



Safety First: Counsel Should Take Affirmative Steps to Ensure ESI Is Being Preserved

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In the advent of the 2015 amendment to Rule 37(e), courts have made clear that counsel's obligation to ensure the preservation of ESI extends beyond the mere issuance of a litigation hold. Instead, to avoid possible sanctions, counsel must take affirmative steps to ensure the client's compliance with the litigation hold to prevent the destruction of relevant ESI.

In multidistrict litigation over a hazardous spill, *In re Gold King Mine Release*, defendant Harrison Western Construction Corporation ("Harrison") was sanctioned for its failure to preserve and produce relevant documents related to its work on a Colorado mine prior to the release of millions of gallons of toxic waste. In its 2019 discovery requests, the state of Utah sought documents related to the work Harrison performed or planned to perform at the mine in 2014 and 2015.

In response, Harrison was unable to provide most of the requested documents from that time period, claiming – through a third-party IT consultant – that a "catastrophic event" occurred during Harrison's migration of documents to a new server. Because Harrison could not produce the requested documents, Utah moved for sanctions under Federal Rules of Civil Procedure 37(b) and (e); however, the court seemingly only analyzed Utah's application under Rule 37(e).

In its analysis under Rule 37(e), the court focused on Harrison's failure to take reasonable steps to preserve the now-unavailable ESI. Besides issuing a litigation hold, the court cited Harrison's failure to take affirmative steps to preserve its ESI, such as: (1) monitoring compliance with the litigation hold; (2) communicating with key employees to understand how the information would be stored; and (3) ensuring that relevant evidence was preserved (e.g., installing a back-up storage system to ensure preservation of ESI). And, while the duty to preserve ultimately falls on the litigant, the court

reminded counsel that they have a “continuing responsibility” to ensure that the parties are preserving the relevant ESI.

The court, however, declined to impose the more serious sanctions against Harrison – namely, an adverse inference and the exclusion of evidence – because Utah failed to show Harrison acted in bad faith, specifically with an “intent to deprive” plaintiffs of the spoliated evidence in the litigation, a requirement under Rule 37(e). Instead, looking to the curative measures available under Rule 37(e)(1), the court allowed Utah to admit evidence of Harrison’s spoliation and awarded attorney fees related to the motion.

Interestingly, the court did not appear to set parameters on the scope of the spoliation evidence that Utah may introduce, despite noting that certain categories of documents sought from Harrison could likely be obtained from other parties in the litigation. Under Rule 37(e)(1), curative measures – e.g., introducing evidence of spoliation – are not available unless the complaining party can meet a threshold element of the rule that the documents cannot be obtained from any other source.

The court’s decision reminds counsel that its job is not done once a litigation hold is issued. Counsel should diligently monitor their client’s adherence to the litigation hold and ensure that the relevant ESI is being preserved. This includes understanding how the evidence is stored and the steps their client is taking to protect ESI from destruction. As illustrated in the *In re Gold King Mine Release* opinion, counsel’s failure to take these affirmative steps may lead to sanctions that adversely effect, or even dispose of, the case.

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