

1 **Rule 37. Failure to Make Disclosures or to Cooperate**
2 **in Discovery; Sanctions**

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4 ~~(e) Failure to Provide Electronically Stored~~
5 ~~Information. Absent exceptional circumstances, a~~
6 ~~court may not impose sanctions under these rules on~~
7 ~~a party for failing to provide electronically stored~~
8 ~~information lost as a result of the routine, good faith~~
9 ~~operation of an electronic information system.~~

10 **(e) Failure to Preserve Discoverable Information.**

11 **(1) Curative measures; sanctions.** If a party
12 failed to preserve discoverable information
13 that should have been preserved in the
14 anticipation or conduct of litigation, the
15 court may:

16 **(A) permit additional discovery, order**
17 **curative measures, or order the party**

18 to pay the reasonable expenses,
19 including attorney's fees, caused by
20 the failure; and
21 (B) impose any sanction listed in Rule
22 37(b)(2)(A) or give an adverse-
23 inference jury instruction, but only if
24 the court finds that the party's
25 actions:
26 (i) caused substantial prejudice
27 in the litigation and were
28 willful or in bad faith; or
29 (ii) irreparably deprived a party
30 of any meaningful
31 opportunity to present or
32 defend against the claims in
33 the litigation.

- 34 (2) *Factors to be considered in assessing a*
35 *party's conduct.* The court should consider
36 all relevant factors in determining whether a
37 party failed to preserve discoverable
38 information that should have been preserved
39 in the anticipation or conduct of litigation,
40 and whether the failure was willful or in bad
41 faith. The factors include:
- 42 (A) the extent to which the party was on
43 notice that litigation was likely and
44 that the information would be
45 discoverable;
- 46 (B) the reasonableness of the party's
47 efforts to preserve the information;
- 48 (C) whether the party received a request
49 to preserve information, whether the
50 request was clear and reasonable,

51 and whether the person who made it
52 and the party consulted in good faith
53 about the scope of preservation;
54 (D) the proportionality of the
55 preservation efforts to any
56 anticipated or ongoing litigation; and
57 (E) whether the party timely sought the
58 court's guidance on any unresolved
59 disputes about preserving
60 discoverable information.

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Committee Note

In 2006, Rule 37(e) was added to provide protection against sanctions for loss of electronically stored information under certain limited circumstances, but preservation problems have nonetheless increased. The Committee has been repeatedly informed of growing concern about the increasing burden of preserving information for litigation, particularly with regard to electronically stored information. Many litigants and prospective litigants have emphasized their uncertainty