Applying Amended Rule 37(e)

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"This proposal is a good rule. It can be adopted, and then tested in application. We will learn more from how it works." Hon. David Campbell, Chair, Civil Rules Advisory Committee[2]

Since December 1, 2015, amended Rule 37(e) has provided a comprehensive approach to deal with the loss of electronically stored information ("ESI") which should have been preserved.[3] It provides a safe harbor for reasonable preservation conduct and cabins use of case-determinative measures unless there is a showing of "intent to deprive." It also makes remedial measures available to address prejudice caused by a breach of a duty to preserve.

Given the substantial number of cases citing the rule, as well as those that should have, but did not, it is possible to reach some tentative conclusions about how well it is working. [4]

Introduction

Under the common law spoliation doctrine, "the destruction or significant alteration of evidence or the failure to preserve [it] for another's use as evidence in pending or reasonably foreseeable litigation" has historically justified imposition of evidentiary or other measures to address prejudice.[5] As a derivative of that doctrine, courts acknowledge a duty to preserve – owed to the court - whose breach is addressed

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[2] Minutes, Civil Rules Advisory Committee, April 10-11, 2014 (at lines 1047-1049).
[3] The text of amended Rule 37(e) and the Committee Note is available at 305 F.R.D. 457, 565-578 (2015).
[4] The author's conclusions and suggestions for further consideration are addressed in the Assessment portion of this Memorandum.
[5] West v. the Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2nd Cir. 1999).

through the inherent authority to regulate litigation abuse or, if a court order exists, under Rule 37(b).

A Panel at the 2010 Duke Litigation Conference (the "Duke Conference"), on which the author served, unanimously recommended a new Federal Rule governing the trigger and extent of the duty as well as the consequences of its breach. The then-current form of Rule 37(e), enacted in 2006 to provide a limited ESI safe harbor from rule-based sanctions[6] had proven to be ineffective.[7]

The Civil Rules Advisory Committee (the "Rules Committee") agreed that the 2006 amendment had not adequately addressed the emerging issues and empowered its Discovery Subcommittee to develop viable alternatives. Ultimately, after a mini-conference to discuss alternatives, the Rules Committee accepted that the common law duty to preserve should be incorporated in a new Rule 37(e) that focused on the measures a court could take when ESI was lost which should have been preserved.

As finally adopted after public comment on in interim draft, Rule 37(e) is expected to bring "consistency and coherence" to the adjudication of claims of spoliation of ESI[8] and to help reduce over-preservation arising from the lack of uniformity among the Circuits in the treatment of the topic.[9] It is hoped that "this approach [will] promote reasonable steps to preserve ESI, cure any prejudice, and deter intentional failure to preserve ESI."[10]

Applicability to Pending Cases

Rule 37(e) applies to all cases filed after December 1, 2015 and to then-pending actions "insofar as just and practicable,"[11] provided that the court in which the action is pending finds that doing so would not work an injustice.[12] Most courts, including appellate courts,[13] have applied the new rule without explanation.

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[6] Rule 37(e)(2006)("Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not imposed sanctions under these rules on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system").

[7] John H. Beisner, *Discovery A Better Way: the Need for Effective Civil Litigation Reform*, 60 DUKE L. J. 547, 590 (2010)(the rule was "too vague to provide clear guidance as to a party's preservation obligations"). Nor was it a "safe harbor." *See* Hon. Lee Rosenthal, as quoted in *Managing Electronic Discovery: Views from the Judges,* 76 FORDHAM L. REV. 1, *16 (2007)(" [a]nything that starts with the words 'absent exceptional circumstancess' is not a safe harbor").

[8] Hon. John G. Koeltl, *From the Bench: Rulemaking*, LITIGATION, Vol.41, No.3 (Spring 2015).

[9] CAT3 v. Black Lineage, 2016 WL 154116, at *4 (S.D. N.Y. Dec. 2015)(parties were incurring burden and expense because of varying Circuit standards applied under use of inherent authority).

[10] Interview of Hon. Paul W. Grimm, *The Path to New Discovery*, 52-JAN TRIAL 26 (2016).

[11] Order, Supreme Court, April 29, 2015; reproduced at 305 F.R.D. 457, 460 (2015).

[12] 28 USC § 2074(a) (an order of the Supreme Court on the topic is not applicable to the extent that, in the opinion of the court in which proceedings are pending, it "would not be feasible or would work injustice, in which event the former rule applies").

[13] *See, e.g.*, Applebaum v. Target, 831 F.3d 740 (6th Cir. Aug. 2, 2016); Mazzei v. The Money Store, __ Fed. Appx. ___, 2016 WL 3902256 (2nd Cir. July 15, 2016); Roadrunner Transp. v. Tarwater, 692 Fed.

Others have explained doings so because it does not impose new preservation obligations,[14] is procedural in nature[15] or is "more lenient as to the sanctions that can be imposed for violation of the preservation obligation."[16] A few have refused to apply the rule to pending cases because the spoliation issues were raised before the effective date of the rule.[17]

Rule 37(e)

Amended Rule 37(e) provides as follows:

> Failure to ~~Produce~~ Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (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.

Scope

Rule 37(e) applies only to losses of ESI which result from the conduct of a party – not its counsel or other non-parties.[18] Courts are prepared, however, to attribute the actions of corporate executives or "agents" to a party for purposes of the rule.[19] In *GN Netcom v. Plantronics*, for example, the court attributed the conduct of a senior executive to a party to justify harsh measures despite the substantial efforts made to meet its obligations to preserve before and after the deletions were known.[20]

Appx. 759 (9th Cir. March 18, 2016); *cf.* McCarty v. Covol Fuels, 644 Fed. Appx. 372 (6th Cir. Feb. 16, 2016)(discussing spoliation of text and call records without mention of Rule 37(e)) .

[14] Gonzalez-Bermudez v. Abbott, 2016 WL 5940199, at n. 10 (D.P.R. Oct. 9, 2016)("the parties had the same duty to preserve ESI" before and after the amendment); *see also* Marshall v. Dentfirst, 313 F.R.D. 691, at 695 (N.D. Ga. March 24, 2016)(the rule "does not create a new duty to preserve evidence").

[15] Accurso v. Infra-Red Services, 169 F.Supp.3d 612, n. 6 (E.D. Pa. March 11, 2016).

[16] CAT3 v. Black Lineage, *supra*, 2016 WL 154116, at *5 and n. 5 (S.D. N.Y. Jan. 12, 2016)(a "different outcome" might have been warranted if the "relief available under the rule was less adequate").

[17] Learning Care Grp. v. Armetta, 315 F.R.D. 433 (D. Conn. June 17, 2016)(unfair to apply Rule 37(e)); McIntosh v. U.S., 2016 WL 1274585 (S.D. N.Y. March 31, 2016)(same); Stinson v. City of New York, 2016 WL 54684 (S.D. N.Y. Jan. 5, 2016)(same).

[18] Andra Group v. JDA, 2015 WL 12731762, at *16 (N.D. Tex. Dec. 9, 2015)(rule inapplicable to non-party).

[19] *See, e.g.*, First Financial Security v. Freedom Equity Group, 2016 WL 5870218, at *3-4 (N.D. Cal. Oct. 7, 2016)(attributing action of "agents" (or "principals) to the party).

[20] 2016 WL 3792833, at *6-7 (D. Del. July 12, 2016).

Losses of documents or tangible property are excluded. As the court noted in *Coale v. Metro-North*, Rule 37(e) applies only to losses of ESI and thus "does not impact the Court's inherent sanctioning authority when spoliation of tangible evidence is at issue."[21] It "does not affect the standard in *Residential Funding* as it relates" to losses of physical evidence."[22]

This distinction can be problematic, however, when both ESI and documents are lost as a result of the same underlying conduct, a fairly common occurrence. Some courts deal with that issue by applying separate legal analyses,[23] others ignore Rule 37(e)[24] and one court has applied the rule to both forms of information.[25] In most cases involving losses of documents there is no principled reason why Rule 37(e) cannot serve as an exemplar and promote uniformity in such a context.

