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ARMA Metro NYC  
Annual Spring Conference

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New York Executive Conference Center  
1601 Broadway, New York, NY 10019

## Auto Deletion in Active Litigation Environments

Anne Kershaw, Knowledge Strategy Solutions, LLC

# The New F.R.C.P. 37

## Failure to Preserve Electronically Stored Information.

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost -



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# The New F.R.C.P. 37

because a party failed to take reasonable steps to preserve it -



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# The New F.R.C.P. 37

- and it cannot be restored or replaced through additional discovery, the court:



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# The New F.R.C.P. 37

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or



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# The New F.R.C.P. 37

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



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# The New F.R.C.P. 37

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.



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# The New F.R.C.P. 37

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it.



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# The New F.R.C.P. 37

If the rule applies – i.e., you had a duty to preserve and you failed to take reasonable steps – then, **if there is prejudice**, the court may only a remedy that will cure the prejudice.



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# The New F.R.C.P. 37

The court can order the worst sanctions – dismissal or adverse inference – only if there is a showing that the disposition was made with the **intent to deprive** the adversary of the information's use in the litigation.



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# Auto Deletion in Active Litigation Environments

## Issuing Timely Litigation Holds in Auto-Delete Environments

### The Case Law and the New F.R.C.P. 37



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# The Case Law and the New F.R.C.P. 37

Analysis of the cases under the new Rule  
37 indicates that:



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# The Case Law and the New F.R.C.P. 37

For sanctions to be imposed, you need:

- (a) extraordinarily aggressive auto-delete;
- and
- (b) an extremely lax litigation hold process.



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# Reasonable Steps

Good news: We can now affordably and quickly interrogate data that is eligible for deletion.



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# Reasonable Steps

Thanks to cloud computing, we can interrogate a file share, for example, in an afternoon, for less than \$500.



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# Reasonable Steps

## Video Presentation



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