February 14, 2019

ARTICLES

Sanctions: 2018 Case Law Update

Despite the intentions of the amended Rule 37(e), the 2018 decisions were still inconsistent.

By Samantha Green

Share this:

Case law regarding e-discovery is ever-changing because technology is constantly evolving. Courts are tasked with interpreting and applying new rules and amendments that pertain to various aspects of e-discovery. In 2018, the federal courts issued a handful of decisions on awarding sanctions for spoliation of electronically stored information (ESI), which falls under the purview of Federal Rule of Civil Procedure 37(e).

In December 2015, lawmakers amended Rule 37(e) to provide courts with a mechanism to streamline sanctions. From emails to text messages, parties have a duty to preserve all relevant information. In fact, the moment that a party anticipates litigation, it has a duty to take reasonable steps to preserve all potentially relevant ESI. The new Rule 37(e) was put in place to allow the courts to take a more unified approach to imposing sanctions when a party fails to preserve evidence or destroys it, whether or not it was intentional. The amended Rule 37(e) provides factors intended to help bring consistency to sanctions determinations.

Despite the intentions of the amended Rule 37(e), the 2018 decisions were still inconsistent. While some judges closely followed the amended rule, others relied instead on inherent authority to reach their decisions. Even when judges followed the amended rule, the array of awarded sanctions varied amongst the courts.

Cases Decided under Rule 37(e)(1): Prejudice and Proportionality

Under the amended rule, courts should first turn to Rule 37(e)(1), which applies when the opposing party was prejudiced by the loss of the ESI. Courts have concluded that even when there is prejudice, the sanctions should be proportional to the damage. In *Klipsch v. EPRO*, the headphone manufacturer brought an action against several defendants alleging that they were selling counterfeit products. 880 F.3d 620 (2d Cir. 2018). EPRO was alleged to have engaged in persistent discovery misconduct. The district court granted the plaintiff's motion for discovery sanctions to compensate Klipsch for corrective discovery efforts and also granted a corresponding "asset restraint" of $2.7 million; in addition, the court granted a $2.3 million bond to preserve the plaintiff's ability to recover damages and fees at the end of the case. *Id.* at 635. Furthermore, the jury received an adverse inference instruction. EPRO appealed to the U.S. Court of Appeals for the Second Circuit, arguing that its inability to provide access to certain email and messaging accounts should not have been construed as evidence of willful spoliation because "those accounts were primarily for private use." *Id.* at 629. The circuit court

upheld that "private" messaging addresses were known to be used for business purposes and thus should have been made available and preserved after a litigation hold was issued. *Id.* at 628. The court emphasized that discovery sanctions should be commensurate with the costs unnecessarily created by the sanctionable behavior, not the total value of the case—making proportionality an important consideration for discovery sanctions in light of the amended federal rule.

When evidence can be found elsewhere, courts are hesitant to impose sanctions even when a party fails to preserve evidence. In *Gordon v. Almanza*, the defendant failed to preserve his cell phone containing data relevant to the accident that gave rise to the lawsuit. 16-CV-00603, 2018 WL 2085223 (S.D. Iowa Mar. 5, 2018). The judge denied the plaintiff's request for an adverse inference, concluding that although the defendant was unable to produce ESI from his cell phone, there was no prejudice because the plaintiff could still obtain all data relevant to the issue of whether the defendant was on his cell phone at the time of the accident. Interestingly, although the judge analyzed the case essentially under Rule 37(e)(1), he reached his decision by determining whether he had inherent authority to issue sanctions. This illustrates the fact that some courts do not want to deviate from inherent authority even though the amended rule seems to account for all relevant factors for determining sanctions.

Cases Decided under Rule 37(e)(2): Intentional Spoliation

While several 2018 cases considered Rule 37(e)(2), which permits severe sanctions for intentional spoliation, many judges were hesitant to go this route. For example, in *Schmalz v. Village of North Riverside*, the defendants failed to preserve cell phones containing vital text messages after there was a litigation hold. No. 13-cv-8012, 2018 WL 1704109 (N.D. Ill. Mar. 23, 2018). While the court awarded attorney fees regarding the discovery of the text messages, it felt that the plaintiff's request for an adverse inference was too severe because intent to deprive the other party of the ESI was not clearly evident.

Similarly, in *Lokai Holdings LLC v. Twin Tiger USA LLC*, the court declined to find intentional spoliation where intent was not absolutely clear. No. 15-cv-9363, 2018 WL 1512055 (S.D.N.Y. Feb. 6, 2018). The defendants were subject to a cease-and-desist letter prior to litigation. Regardless, they continued to manually delete old emails to stay within their provider's storage limit. After receiving minimal email production during discovery, the plaintiff sought dispositive sanctions and claimed that the defendants intentionally destroyed key emails. The judge ruled that intent cannot be assumed and declined to award severe sanctions. Because the judge did agree that the plaintiff was prejudiced, she awarded the plaintiff fees and costs and banned the defendant from mentioning the lost emails at trial, which are essentially Rule 37(e)(1) sanctions.

However, some conduct is so egregious that intent is evident and therefore warrants harsher punishment. In *GN Netcom, Inc. v. Plantronics, Inc.*, a former employee of the defendant ordered coworkers to delete emails that were critical to the lawsuit, even after the company implemented a litigation hold. CA No. 12-1318, 2018 WL 273649 (D. Del. Jan. 3, 2018). The judge awarded a $5 million fee against the defendant, instructed the jury on the spoliation, and allowed comments from the plaintiff's counsel during trial about the spoliation. Interestingly, the judge still drew a line and denied the plaintiff's request for a dispositive sanction, illustrating that clear intent does not open the floodgates for all severe sanctions.