Courts are badly split as to whether video recordings should be treated as physical property or as ESI. In part, this appears to reflect differences in the technologies involved, as digital recordings replace or supplement the "hard copy" video tapes. In *Wichansky v. Zowine*,[26] for example, a court did not apply Rule 37(e) to a loss of videotape in contrast to *Martinez v. City of Chicago*[27] where the opposite conclusion was reached in a case where the digital content was uploaded. Surveillance videos in "slip and fall" cases are often involved.[28]

Similarly, there is confusion as to whether to treat loss of cell phones as a loss of physical property or, focusing on the contents, a loss of ESI.[29]

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[21] 2016 WL 1441790, at n. 7 (D. Conn. April 11, 2016).
[22] In re Bridge Constr.Services, 2016 WL 2755877, at *11 S.D. N.Y. May 12, 2016).
[23] Best Payphones v. City of New York, 2016 WL 792396, at *3 (E.D. N.Y. Feb. 26, 2016)("there are separate legal analyses governing the spoliation of tangible evidence versus electronic evidence"); *accord* In re Ethicon, 2016 WL 5869448, at *3 (S.D. W.Va. Oct. 6, 2016); First Financial Security v. Freedom Equity Group, 2016 WL 5870218 (N.D. Cal. Oct. 7, 2016)(no sanctions under Rule 37(e) or the inherent authority).
[24] Dubois v. Board of County Comm., 2016 WL 868276 (N.D. Okla. March 7, 2016).
[25] First American Title v. Norwest Title, 2016 WL 4548398, at *5 (D. Utah Aug. 31, 2016)("the court analyzes spoliation of non-ESI documents under the same rubric of Rule 37").
[26] 2016 U.S. Dist. LEXIS 37065, *32-34 (D. Ariz. March 22, 2016)(Campbell, J.)("the parties do not contend that the lost information [photos and videotape] constitutes [ESI]").
[27] 2016 WL 3538823 (N.D. Ill. June 29, 2016)(Dow, J.).
[28] *Compare* Stetford v. Wal-Mart Stores, 2016 WL 3462132 (D. Nev. June 24, 2016)(ignoring Rule 37(e)) and Orologio v. The Swatch Group, __Fed. Appx. __, 2016 WL 3454211, at *2 & *8 (3rd Cir. June 16, 2016)(Rule 37(e) ignored in "hard-copy" video tapes) *with* Thomley v. Bennett, 2016 WL 498436 (S.D. Ga. Feb. 8, 2016)(applying Rule 37(e) to "loop-type" video recording) *and* Thomas v. Butkiewicus, 2016 WL 1718368 (D. Conn. April 29, 2016)(applying Rule to video surveillance tape).
[29] *Compare* Kazan v. Walter Kennedy, 2016 WL 6084934, at *7 (W.D. Wash. Oct. 18, 2016)(ignoring rule where cell phone lost on fishing trip arguably contained records of calls relevant to claims) *and* Richard v. Inland Dredging Co., 2016 WL 5477750, at *5 (W.D. La. Sept. 29, 2016)(laptop containing photos was lost when barge containing it sank) with Shaffer v. Gaither, 2016 U.S. Dist. DEXIS 118225 (W.D. N.C. Sept. 1, 2016)(phone on which texts contained dropped in bathroom). Relevant cases where the rule is not cited are collected in Appendix C.

Threshold Requirements

Rule 37(e) accepts as a given the existence of the common law duty to preserve and incorporates it as part of the articulation of the threshold requirements to its application.[30] Thus, before a court is empowered to impose any of the measures under subsections (e)(1) or (e)(2), it must *first* determine that:

- ESI which "should have been preserved" has been "lost;"
- *after* a duty to preserve attached;
- because a party failed to take "reasonable steps" to preserve; and it
- cannot be restored or replaced through additional discovery.

These requirements were more clearly identified by the Rules Committee in the final draft adopted after conclusion of the public comment period, as compared to the initial released for comment.[31] They are "predicate elements" that must be met "before turning to the sub-elements of (e)(1) and (e)(2)."[32]

The moving party "bears the burden of proof" on all the elements.[33] The fact-finding involved is to be undertaken pursuant to a "preponderance of the evidence" standard of proof, given that the availability of applicable measures, some of which require a heightened standard of proof, is treated separately. Fact-finding associated with measures which impact the right to a trial on the merits arguably require proof by "clear and convincing evidence."[34]

Triggering the Duty

The *onset* ("trigger") of the duty to preserve is largely determined by whether "litigation is reasonably foreseeable," which involves the "extent to which a party was on notice that litigation [is] likely and that the information would be relevant."[35]

In the case of the party which initiates the action, that means that "once it [has] decided" that it is going to do so, it has an obligation to preserve.[36] The issue is intensely fact-specific.[37] The Committee Note observes that "a variety of events may alert a party

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[30] 2014 Rules Committee Report, 305 F.R.D. 457, 526 (2015)("the proposed Rule 37(e) does not purport to create a duty to preserve. The new rule takes the duty as it is established by case law, which uniformly holds that a duty to preserve arises when litigation is reasonably anticipated")
[31] See *Advisory Committee Makes Unexpected Changes to 37(e), Approves Duke Pack*age, BNA EDISCOVERY RESOURCE CENTER, April 14, 2014, copy at http://www.bna.com/advisory-committee-makes-n17179889550/(reproducing text of over-night revision ultimately approved by Rules Committee).
[32] Konica Minolta Business Solutions v. Lowery Corp, 2016 WL 4537847 (E.D. Mich. Aug. 31, 2016).
[33] Richard v. Inland Dredging, 2016 WL 5477750, at *4 (W.D. La. Sept. 29, 2016)(collecting cases).
[34] *See* discussion *infra*, and compare CAT3 v. Black Lineage, 164 F. Supp. 3d 488 (S.D.N.Y. 2016) with DVComm v. Hotwire Comm. 2016 WL 6246824, at ¶51 (E.D. Pa. Feb. 3, 2016).
[35] Committee Note ("[t]he rule does not apply when information is lost before a duty to preserve arises").
[36] Best Payphones v. City of New York, 2016 WL 792396, at *4 (E.D.N.Y. Feb. 26, 2016).
[37] *See, e.g.*, Pill and Larsen-Chaney, *Litigating Litigation Holds: A survey of Common Law Preservation Duty Triggers*, 17 J. TECH. L. & POL'Y 193, 209 (2012)(advocating use of "pragmatic" suggestions in the Sedona Conference® *Commentary on Legal Holds*, 11 Sedona Conf. J. 265 (2010).

to the prospect of litigation," but cautions that they may provide only "limited information" about it.

In *Marten Transport v. Plattform Advertising*, Rule 37(e) was deemed to be inapplicable because the ESI at issue had already been overwritten by the time the duty attached.[38] A similar result occurred in *Marshall v. Dentfirst*,[39] where there was no evidence that the missing ESI existed at the earliest time the duty attached. In *O'Berry v. Turner*, a duty to preserve arose when an injured party's counsel faxed a "spoliation letter" demanding preservation by the defendants.[40]

A duty to preserve may also arise from statutory requirements, administrative regulations[41] or "a party's own information-retention protocols" including litigation hold policies.[42] A preservation obligation imposed for internal investigative purposes has been held to place a party on sufficient notice to trigger a duty to preserve for litigation.[43] However, the mere fact of "an independent obligation to preserve" does not mean that the party also had "such a duty with respect to the litigation."[44]

Scope of the Duty

The *scope* of the duty to preserve presents a separate issue. Once the duty is triggered, a party is expected to take reasonable and proportionate action ("reasonable steps") to preserve potentially relevant and discoverable ESI under its custody and control. This may involve undertaking appropriate affirmative action in regard to ensuring that ESI is preserved by key custodians or in various forms of data repositories.[45]

The duty to preserve is applicable only to "relevant" ESI. To date, courts applying Rule 37(e) have not focused on the impact of the renewed emphasis on proportionality in the 2015 Amendments.[46] Rule 26(b)(1) arguably defines the scope of the initial duty to preserve ESI, including ESI which may be "relevant" but whose production would not necessarily be proportional to the needs of case.

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[38] Marten Transport v. Plattform Advertising, 2016 WL 492743, at *10 (D, Kan. Feb. 8, 2016)(the initial scope did not include browsing history of the computer that eventually became relevant subsequently); *accord* Saller v. QVC, 2016 WL 4063411, at *5 (E.D. Pa. July 29, 2016)(it is "far from certain" that data had not been overwritten at the time the duty attached under Rule 37(e)).

[39] 313 F.R.D. 691(N.D. Ga. March 24, 2016).

[40] O'Berry v. Turner, 2016 WL 1700403, *3 (M.D. Ga. April 27, 2016).

[41] *Compare* Austrum v. Federal Cleaning Contractors, 149 F.Supp.3d 1343 (S.D. Fla. Jan. 8, 2016) *with* EEOC v. Office Concepts, 2015 WL 9308268 (N.D. Ind. Dec. 22, 2105)(violation of 29 CFR § 1602.14 does not automatically trigger entitlement to adverse inference).

[42] CTB v. Hog Slat, 2016 WL 12444998, at *12 (E.D. N.C. March 23, 2016)(records retention policy which covered both ESI and hard copy required use of a litigation).

