

Modern ESI Practice and the Cost of Failed Preservation: A Case Study in Rule 37(e) Sanctions

Modern civil litigation is increasingly defined by electronically stored information (“ESI”). Emails, calendar entries, metadata, local storage files, synchronized cloud data, and messaging systems now form the evidentiary backbone of many employment, commercial, and institutional disputes. As a result, the duty to preserve ESI is no longer a secondary discovery obligation. In many cases, it is central to the integrity of the litigation process itself.

A recent series of sanctions decisions issued by Judge Walter H. Rice of the United States District Court for the Southern District of Ohio provides a significant and instructive example of how modern courts are approaching failed preservation efforts under Federal Rule of Civil Procedure 37(e). The rulings are noteworthy not because the court found intentional destruction of evidence—it expressly did not—but because the court nevertheless imposed substantial remedial sanctions after concluding that the loss of ESI materially impaired the plaintiff’s ability to prosecute the case.

In one especially striking passage, Judge Rice wrote:

“ . . . [I]t almost defies belief that an entity as large and formalized as Defendant could repeatedly miss a litigation hold and not discover its oversight for almost five years.”

The decisions illustrate several increasingly important realities of modern ESI practice:

- severe litigation consequences can arise even absent intentional misconduct;
- metadata and native-format files matter;
- impeachment prejudice is real prejudice;
- delayed productions do not cure lost evidence;
- and a written litigation hold is meaningless if preservation efforts are not actively verified.

The rulings also demonstrate that Rule 37(e)(1) is far more powerful than many practitioners assume.

Background of the Litigation

The underlying litigation involved claims brought by Dr. Igor Elman, who had been recruited by Wright State University in 2015 to serve as Chair of the Department of Psychiatry at the Boonshoft School of Medicine.

In December 2016, the university removed Dr. Elman from his chairmanship. According to the university, the decision was based upon allegations that he failed to:

1. communicate effectively with faculty and learners;
2. constructively accept feedback; and
3. work effectively with faculty and learners because “the majority are trying to actively avoid contact” with him.

Dr. Elman later filed EEOC charges and ultimately brought suit alleging discrimination and retaliation.

From the outset, the factual disputes in the case were heavily dependent upon interpersonal interactions, communications, scheduling records, and witness credibility. That distinction became critically important once discovery began.

The Litigation Hold

Shortly after Dr. Elman filed his EEOC charge, Wright State’s Assistant General Counsel issued a formal litigation hold memorandum. The hold was comprehensive and specifically instructed recipients to preserve all potentially relevant ESI, including:

- emails;
- calendars;
- hard drives;
- local workstation data;
- removable media;
- mobile devices;
- and metadata.

The hold expressly warned:

“Suspend deletion, overwriting, or any other destruction of any electronically stored information (ESI) relevant to this dispute...”

It further advised:

“This is an important legal duty and failure to follow these instructions may subject the University to sanctions by a court...”

Importantly, the litigation hold specifically contemplated preservation of:

- workstation data,
- locally stored files,
- and Microsoft 365 information.

In other words, the preservation obligations were neither vague nor limited.

The Discovery Problems Begin

Despite the litigation hold, significant ESI was not preserved.

During discovery, it gradually became apparent that large categories of responsive information were missing. Motions to compel followed. Eventually, the university disclosed that email accounts belonging to both Dr. Elman and his administrative assistant had not actually been preserved despite the litigation hold.

The university attributed the problem to an “unknown error” involving its preservation system.

The preservation failures, however, extended beyond emails.

At evidentiary hearings, the university’s Chief Information Officer testified that Dr. Elman’s desktop computer had also been “wiped,” meaning all files stored locally on the machine had been erased.

Critically, this occurred despite the existing litigation hold.

Judge Rice later emphasized that the litigation hold “plainly encompassed” the desktop computer and that the university had never adequately explained why preservation steps were not taken before wiping the machine.

Rule 37(e): Negligence Versus Intent

The sanctions analysis proceeded under Federal Rule of Civil Procedure 37(e), which governs failures to preserve ESI.

The rule creates an important distinction between:

- negligent or grossly negligent preservation failures under Rule 37(e)(1); and
- intentional destruction designed to deprive another party of evidence under Rule 37(e)(2).

Under Rule 37(e)(2), severe sanctions such as mandatory adverse inference instructions, dismissal, or default judgment generally require a finding that the offending party acted with “intent to deprive.”

Judge Rice expressly declined to find such intent.

The court concluded that the failures were negligent and even grossly negligent, but not intentional within the meaning of Rule 37(e)(2).

That finding, however, did not prevent the court from imposing substantial sanctions under Rule 37(e)(1).

This distinction is extremely important.

