case.<sup>51</sup> As such, the non-spoliating party generally must establish that the lost information helps prove a fact relating to the issues in the case.<sup>52</sup> On the question of the relevance of spoliated information, courts have also applied varied standards.<sup>53</sup>

One approach for relevance is the “direct nexus” standard. The District Court for the Southern District of Florida adopted this standard in *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*<sup>54</sup> The plaintiff moved for sanctions under rule 37(e) due to lost text messages when the defendant failed to disable a cell phone feature that deleted text messages automatically after thirty days.<sup>55</sup> The plaintiff argued that information contained in the missing text messages would have shown that the defendant was involved in a misappropriation scheme.<sup>56</sup> The court rejected this argument, finding that the missing text messages did not prejudice the plaintiff because the plaintiff did not “explain[] any direct nexus between the missing text messages and the allegations in its [c]omplaint” regarding the misappropriation.<sup>57</sup> When applying this standard, the court carefully analyzed the plaintiff’s motion for sanctions to determine whether it explained why the spoliated information would establish facts necessary to prove the plaintiff’s allegations.<sup>58</sup> The district court’s “direct nexus” test therefore places a high burden on the non-spoliating party to explain the relevance of the destroyed information.

The District Court for the Northern District of Georgia adopted a lower standard to show relevance.<sup>59</sup> In *Virtual Studios, Inc. v. Stanton Carpet Corp.*, the defendant argued that the plaintiff failed to preserve emails exchanged between the two parties in litigation over a copyright claim.<sup>60</sup> One of the disputed issues was whether the plaintiff communicated its one-year use limitation to the defendant.<sup>61</sup> Because the central issue in the case

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51. See, e.g., *Living Color Enters., Inc. v. New Era Aquaculture, Ltd.*, No. 14-cv-62216, 2016 WL 1105297, at \*5–6 (S.D. Fla. Mar. 22, 2016).

52. See *id.* at \*6.

53. See *id.*; *Virtual Studios, Inc. v. Stanton Carpet Corp.*, No. 4:15-CV-0070-HLM, 2016 WL 5339601, at \*10 (N.D. Ga. June 23, 2016).

54. *Living Color*, 2016 WL 1105297, at \*5–6.

55. *Id.* at \*2.

56. *Id.* at \*5.

57. *Id.*

58. See *id.* at \*5–6.

59. See *Virtual Studios*, 2016 WL 5339601, at \*10.

60. *Id.* at \*1–2.

61. See *id.* at \*10.

was whether a certain communication took place between the parties, the lost emails would have been “helpful in evaluating the merits of the Parties’ positions.”<sup>62</sup> As such, the court found that the spoliation resulted in prejudice to the defendant.<sup>63</sup> This approach—whether the spoliated evidence is “helpful” in evaluating the merits of the case—suggests that it only need be shown that the destroyed evidence would aid in assessing the validity of each party’s arguments. This method is less demanding than the “direct nexus” standard, which requires the non-spoliating party to show how the spoliated information would directly help prove the allegations in the complaint. Though the differences between the approaches adopted by the Florida and Georgia district courts are subtle, they demonstrate the varying degrees of difficulty that the non-spoliating party may face in meeting its burden of showing prejudice.

Placing the burden of proof to show prejudice on the non-spoliating party may seem unfair, as it requires the party that has not committed any wrongdoing to present some idea regarding information that it does not have—evidence that the opposing party lost or destroyed. The standard nonetheless makes sense in that it requires the party wishing to impose sanctions to meet some sort of burden. Importantly, this approach seems to be the one most favored by district courts, although courts have used different language in describing how the non-spoliating party must satisfy the burden. As courts are increasingly placing the burden of proof on the non-spoliating party to show prejudice, it remains to be seen if any one standard will emerge as the most commonly used.

### *B. Burden on Spoliating Party*

Although most district courts have placed the burden of proof for establishing prejudice under rule 37(e)(1) on the non-spoliating party, a minority of courts have taken the opposite approach, placing the burden of proof on the party accused of spoliation.<sup>64</sup> Under this position, all that the non-spoliating party need show is that spoliation has occurred; the burden of proof then shifts to the spoliating party to show that the opposing party has not been prejudiced by the spoliation.<sup>65</sup> This position is justified on the

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62. *Id.*

63. *Id.*

64. *See* *OmniGen Research v. Yongqiang Wang*, 321 F.R.D. 367, 372 (D. Or. 2017); *Sec. Alarm Fin. Enters., L.P. v. Alarm Prot. Tech., LLC*, No. 3:13-cv-00102-SLG, 2016 WL 7115911, at \*6 (D. Alaska Dec. 6, 2016), *aff’d*, No. 17-35688, 2018 WL 3615889 (9th Cir. July 30, 2018).