[43] Coale v. Metro-North Railroad, 2016 WL 1441790, at *2 (D. Conn. April 11, 2016).

[44] Committee Note.

[45] First American Title v. Northwest Title, 2016 WL 4548398 (D. Utah Aug. 31, 2016)(an oral litigation hold while not per se violative of Rule 37(e) may be problematic).

[46] Rule 26(b)(1)(Scope in General). Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery of any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering [factors]. Information within this scope of discover need not be admissible in evidence to be discoverable.

Unilateral preservation decisions based on preserving only "discoverable" ESI can be problematic, however.[47] Parties are well advised to discuss preservation issues with opposing parties (and, if needed, the court) with a view towards negotiation of case-specific protocols embodying limits on the scope.[48] Amendments to Rules 16(b) and 26(f) are designed to encourage that effort. In *Martinelli v. Johnson & Johnson*, for example, the parties agreed on the types of ESI within the scope of preservation, as spelled out in a Stipulated ESI and Hard Copy Protocol.[49]

In *Marten Transport*, the court noted that it would not "use a 'perfection' standard or hindsight" in assessing conduct because the scope of "may be uncertain."[50] Courts are prepared to compel preservation if a sufficient basis exists to justify it.[51] In *Leroy Bruner v. American Honda Motor Co.*,[52] the court required prospective use of a litigation hold and the court in *Shein v. Cook* granted an *ex parte* order compelling preservation.[53]

"Reasonable Steps"

Rule 37(e) applies only if the loss of the ESI is due to a failure to take "reasonable steps" to meet preservation obligations.[54] In *Rimkus v. Cammarata*, Judge Rosenthal famously observed that "[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done – or not done – was *proportional* to that case." (Emphasis in original).[55] Rule 37(e) incorporates that concept.[56]

Unfortunately, some courts see a finding of "reasonable steps" as being foreclosed by a mere loss of ESI.[57] In *Living Color v. New Era Acquastructure*, for example, the court decided that a failure to disable an auto-delete function did not constitute "reasonable steps" under the circumstances.[58] Judge Scheindlin has made the argument

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[47] See, e.g., Minutes, Civil Rules Advisory Committee, April 10-11 (2014), at lns 1224-1226 (the proposed rule "is not limited to loss of 'discoverable' information nor does it require materiality").
[48] *See, e.g.*, DEL. FED. CT. DEFAULT STANDARD (2011), Para. 1(b), copy at http://www.ded.uscourts.gov/ (listing ESI that need not be preserved absent a showing of good cause by the requesting party).
[49] 2016 WL 1458109 (E.D. Cal. April 13, 2016).
[50] 2016 WL 492743, at *10 (D. Kan. Feb. 8, 2016).
[51] *See, e.g.*, Swetlic Chiropractic v. Foot Levelers, 2016 WL 1657922 (S.D. Ohio April 27, 2016)(injunction granted where "real danger" of destruction existed); *cf.* Micolo v. Fuller, 2016 WL 158591 (W.D. N.Y. Jan. 13, 2016).
[52] 2016 WL 2757401 (S.D. Ala. May 12, 2016)(citing Rule 37(e)).
[53] Schein v. Cook, 2016 WL 3212457, at *5 (N.D. Cal. June 10, 2016)(citing Rule 37(e)).
[54] Minutes, supra, at lns. 1102-1104 ("reasonable steps are not perfect steps; information will be lost even when reasonable steps are taken to preserve").
[55] 688 F. Supp. 2d, 613 (S.D. Tex. Feb. 19, 2010).
[56] Committee Note (a factor in "evaluating the reasonableness of preservation is proportionality").
[57] *See* Lexpath Technologies v. Welch, 2016 WL 4544344, at *2 (D. N.J. Aug. 30, 2016)(relying on Mosaid Technologies v. Samsung Electronics, 348 F. Supp.2d 332, 335 (D. N.J. 2004).
[58] 2016 WL 1105297 at *5 (S.D. Fla. March 22, 2016)("since it appears that at least some of the text messages at issue" were lost which should have been preserved).

that it is unlikely that a party can be held to have taken reasonable steps if it failed to implement some form of a legal hold.[59]

However, as noted in *Konica Minolta Business Solutions*, "[s]anctions are not automatic."[60] Rule 37(e) "does not take a strict liability approach to compliance with preservation obligations."[61] In *Best Payphones v. City of New York*, conduct which "amount[ed] to mere negligence" did not mean that the party had acted "unreasonably as is required for the Court to issue sanctions under Rule 37(e)."[62]

The Committee Note suggests that "the level of sophistication and experience should be taken into account in evaluating preservation efforts." It also suggests that "good faith" adherence to routine policy qualifies as undertaking of reasonable steps. In *Marten Transport*, a party successfully avoided measures for losses of ESI because of routine, good-faith" reliance on a business system.[63] A similar result existed in *Terral v. Ducote* when a retention policy was followed.[64]

Not surprisingly, egregious or reckless misconduct usually results in a finding that the party did not take reasonable steps.[65] In *CAT3 v. Black Lineage*," an unsuccessful attempt to falsify ESI was deemed to be inconsistent with taking "reasonable steps."[66] In *Arrowhead Capital Finance v. Seven Arts*, the court compared a lack of reasonable steps to "reckless" conduct.[67]

Additional Discovery

A court must also determine that the missing ESI "cannot be restored or replaced through additional discovery" before any measures are available. As the Committee Note puts it, "[b]ecause [ESI] often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere."

If recoverable, the ESI is not "lost."[68] The Note cautions that any additional efforts should be proportional to the apparent importance of the lost information and

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[59] As noted in Thomas Allman, *A Second Look at "Reasonable Steps": A New Role for a Familiar Concept*, 15 DDEE 485 (2015), copy at http://www.lfcj.com/uploads/3/8/0/5/38050985/2015allmanreasonablestepsii_bbnareprint_.pdf.
[60] 2016 WL 4537847, at *6 (E.D. Mich. Aug. 31, 2016).
[61] Allman, *supra.*
[62] Best Payphones v. City of New York, 2016 WL 792396, at *5 (E.D.N.Y. Feb. 26, 2016).
[63] Marten Transport v. Plattform Advertising, 2016 WL 492743 (D. Kan. Feb. 8, 2016)(accepted business practices followed in replacing computers and not retaining browsing histories).
[64] 2016 WL 5017328, at *3 (W.D. La. Sept. 19, 2016)(failure to preserve was pursuant to routine video retention policy).
[65] GN Netcom v. Plantronics 2016 WL 3792833, at *6 (D. Del. July 12, 2016)(actions of executive in deleting massive amounts of email). The court was also not convinced that the party took all the reasonable steps it could to recover the deleted email. *Id*, at *7.
[66] CAT3 LLC v. Black Lineage, 2016 WL 154116, at *9 (S.D. N.Y. Jan. 12, 2016)("manipulation of the email addresses is not consistent with taking 'reasonable steps' to preserve the evidence").
[67] 2016 WL 4991623, at *20 (S.D.N.Y. Sept. 16, 2016)(failure to move or copy ESI on serve "could be seen as reckless," citing Rule 37(e)).
[68] Erhart v. Bofl, 2016 WL 5110453, at *3 (S.D. Cal. Sept. 21, 2016)(reaching similar conclusion applying pre-amendment principles in case where Rule 37(e) should have been, but was not, applied).

substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.[69]

The moving party has the burden to negate that possibility. This represents a significant from existing case law in some Circuits under which proof of the availability of ESI from other sources "does not go toward the question of whether sanctions are appropriate but rather the type of sanction the Court imposes."[70]

However, if ESI is lost after additional discovery directed at restoration, the court may then consider measures under the Rule.[71] *In Living Color v. New Era Acquaculture*, the court held that since "at least some of the text messages at issue" could not be replaced and "were therefore lost," the preliminary condition was met.[72]

In *First American Title v. Northwest Title*, [73] however, the moving party failed to establish that the emails, or a significant portion of them, "cannot be restored, or replaced through additional discovery." In *Fiteq v. Venture Corporation*, the moving party did not demonstrate that any responsive documents existed other than the emails which were restored.[74] In *Feist v. Paxfire*, the court concluded that "additional discovery [would] not rectify" the failure to preserve the missing ESI.[75]

A current Member of the Rules Committee has argued that "if necessary" the non-moving party should be required to show where or from whom the replacement ESI may be obtained or how the missing ESI should be restored.[76] In *GN Netcom v. Plantronics*,[77] the court went further and shifted the burden to the non-moving party to establish that additional discovery was likely to replace the missing ESI, given its finding of bad faith involved.[78]

The court framed the issue as the non-moving party having a "heavy burden" of showing that the missing ESI might "*plausibly*" be thought not "likely to affect the outcome of the trial. It reached this conclusion because not all of the missing email had been recovered, despite the vigorous efforts, including the addition of additional custodians.