Many litigators incorrectly assume that absent intentional destruction, meaningful sanctions are unlikely. The Elman decisions demonstrate otherwise.

Why the Court Found Prejudice

The intellectual center of the rulings lies in the court's analysis of prejudice.

Judge Rice repeatedly emphasized that the case hinged upon credibility determinations and witness impeachment.

That observation shaped virtually every aspect of the sanctions analysis.

The university's stated reasons for removing Dr. Elman concerned communication problems, interpersonal relationships, and alleged avoidance by faculty and learners. Accordingly, the missing ESI directly related to:

- communications with students and faculty;
- research collaboration;
- scheduling records;
- recommendation letters;
- meeting attendance;
- and day-to-day interactions.

Judge Rice concluded that the destruction of emails, calendars, and local computer files materially impaired Dr. Elman's ability to challenge the university's narrative.

The court specifically recognized the importance of impeachment evidence:

"Plaintiff is correct that without a full complement of emails, calendar entries, and other documents, he is necessarily hamstrung in his efforts to impeach the credibility of Defendant's witnesses."

The court further observed that:

- memories fade;
- witness testimony evolves;
- and contemporaneous documents often provide the most reliable means of testing credibility.

As the court noted:

“ . . . [I]t is axiomatic that impeachment is far less effective when a witness testifies that he wrote ‘X,’ and opposing counsel cannot publish to the jury a document showing that the witness actually wrote ‘Y.’”

This aspect of the rulings is especially significant because it recognizes a modern reality of litigation:

prejudice is not limited to inability to prove an ultimate fact directly. Prejudice also exists when missing ESI impairs the ability to:

- reconstruct events,
- test credibility,
- challenge timelines,
- or expose inconsistencies.

The Importance of Metadata and Native Files

Another unusually sophisticated aspect of the rulings was the court’s recognition that native-format ESI matters.

The plaintiff argued that PDF printouts of emails and calendars were not adequate substitutes for original electronic files containing metadata and synchronization information.

The court agreed.

Judge Rice specifically observed:

“ . . . PDF versions of printed copies of emails and calendar entries do not substitute for receiving electronic materials in their native formats with metadata included.”

That finding reflects a growing judicial awareness that metadata itself may have evidentiary significance.

Native files can reveal:

- creation dates,

- edits,
- deletions,
- synchronization activity,
- cancellation histories,
- embedded routing information,
- and other contextual details unavailable from static printouts.

This recognition is likely to become increasingly important as litigation continues to evolve around digital evidence ecosystems.

“Too Much, Too Little, and Too Late”

Perhaps the most memorable phrase in the rulings came when Judge Rice addressed Wright State’s eventual production of approximately 176,000 pages of documents after years of discovery disputes.

The court wrote:

“Defendant’s arguments to the contrary are unavailing. Its production of 176,000 pages of discovery at the beginning of this year—after producing barely 5,000 pages in the four years prior—is too much, too little, and too late.”

That statement captures another important principle of modern ESI practice: late production does not necessarily cure spoliation prejudice.

By the time large-scale productions occur:

- witnesses may already have been deposed;
- litigation strategy may already have been shaped;
- discovery deadlines may have passed;
- motion practice may already have occurred;
- and critical ESI may still remain missing.

The court also recognized the practical burden imposed upon litigants forced to spend years uncovering preservation failures.

Judge Rice emphasized that substantial prejudice arose from the time and expense required to pursue missing evidence through motions practice, hearings, and supplemental proceedings.

That aspect of the rulings is particularly important because it recognizes that discovery misconduct can distort litigation even before trial begins.

The Sanctions Imposed

Although the court declined to impose Rule 37(e)(2) intent-based sanctions, the remedies imposed under Rule 37(e)(1) were substantial.

Among other things, the court:

- barred Wright State from introducing certain evidence regarding alleged communication failures with learners;
- permitted the plaintiff to testify regarding destroyed ESI and his recollection of its contents;
- instructed that the jury could infer the lost ESI would have been favorable to the plaintiff;
- prohibited the university from arguing that the missing ESI supported its position;
- and awarded substantial attorney's fees and costs associated with the sanctions litigation.

