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## **Adverse Inferences for Spoliation of ESI: Do New Federal Rules Impact NJ Jurisprudence?**

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On Dec. 1, 2015, the proposed amendments to the Federal Rules of Civil Procedure went into effect. One of the most significant changes concerned Rule 37(e), which governs remedies available to parties when electronically stored information (ESI) is not adequately preserved. Initially adopted in 2006, the original Rule 37(e) sought to balance the common-law duty to preserve with the practical consequences of routine auto-delete features. It stated: “Absent exceptional circumstances, a court may not impose sanctions for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”

Yet less than 10 years following its debut, the rule makers determined that Rule 37(e) should be replaced in its entirety. First, the limited nature of the rule did not adequately address the challenges arising from the explosion of ESI in recent years. Today, we cannot imagine a world without smartphones. But when the 2006 rule amendments were published for public comment in August 2004, there were no iPhones, iPads or Twitter, and Facebook was only six months old. Second, the rule spawned conflicting standards in different circuits regarding when sanctions such as adverse inferences could be imposed—was negligence sufficient or was bad faith required? Finally, the uncertainty in that standard led to the over-preservation of ESI and the needless expenditure of millions of dollars.

The new Rule 37(e), Failure to Preserve Electronically Stored Information, seeks to address the gaps in the prior rule. It provides:

If electronically stored information that should have been preserved in the anticipation of 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 such measures no greater than necessary to cure the prejudice; or (2) only upon a 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.

This article speaks to whether new Rule 37(e) will impact how New Jersey federal district courts approach motions seeking an adverse inference arising from the loss of ESI. Prior to implementation of the new rule, there was some ambiguity in New Jersey federal law as to whether in the context of ESI, bad faith was a prerequisite to imposing an adverse inference or whether negligent conduct was sufficient. This ambiguity may have been the result of reliance on Third Circuit spoliation opinions, which addressed the loss of tangible as opposed to electronic evidence. With these rule changes, it is now clear that negligence *will not* support an adverse inference and that some form of intentional conduct to deprive the party of use of information is required.

*Mosaid Technologies v. Samsung Electronics Co.*, 348 F. Supp. 332 (D. N.J. 2004), provided a template for New Jersey federal courts evaluating whether to permit an adverse inference due to the loss of ESI. Decided prior to the adoption of the original Rule 37(e), *Mosaid* was a patent dispute in which the defendant failed to implement a litigation hold. As a result, the auto-delete function for email remained in place, and email continued to be deleted after the duty to preserve attached. The plaintiff sought monetary sanctions and a permissive adverse inference. (An adverse or spoliation inference allows or requires the jury to find that the missing information would have been unfavorable to the party that lost it.)

Relying on the Third Circuit's opinion in *Brewer v. Quaker Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir. 1995), the court identified the following test for such an inference: (1) the evidence in question must be within the party's control; (2) it must be apparent that there has been an "actual suppression or withholding of the evidence"; (3) the evidence destroyed or withheld was relevant to the claims or defenses; and (4) it was reasonably foreseeable that the evidence would later be discoverable. *Mosaid*, 348 F. Supp. at 336. The court found that the first, third and fourth factors were easily satisfied, but paused to consider what degree of culpability was required to satisfy the second factor. It noted that the Third Circuit had "yet to elaborate" on what was meant by the phrase "actual suppression" and that it had found no case law in the circuit which required a finding of bad faith before allowing a spoliation inference. Some courts in the Third Circuit had construed "actual suppression" to mean the intentional or knowing destruction of evidence, while others had utilized

a more flexible approach and found that negligence was sufficient. The *Mosaid* court opted for the more flexible approach: "As long as there is some showing that the evidence is relevant ... the offending party's culpability is largely irrelevant as it cannot be denied that the opposing party has been prejudiced. Contrary to Samsung's contention, negligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference." *Id.* at 337.

