



# Avoiding Spoliation Sanctions Under the New FRCP for 2017

*Practical tips on best practices for ESI collection and preservation*

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US District Judge | Western District of Texas

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# Avoiding Spoliation Sanctions

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# Avoiding Spoliation Sanctions

## Hon. Xavier Rodriguez bio

- Xavier Rodriguez is a former Texas Supreme Court Justice and currently sits on the bench as a US District Judge for the Western District of Texas.
- He received his bachelor's degree from Harvard University, a master's degree from the University of Texas LBJ School of Public Affairs and a JD degree from the University of Texas Law School.
- Prior to assuming the bench, he was a partner at Fulbright & Jaworski (now Norton Rose Fulbright).
- Judge Rodriguez is a frequent speaker at continuing legal education seminars and has authored numerous articles regarding employment law, discovery and arbitration issues. He is the editor of Essentials of E-Discovery (TexasBarBooks 2014) and is a contributor to the Sedona Conference.
- He serves as an adjunct professor of law at the St. Mary's University School of Law.



Judge Rodriguez

# Avoiding Spoliation Sanctions

## Agenda

- 2015 FRCP Amendments Overview on Preservation Sanctions
- Selected 2016 Preservation Sanctions Case Law Since the Amendments
- Changes in Sanction Practice & Standards
- Approaches in Avoiding Sanctions for 2017 and Beyond

# Avoiding Spoliation Sanctions

## Selected Overview of FRCP Amendments

- **New Amendments.** New FRCP amendments have been in effect almost a year (12/2015).
- **Scope of Discovery.** Scope must be relevant and “proportional to the needs of the case.” Rule 26(b)(1)
- **Understand ESI Earlier.** In their discovery plan, the parties must state their views and proposals on any issues about disclosure, discovery, or preservation of ESI, and for privileged claims and whether to seek a FRE 502 order. Rule 26(f)(3)
- **Preservation.** New test and sanction standard. Rule 37(e). Replaced more general ‘good faith’ standard.

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## 37(e) Workflow

Was ESI Allegedly Spoliated That:

Should have been preserved?



Was lost because a party did not take reasonable steps to preserve it?



Cannot be restored and replaced through additional discovery?

If 'Yes' to all three conditions

Upon a finding of 'prejudice'

Court may order measures no greater than necessary to cure the prejudice

Upon finding of 'intent to deprive'

Court may:

- (a) Presume that the lost information was unfavorable to the party;
- (b) Instruct the jury that it may r must presume the information was unfavorable to the party
- (c) Dismiss the action or enter a default judgment

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## Proportionality Standard Under FRCP 26

- Discovery must be “relevant” and “proportional to the needs of the case”. Information within this scope of discovery need not be admissible in evidence to be discoverable.
- Proportionality Factors:
  1. Importance of the issues at stake in the action.
  2. The amount in controversy.
  3. The parties’ relative access to relevant information.
  4. The parties’ resources.
  5. The importance of the discovery in resolving the issues.
  6. Whether the burden or expense of the proposed discovery outweighs its likely benefit.

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## Selected 2016 Sanctions Cases

- CAT3, LLC v. Black Lineage, Inc., No. 14 Civ. 5511 (AT) (JCF) (S.D.N.Y. Jan. 12, 2016). Magistrate Judge Francis addressed alleged intentional alteration of email, finding that Rule 37 applied or, alternatively, he could sanction under inherent authority. He ordered that the producing parties were precluded from relying on “their version” of the emails at issue.  
[https://scholar.google.com/scholar\\_case?case=3276317222509329332](https://scholar.google.com/scholar_case?case=3276317222509329332)
- Nuvasive, Inc. v. Madsen Med. Inc., No. 13cv2077 BTM(RBB) (S.D. Cal. Jan. 26, 2016). Court reversed its previous adverse inference sanctions for failure to preserve text messages for four custodians, citing failure to meet new stricter 37(e) requirement of intent finding.  
[https://scholar.google.com/scholar\\_case?case=11290225196569399956](https://scholar.google.com/scholar_case?case=11290225196569399956)
- InternMatch, Inc. v. Nxtbigthing, LLC, No. 14-05438 (N.D. Cali., Feb. 8, 2016), Court applied FRCP 37(e) to grant an adverse inference, after finding a party’s “consciously disregarded their obligations to preserve relevant evidence” by parties discarding various electronic devices after experiencing an alleged power surge without checking to see if they could recover any files from them.  
[https://scholar.google.com/scholar\\_case?case=10719757918498623165](https://scholar.google.com/scholar_case?case=10719757918498623165)



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## Selected 2016 Sanctions Cases

- Shaffer v. Gaither, No. 14-00106 (W.D. N.C., Sept. 1, 2016). Court declined to apply dismissal sanction regarding lost text messages resulting from a dropped cell phone, finding no “intent to deprive defendant of the ESI under Rule 37(e)(2)”.  
[https://scholar.google.com/scholar\\_case?case=10659956117383126377](https://scholar.google.com/scholar_case?case=10659956117383126377)
- Rodman v. Safeway, No. 11-cv-03003-JST (N.D. Cal., Oct. 6, 2016). Shortly before trial of a class action, defendant produced highly relevant documents which it found on a legacy computer drive by an individual custodian preparing for trial - over six months after the discovery request. The initial searches for discovery had been on file names only (not contents). The court found that the defendant’s actions constituted an unreasonable inquiry under Rule 26(g), which “requires a signing attorney to certify that a reasonable inquiry has been made with respect to the factual and legal basis for any discovery request or response.” The court found the reliance of counsel on his client’s search adequacy to have been insufficient and awarded \$688,646 in sanctions. (NOTE: This is not a 37(e) case but interesting shows the potentially overlapping scope of the 26(g) certification requirement.)  
[https://scholar.google.com/scholar\\_case?case=1351610129190010481](https://scholar.google.com/scholar_case?case=1351610129190010481)

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## Discussion Topics with Judge Rodriguez

How has the new 'proportionality' standard affected a sanctions determination?

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## Discussion Topics with Judge Rodriguez

How much harder is it to get a sanction for spoliation in 2016, than it was in 2015 and before?

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## Discussion Topics with Judge Rodriguez

Are judicial expectations shifting as to what the parties should accomplish in early case conferences and the scheduling order before discovery commences?

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## Discussion Topics with Judge Rodriguez

Hold practices can be pretty inconsistently applied by litigants. Do you have any observations on the effect of the new amendments on hold practices?

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## Discussion Topics with Judge Rodriguez

Do you have general advice for attorneys appearing in your court on how to properly handle preservation so as not to run into areas of possible sanction?

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