

Karta Legal LLC: E-Discovery Training Module

# E-discovery Primer

April 9, 2019

# Topics

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- The importance of mastering e-Discovery
  - The Electronic Discovery Reference Model
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- The Federal Rules of Civil Procedure (related to e-Discovery)
  - Life after the 2015 FRCP Amendments
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# The Importance of Mastering E-Discovery

# The importance of e-Discovery

E-discovery is the extension of the discovery process to information that is stored electronically and includes e-mail, instant messages, word processing files, spreadsheets and other electronic content that may be stored on desktops, laptops, file servers, mainframes, smartphones, employees' home computers or on a variety of other platforms.

Social media, messaging and other types of electronic communications systems further complicate the entire process.

E-discovery today represents approx. 35% of the total cost of litigation, and companies that fail to produce ESI in a timely or appropriate manner face the risk of paying millions of dollars in sanctions and fines, not to mention loss of corporate reputation, lost revenue and embarrassment.

In a recent Federal Judges Survey only 23% of federal judges agreed with the statement, “The typical attorney possesses the legal and technical subject matter expertise required to effectively counsel clients on e-discovery matters.”

# Professional and Ethical Rules Demand Competency

Model Rule 3.4 states that a lawyer must provide “competent representation,” including the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

# Professional and Ethical Rules Demand Competency

The ABA Model Rule 3.4 also state that a “lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”

# Professional and Ethical Rules Demand Competency

In 2012, the ABA amended its comments to the Model Rule to state that: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology...**”

# Professional and Ethical Rules Demand Competency

In practice, this means that, to avoid spoliation claims, an attorney needs to fully understand the client's data, including:

- ✓ The email and network infrastructure,
- ✓ The document retention and destruction practices, and
- ✓ The sources of all potentially relevant data.

Lawyers must be able to represent with candor and proficiency the entire process of identification, preservation, collection, processing, review and production in any given case.

# States adopting the Model Rules or a version of them:

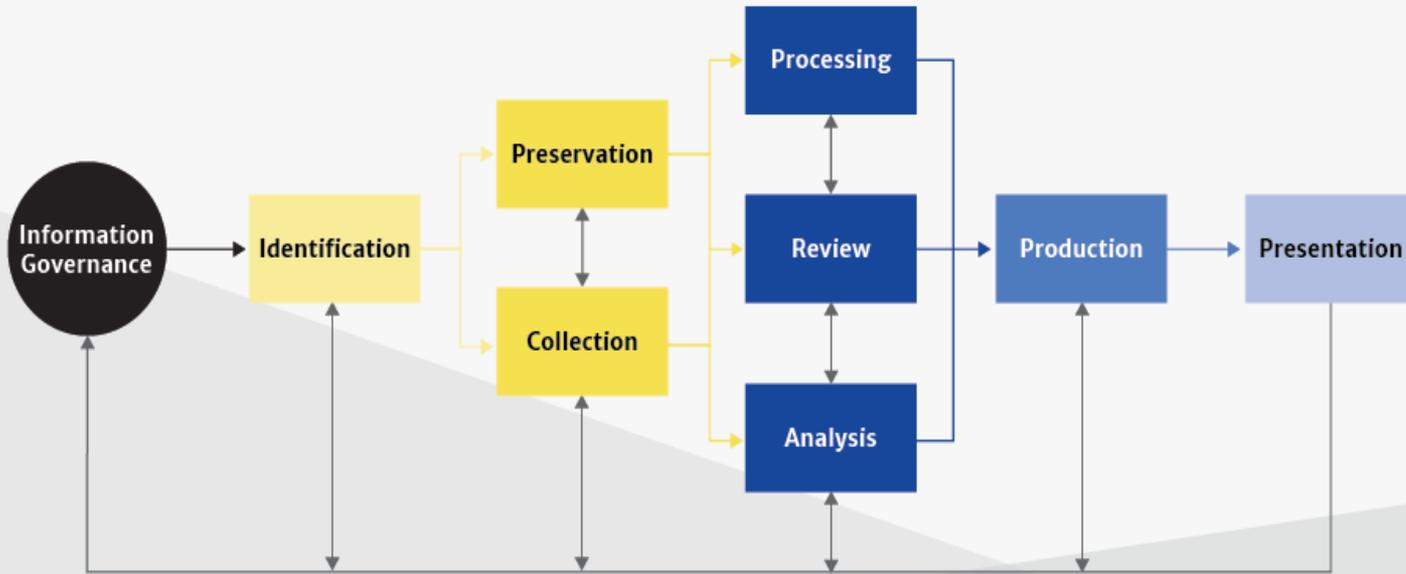
- Alaska
- Arkansas
- Colorado
- Connecticut
- Delaware
- Florida
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas
- Kentucky
- Louisiana
- Massachusetts
- Minnesota
- Missouri and Montana
- Nebraska
- New Hampshire
- New Mexico
- New York
- North Carolina
- North Dakota
- Ohio
- Oklahoma
- Pennsylvania
- Tennessee
- Utah
- Vermont
- Virginia
- Washington
- West Virginia
- Wisconsin and Wyoming

