Primer on Avoiding Sanctions for the Loss of Electronically Stored Information

By Ron Hedges

Several of my posts have addressed sanctions for the loss of electronically stored information (ESI) through AHIMA's Information Governance Principles for Health Care™ (IGPHC). I have also referred on several occasions to the December 1, 2015 amendments to the Federal Rules of Civil Procedure.

In this blog post I want to focus on amended Rule 37(e) and how it will impact the loss of ESI in civil litigation. A caveat before we begin: The federal rules apply only to federal courts. Most litigation in the United States takes place in state courts and these have their own rules. Back to Rule 37(e).

First, the rule does not speak of sanctions per se. Instead, for reasons that will become apparent, Rule 37(e) speaks of "remedial measures." Don't be misled by this. A remedial measure imposed by a federal court for the loss of ESI is bad for the party (and sometimes the party's attorney) that has to undertake any measure and would be deemed a sanction by most.

Second, Rule 37(e) only addresses the loss of ESI. It leaves the loss of physical things (blood samples, handwritten notes, etc.) to be dealt with according to case law that existed before December 1. That might be a story for another post.

Think of Rule 37(e) as a series of barriers. Each barrier must be surmounted before a court can impose any sanction against a party. Here are the barriers:

1. Should the lost ESI have been preserved? This means that the party that "lost" the ESI had a duty to preserve it because the party knew of the existence of litigation or reasonably anticipated litigation and the lost ESI would have been relevant to the litigation. *If the answer to this question is no, stop.*

2. Did the party take reasonable steps to avoid the loss of the ESI? "Reasonable steps" are not defined in Rule 37(e) or in the comment that accompanies the rule. In other words, courts will look at what was done and not done to preserve the lost ESI and fit the facts into the rubric of reasonableness. *If the answer to this question is no, go to 3.*

3. Can the lost ESI be "replaced or restored through additional discovery?" This phrase opens a number of possibilities. Might the lost ESI reside on a backup tape or in "the cloud?" What effort would have to be expended to restore the ESI from a backup tape? Would doing so be proportionate to the needs of the particular litigation? Might the lost ESI be replaced by depositions of individuals or business entities who could be questioned about the circumstances surrounding the lost ESI or about its content? Note here my earlier observation about a remedial measure vis-à-vis a sanction: If a party is ordered to, for example, restore backup tapes or produce personnel to be deposed and perhaps pay the other party's attorneys' fees and costs are we not in fact talking about a sanction? *If the ESI cannot be restored or replaced go to 4.*

4. Only when these barriers have been surmounted can the court decide *what* should be done because the lost ESI cannot be restored or replaced. Here, what the court can do depends on the state of mind of the party that lost the ESI. And bear in mind that a business entity acts through individuals and that under certain circumstances the state of mind of an individual can be *attributed* to his employer. *Then, depending on state of mind go either to 5 or 6.*

5. If the ESI was lost because of an error, such as a negligent failure to implement a legal hold on relevant ESI, and if there has been prejudice to the other party, the court may "order measures no greater than necessary to cure the prejudice."

6. If the ESI was lost because a party intended to deprive the other party of the ESI, prejudice is presumed. Here, the court might:

    - presume that the lost information was unfavorable to the party
    - instruct the jury that it may or must presume the information was unfavorable to the party
    - dismiss the action or enter a default judgment

Suffice it to say that any of these sanctions should be avoided if at all possible. Another caveat: Most civil actions in federal are resolved without going to trial. Nevertheless, the potential for sanctions arising out of the loss of ESI might lead a party to "over preserve" ESI to avoid the risk of sanctions and to settle rather than proceed on the merits. And, of course, being branded a "spoliator" by a court may have reputational implications for a party and its attorney.

What does all this mean for the reader? Some thoughts in that regard:

1. Understand your organization's information governance principles
2. Adhere to those principles
3. Refresh your understanding of the governing principles
4. When you dispose of ESI follow the governing principles and, assuming there be to be duty to preserve the ESI, don't dispose of it.
5. Don't be afraid to ask questions about what you should or not do.

But be optimistic. Motions for sanctions are rarely made and even more rarely granted!

***Editor's note: The views expressed in this column are those of the author alone and should not be interpreted otherwise or as advice.*

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