Cases Decided under Inherent Authority

As evidenced in the *Gordon* decision, discussed above, courts are still struggling with whether to use inherent authority despite the fact that the committee note to Rule 37(e) states that the amended rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used." Fed. R. Civ. P. 37(e) advisory committee's note (2015).

It is clear, though, that inherent authority is still alive and well in 2018, as seen in *Lawrence v. City of New York*. No. 15-CV-8947, 2018 WL 3611963 (S.D.N.Y. July 27, 2018). In that case, Lawrence alleged that New York Police Department officers entered her home without a warrant, pushed her to the floor, damaged her property, and stole more than $1,000. Two years later, Lawrence provided photos of her apartment after the alleged incident. Her counsel produced them to the City of New York, claiming that he was "unfamiliar" with

metadata and ESI but "did not doubt that the photos were taken contemporaneously" with the incident. *Id.* at *1 (internal citation omitted). Subsequently, the City of New York learned that 67 of 70 photos were taken two years after the incident. Lawrence's counsel then moved to withdraw as Lawrence's attorney.

In choosing dismissal of the case as a sanction instead of imposing harsher sanctions, the court in *Lawrence* demonstrated how courts "possess certain inherent powers, not conferred by rule or statute . . . to fashion an appropriate sanction for conduct which abuses the judicial process." *Id.* at *2 (internal citation omitted). The court, although sympathetic to the plaintiff's claim of mental illness, sanctioned her by dismissing the case; it concluded that Lawrence's "financial circumstances" precluded even harsher sanctions. *Id.* at *8. And the court was somewhat lenient on Lawrence's counsel, noting that his deficiencies did not meet the standard of Rule 11, 26, or 37. Despite what seems like massive errors in legal counsel and e-discovery sanctions, the court took the position that counsel met some minimum requirements of competency.

EPAC Technologies, Inc. v. HarperCollins Christian Publishing, Inc. is an example of judges using a combination of the Rule 37(e) factors and inherent authority. No. 12-cv-00463, 2018 WL 1542040 (M.D. Tenn. Mar. 29, 2018). In that case, the defendant publisher lost or deleted a significant amount of relevant information (books, inventory, and emails). The plaintiff, a book printing company, asked for monetary damages and adverse inference sanctions. The judge relied on inherent authority regarding the lost books and concluded that the defendant was negligent for failing to preserve the books, resulting in prejudice to the plaintiff's case. The judge decided to make a rebuttable presumption that the missing evidence would have proved the elements of the plaintiff's case. As for the inventory and emails, the judge concluded that the defendant did not take reasonable steps to preserve the ESI and did not replace all of the lost ESI. As a result, the judge awarded various sanctions, including fees and costs, limited jury instruction on the missing data, and preclusion of evidence.

Cases Without Sanctions

In the realm of possession, custody, and control, organizations must know what data they have and where it lives, which may not be on the company's servers. *Shenwick v. Twitter* looks at whether Twitter messages sent and received from nonparties are subject to discovery. No. 16-CV-05314, 2018 WL 833085 (N.D. Cal. Feb. 7, 2018). The plaintiffs requested that the defendants search Twitter direct messages that each designated custodian sent and received. The defendants agreed to provide direct messages for two defendants only, arguing that the Stored Communications Act prevents the disclosure of direct messages from anyone other than a named individual defendant. The court agreed with the defendants. The court cannot compel Twitter to produce protected direct messages of individual custodians who are not parties simply because Twitter is the direct messaging service provider. If the messages involved actual parties to the lawsuit, the court most likely would have reached the opposite conclusion.

In *Trainer v. Continental Carbonic Products, Inc.*, the judge declined to award sanctions because he did not find a duty to preserve or prejudice to the requesting party. Case No. 16-cv-4335, 2018 WL 3014124 (D. Minn. 2018). The defendant requested several text messages between the plaintiff and his former supervisor (a former employee of the defendant) that allegedly illustrated the plaintiff's desire to quit the company and sue the defendant. The defendant claimed that these messages would go to the heart of its defense because the lawsuit is predicated on wrongful termination and a human rights investigation. Because the plaintiff and his former supervisor both produced the text messages during an investigation before this lawsuit, the judge denied the forensic imaging request. The judge also found that the texts would be minimally helpful to the defense. The defendant additionally requested sanctions for emails that the plaintiff produced that appeared to be incomplete. The judge concluded that while this was true, the plaintiff still fulfilled his duty to preserve, and the emails served their intended purpose; thus, the incomplete emails did not prejudice the defendant.

Hernandez v. Tulare County Correction Center was an important decision because it demonstrated that even when a party fails to take reasonable steps to preserve key evidence, sanctions may not be appropriate. No. 16-CV-00413, 2018 WL 784287 (E.D. Cal. Feb. 8, 2018). In *Hernandez*, the judge did not award sanctions because there was no evidence of prejudice or intent to deprive.

Conclusion

The above is just a snapshot of key 2018 sanctions cases that demonstrate how the federal courts adhered to the Rule 37(e) amendments, if at all. While the results reached in these cases varied, in the analysis of whether to impose sanctions, the case law clearly reveals some vital themes:

- Sanctions must be proportional to the act and resulting harm. This can vary because judges may view proportionality through different lenses.
- Unless a party clearly acts intentionally, judges will not impose sanctions under Rule 37(e)(2). Even if they do, dispositive sanctions are rare.
- Parties need to know when they are required to preserve data and should take appropriate steps to do so after a party issues a legal hold.
- Inherent authority is still in the game even though the 2015 amendments aimed to abolish it.

Samantha Green is an attorney who serves as the manager of Thought Leadership for Epiq in New York, New York.