Judge Rice's decision was particularly significant because the Court went beyond merely permitting evidence about the destruction of ESI and **authorized a permissive adverse inference instruction** allowing the jury to infer that the missing evidence would have been favorable to Plaintiff and unfavorable to Defendant. That remedy substantially alters the trial landscape in a credibility-driven case because it directly affects how jurors may evaluate disputed testimony and missing documentary evidence. Importantly, the Court recognized that Rule 37(e)(1), even absent a finding of intent to deprive under Rule 37(e)(2), still permits meaningful remedial sanctions where lost ESI materially impairs a party's ability to prove pretext and impeach witnesses. In granting the permissive inference sanction, Judge Rice relied on a growing body of Rule 37(e)(1) authority recognizing that juries may be instructed to draw negative inferences from negligent preservation failures.¹

¹ *EPAC Tech., Inc. v. HarperCollins Christian Publishing, Inc.*, 810 F. App'x 389, 402-03 (6th Cir. 2020); *Pelino v. Gilmore*, No. 18-1232, 2020 WL 2572361, at *6 (W.D. Pa. May 21, 2020); *Kologik Capital, LLC v. In Force Tech., LLC*, No. 18-11168-GAO, 2020 WL 1169403, at *3 (D. Mass. Mar. 11, 2020); and *Soule v. P.F. Chang's China Bistro, Inc.*, No. 2:18-cv-2339, 2020 WL 959245, at *9 (D. Nev. Feb. 26, 2020).

On February 21, 2024, the court awarded Plaintiff \$42,876.79 in attorney's fees and expenses arising from the first sanctions proceedings.

On April 3, 2024, the court awarded an additional \$32,915.90 in fees and expenses relating to the second sanctions proceedings.

The combined sanctions-related fee awards totaled \$75,792.69.

Importantly, these were not symbolic sanctions.

They directly affected:

- evidentiary presentation,
- witness examination,
- credibility determinations,
- and the overall litigation posture.

Indeed, the sanctions rulings ultimately opened the door to meaningful mediation discussions.

Lessons for Modern Litigators and Institutional Clients

The Elman sanctions decisions offer several practical lessons for lawyers, institutions, and in-house counsel.

1. A Litigation Hold Must Be Verified

A written hold notice is not enough.

The central institutional failure identified by Judge Rice was not merely issuance of an ineffective hold. It was the absence of any meaningful verification process.

The court emphasized that for nearly five years nobody confirmed whether the preservation protocols were functioning.

Modern preservation obligations require:

- auditing,
- monitoring,
- and coordination with IT personnel.

2. Legal and IT Departments Must Work Together

The rulings expose a common institutional problem: disconnects between legal obligations and operational IT procedures.

Here, routine employee-separation protocols allegedly resulted in wiping a computer subject to an active litigation hold.

That kind of systems conflict is increasingly common in large organizations.

3. Metadata Matters

Courts are becoming more sophisticated regarding metadata and native-format evidence.

Producing static PDFs may not satisfy discovery obligations where:

- timing,
- edits,
- revisions,
- synchronization,
- or chronology
matter to the litigation.

4. Persistence Matters

One of the most important practical realities illustrated by the case is that proving spoliation often requires extraordinary persistence.

The preservation failures here were uncovered only after years of:

- discovery requests,
- motions to compel,
- evidentiary hearings,
- supplemental briefing,
- and examination of IT witnesses.

Many litigants abandon such issues long before a sufficient factual record develops.

5. Rule 37(e)(1) Is More Powerful Than Many Lawyers Assume

Perhaps the single most important lesson from the rulings is doctrinal.

Even absent intentional destruction, Rule 37(e)(1) can support:

- evidentiary preclusion,
- permissive adverse inference instructions,

- testimony restrictions,
- fee shifting,
- and significant litigation consequences.

The modern prejudice analysis is broader, more practical, and more sophisticated than many practitioners recognize.

Conclusion

The Elman sanctions decisions provide a significant case study in modern ESI practice and Rule 37(e) jurisprudence.

The rulings recognize an increasingly important truth: the loss of ESI can fundamentally impair the truth-finding function of litigation even where no party acted with intentional bad faith.

In credibility-driven cases especially, missing emails, calendars, metadata, and native electronic files may alter a party's ability to reconstruct events, challenge testimony, and present a coherent narrative to a jury.

Judge Rice ultimately concluded that Wright State's discovery conduct:

“. . . violates the letter and spirit of the laws and rules governing federal civil discovery.”

That observation extends beyond this particular litigation.

As modern litigation becomes increasingly dependent upon digital evidence, courts, litigants, and institutions alike are likely to face growing scrutiny regarding whether preservation efforts are merely formal—or genuinely effective.

About the Author

Craig T. Matthews is the founder of Craig T. Matthews & Associates, LPA, a Dayton, Ohio law firm focused on employment litigation, whistleblower claims, civil rights litigation, and complex business disputes. He has represented employees and businesses in state and federal courts for more than four decades and has extensive experience litigating high-stakes employment and discrimination matters.

Mr. Matthews served as lead counsel for Plaintiff Dr. Igor Elman in *Elman v. Wright State University*, Case No. 3:18-cv-358 (S.D. Ohio), including the Rule 37(e) sanctions proceedings discussed in this article.

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