

Addressing Altered Emails, Court Tests Limits of Amended Rule 37

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Intentional spoliation of evidence may not warrant dismissal under amended Federal Rule of Civil Procedure 37. A district court declined to impose terminating sanctions for the intentional alteration of emails under the proportionality standard for preserving electronically stored information (ESI), but did issue a preclusion order and awarded attorney fees and costs. The decision is one of the first to address a spoliation claim under the amended rule, and it provides insight into how courts will analyze such claims in the future.

In *Cat3, LLC v. Black Lineage, Inc.*, the plaintiffs alleged that the defendants' use of the name FLASHXHYPE infringed on the plaintiffs' trademark, SLAMXHYPE. A key issue was when the defendants became aware of the SLAMXHYPE name. During discovery, two versions of an email surfaced. The plaintiffs' production contained an email sent by the defendants to the plaintiffs at the email extension @slamxhype.com. The defendants' version was addressed to the plaintiffs at the email extension "@ecko.com." After forensically analyzing the plaintiffs' document production, the defendants' expert concluded that the plaintiffs had deleted the original email containing the true email addresses and replaced the original email with an altered version.

The defendants sought dismissal of the complaint, or, alternatively, imposition of an adverse inference, evidentiary preclusion, and attorney fees and costs pursuant to Rules 26 and 37. In response, the plaintiffs' expert testified that the alteration was caused by a change in email systems from Lotus Notes to a Gmail cloud-based storage system. The plaintiffs argued sanctions were not warranted because the defendants uncovered the original email, and thus, Rule 37(e) did not apply because the data were not lost. The plaintiffs further argued that neither a terminating sanction nor an adverse inference was appropriate because they did not act with intent to deprive the defendants of evidence.

The court rejected the plaintiffs' arguments. Though it declined to impose the ultimate sanction of dismissal, it barred the plaintiffs from introducing the altered emails into evidence at trial and ordered the plaintiffs to reimburse the defendants' attorney fees and costs incurred as a result of the plaintiffs' misconduct.

In so holding, the court applied the new version of Rule 37 and set forth a uniform approach to handling spoliation claims. Under amended Rule 37(e), if ESI is lost, the court can impose several specific forms of relief or consider a proportional order that is "no greater than necessary to cure the prejudice."

The court determined the manipulated email fell within the definition of lost data—a threshold requirement for applying

amended Rule 37(e). It reasoned that "near-duplicate emails showing different addresses cast doubt on the authenticity of both" and prejudiced the defendants by weakening the cumulative weight of the evidence. The court further noted that even if amended Rule 37(e) did not apply, it still had power to redress spoliation under its inherent authority to address abuse of the judicial process.

Acknowledging a split of authority in the standard of proof required of spoliation claims, the court used a clear and convincing standard because terminating sanctions and the plaintiffs' intent were at issue. The court concluded that the plaintiffs "intentionally altered the emails at issue . . . to gain an advantage in the litigation." The court added that the evidence also met the "particularized showing of bad faith" necessary to impose sanctions under the court's inherent power.

Cat3 provides litigants a lesson in Rule 37(e)'s proportionality standard. Under the old rule, "the court may have imposed even greater sanctions under a lesser standard. The old rule did not impose a proportionality standard on the curative measures, and more severe sanctions, including dismissal or a default judgment, probably would have been remedies available to the court in this instance," explains Kenneth M. Klemm, New Orleans, LA, cochair of the ABA Section of Litigation's Pretrial Practice & Discovery Committee. The remedies awarded "seemed to be proportional to the intentional conduct that the court deemed the evidence to support and to be correct based on the rule's provisions," observes Klemm. Because the plaintiffs' manipulation precluded the defendants from verifying the authenticity of either email, precluding use of the emails sufficiently cured the prejudice, Klemm adds.

The decision also highlights the interplay between the rule and a court's inherent authority to control the judicial process. "If the court did not have inherent authority to address intentional conduct falling outside the rule, the court would have little if any other options available to police such conduct, and thus would be forced into an untenable position of condoning bad-faith intentional conduct by parties successful in skirting the rule. To conclude otherwise produces an absurd result," says Robert J. Will, St. Louis, MO, cochair of the Section of Litigation's Pretrial Practice & Discovery Committee. **L**

2 An expanded version of this story, including links to resources and authorities, is available at <http://bit.ly/LN414-Burge>.