

PRELIMINARY DRAFT OF

Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure

Request for Comment

Comments are sought on Amendments to:

Bankruptcy Rules	2002, 3002, 3007, 3012, 3015, 4003, 5005, 5009, 7001, 9006, and 9009, and Official Forms 17A, 17B, 17C, 22A-1, 22A-1 Supp, 22A-2, 22B, 22C-1, 22C-2, 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 113, 119, 121, 318, 423, and 427
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Civil Rules	1, 4, 6, 16, 26, 30, 31, 33, 34, 36, 37, 55, 84, and Appendix of Forms
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All Written Comments are Due by
February 15, 2014



THE UNITED STATES COURTS

Prepared by the
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States

AUGUST 2013

1 **Rule 37. Failure to Make Disclosures or to Cooperate**
2 **in Discovery; Sanctions**

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4 ~~(e) Failure to Provide Electronically Stored~~
5 ~~Information.~~ Absent exceptional circumstances, a
6 court may not impose sanctions under these rules on
7 a party for failing to provide electronically stored
8 information lost as a result of the routine, good faith
9 operation of an electronic information system.

10 (e) Failure to Preserve Discoverable Information.

11 (1) Curative measures; sanctions. If a party
12 failed to preserve discoverable information
13 that should have been preserved in the
14 anticipation or conduct of litigation, the
15 court may:

16 (A) permit additional discovery, order
17 curative measures, or order the party

18 to pay the reasonable expenses,
19 including attorney's fees, caused by
20 the failure; and
21 (B) impose any sanction listed in Rule
22 37(b)(2)(A) or give an adverse-
23 inference jury instruction, but only if
24 the court finds that the party's
25 actions:
26 (i) caused substantial prejudice
27 in the litigation and were
28 willful or in bad faith; or
29 (ii) irreparably deprived a party
30 of any meaningful
31 opportunity to present or
32 defend against the claims in
33 the litigation.

- 34 (2) Factors to be considered in assessing a
35 party's conduct. The court should consider
36 all relevant factors in determining whether a
37 party failed to preserve discoverable
38 information that should have been preserved
39 in the anticipation or conduct of litigation,
40 and whether the failure was willful or in bad
41 faith. The factors include:
42 (A) the extent to which the party was on
43 notice that litigation was likely and
44 that the information would be
45 discoverable;
46 (B) the reasonableness of the party's
47 efforts to preserve the information;
48 (C) whether the party received a request
49 to preserve information, whether the
50 request was clear and reasonable,

51 and whether the person who made it
52 and the party consulted in good faith
53 about the scope of preservation;
54 (D) the proportionality of the
55 preservation efforts to any
56 anticipated or ongoing litigation; and
57 (E) whether the party timely sought the
58 court's guidance on any unresolved
59 disputes about preserving
60 discoverable information.
61 * * * * *

Committee Note

In 2006, Rule 37(e) was added to provide protection against sanctions for loss of electronically stored information under certain limited circumstances, but preservation problems have nonetheless increased. The Committee has been repeatedly informed of growing concern about the increasing burden of preserving information for litigation, particularly with regard to electronically stored information. Many litigants and prospective litigants have emphasized their uncertainty

about the obligation to preserve information, particularly before litigation has actually begun. The remarkable growth in the amount of information that might be preserved has heightened these concerns. Significant divergences among federal courts across the country have meant that potential parties cannot determine what preservation standards they will have to satisfy to avoid sanctions. Extremely expensive overpreservation may seem necessary due to the risk that very serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some information later sought in discovery.

This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of guidelines for federal courts, and applying them to all discoverable information, not just electronically stored information. The amended rule is not limited, as is the current rule, to information lost due to “the routine, good-faith operation of an electronic information system.” The amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts. It does not provide “bright line” preservation directives because bright lines seem unsuited to a set of problems that is intensely context-specific. Instead, the rule focuses on a variety of considerations that the court should weigh in calibrating its response to the loss of information.

Amended Rule 37(e) supersedes the current rule because it provides protection for any conduct that would be protected under the current rule. The current rule

provides: “Absent 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.” The routine good faith operation of an electronic information system should be respected under the amended rule. As under the current rule, the prospect of litigation may call for altering that routine operation. And the prohibition of sanctions in the amended rule means that any loss of data that would be insulated against sanctions under the current rule would also be protected under the amended rule.

Amended Rule 37(e) applies to loss of discoverable information “that should have been preserved in the anticipation or conduct of litigation.” This preservation obligation was not created by Rule 37(e), but has been recognized by many court decisions. It may in some instances be triggered or clarified by a court order in the case. Rule 37(e)(2) identifies many of the factors that should be considered in determining, in the circumstances of a particular case, when a duty to preserve arose and what information should have been preserved.