# The Electronic Discovery Reference Model

# The EDRM



## Electronic Discovery Reference Model

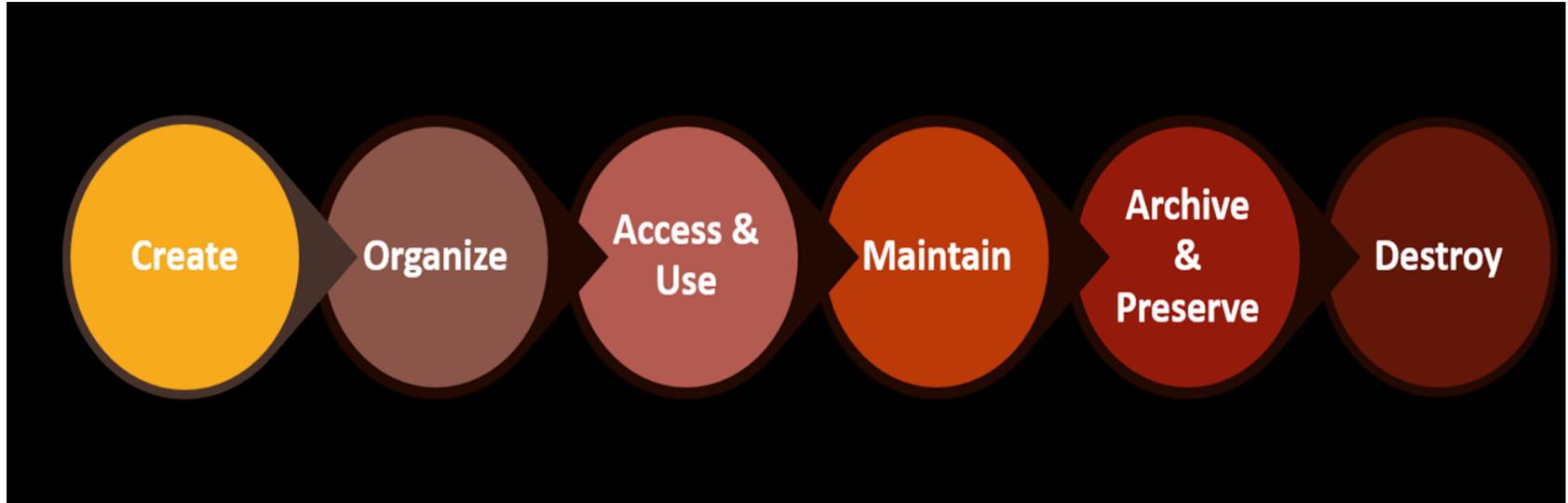


VOLUME

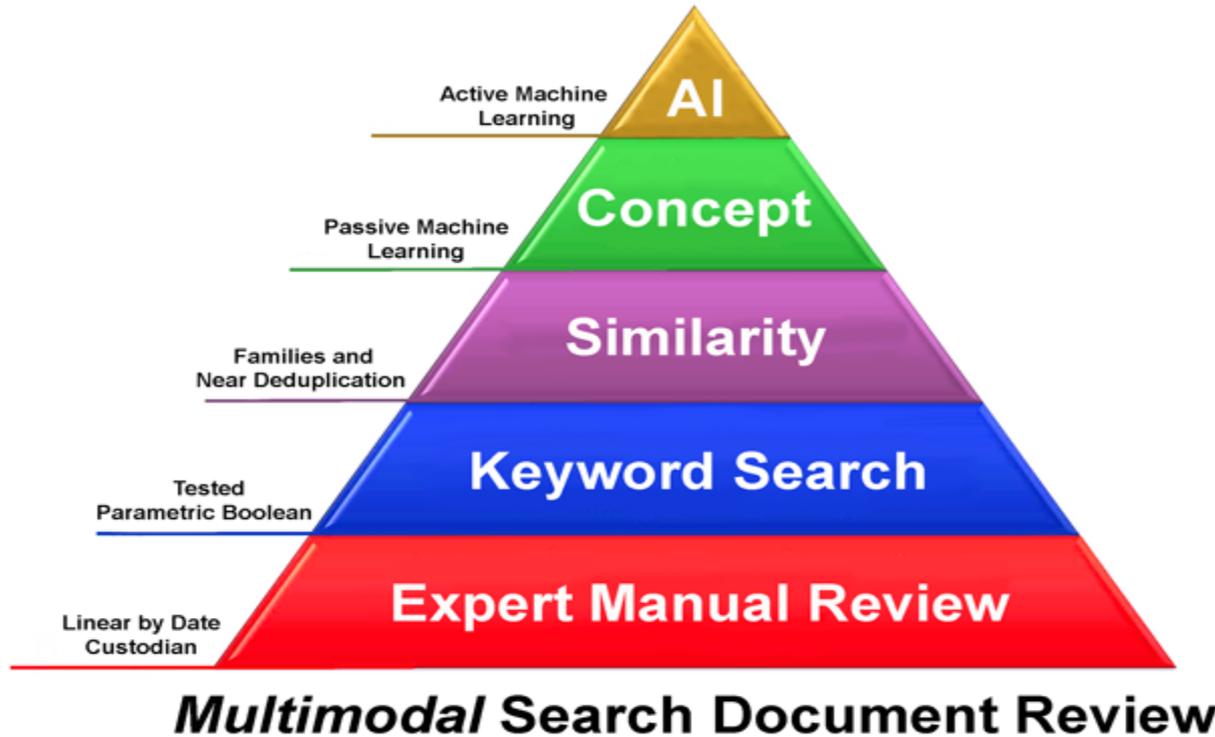
RELEVANCE

Adapted from Electronic Discovery Reference Model, EDRM (edrm.net)

# Information Governance



# Document Review Concepts



# Analytics



## According to the 2018 ABA TECHREPORT:

Keyword searching remains the most favored technique for processing and reviewing e-discovery materials at 80%;

Predictive coding remained at a low 12%; and

38% of the respondents never bother to perform any sort of early case *assessment*.

# FRCP Applicable to e-Discovery

# Relevant Federal Rules of Civil Procedure

## ➤ Rule 1

## ➤ Rule 16

## ➤ Rule 26

## ➤ Rule 34

## ➤ Rule 37

### Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in [Rule 81](#). They should be construed, administered, and employed by the court and the parties to secure the just, **speedy, and inexpensive** determination of every action and proceeding.

RULE 16 (Pre-trial conferences, scheduling)	SECTION	NEW
Pre-trial Conference	(b)(1)	Court must issue scheduling order after (A) receiving parties' Rule 26(f) report or (B) consulting with the parties <b>via direct simultaneous communication</b> . Those communications may be in person, by telephone, or by more sophisticated electronic means.
Scheduling	(b)(3)(B)(iii)	The scheduling order may provide for disclosure, <b>discovery, or preservation of ESI</b> .
Scheduling	(b)(3)(B)(iv)	The scheduling order may include agreements reached under <b>FRE 502</b> .