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[69] *Id.* (*See, e.g.,* In re Delta/AirTran Baggage Fee Antitrust Litigation, 770 F. Supp.2d 1299, 1311 (N.D. Ga. Feb. 22, 2011).
[70] Learning Care Group v. Armetta, 315 F.R.D. 433, 439-440 (D. Conn. June 17, 2016)(refusing to apply Rule 37(e) threshold conditions to assess impact of ability to recover ESI lost from destroyed laptop despite the lack of bad faith or gross negligence because the issue of spoliation was raised two months before Rule 37(e) became effective).
[71] In re: Ethicon, 2016 WL 5869448, at *3 (S.D. W.Va. Oct. 6, 2016).
[72] 2016 WL 1105297, at *5 (S.D. Fla. March 22, 2016)(the cell phone carrier did not provide add'l info).
[73] 2016 WL 4548398, at *3 (D. Utah Aug. 31, 2016
[74] Fiteq v. Venture Corporation, 2016 WL 1701794, at *3 (N.D. Cal. April 28, 2016).
[75] Betsy Feiset v. Paxfire, 2016 WL 4540830 (S.D. N.Y. Aug. 29, 2016).
[76] Hon. Craig B. Schaffer, *The Burdens of Applying Proportionality, 16* SEDONA CONF. U. 55, 109 (2015).
[77] GN Netcom v. Plantronics, 2016 WL 3792833 (D. Del. July 12, 2016).
[78] *Id.*, at *9-10 (the burden of proof on prejudice shifted once bad faith was shown).

Measures Available

Rule 37(e) specifies the measures available once all the threshold conditions are met in two subdivisions. The subdivisions are not mutually exclusive. We discuss them separately.

According to the Committee Note, Rule 37(e) "forecloses reliance on inherent authority or state law" to "determine when [these] measures should be used."[79] However, as discussed *infra* (in the "Exclusivity" section of this Memorandum), while the Supreme Court has stated a preference for its civil rules to be followed unless "in the informed discretion of the court . . . the Rules are not up to the task, [which means that] the court may safely rely on its inherent power.[80]

Subdivision (e)(1)

Subdivision (e)(1) of Rule 37(e) authorizes measures "no greater than necessary to cure" prejudice caused by the loss of ESI. No additional showing of culpability is required beyond that implicit in the finding that the ESI "should have been preserved."[81] Measures should be no greater than necessary to cure prejudice; but a court does not need to cure every prejudicial effect.[82] The Committee Note famously observes that "[m]uch is entrusted to the court's discretion."

The goal is to remediate – not punish – and the rule "does not require the court to adopt measures to cure every possible prejudicial effect."[83] Because of subdivision (e)(2), however, harsh measures are not available unless the court also makes a finding that the party acted with the requisite "intent to deprive." However, given the breath of the discretion available, serious sanctions are available under the subdivision.[84]

Care must be taken to ensure that curative measures imposed under subdivision (e)(1) do not have the effect of those permitted only on a finding of intent to deprive. For

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[79] Committee Note, 305 F.R.D. 457, 569-570 (2015); *cf.* Hill v. Brass Eagle, 2016 WL 4505170, at *4 (N.D. Ill. Aug. 29, 2016)(parties agree that state law governs application of spoliation remedies in diversity case).
[80] Chambers v. NASCO, 501 U.S. 32, at 50 (1991).
[81] Minutes, April 10-11, 2014 Rules Committee. *See also* Konica Minolta Business Solutions v. Lowery Corporation**,** 2016 WL 4537847, at *3 (E.D. Mich. Aug. 31, 2016)(explaining that traditionally a party must have shown that the lost ESI would support a claim or defense, which "is another way of saying the loss of ESI" could prejudice the party).
[82] Committee Note.
[83] *Id*.
[84] Gregory P. Joseph, Rule 37(e), 99 JUDICATURE 35, at 39-40 (2015) (the "serious sanctions" which may be imposed as "curative measures" under the subdivision include (1) directing that designated facts be taken as established; (2) prohibiting the party from supporting or opposing designated claims or defenses; (3) barring introduction of designated matters; (4) striking pleadings; (5) introducing evidence of failure to preserve; (6) allow argument on failure to preserve; and (7) giving jury instructions other than adverse inference instructions).

example, evidence preclusion, striking of claims or defense and the like which have case dispositive effect are properly treated as subdivision (e)(2) matters.

Prejudice

The Committee Note defines "prejudice" as a threat to the ability to present a claim or defense, taking into account the "information's importance in the litigation." The inquiry looks to "whether the [spoliating party's] actions impaired the non-spoliating party's ability to go to trial or threatened to interfere with the rightful decision of the case."[85] As noted in *First American Title v. Northwest Title*, not "every loss of ESI is *per se* prejudicial for purposes of spoliation sanctions."[86]

In *Erhart v. Bofl Holding*, where forensic examination of the relevant storage devices revealed that only a "fraction" of the allegedly missing ESI could not be accessed, the court found that the moving party had not suffered any meaningful prejudice.[87] Moreover, as *Best Payphones v. City of New York* emphasizes, however, when the same information is available from "obvious non-party discovery leads" which are not pursued, there is not basis "under Rule 37(e)" to find the loss of relevant information to be subject to the measures under the rule.[88]

In *Marshall v. Dentfirst* the loss of the internet browsing history of a terminated employee was deemed not to be prejudicial because it had not been relied upon in making termination decisions."[89] Courts also failed to find sufficient prejudice to justify measures under subdivision (e)(1) in *Fiteq v. Venture,*[90] *In re Ethicon,*[91] *Living Color v. New Era*[92] and *Matthew Enterprise v. Chrysler*.[93]

According to the Committee Note, the rule does not assign the burden to demonstrate prejudice to a specific party although, even though the "party alleging spoliation [generally] bears the burden of proof."[94] The Note observes that it may be fair to place the burden on the moving party when the content of the missing information is

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[85] Leon v. IDX Systems, 464 F.3d 951, 960 (9th Cir. 2006).
[86] 2016 WL 4548398, at *3 (D. Utah Aug. 31, 2016).
[87] 2016 WL 5110453 (S.D. Cal. Sept. 21, 2016)(the court inexplicitly failed to discuss Rule 37(e) in the course of declining to find sufficient prejudice to award terminating sanctions, an adverse inference or monetary sanctions).
[88] 2016 WL 7922396, at *6 (E.D.N.Y. Feb. 26, 2016)(collecting cases demonstrating that the absence of prejudice can be shown by demonstrating that the parties were able to obtain the same information other sources).
[89] 313 F.R.D. 691 (N.D. Ga. March 24, 2016)("no evidence to support that the allegedly spoliated documents were reviewed, relied upon or even available" at the relevant times).
[90] 2016 WL 1701794 (N.D. Cal. Aril 28, 2016).
[91] 2016 WL 5869448 (S.D. W.Va. Oct. 6, 2016).
[92] 2016 WL 1105297, at *5 (S.D. Fla. March 22, 2016)(prejudice, if any, was "so minimal" that no measures necessary).
[93] 2016 WL 2957133, at *4 (N.D. Cal. May 23, 2016).
[94] Richard v. Inland Dredging, 2016 WL 5477750, at *4 (W.D. La. Sept. 29, 2106)(citing Terral v. Ducote, 2016 WL 5017328, *3 (W.D. La. 2016) and Martinez v. City of Chicago, 2016 WL 3538823, *24 (N.D. Ill. 2016).

fairly evident or appears to be unimportant or if existing evidence is sufficient to meet the needs of the parties. However, if conduct is egregious enough, prejudice, like relevance, is likely to be established as a matter of law.[95]

Evidence/Issue Preclusion

In *CAT3 v. Black Lineage,*[96] the court precluded reliance on emails whose authenticity was placed in doubt by the destruction of earlier versions.[97] In *Ericksen v. Kaplan*, use of disputed emails and documents was precluded in order to "cure the prejudice created" by the destruction of other information.[98] In *Betsy Feist v. Paxfire,*[99] a court precluded a party from seeking statutory damages in light of the use of a "cleaner" which eliminated cookies and a browsing history.

However, the Committee Note cautions that it would be inappropriate to preclude a party from offering evidence in support of the "central or only claim or defense in the case" absent a finding of "intent to deprive."