Except in very rare cases in which a party’s actions cause the loss of information that irreparably deprives another party of any meaningful opportunity to present or defend against the claims in the litigation, sanctions for loss of discoverable information may only be imposed on a finding of willfulness or bad faith, combined with substantial prejudice.

The amended rule therefore forecloses reliance on inherent authority or state law to impose litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B). But the rule does not affect the validity of an independent tort claim for relief for spoliation if created by the applicable law. The law of some states authorizes a tort claim for spoliation. The cognizability of such a claim in federal court is governed by the applicable substantive law, not Rule 37(e).

An amendment to Rule 26(f)(3) directs the parties to address preservation issues in their discovery plan, and an amendment to Rule 16(b)(3) recognizes that the court's scheduling order may address preservation. These amendments may prompt early attention to matters also addressed by Rule 37(e).

Subdivision (e)(1)(A). When the court concludes that a party failed to preserve information that should have been preserved in the anticipation or conduct of litigation, it may adopt a variety of measures that are not sanctions. One is to permit additional discovery that would not have been allowed had the party preserved information as it should have. For example, discovery might be ordered under Rule 26(b)(2)(B) from sources of electronically stored information that are not reasonably accessible. More generally, the fact that a party has failed to preserve information may justify discovery that otherwise would be precluded under the proportionality analysis of Rule 26(b)(1) and (2)(C).

In addition to, or instead of, ordering further discovery, the court may order curative measures, such as

requiring the party that failed to preserve information to restore or obtain the lost information, or to develop substitute information that the court would not have ordered the party to create but for the failure to preserve. The court may also require the party that failed to preserve information to pay another party's reasonable expenses, including attorney fees, caused by the failure to preserve. Such expenses might include, for example, discovery efforts caused by the failure to preserve information. Additional curative measures might include permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information.

Subdivision (e)(1)(B)(i). This subdivision authorizes imposition of the sanctions listed in Rule 37(b)(2)(A) for willful or bad-faith failure to preserve information, whether or not there was a court order requiring such preservation. Rule 37(e)(1)(B)(i) is designed to provide a uniform standard in federal court for sanctions for failure to preserve. It rejects decisions that have authorized the imposition of sanctions -- as opposed to measures authorized by Rule 37(e)(1)(A) -- for negligence or gross negligence. It borrows the term "sanctions" from Rule 37(b)(2), and does not attempt to prescribe whether such measures would be so regarded for other purposes, such as an attorney's professional responsibility.

This subdivision protects a party that has made reasonable preservation decisions in light of the factors identified in Rule 37(e)(2), which emphasize both reasonableness and proportionality. Despite reasonable efforts to preserve, some discoverable information may be

lost. Although loss of information may affect other decisions about discovery, such as those under Rule 26(b)(1), (b)(2)(B), and (b)(2)(C), sanctions may be imposed only for willful or bad faith actions, unless the exceptional circumstances described in Rule 37(e)(1)(B)(ii) are shown.

The threshold under Rule 37(e)(1)(B)(i) is that the court find that lost information should have been preserved; if so, the court may impose sanctions only if it can make two further findings. First, the court must find that the loss of information caused substantial prejudice in the litigation. Because digital data often duplicate other data, substitute evidence is often available. Although it is impossible to demonstrate with certainty what lost information would prove, the party seeking sanctions must show that it has been substantially prejudiced by the loss. Among other things, the court may consider the measures identified in Rule 37(e)(1)(A) in making this determination; if these measures can sufficiently reduce the prejudice, sanctions would be inappropriate even when the court finds willfulness or bad faith. Rule 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2) sanctions in the expectation that the court will employ the least severe sanction needed to repair the prejudice resulting from loss of the information.

Second, it must be established that the party that failed to preserve did so willfully or in bad faith. This determination should be made with reference to the factors identified in Rule 37(e)(2).

Subdivision (e)(1)(B)(ii). This subdivision permits

the court to impose sanctions in narrowly limited circumstances without making a finding of either bad faith or willfulness. The need to show bad faith or willfulness is excused only by finding an impact more severe than the substantial prejudice required to support sanctions under Rule 37(e)(1)(B)(i). It still must be shown that a party failed to preserve discoverable information that should have been preserved. In addition, it must be shown that the party's actions irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

The first step under this subdivision is to examine carefully the apparent importance of the lost information. Particularly with electronically stored information, alternative sources may often exist. The next step is to explore the possibility that curative measures under subdivision (e)(1)(A) can reduce the adverse impact. If a party loses readily accessible electronically stored information, for example, the court may direct the party to attempt to retrieve the information by alternative means. If such measures are not possible or fail to restore important information, the court must determine whether the loss has irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

