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Spoliation: The ramifications of the failure to preserve evidence, *InsideCounsel*

Rule 37(e) may offer some clarity and uniformity about the potential sanctions that await companies for the failure to properly preserve ESI

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The failure to preserve evidence that may be demanded in pending or reasonably foreseeable litigation can have significant, case-altering ramifications that can result in sanctions or further litigation. Perhaps no type of discovery has been more fraught with evidence preservation and loss issues than the discovery of electronically stored information (ESI). This is due to the explosion in volume of ESI, the corresponding increased costs associated with ESI preservation, and the absence of clear legal guidance on the issues of preservation and failures that might result in a spoliation inference.

Today, Federal Rule of Civil Procedure 37(e) instructs that "[a]bsent exceptional circumstances, a court may not impose sanctions…

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