Evidence/Argument Before the Jury

According to the Committee Note, a court may instruct the jury that it "may consider that evidence along with all the other evidence in the case, in making its decision" in order to cure prejudice in the absence of an "intent to deprive." However, courts may not instruct the jury that it must or may "infer from the loss of information that the information was in fact unfavorable to the party that lost it."

The Committee Note also states that the rule does not limit the discretion of courts to give a "traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial."[100]

Supporters of this approach insist that the purpose is not to punish.[101] Fed. Rule Evid. 403 cautions against the admissibility of evidence when its probative value is outweighed by a danger of "undue prejudice," "confusing the issues" or "misleading the jury."[102] In *Delta/AirTran Baggage Fee Antitrust Litigation,* a court barred such

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[95] *See, e.g.,* GN Netcom v. Plantronics, 2016 WL 3792833, at *9-*10 (D. Del. July 12, 2016).
[96] 2016 WL 154116 (S.D. N.Y. Jan. 12, 2016)[subsequently dismissed, 2016 WL 1584011 (April 6, 2026)].
[97] *Id*. at *10.
[98] Ericksen v. Kaplan Higher Education, 2016 WL 695789, at *2 (D. Md. Feb. 22, 2016).
[99] 2016 WL 4540830] (S.D. N.Y. Aug. 29, 2016).
[100] *See, e.g.,* Applebaum v. Target, 831 F.3d 740 (6th Cir. Aug. 2, 2016)(Sutton, J.)(approving the use of such an instruction while affirming refusal of trial judge to also award adverse inference for loss of a documents).
[101] Hon. Shira A. Scheindlin and Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 FORDHAM L. REV. 1299, 1309 (2014)("the jury must not use evidence of spoliation to *punish* the spoliating party")(emphasis in original); Mali v. Federal Insurance, 720 F3d. 387, 393 (2nd Cir. June 13, 2013)("[s]uch an instruction is not a punishment. It is simply an explanation to the jury of its fact-finding powers").
[102] *See, e.g.,* Decker v. GE Healthcare, 770 F.3d 378, 397-398 (6th Cir. 2014)(instruction declined that would have given a lot more importance to lost or discarded documents than appropriate).

evidence because it would "transform what should be a trial about [an] alleged antitrust conspiracy into one on discovery practices and abuses."[103]

In *First American Title v. Northwest Title*, the parties were to be "permitted to present evidence and argument to the jury" but the jury would not be instructed regarding any presumption or inference regarding the materials.[104] In *BMG Rights Management v. Cox Communications*,[105] the court allowed a party to argue about spoliation during opening arguments and gave an instruction alerting the jury to the fact of spoliation. The Court described this as a "lesser measure" than dismissal or evidence preclusion and consistent with the Rule 37(e) Committee Note.[106]

In *Virtual Studios v. Stanton Carpet*[107] a dispute over the governing terms of a contractual relationship, the court decided to allow the defendant to introduce evidence concerning the loss of emails by plaintiff which would have borne on that dispute because they would have been "helpful" to the resolution of the issue. The court cited the Committee Note and allowed the defendant to make an argument to the jury concerning the effect of the loss of the emails.

In *Shaffer v. Gaither*,[108] a court faced with the loss of texts on a cell phone held that the moving party would be free to examine witnesses who had read them before the jury, which would be "free to decide whether to believe that testimony."[109] The court also allowed the party to "explore" the circumstances regarding the destruction before the jury and reserved the right to issue a spoliation or modified spoliation instruction depending on the evidence. Similarly, In *Accurso v. Infra-Red Services*[110] and *SEC v. CKB168 Holdings*,[111] courts planned to admit spoliation evidence at trial and noted that further relief under Rule 37(e) might follow if justified.

In *Nuvasive v. Madsen Medical*, both sides were to be permitted to submit evidence of spoliation and the jury could consider the evidence along with other evidence in making its decisions.[112]

In *Matthew Enterprise v. Chrysler*,[113] it was stated that evidence of spoliation would be admissible to counter certain testimony, if offered.

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[103] In re Delta/AirTran Baggage Fee t Litigation, 2015 WL 4635729, at *14 (N.D. Ga. Aug. 3, 2015).
[104] 2016 WL 458398, at *7 (D. Utah Aug. 31, 2016)(leaving it to trial judge to determine "the appropriate mechanism for permitting presentation of the evidence and argument at trial").
[105] 2016 WL 4224964 (E.D. Va. August 8, 2016).
[106] *Id*. at *19.
[107] 2016 WL 5339601 (N.D. Ga. June 23, 2016)(refusing to draw an adverse inference or direct the jury that it must presume the emails were adverse since at most the plaintiff was negligent or careless in its IT practices).
[108] 2016 U.S. Dist. LEXIS 118225 (W.D. N.C. Sept. 1, 2016).
[109] *Id*. at *7-*8.
[110] 169 F.Supp.3d 612 (E.D. Pa. March 11, 2016)
[111] 2016 U.S. Dist. LEXIS 16533 (E.D. N.Y. Feb. 2, 2016).
[112] Nuvasive v. Madsen Medical, 2016 WL 305096, at *3 (S.D. Cal. Jan. 26, 2016)(describing it as a "remedy or recourse" because of prejudice suffered by party not entitled to adverse inference).
[113] 2016 WL 2957133 (N.D. Cal. May 23, 2016).

Monetary Sanctions, Fines & Attorney's Fees

It has been noted that Rule 37(e) in its final form "does not specifically list attorney's fees as an available sanction," in contrast to the original draft and other provisions of Rule 37.[114] Nonetheless, attorney's fees and reimbursement of moving party expenses are routinely awarded when the threshold requirements are met. Courts justify their action in a variety of ways. In *CAT3 v. Black Lineage*, for example, the court invoked subdivision (e)(1) by holding that an award of attorneys' fees "ameliorates the economic prejudice imposed on the defendants."[115]

Other courts have cited authority under Rule 37(a)(5)(A),[116] which permits an award of reasonable expenses, including attorney's fees when additional ESI is produced after a motion to compel is granted.[117] This has been criticized as "inappropriate" given the limited scope of the rule.[118] In *Friedman v. Phila. Parking Auth.*, the court candidly explained that it preferred to use Rule 37(a)(5) rather than its inherent power, since there was no need to show that the party had acted in bad faith.[119]

In *GN Netcom v. Plantronics*,[120] the court initially awarded attorney's fees and costs as "an appropriate component of relief for the prejudice."[121] However, it also imposed a $3M "punitive monetary sanction," payable to the moving party, without asserting that it was intended to reduce prejudice, as required under subsection (e)(1). By making the sanction payable to the moving party, the court avoided the procedural requirements for punitive sanctions designed to vindicate a court's authority.[122]

As noted in the "Exclusivity" Section *infra*, this additional appears to be an instance of the exercise of inherent authority to supplement Rule 37(e) because, in the court's judgment, rule-based remedies are deemed inadequate to deter and punish.

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[114] Newman v. Gagan, 2016 U.S. Dist. LEXIS 123168, at *20-21 (N.D. Ind. May 10, 2016).
[115] 2016 WL 154116 (S.D. N.Y. Jan. 12, 2016).
[116] "Rule 37(a)(5)(A) If the motion is Granted or Disclosures or Discovery is Provided After Filing)." *See* Ericksen v. Kaplan, 2016 WL 695789 (D. Md. Feb. 22, 2016) and Marshall v. Dentfirst, 313 F.R.D. 691, at n. 9 (N.D. Ga. March 24, 2016)(refusing award because of "plaintiff's motion having been denied").
[117] Best Payphones v. City of New York, 2016 WL 792396, at *8 (E.D. N.Y. Feb. 26, 2016).
[118] John M. Barkett, *The First 100 Days (or So) of Case Law Under the 2015 Amendments to the Federal Rules*, 16 DDEE 178 (2016), copy at http://www.bna.com/first-100-days-n57982069891/. ("[a] motion for sanctions for the loss of documents is not a motion to compel production of documents that no longer exist. Hence using Rule 37(a) as a basis to award fees when the the requirements of Rule 37€ are not satisfied is inappropriate").
[119] Friedman v. Phila. Parking Auth., 2016 WL 6247470 (E.D. Pa. March 10, 2016)(Opinion).
[120] 2016 WL 3792833 (D. Del. July 12, 2016).
[121] *Id*. at *13.
[122] *See, e.g.* Haeger v. Goodyear Tire & Rubber, 813 F.3d 1233, 1252 (9th Cir. Feb. 16, 2016)(award of $2.7 M to moving party was compensatory because "[n]ot one dime was awarded to the government or the court"), *certiorari granted*, 2016 WL 3219065 (Sept. 29, 2016). The Petition was granted to determine if a court refusing to afford protections to sanctioned counsel of criminal due process must tailor compensatory remedies under inherent power to the harm caused by the misconduct. ABA Journal, Trials & Litigation, Sept. 29, 2016.