**RULE 26** (Duty to Disclose;  
General Provisions Governing  
Discovery)

**SECTION**

**NEW**

Discovery Scope and Limits... Scope in General	(b)(1)	Parties may discover information about any non-privileged matter where the information is both: relevant to any party's claim or defense <b>and proportional to the needs of the case.</b>
Discovery Scope and Limits... Scope in General	(b)(1)	<b>Factors to be considered to determine proportionality are:</b> The importance of the issues at stake in the action; The amount in controversy; The <b>parties' relative access</b> to relevant information; The <b>parties' resources</b> ; The importance of the discovery in resolving the issues; and Whether the burden or expense of the proposed discovery outweighs its likely benefit. Proportionality factors have been moved to one location, at the beginning of the rule, and have been reordered. A previously implicit factor has been made explicit: the parties' relative access to relevant information. The Committee Note concerning this aspect of the rule is long and detailed and should be read with care.
Protective Orders	(c)(1)(B)	Court is explicitly authorized to <b>issue protective orders that allocate expenses for disclosure or discovery.</b> This change is not meant to suggest that <b>cost-shifting should become a common practice.</b>

**RULE 34** (Producing Documents, ESI)

**SECTION**

**NEW**

Procedure... Responses and Objections... Time to Respond	(b)(2)(A)	Party responding to <a href="#">Rule 26(d)(2)</a> early document requests must deliver responses within 30 days of the <a href="#">Rule 26(f)</a> conference.
Procedure... Responses and Objections... Responding to Each Item	(b)(2)(B)	<b>Parties objecting to document requests must specify the grounds for objecting.</b>  Responding parties may produce copies of documents or ESI instead of permitting inspection. The same deadlines apply either way.
Procedure... Responses and Objections... Objections	(b)(2)(C)	Parties objecting to document requests must state, with each objection, <b>whether they are withholding any responsive materials on the basis of that objection.</b>

**RULE 37** (Failure to Make Disclosures or to Cooperate in Discovery; Sanctions)

**SECTION**

**NEW**

Failure to Preserve ESI	(e)	Court takes action only if:  ESI has been lost; The lost ESI should have been preserved in the anticipation or conduct of litigation; The party failed to take reasonable steps to preserve the ESI; and The ESI cannot be restored or replaced through additional discovery.
	(e) 1	If court finds that another party has been prejudiced by loss of the information, <b>court may order measures no greater than necessary to cure the prejudice.</b>
	(e) 2	If and only if court finds that the other party acted with intent to deprive another party of the information's use in the litigation, court may take one of three actions:
	(e)(2)(A)	Presume the lost information was unfavorable to the party;
	(e)(2)(B)	Instruct jury that it may or must presume the lost information was unfavorable to the party; or
	(e)(2)(C)	Dismiss action or enter a default judgment.

# State of Affairs Post 2015 Amendments

# Post 2015 cases: focus on 26(b)(1) and 37(e)

Rules 26(b)(1): DISCOVERY SCOPE AND LIMITS: Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering:

- the importance of the issues at stake in the action,
- the amount in controversy,
- the parties' relative access to relevant information
- the parties' resources
- the importance of the discovery in resolving the issues, and
- whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

## 26(b)(1)

For a case with careful analysis on the 6 factors see [\*Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Co.\*](#), 11-cv-1049 (PLF/GMH) (D.D.C. Sept. 11, 2017).

In this anti-trust case, the defendants moved to compel the plaintiffs to include their CEO as a custodian and to produce all of his documents in discovery. The plaintiffs argued that that production “would be unduly burdensome and disproportionate” to the value of the documents. The court granted the motion, finding the documents responsive, relevant and proportional in light of the litigation’s overall value.