65. *See Alarm*, 2016 WL 7115911, at \*6.

basis that the spoliating party is in a better position to establish what evidence was destroyed and “should not be able to benefit from its wrongdoing.”<sup>66</sup>

This approach was most clearly adopted by the District Court for the District of Alaska in *Security Alarm Financing Enterprises, LP v. Alarm Protection Technology, LLC*.<sup>67</sup> The case involved two home security companies—SAFE and APT—that were engaged in extensive litigation over a number of claims, including defamation and tortious interference with contractual relationships.<sup>68</sup> During discovery, APT sought to obtain recordings of phone calls that came into SAFE’s call center.<sup>69</sup> However, most of the calls had been overridden—of the thousands of recordings that had existed, fewer than 150 were still remaining, and most were favorable to SAFE.<sup>70</sup> In APT’s motion for spoliation sanctions, the court placed the burden of proof on SAFE to show that APT had not been prejudiced from SAFE’s destruction of evidence.<sup>71</sup> According to the court, one way for the spoliating party to meet its burden is to show that the destroyed evidence is “available through other means.”<sup>72</sup> This inquiry is broader than whether the information can merely be “restored or replaced,” which is one of the prerequisites to imposing sanctions in the first place.<sup>73</sup> SAFE argued that the information contained in the lost recordings could be available through call notes, as well as depositions of the relevant customers.<sup>74</sup> The court rejected these propositions as adequate replacements.<sup>75</sup> The call notes, made by a SAFE employee listening to the recordings, would likely reflect the employee’s own biases towards the company, and depositions would require customers to recollect a brief phone call made years earlier.<sup>76</sup> Because “the actual recordings would be far more accurate” and inclusive, the court found that SAFE failed to meet its burden of showing lack of prejudice and therefore imposed sanctions.<sup>77</sup>

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66. *Id.* (quoting *Apple, Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 998 (N.D. Cal. 2012)).

67. *Id.*

68. *Id.* at \*1.

69. *Id.*

70. *Id.*

71. *Id.* at \*6.

72. *Id.* at \*7.

73. *Id.* at \*7 n.54.

74. *Id.* at \*7.

75. *Id.*

76. *Id.*

77. *Id.*

Although there is a strong appeal in placing the burden of proof for prejudice on the party accused of spoliation, this standard has not gained much traction among district courts. At least one court has acknowledged the standard adopted in *Security Alarm*.<sup>78</sup> The rationales underlying the approach—that the spoliating party is in a better position to know what evidence was destroyed and should not benefit from its own wrongful conduct—are persuasive. Although placing the burden on the spoliating party would be consistent with the Advisory Committee’s concern about not making it too difficult for the non-spoliating party to show prejudice, this standard could potentially undermine another goal of the 2015 amendment—to reduce the over-preservation of ESI.<sup>79</sup> The previous version of the rule had led litigants to assume enormous costs in preserving ESI out of fear of facing sanctions.<sup>80</sup> If the spoliating party always had the burden of showing lack of prejudice, then common litigants would likely still be incentivized to over-preserve, knowing that they would face an uphill battle if any lost ESI were challenged. Moreover, such a standard would probably encourage the non-spoliating party to bring more motions for sanctions under rule 37(e), since the opposing party would bear the burden of proof. With these considerations in mind, placing the burden of proof on the spoliating party may be counterproductive to the purposes of the 2015 amendment.

Rather than placing the burden of proof on the spoliating party, many courts concerned about creating too heavy a burden for the non-spoliating party have given the burden to the non-spoliating party, but have chosen to relax the standard. For example, the District Court for the Western District of New York has cautioned against “holding the prejudiced party to too strict a standard of proof regarding the likely contents of . . . destroyed evidence.”<sup>81</sup> While still requiring the non-spoliating party to produce some evidence regarding the nature of the spoliated evidence, the court expressed concern that it would be “unreasonable and unfair” to compel the party to

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78. *See* *OmniGen Research v. Yongqiang Wang*, 321 F.R.D. 367, 372 (D. Or. 2017). The case was ultimately decided under rule 37(e)(2), the intent to deprive standard, so it is unclear how the court’s approach to prejudice under subdivision (e)(1) would have affected the outcome.

79. *See* FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment; Gross, *supra* note 3, at 740.

80. FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment; Gross, *supra* note 3, at 740.

81. *Moody v. CSX Transp., Inc.*, 271 F. Supp. 3d 410, 430 (W.D.N.Y. 2017) (quoting *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998)).

establish that the lost evidence would have been favorable to its claim.<sup>82</sup> The court's approach in this case is more typical than the standard adopted in *Security Alarm*. When concerned about disadvantaging the non-spoliating party, courts are more willing to decrease the burden on the non-spoliating party, instead of placing the burden entirely on the spoliating party.

### C. Bad Faith

The third position for assessing prejudice under rule 37(e)(1) is the "bad faith" standard. Under this position, the starting point is that the non-spoliating party has the burden of proof.<sup>83</sup> If, however, there is evidence that the spoliating party acted in bad faith in destroying the evidence, then the court may infer that the lost evidence was unfavorable to the party and that there was prejudice.<sup>84</sup> In that case, the burden of proof shifts to the spoliating party to show lack of prejudice.<sup>85</sup> The primary justifications for this approach are that only the party engaged in the destruction of evidence can know how much prejudice was caused by the spoliation, and it is unlikely that the non-spoliating party will be able to prove what was contained within the destroyed information.<sup>86</sup>

A small number of courts have taken this approach, most notably the District Court for the Northern District of Alabama in *Alabama Aircraft Industries, Inc. v. Boeing Co.*<sup>87</sup> The case involved two corporations, AAI and Boeing, that were engaged in a breach of contract dispute after they had agreed to submit a joint proposal for work on aircraft for the United States Air Force, but Boeing terminated the agreement.<sup>88</sup> After the agreement was breached, Boeing implemented a Firewall Plan, ordering the preservation and delivery of all relevant ESI to the law department.<sup>89</sup> However, two employees who were supposed to extract emails from the CFO's computer instead deleted the emails.<sup>90</sup> Because the CFO was directly involved in the contract for the joint proposal, and had attended a meeting discussing the Firewall Plan, the court found that Boeing clearly acted in bad faith when

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82. *Id.*

83. *Ala. Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 743 (N.D. Ala. 2017).

84. *Id.*

85. *Id.* at 744.

86. *See id.* at 743.

87. *Id.* at 743–44.

88. *Id.* at 733.

89. *Id.* at 736–37.

90. *Id.* at 737.

its employees deleted emails from the CFO's computer.<sup>91</sup> The burden then shifted to Boeing to show lack of prejudice resulting from the spoliation.<sup>92</sup> Boeing failed to meet this "heavy burden" because there was no way to determine whether the deleted emails were relevant to the underlying claim.<sup>93</sup>

Although the "bad faith" standard is appealing because it places a greater burden on the spoliating party when its conduct appears particularly wrongful, its biggest drawback is that it runs the risk of overlapping with the "intent to deprive" requirement already written into rule 37 under subdivision (e)(2). In enacting the 2015 amendment, the Advisory Committee intended for the finding of prejudice under subdivision (e)(1) to be a separate inquiry from the question under subdivision (e)(2) of whether the spoliating party acted with the intent to deprive the opposing party of the information.<sup>94</sup> The greatest concern was that curative measures granted under subdivision (e)(1) should *not* be the same as the remedies permissible under subdivision (e)(2)—which includes a presumption that the lost information is unfavorable to the spoliating party, instructions that the jury may or must presume that the information was unfavorable to that party, or dismissal of the action altogether.<sup>95</sup> Under these guidelines, the "bad faith" standard would be workable within the framework of subdivision (e)(1) so long as the remedies granted were not the same as those requiring a showing of intent to deprive.

The court in *Alabama Aircraft* somewhat blurs the line between bad faith and intent to deprive. While mentioning that other courts have suggested that the "intent to deprive" standard under subdivision (e)(2) "could be harmonious with the 'bad faith' standard," the court does not definitively state whether it takes this position.<sup>96</sup> It nonetheless clearly treats finding prejudice under subdivision (e)(1) as a separate inquiry from finding intent to deprive under subdivision (e)(2).<sup>97</sup> In assessing whether Boeing showed intent to deprive the opposing party of information, the court found that, while there was no direct evidence on the matter, there was sufficient circumstantial evidence to show that Boeing deleted the emails with the

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91. *Id.* at 744.

92. *Id.*

93. *Id.*

94. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

95. *Id.*

96. *Ala. Aircraft*, 319 F.R.D. at 746.