Counsel Sanctions

Rule 37(e) does not explicitly authorize measures to be imposed against counsel, only the party. In *Sun River Energy v. Nelson*,[123] the Tenth Circuit Court of Appeals refused to interpret Rule 37(c)(1), which also refers only to a party, to authorize counsel sanctions, a conclusion that also applies to Rule 37(e).[124] However, in *CAT v. Black Lineage, supra*, the only reason the court did not sanction counsel was that "there was no evidence of culpability on [their] part."[125]

Subsection (e)(2)

Subdivision (e)(2) authorizes potentially case-dispositive measures when it is shown that the party acted "with intent to deprive another party of the information's use in the litigation." It does not require an explicit finding of prejudice[126] which is presumed to exist when there is an "intent to deprive."[127] However, "reprehensible conduct" alone does not justified sanctions in the absence of prejudice.[128] As explained by one court, "Rule 37(e)(2) sanctions are available to address the prejudicial effect of lost ESI only if the loss is shown" to have motivated by an intent to deprive.[129]

The requirement of proof of an "intent to deprive" applies to the use of the following measures:

- presumptions that lost ESI was unfavorable when ruling on pretrial motions or presiding at a bench trial,
- instructions to a jury that they may or must conclude that lost ESI was unfavorable to the party, and
- dismissal of the action or entry of a default judgment, as well as rulings with similar dispositive impact (preclusions, summary judgments, etc.).

Subdivision (e)(2) explicitly rejects *Residential Funding Corp. v. DeGeorge Financial Corp.*,[130] under which missing ESI may be presumed to be adverse if

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[123] 800 F.3d 1219, 1226 (10th Cir. Sept. 2, 2015).
[124] Accord, Grider v. Keystone Health Plan, 580 F.3d 119, 140-141 (3rd Cir. 2009).
[125] 2016 WL 154116, at n. 7 (S.D. N.Y. Jan. 12, 2016). The court may have assumed that it retained inherent authority to sanction counsel, regardless of the limits of Rule 37(e).
[126] Minutes, Std. Comm. Meeting, May 29-30, 2014, at n. 2.
[127] Committee Note ("the finding of intent required . . . can support . . .an inference that the opposing party was prejudiced by the loss of information [and no further] finding of prejudice [is required]").
[128] The Standing Committee struck the provision that "~~there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice.~~" Minutes, Std. Comm. Meeting, May 29-30, 2014, at n. 2.
[129] Konica Minolta v. Lowery Corporation 2016 WL 4537847, at *6 (E.D. Mich. Aug. 31, 2016); *Cf.* Global Material Technologies v. Dazheng Metal Fibre Co., 2016 WL 4765689, at *4, *10 (N.D. Ill. Sept. 13, 2016)(imposing default judgment without finding prejudice in light of the egregious conduct involved).
[130] 306 F.3d 99 (2nd Cir. 2002).

destruction occurred without a showing of bad faith.[131] Had it been in effect, it could well have barred use of such instructions in decisions such as *Zubulake V*,[132] *Pension Committee*[133] and *Sekisui v. Hart.*[134] As the Sixth Circuit recently noted in *Applebaum v. Target*, "a showing of negligence or even gross negligence will not do the trick [under the rule]."[135]

Measures Available

By and large, cases applying Subdivision (e)(2) have involved the availability of various forms of adverse inferences or presumptions, with the primary issue being whether or not an "intent to deprive" is present. Only in rare cases, with extreme fact patterns showing egregious conduct, have courts actually selected dismissals or defaults or their functional equivalents, such as a summary judgment.[136] The Committee Note also cites the striking of pleadings or defenses or precluding evidence in support of "the central or only claim or defense in the case."

In selecting spoliation sanctions under existing Circuit Jurisprudence once a breach of the duty is identified courts, individual Circuits often establish discrete guidelines which emphasize additional factors which must be met when the most harsh measures are selected, such a dismissals or default jugments.

Rule 37(e) adopts a similar, but carefully calibrated, approach which takes no position on whether the rule is intended to punish.[137] Instead, the Note cautions that the "remedy should fit the wrong" and that "severe measures" should not be used when the information lost was "relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss."

In *GN Netcom v. Plantronics*,[138] the court refused to impose dispositive sanctions where an adequate, alternative remedy was available. In *CAT3 v. Black Lineage*, preclusion of evidence under subdivision (e)(1) was deemed sufficient to address the prejudice involved in the altering of emails.[139] When courts seek to impose dismissals or defaults under Rule 37(e), they often refer to the Circuit guidelines generally applicable to such matters. In Global Material Technologies v. Dazheng Metal Fibre, the

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[131] In re Bridge Construction Services of Florida, 2016 WL 2755877, at ¶17 (S.D. N.Y. May 12, 2006)(Koeltl, J.).
[132] Zubulake v. UBS Warburg ("Zubulake V"), 229 F.R.D. 422, 439-440 (S.D. N.Y. July 20, 2004).
[133] Pension Committee v. Banc of America, 685 F. Supp. 2d 456, 496-497 (S.D. N.Y. May 28, 2010.
[134] Sekisui American v. Hart, 945 F.supp.2d 495, 509-510 (S.D. N.Y. Aug. 15, 2013).
[135] Applebaum v. Target, 831 F.3d 740 (6th Cir. Aug. 2, 2016)(Sutton, J.).
[136] Brice v. Auto-Owners Insurance Co., 2016 WL 1633025 (E.D. Tenn. April 21, 2016)(summary judgment as a sanction rejected because it is "too harsh"). One of the more difficult related issues is whether presumptions or inferences supply sufficient evidentiary support to avoid the imposition of a summary judgment on the merits. Reyes v. Julia Place Condominium Homeowners Association, 2016 WL 5871278, at n. 2 (E.D. La. Oct. 7, 2016)(refusing to do so).
[137] Minutes, Civil Rules Advisory Committee, April 10-11 (2014)("[t]he Subcommittee agreed with a separate suggestion that the Note should make clear that (e)(2) measures should not be punitive").
[138] 2016 WL 3792833, at *14 (D. Del. July 12, 2016).
[139] CAT3 v. Black Lineage, 2016 WL 154116 at *8-9 (S.D.N.Y. Jan 12, 2016).

court cited Rule 37(e)(2) requirments followed by a list of three Circuit-based factors which determine when "[d]efault judgment is an appropriate sanction."[140]

Role of the Jury

Assessments of "intent to deprive" are typically made by the court, although a jury may be called upon to do so. However, that practice risks inviting a juror "to reason that someone who suppresses evidence is more likely to be the kind of person who would be wrong on the merits."[141] It is particular unfair if evidence is offered but the court concludes that an "intent to deprive" is not shown.[142] In that circumstance, as has been observed, "[r]egardless of whether the jury makes the inference, it will still have heard damaging evidence and arguments about the circumstances that caused the information loss."

It is not unusual for a court to provisionally deny a motion for Rule 37(e)(2) measures in order to "revisit" the issue after presentation of evidence at trial.[143] It is unclear from the decisions to date if the court or the jury is to rule on the issue. In *Accurso v. Infra-Red Services*, the court left the issue open for renewal at the trial without specifying what role, if any, the jury would play.[144]

Similarly, in *Shaffer v. Gaither*, the court noted that it had "not ruled out a spoliation or modified spoliation instruction" after it heard the evidence at trial.[145]

A better approach would be for the court to determine, in advance, whether a party has acted with or without the requisite intent and then determine whether a remedy under subdivision (e)(2) is appropriate. The Texas Supreme Court has adopted that approach for its state based on the logic that spoliation is "essentially a particularized form of discovery abuse," since it ultimately results in the failure to produce discoverable information which is "within the sole province of the trial court."[146]

Determining the Intent to Deprive: Generally

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[140] 2016 WL 4765689, at *1 (N.D. Ill. Sept. 13, 2016)("where (1) there is 'clear record of delay or contumacious conduct'; (2) less drastic sanctions have proven ineffective; or (3) a party has demonstrated willfulness, bad faith, or fault"). It is unclear but largely academic to ask if the court was merely providing background or would not have granted relief in their absence; all of which were clearly present.

[141] Dale A. Nance, *Adverse inferences about Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering by Parties to Litigation*, 90 B.U.L. REV. 1089, 1102 (2010).

[142] Ariana J. Tadler & Henry J. Kelston, *What You Need to Know About the New Rule 37(e)*, 52-JAN Trial 20, 23 (2016

[143] Gonzalez-Bermudex v. Abbott, 2016 WL 5940199, at *25 (D. P.R. Oct. 9, 2016)(provisionally denying an adverse inference for failure to preserve ESI after finding threshold requirements were met because there were not yet enough facts of record to make a finding of "intent to deprive").