With the adoption of the new rules, it should now be clear that the 'Mosaid' analysis has been replaced by a uniform standard of intent. The Rules Committee stated that the "intent requirement" was akin to bad faith but is defined even more precisely.

This ruling led one New Jersey court to adopt a sliding-scale approach to "actual suppression," focused on the nature and extent of the prejudice rather than intent. *See The Katiroll Company v. Katiroll and Platters*, 2011 U.S. Dist. LEXIS 85212 at \*5 (D. N.J. Aug. 3, 2011) (in trademark infringement case in which plaintiff alleged defendants failed to preserve Facebook pages in their original state, documents from its website, annual report and emails, the court found "[w]here there is substantial prejudice to the

opposing party, negligence may be sufficient to warrant a spoliation inference. Where there is minimal prejudice to the opposing party, intentional conduct is required."). Another court skirted the issue entirely, finding that it "need not delve into these murky waters, as either under a negligence or bad-faith/intentional destruction standard, an adverse inference is warranted." *Arteria Property Pty v. Universal Funding V.T.O.*, 2008 U.S. Dist. LEXIS 77199 (D. N.J. Oct. 1, 2008) (evidence tended to show that the defendants either had the document and willfully destroyed it or had the document and lost it, which would constitute bad faith or negligence, respectively).

The Third Circuit "spoke" in *Bull v. UPS*, 665 F.3d 68 (3d.

Cir. 2012). There, the court clarified that “actual suppression” required intent and that a finding of bad faith was “pivotal to a spoliation determination.” *Id.* at 79. Importantly, *Bull* involved the failure to produce tangible evidence (original medical notes), not ESI. Following *Bull*, New Jersey federal district court judges required bad faith in several cases seeking relief for spoliation of evidence. *Van De Wiele v. Acme Supermarkets*, 2015 U.S. Dist. LEXIS 96711 (D.N.J. July 24, 2015) (motion to amend complaint denied in part because of lack of evidence that defendant taped over surveillance video in bad faith or with intent to deprive plaintiff of access to the footage); *Mock v. Wal-Mart Stores, East*, 2014 U.S. Dist. LEXIS 56670 (D.N.J. Apr. 23, 2014) (motion for summary judgment denied where plaintiffs could not show that defendants discarded the object on which plaintiff tripped in bad faith); *McCann v. Kennedy University Hospital*, 2014 U.S. Dist. LEXIS 9074 (D. N.J. Jan. 24, 2014) (motion for spoliation sanctions denied where the plaintiff failed to establish that defendants acted in bad faith by allowing the surveillance tapes to be taped over as a matter of routine procedure).

But when it came to electronic evidence and motions for an adverse inference, at least one court continued to follow the *Mosaid* approach, and did not require bad faith as a prerequisite for sanctions. In *Gatto v. United Airlines*, 2013 U.S. Dist. LEXIS 41909 (Mar. 25, 2013), the defendants sought a mandatory adverse inference for the plaintiff’s failure to preserve his Facebook account. The plaintiff argued that because he did not intentionally destroy evidence or violate a court order, his actions fell short of “actual suppression.” The court disagreed. Invoking *Mosaid*, the court found that “[e]ven if Plaintiff did not intend to permanently deprive the defendants of the information associated with this Facebook account, there is no dispute that Plaintiff intentionally deactivated the account,” and the defendants are prejudiced because they have lost access to evidence that is potentially relevant to the plaintiff’s damages and credibility. *Id.* at \*12 - \*14. It therefore determined that an adverse inference was appropriate.

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of intent. The Rules Committee stated that the “intent requirement” was akin to bad faith but is defined even more precisely. See June 14, 2014, memorandum to the Standing Committee on Rules of Practice and Procedure from the Advisory Committee on Federal Rules of Civil Procedure at Appendix B-17. Interestingly, neither this explanation nor the phrase “bad faith” is a part of the Advisory Committee notes which accompany the rules. Time will tell whether the “intent to deprive a party” language is equivalent to or a more exacting standard than “bad faith.”

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