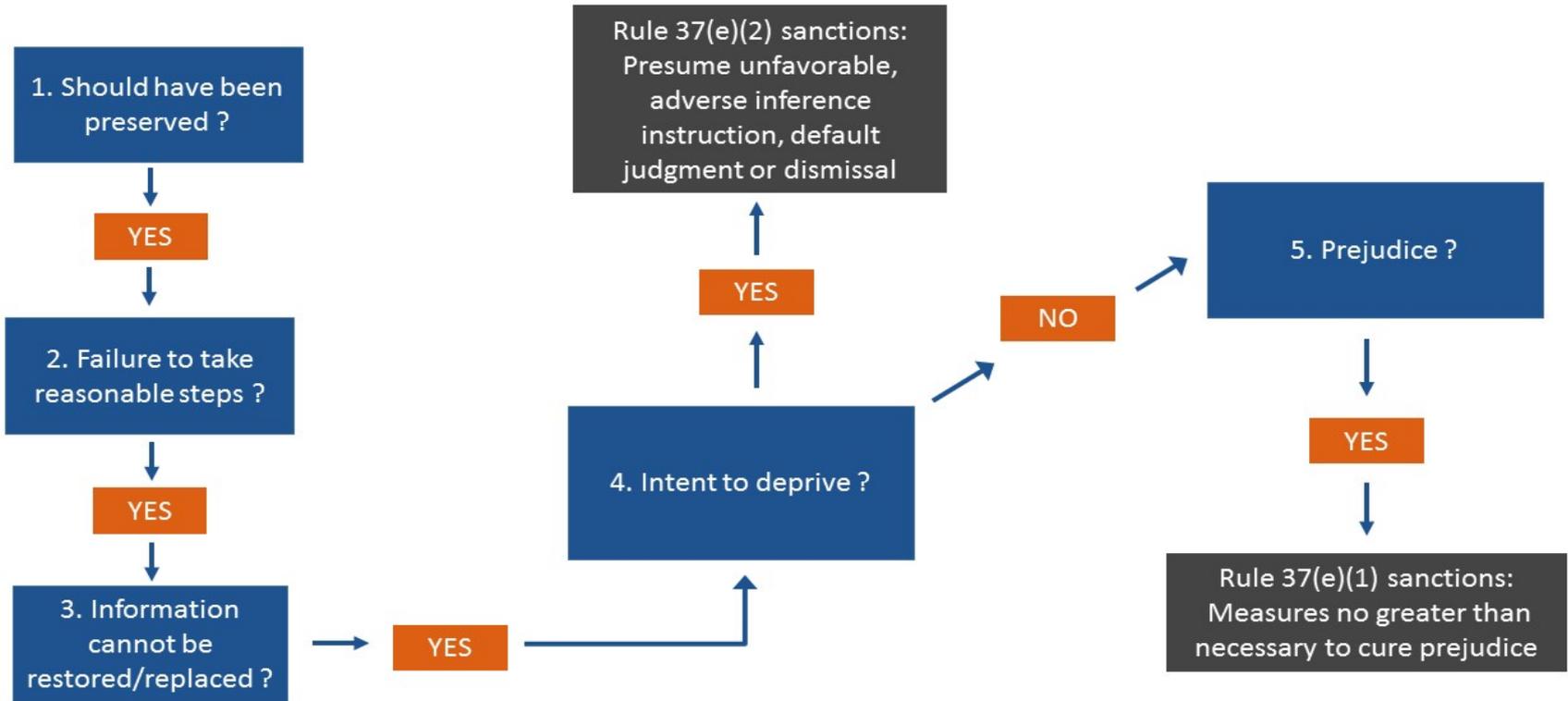
## Rule 37(e): Failure to Preserve ESI

If ESI that should have been preserved in the anticipation or 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 **upon finding prejudice** to another party from loss of the information, **may order measures** no greater than necessary **to cure the prejudice**; or

only **upon finding** that the party acted with the **intent to deprive** another party of the information's use in the litigation may:

- **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; or**
- **dismiss the action or enter a default judgment**

# Revised Rule 37(e) Flowchart



# Reasonableness Factors

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- Available resources
- Level of sophistication
- Level of control over ESI
- Pre-existing document retention policy, schedule, and system

# The Reasonableness Battle: You Can Win, But It Will Cost

Courts determining the reasonableness of the steps a party took to preserve ESI under the amended rule have permitted the moving party to conduct additional discovery on the timing of and circumstances surrounding the preservation efforts.