[144] 169 F.Supp.3d 612, 619 (E.D. Pa. March 11, 2016).

[145] 2016 U.S. Dist. LEXIS 118225, at *8-*9 (W.D.N.C. Sept. 1, 2016).

[146] Brookshire Brothers v. Aldridge, 57 Tex. Sup. Ct. J. 947, 438 S.W. 3d 9, at *20 (S.C. Tex. July 3, 2014)(presenting spoliation issues to the jury risks a "shift" in the focus of the trial from "the merits to a party's spoliating conduct"); *but compare* Hon. Xavier Rodriquez, *Brookshire Bros: Cleanup on Aisle 9: The Current Messy State of Spoliation*, 46 St. Mary's L.J. 447, 480 (contrasting the Texas decision unfavorably with Rule 37(e)(1) Committee Note in regard to admission of evidence of negligent spoliation).

The "intent to deprive" standard bears a close relationship to the "bad faith" requirement in use in some Circuits, but is "defined even more precisely."[147] In *Accurso v. Infra-Red Services*, for example, a court held that the rule did not appear to have "substantively altered" the burden in the Third Circuit of showing that the ESI was destroyed in "bad faith."[148] In *Marshall v. Dentfirst*, the court noted that the considerations were "substantially similar" to Eleventh Circuit case law.[149]

A finding of "willful" conduct also does not demonstrate that a party has acted with an "intent to deprive"; it must have been undertaken in order "to deprive another party of the information's use in the litigation."[150] In *Mazzei v. The Money Store,*[151] the Second Circuit affirmed a refusal to issue an adverse inference based on willful conduct where the lower court found that defendants did *not* act with an intent to deprive.[152]

A surprising number of Courts have ignored the "intent to deprive" standard of Rule 37(e) entirely in circumstances involving losses of ESI in which application of the Rule would have barred the imposition of the sanctions actually applied.[153] In another case where no finding of "intent to deprive" was made, a court professed to be applying subdivision (e)(2) but still authorized an instruction providing that "any emails not produced" were presumed to be unfavorable.[154]

The court in *CAT3 v. Black Lineage* utilized a "clear and convincing" standard of proof in assessing largely circumstantial evidence to determine whether a dismissal was warranted and whether the party acted with "intent to deprive" under Rule 37(e).[155] A

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[147] June 2014 Report, Rules Advisory Committee, 305 F.R.D. 457, 512 at 528 ("The Committee views this definition as consistent with the historical rationale for adverse inference instructions").
[148] 169 F.Supp.3d 162 (E.D. Pa. March 11, 2016).
[149] 313 F.R.D. 691,695,699 (M.D. Ga. March 24, 2016)(finding that party failed to show non-moving party had "acted in bad faith or with intent to deprive [the moving party] of the use of the information in this litigation").
[150] Roadrunner Transportation v. Tarwater, 642 Fed. Appx. 759, at n. 1 (9th Cir. March 18, 2016)(affirming finding of entitlement based on "willful" conduct since, under the facts of the case, the court could have also found an "intent to deprive").
[151] Mazzei v. The Money Store,___ F.3d ___, 2016 WL 3902256] (2nd Cir. July 15, 2016)(finding that Byrnie v. Town of Cromwell was "superseded in part" by Rule 37(e)).
[152] 308 F.R.D. 92, 101 (S.D.N.Y. May 29, 2015)(although the party willfully failed to preserve, there was "no evidence of bad faith 'in the sense that the defendants were intentionally depriving the plaintiff of information for use in this litigation" [internal quotes omitted]).
[153] Benefield v. MStreet Entertainment, 2016 WL 374568 (M.D. Tenn. Feb. 1, 2006)(spoliation instruction imposed); Brice v. Auto-Owners Insur., 2016 WL 1633025 (E.D. Tenn. April 4, 2016)(adverse inference imposed); Dallas Buyers Club v. Doughty, 2016 WL 1690090 (D. Ore. April 27, 2016)(jury permitted to presume missing texts were adverse); Davis v. Crescent Elec., 2016 WL 1637309 (D. S.Dak. April 21, 2016)(jury permitted to infer violation); In re: Ajax Integrated, 2016 WL 1178350 (N.D. N.Y. March 23, 2016)(evidentiary hearing to be held); Nelda Ayala v. Your Favorite Auto Repair, 2016 WL 5092588 (E.D. N.Y. Sept. 19. 2016)(preclusion of use of wage hour records essential to defense); Prezio Health v. John Schenk & Spectrum Surgical Instruments, 2016 WL 111406 (D. Conn. Jan. 11, 2016)(permissive adverse inference); Stedeford v. Wal-Mart Stores, 2016 WL 3462132 (D. Nev. June 24, 2016)(adverse inference).
[154] Core Laboratories v. Spectrum Tracer Services, 2016 WL 879324, at *3 (W.D. Okla. March 7, 2016)(relying on selective quotation from pre-Amendment case law implying per se liability attached when prejudice was shown).
[155] 2016 WL 154116, at *8 (S.D. N.Y. Jan. 12, 2016)(because the party sought terminating sanctions and the state of mind was at issue in applying (e)(2)).

similar approach was adopted in *Montgomery v. Risen* where the "bad faith" was said to be the determinative factor.[156]

There is a "strong presumption against sanctions that decide the issues of a case."[157] A dismissal is a "draconian measure"[158] and as when assessing the presence of "bad faith" under inherent authority, courts often apply the principle that fraud must be proven by "clear and convincing evidence," absent a contrary statute or rule.[159]

Some courts have applied a lesser "preponderance of evidence" standard as to adverse inferences, arguing that it is a remedial, not punitive measure. A District Court distinguished *CAT3* on that ground and also argued that imposing a higher standard of factual certainty under subdivision (e)(2) might allow a spoliator to escape responsibility (ignoring the availability of severe Subdivision (e)(1) measures) while minimizing the unique aspects of finding bad faith.[160]

However, since Rule 37(e) explicitly treats adverse inferences as having the same case-dispositive potential as dismissals and defaults,[161] and since it is well known that a spoliation instruction "has the propensity to tilt a trial in favor of a nonspoliating party,"[162] the heightened standard standard of proof should apply.

Examples

Courts have readily found an "intent to deprive" when egregious conduct is involved. In *Global Material Technologies v. DazhengMetal Firbre Co.*, parties "discarded one source of electronic evidence and failed to preserve others"[163] In *Brown Jordan v. Camicle,*[164] a court found the requisite intent when an individual with substantial IT experience deleted substantial amounts of information without credible

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[156] 2016 WL 3919809 (D.D.C. July 15, 2016)(the court inexplicitly failed to cite Rule 37(e) as the supplying the governing principle for failure to preserve the software involved); *accord*, Xyngular Corporation v. Schenkel, 2016 WL 4126462, at *21-22 (D. Utah Aug. 2, 2016)(dismissal requires proof by clear and convincing evidence that spoliation was committed (*29-30); *cf* Harrods v. Sixty Internet Domain Names, 302 F.3d 214, 225-227 (4th Cir. 2002)(finding silence by Congress on the topic of heightened culpability in the ACPA to justify use of "preponderance" standard).

[157] Drone Technologies v. Parrot S.A., __ F.3d __, 2016 WL 5439806, at *121 (Fed. Cir. Sept. 29, 2016).

[158] Thermoteck v. Orthflex, 2015 WL 12711721, at *3 (N.D. Tex. 2015).

[159] Ty Inc. v. Saftbelly's Inc., 517 F.3d 494, 499 (7th Cir. 2008)(Posner, J.)(doubting the necessity for applying the standard to sanctions imposed for fraud in the litigation process which "will often be written off" by the peers of the party "as a mere battle scar" of litigation" in favor of applying "proportionality").

[160] DVComm v. Hotwire Comm., 2016 WL 6246824, at ¶51 (E.D. Pa. Feb. 3, 2016) and in Friedman v. Phila. Parking Authority, 2016 WL 6247470, at ¶58-59 (D.D. Pa. March 10, 2016)(arguing that applying a higher standard might allow a spoliator to benefit)(same District Judge); *see also* Krause v. Nev. Mut. Ins. Co., 2014 WL 496936, at *7 (D. Nev. Feb. 6, 2014)(the standard of proof for spoliation "appears" to be by a preponderance of the evidence).

[161] Rules Comm. Report (June 2014) as furnished to Congress, at 305 F.R.D. 457, 528-529 (2015)("[a]n adverse inference … may tip the balance [at trial] in ways the lost evidence never would have").