97. *See id.* at 743–46.

hopes of concealing the information contained within them.<sup>98</sup> This finding was based on the fact that the emails were “intentionally destroyed by an affirmative act,” and there was no credible explanation for why the emails were deleted after employees had been informed of the Firewall Plan.<sup>99</sup> Because the “intent to deprive” showing had been satisfied, the court ordered sanctions consistent with subdivision (e)(2)—that “the court will instruct the jury that it may presume that the lost information contained in [the deleted emails] was unfavorable to Boeing.”<sup>100</sup> Additionally, Boeing was ordered to pay reasonable attorney’s fees and other costs in litigating the motion.<sup>101</sup> Although the court found both prejudice under subdivision (e)(1) by applying the “bad faith” standard and intent to deprive under subdivision (e)(2), it ordered sanctions only under subdivision (e)(2); it is unclear whether the other sanctions (i.e., the attorney’s fees and other costs) were meant to be directed under subdivision (e)(1). For this reason, the distinction between bad faith and intent to deprive and the effect on the ultimate curative measures is unclear.

Other courts have also combined the issues of bad faith and intent to deprive in ways that seem to muddy the rule’s intended purpose.<sup>102</sup> *GN Netcom, Inc. v. Plantronics, Inc.* involved an antitrust claim in which one party accused the other of deleting relevant emails.<sup>103</sup> The evidence showed that the vice president of one of the companies had instructed his employees to delete some of the emails.<sup>104</sup> The District Court for the District of Delaware stated that the “question of prejudice turns largely on whether a spoliating party destroyed evidence in bad faith.”<sup>105</sup> The court even referred to the issue as “bad faith with the intent to deprive” the opposing party of the information.<sup>106</sup> After finding that the spoliating party acted in bad faith, the court then shifted the burden of proof to that party to show lack of prejudice.<sup>107</sup> Upon finding that the spoliating party did not meet this burden, the court ordered an adverse jury instruction consistent with

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98. *Id.* at 746.

99. *Id.*

100. *Id.* at 746–47.

101. *Id.* at 747.

102. *See* *GN Netcom, Inc. v. Plantronics, Inc.*, No. 12-1318-LPS, 2016 WL 3792833, at \*6–7 (D. Del. July 12, 2016).

103. *Id.* at \*1.

104. *Id.* at \*2.

105. *Id.* at \*6 (quoting *Micron Tech., Inc. v. Rambus, Inc.*, 917 F. Supp. 2d 300, 319 (D. Del. 2013)).

106. *Id.* at \*7.

107. *Id.* at \*9.

subdivision (e)(2), along with additional monetary and punitive sanctions.<sup>108</sup> Throughout its analysis, the court treated the question of bad faith and intent to deprive as one and the same.

Though the “bad faith” standard for assessing prejudice under subdivision (e)(1) could in theory coexist alongside the “intent to deprive” inquiry under subdivision (e)(2), there is a strong risk of conflating the two standards in application. The Advisory Committee’s main purpose in separating these provisions is so that the remedies imposed for a mere showing of prejudice are not as severe as those imposed for showing intent to deprive. A court applying the bad-faith standard to its analysis of prejudice would accord with the committee’s policy as long as the court made clear that it was imposing remedies under subdivision (e)(1) rather than subdivision (e)(2). If bad faith and intent to deprive mean essentially the same thing, however—as the court in *Alabama Aircraft* hinted at and the court in *GN Netcom* stated outright—then a finding of bad faith would inevitably mean that the party acted with intent to deprive as well. Such a finding would therefore have a two-fold effect: it would alter the burden of proof for showing prejudice under subdivision (e)(1), and it would allow for potential curative measures under subdivision (e)(2). The result would be to erode the distinction between subdivisions (e)(1) and (e)(2) in cases in which the court finds bad faith. Because the Advisory Committee expressly intended for subdivisions (e)(1) and (e)(2) to be treated as separate inquiries, the “bad faith” standard for assessing prejudice seemingly runs counter to a significant goal of the 2015 amendment.

#### IV. Conclusion

Rule 37(e)(1) deliberately leaves judges with wide latitude in determining whether prejudice has resulted from a party’s spoliation of ESI. A majority of courts have placed the burden of proof on the non-spoliating party to show that it has been prejudiced by the loss of evidence. Even among courts adopting this position though, the standards for what the non-spoliating party must show vary significantly across jurisdictions. Generally, the non-spoliating party must establish some idea regarding the content of the lost information, and sometimes must go one step further and show how that information would be relevant to the party’s underlying claim. Courts’ requirements to meet this burden range considerably—from “plausible, concrete suggestions,” to inferential evidence; from showing a “direct nexus” between the destroyed information and the underlying claim,

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108. *Id.* at \*13.



to merely showing that the information is “helpful in evaluating” the parties’ claims.