- *See Konica Minolta Bus. Sols., U.S.A. Inc. v. Lowery Corp.*, 2016 WL 4537847, at \*5-6 (E.D. Mich. Aug. 31, 2016)

# Non-Intentional: Sanctionable, but Measuredly

If the movant was prejudiced (court's discretion) by the loss of ESI the court “may order measures no greater than necessary to cure the prejudice,” for example:

- Allowing the parties to introduce evidence about the ESI's loss. *Nuvasive, Inc. v. Madsen Med., Inc.*, 2016 WL 305096, at \*2-3 (S.D. Cal. Jan. 26, 2016)

# Non-Intentional: Sanctionable, but Measuredly

## Court may:

- **Give instructions to the jury to assist it in evaluating the evidence introduced or arguments made about the lost ESI, so long as the instructions are not tantamount to an adverse inference instruction (see *O'Berry v. Turner*, 2016 WL 1700403, at \*3 (M.D. Ga. Apr. 27, 2016))**
- **Require the spoliating party to pay the reasonable attorneys' fees and costs incurred by the plaintiff to uncover the ESI's loss and make the spoliation motion (see *Matthew Enter., Inc. v. Chrysler Grp., LLC*, 2016 WL 2957133, at \*5 (N.D. Cal. May 23, 2016))**

## ***Non-intentional: Sanctions: EPAC v. HarperCollins***

**When notice of pending litigation was received, the defendant sent a boilerplate legal hold that did not include any guidance or follow up instructions on how to preserve data to employees. On top of this, the records manager was not notified of this legal hold until three years after the duty to preserve was triggered, meaning thousands of documents were deleted under the corporate document retention policy.**

***EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc., No. 3:12-cv-00463, 2018 WL 1542040 (M.D. Tenn. Mar. 29, 2018):***

## *Non-intentional: Sanctions: EPAC v. HarperCollins*

The plaintiff motioned for spoliation sanctions based on the defendant's "willful blindness," arguing it equated to an "intent to deprive."

**Minor Sanctions Ordered Under Rule 37(e).** Since the court did not find that the defendant had an "intent to deprive" information to the plaintiff and the emails lost could be restored through additional means, the court only granted minor sanctions, including the plaintiff could re-depose witnesses after reviewing the missing emails and the jury would be instructed about the data loss

## *Non-intentional: Tongue Lashing: EPAC v. HarperCollins*

- **Even though the defendant was protected from severe sanctions based on Rule 37(e), the court had harsh criticism of the defendant's management of their preservation processes as "arrogance by management, lack of initiative by IT and a pitiable lack of legal leadership."**

# Intentional Spoliation: Severe Sanctions

**FRCP 37(e)(2) enumerates certain severe sanctions that a court may impose if it finds that a spoliating party acted with the intent to deprive another party of using the lost ESI in litigation.**

**Under this provision, a court need not separately find prejudice to the party deprived of the lost or destroyed ESI because prejudice is inherent in the finding of the requisite intent**

**FRCP 37(e)(2); 2015 Advisory Committee Notes to FRCP 37(e)(2)).**

# Intentional Spoliation: Severe Sanctions

**If the court finds intent, the court may:**

- ✓ **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; or**
- ✓ **dismiss the action or enter a default judgment**

# Gross Negligence may be Enough to Find Intent

In *O'Berry v. Turner*, 2016 WL 1700403, at \*3 (M.D. Ga. Apr. 27, 2016), the court issued an adverse inference instruction as a sanction against a party for “irresponsible and shiftless” behavior that went beyond mere negligence, including:

- Printing only a single paper copy of ESI it had a duty to preserve,
- Lacking a document preservation policy, and
- Failing to maintain documents while they were in the party’s possession.

# Intent to Deprive: factors to consider

- Party's level of sophistication (*Brown Jordan Int'l, Inc. v. Carmicle*, 2016 WL 815827, at \*36 (S.D. Fla. Mar. 2, 2016)).
- Party's level of deceitfulness (*Global Material Tech., Inc. v. Dazheng Metal Fibre Co.*, 2016 WL 4765689, at \*9-10 (N.D. Ill. Sept. 13, 2016)).
- The timing surrounding the spoliation and the method of deletion used (*GN Netcom, Inc. v. Plantronics, Inc.*, 2016 WL 3792833, at \*7-8 (D. Del. July 12, 2016)).

# Thank you

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