The "irreparably deprived" test is more demanding than the "substantial prejudice" that permits sanctions under Rule 37(e)(1)(B)(i) on a showing of bad faith or willfulness. Examples might include cases in which the alleged injury-causing instrumentality has been lost. A plaintiff's failure to preserve an automobile claimed to have defects that caused injury without affording the defendant

manufacturer an opportunity to inspect the damaged vehicle may be an example. Such a situation led to affirmance of dismissal, as not an abuse of discretion, in *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001). Or a party may lose the only evidence of a critically important event. But even such losses may not irreparably deprive another party of any meaningful opportunity to litigate. Remaining sources of evidence and the opportunity to challenge the evidence presented by the party who lost discoverable information that should have been preserved, along with possible presentation of evidence and argument about the significance of the lost information, should often afford a meaningful opportunity to litigate.

The requirement that a party be irreparably deprived of any meaningful opportunity to present or defend against the claims in the litigation is further narrowed by looking to all the claims in the litigation. Lost information may appear critical to litigating a particular claim or defense, but sanctions should not be imposed — or should be limited to the affected claims or defenses — if those claims or defenses are not central to the litigation.

A special situation arises when discoverable information is lost because of events outside a party's control. A party may take the steps that should have been taken to preserve the information, but lose it to such unforeseeable circumstances as flood, earthquake, fire, or malicious computer attacks. Curative measures may be appropriate in such circumstances — this is information that should have been preserved — but sanctions are not. The loss is not caused by “the party's actions” as required by (e)(1)(B).

Subdivision (e)(2). These factors guide the court when asked to adopt measures under Rule 37(e)(1)(A) due to loss of information or to impose sanctions under Rule 37(e)(1)(B). The listing of factors is not exclusive; other considerations may bear on these decisions, such as whether the information not retained reasonably appeared to be cumulative with materials that were retained. With regard to all these matters, the court's focus should be on the reasonableness of the parties' conduct.

The first factor is the extent to which the party was on notice that litigation was likely and that the information lost would be discoverable in that litigation. A variety of events may alert a party to the prospect of litigation. But often these events provide only limited information about that prospective litigation, so that the scope of discoverable information may remain uncertain.

The second factor focuses on what the party did to preserve information after the prospect of litigation arose. The party's issuance of a litigation hold is often important on this point. But it is only one consideration, and no specific feature of the litigation hold -- for example, a written rather than an oral hold notice -- is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized. One focus would be on the extent to which a party should appreciate that certain types of information might be discoverable in the litigation, and also what it knew, or should have known, about the likelihood of losing information if it did not take steps to preserve. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual

litigants, may be less familiar with preservation obligations than other litigants who have considerable experience in litigation. Although the rule focuses on the common law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that some information was lost does not itself prove that the efforts to preserve were not reasonable.

The third factor looks to whether the party received a request to preserve information. Although such a request may bring home the need to preserve information, this factor is not meant to compel compliance with all such demands. To the contrary, reasonableness and good faith may not require any special preservation efforts despite the request. In addition, the proportionality concern means that a party need not honor an unreasonably broad preservation demand, but instead should make its own determination about what is appropriate preservation in light of what it knows about the litigation. The request itself, or communication with the person who made the request, may provide insights about what information should be preserved. One important matter may be whether the person making the preservation request is willing to engage in good faith consultation about the scope of the desired preservation.

The fourth factor emphasizes a central concern -- proportionality. The focus should be on the information

needs of the litigation at hand. That may be only a single case, or multiple cases. Rule 26(b)(1) is amended to make proportionality a central factor in determining the scope of discovery. Rule 37(e)(2)(D) explains that this calculation should be made with regard to “any anticipated or ongoing litigation.” Prospective litigants who call for preservation efforts by others (the third factor) should keep those proportionality principles in mind.

Making a proportionality determination often depends in part on specifics about various types of information involved, and the costs of various forms of preservation. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited resources to devote to those efforts. A party may act reasonably by choosing the least costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients’ information systems and digital data -- including social media -- to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

Finally, the fifth factor looks to whether the party alleged to have failed to preserve as required sought guidance from the court if agreement could not be reached with the other parties. Until litigation commences, reference to the court may not be possible. In any event, this is not meant to encourage premature resort to the court; amendments to Rule 26(f)(3) direct the parties to address

preservation in their discovery plan, and amendments to Rule 16(c)(3) invite provisions on this subject in the scheduling order. Ordinarily the parties' arrangements are to be preferred to those imposed by the court. But if the parties cannot reach agreement, they should not forgo available opportunities to obtain prompt resolution of the differences from the court.