A small number of courts have taken the opposite approach, placing the burden of proof on the spoliating party to show lack of prejudice, based on the idea that the spoliating party is more familiar with the contents of the lost information. In spite of its appeal, this approach has not enjoyed widespread recognition. Its main drawback is that placing a heavy burden on the party accused of spoliation might cause litigants to over-preserve ESI, thereby undermining one of the amended rule’s central policies. The more common approach is for courts to place the burden of proof on the non-spoliating party, but to adopt a more relaxed standard for meeting this burden.

Still other courts have adopted the “bad faith” standard, placing the burden of showing prejudice on the non-spoliating party initially, but then shifting the burden to the spoliating party if it is shown to have acted in bad faith in destroying the evidence. The most problematic aspect of this approach is that it runs the risk of courts conflating the question of prejudice under subdivision (e)(1) with the question of intent to deprive under subdivision (e)(2). In addition to these standards, a number of courts have analyzed prejudice without articulating a clear standard or giving a clear indication of how the burden of proof is allocated.<sup>109</sup>

Based on the competing concerns and district courts’ current trends, the most desirable position seems to be placing the burden of proof on the non-spoliating party, but adopting a relatively low threshold for meeting this burden. Of the different standards articulated by the courts, the most appealing is the “plausible, concrete suggestions” standard recognized in *Matthew Enterprise*. One of the main strengths of the standard is that it is clear and articulable. It provides clarity by informing the non-spoliating party of what type of evidence it must put forward regarding the nature of the destroyed evidence—namely, the suggestions must be specific and realistic based on the evidence. This standard is more helpful than generic references that the non-spoliating party must produce “some sort of

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109. See, e.g., *Moody v. CSX Transp., Inc.*, 271 F. Supp. 3d 410, 430 (W.D.N.Y. 2017) (finding prejudice where a party had to “piece together information from other sources to try to recover relevant documents” (quoting *In re Ethicon, Inc.*, No. 2:12-cv-00497, 2016 WL 5869448, \*4 (S.D. W. Va. Oct. 6, 2016))); *CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 501 (S.D.N.Y. 2016) (“The defendants have been prejudiced . . . because . . . the existence of multiple versions of the same document at the very least obfuscates the record. . . . Moreover, the defendants have been put to the burden and expense of ferreting out the malfeasance and seeking relief from the Court.”).

evidence.” Additionally, the burden on the non-spoliating party is not too stringent. The suggestions as to what the destroyed evidence may have contained need only be “plausible,” not likely. Moreover, some courts recognized the “plausible, concrete suggestions” standard prior to the 2015 amendment, so the standard is not an entirely unfamiliar one.<sup>110</sup>

The “plausible, concrete suggestions” standard also furthers the goals of the 2015 amendment. The Advisory Committee, in enacting the 2015 amendment, seemed particularly concerned about placing a heavy burden on the party seeking sanctions when the content of the lost information was difficult to determine.<sup>111</sup> The committee also sought to leave judges with enough discretion to decide how best to approach prejudice on a case-by-case basis.<sup>112</sup> The “plausible, concrete suggestions” standard does not impose too harsh a burden on the non-spoliating party so as to make it especially difficult to impose sanctions. Nor is it so rigid as to eliminate the discretionary role of judges. As such, there is great appeal for district courts to adopt this standard on a wider scale.

A primary reason for amending rule 37(e) in 2015 was to ensure greater uniformity in district courts’ analyses of spoliation of ESI.<sup>113</sup> With regard to subdivision (e)(1) though—whether prejudice resulted from the spoliation—the Advisory Committee expressly intended to allow for discretion.<sup>114</sup> In light of the varying standards that district courts have adopted in interpreting this provision, it is too early to determine whether this flexibility has served the purposes of the amendments or has instead created too much inconsistency. With particular trends beginning to emerge among the district courts’ standards—such as an emerging consensus towards placing the burden of proof on the non-spoliating party, as well as the problematic tendencies of the “bad faith” standard—future amendments to the Rules may wish to consider officially adopting a more specific standard with regard to prejudice in claims of spoliation of ESI.

*Thomas J. Joyce*

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110. *See* *Hynix Semiconductor Inc. v. Rambus Inc.*, 897 F. Supp. 2d 939, 981 (N.D. Cal. 2012).

111. *See* FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.

112. *Id.*

113. *Id.*

114. *Id.*