[162] Brookshire Bros. Ltd. v. Aldridge, *supra*, 438 S.W.3d 9, at *23 (Tex. S.C. 2014)(citing to Zubulake v. Warburg, 220 F.R.D. 212, 220 (S.D.N.Y. 2013)(describing spoliation instruction as an "extreme sanction" that "should not be given lightly").

[163] 2016 WL 4765689, at *9 (N.D. Ill. Sept. 13, 2016).

[164] 2016 WL 815827 (S.D. Fla. March 2, 2016).

explanation.[165] A similar conclusion was reached in *GN Netcom v. Plantronics*, where a top executive "acted in bad faith with an intent to deprive" because "at least part" of the motivation was to deprive the party of the information.[166]

In *DVComm v. Hotwire*, the court found "substantial circumstantial evidence" that the "double deletion" of crucial information was done with an intent to deprive.[167] In *O'Berry v. Turner*, a court concluded that the loss of the only copy of subsequently deleted ESI could "only" have resulted if defendants had "acted with the intent to deprive,"[168] a a result criticized as an "end around" the rejection of the Second Circuit standards by Rule 37(e).[169]

However, Courts have typically not found an "intent to deprive" when negligent conduct has resulted in the loss of ESI. In *Best Payphones v. City of New York,*[170] the court found that the failure to preserve "amounted to mere negligence." In the case of *In re Ethicon*, the "poor handling" of ESI in custodial files was not evidence of intentional misconduct.[171] A party that acted in good-faith was not found to have the requisite intent in *Marshall v. Dentfirst,*[172] where records were lost during a routine upgrade.[173]

In *Betsy Feist v. Paxfire,*[174] a court did not find an intent to deprive in the use of a "cleaner" which eliminated the existence of cookies and a browsing history. In *Nuvasive v. Madsen Medical,* deletion of text messages was not indicative of an intent to deprive.[175] A similar conclusion was reached in *SEC v. CKB168 Holdings*.[176]

Other courts refusing to find the requisite intent to deprive under similar fact patterns include *Bry v. City of Frontenac,*[177] *Friedman v. Phila. Parking Auth.,*[178] *Living*

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[165] *Id.* at *36 ("Carmicle was familiar with the preservation of metadata and forensic copies of electronic data in light of his educational and professional background and [the] fact that he has at all relevant times been represented by counsel").
[166] 2016 WL 3792833, *7 at (D. Del. July 12, 2016).
[167] DVComm. v. Hotwire, 2016 WL 6246824, at ¶¶37, 38, 52-62 (E.D. Pa. Feb. 3, 2016).
[168] O'Berry v. Turner, 2016 WL 1700403, *4 (M.D. Ga. April 27, 2016)("the loss of the at-issue ESI was beyond the result of mere negligence" and such "irresponsible and shiftless behavior can only lead to one [adverse] conclusion").
[169] Skoczllas and Fortney, *Is the Road to Sanctions Paved with Specific Intentions? The Resurgence of Gross Negligence under New Rule 37(e)(2),* National Law Rev., Aug. 31, 2016.
[170] 2016 WL 792396 (E.D. N.Y. Feb. 26, 2016).
[171] 2016 WL 5869448, at *4 (S.D. W.Va. Oct. 6, 2016)(loss was result of "negligent, not willful or deliberate).
[172] 313 F.R.D. 691 (N.D. Ga. March 24, 2016).
[173] *Id.* at 701.
[174] 2016 WL 4540830] (S.D. N.Y. Aug. 29, 2016).
[175] 2015 WL 4479147, at *2 (S.D. Cal. July 22, 2015).
[176] 2016 U.S. Dist. LEXIS 16533, at *14 (E.D. N.Y. Feb. 2, 2016)("the existing record is not sufficiently clear" but permitting SEC to renew its motion at trial based on evidence there adduced).
[177] 2015 WL 9275661, at 7 (E.D Mo. Dec. 18, 2015).
[178] 2016 WL 6247470, at ¶73 ((E.D. Pa. March 10, 2016)(Opinion).

Color v. New Era Acquaculturre,[179] *Orchestratehr v. Trombetta,*[180]*Matthew Enterprise v. Chrysler*[181] and *Thomley v. Bennett.*[182]

Exclusivity

Rule 37(e) is silent as to its impact on the use of inherent sanctioning authority to supplement or replace the rule as well as its interaction with other subsections of Rule 37 when both are implicated. We deal first with inherent authority and the role of the "foreclosure" of its use by the fact that conduct may be subject to Rule 37(e).

Foreclosure of Inherent Authority

The Committee Note states that Rule 37(e) "authorizes and specifies" measures a court may employ "if information that should have been preserved is lost" as well as "the finding necessary to justify these measures." Thus, it "forecloses reliance on inherent authority or state law to determine when certain measures should be used."[183]

This principle appears to be generally accepted in the "plain vanilla" application of the Rule and most courts have confined themselves to the rationale of Rule 37(e).[184] Thus, where there is a clear conflict between Rule 37(e) and requirements in the pre-amendment Circuit case law, the Rule prevails. As noted in *CAT3 v. Black Lineage*, courts now have no authority "to dismiss a case as a sanction for merely negligent destruction of evidence, as would have been the case under *Residential Funding*."[185]

However, it is also clear that a role remains for the application of inherent authority where necessary, despite the Committee Note or, to be more accurate, consistent with it. In *Chambers v. NASCO*, Court famously stated that "where there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power." But "if, in the informed discretion of the court . . . the Rules are not up to the task, the court may safely rely on its inherent power.[186]

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[179] 2016 WL 1105297 (S.D. Fla. March 22, 2016).
[180] 2016 WL 1555784, at *12 (N.D. Tex. April 18, 20116).
[181] 2016 WL 2957133 (N.D. Cal. May 23, 2016)(no "intentional spoliation").
[182] 2016 WL 498436, at n. 18 (S.D. Ga. Feb. 8, 2016).
[183] Some states permit tort recoveries based on spoliation and it is not unknown for courts sitting in diversity to be faced with both a claim for damages (whose substantive elements are a matter of state law) and requests for evidentiary measures under inherent power or Rule 37(e). *See, e.g.*, BASF Corporation v. Man Diesel & Turbo North America, 2016 WL 5817159, at *41 (M.D. La. Sept. 30, 2016)(finding that under either standard "Man has failed to prove that BASF spoliated evidence").
[184] *See, e.g.*, Living Color v. New Era Acquaculture, 2016 WL 11052, at n. 2 (S.D. Fla. March 22, 2016)(a court must first look to Rule 37(e)); Fiteq v. Venture, 2016 WL 1701794 at *3 (N.D. Cal. April 28, 201"[t]he court agrees " that the Committee Note "explicitly" forecloses resort to inherent authority).
[185] CAT3 v. Black Lineage, *supra*, 2016 WL 154116, at *6.
[186] Chambers v. NASCO, 501 U.S. 32, at 50 (1991). In *Dietz v. Bouldin*, __ U.S. ___, 136 S. Ct. 1885, 1892 (2016), the Supreme Court added that the use of inherent authority is not appropriate when "contrary to any express grant of or limitation" on the district court's power contained in a rule or statute."

The threshold for the use of inherent power is high and it should only be used when the court "finds that "fraud has been practiced upon it, or that the very temple of justice has been defiled."[187]

Thus, in *CAT3*, the court also stated that it *would* have had authority to act under its inherent authority even if Rule 37(e) measures were unavailable. As the Court explained, "[a] party's falsification of evidence and attempted destruction of authentic, competing information threatens the integrity of judicial proceedings even if the authentic evidence is not successfully deleted."[188]

In *GN Netcom v. Plantronics*, a court imposed a "punitive monetary sanction" in addition to measures under Rule 37(e)(1) because the court was apparently not satisfied that rule-based measures were sufficient.[189] The court gave no explanation for its decision to do so and cited no authority for its sanctions.

In *Sell v. Country Life Insur. Co.,*[190] a court entered a default judgment under inherent authority without mention of Rule 37(e) because of bad faith discovery misconduct, despite the fact that the central failing was a failure to identify and preserve emails. The policy of the insurer was to rely on employees to move relevant emails into a claims file and to establish a litigation hold only if litigation was instituted. The court found this to be deficient because "email communications that occur at arguably the most relevant time" are not preserved "unless employees electronically deposit their communications into the appropriate claim file."[191] *Id*. at *14.

The court in *Sell* noted the statement by the Ninth Circuit in *Haeger v. Goodyear*[192] to the effect that Rule 37 is "not the exclusive means" for addressing the adequacy of discovery conduct but it does not appear that the court was aware of the amended rule. Ironically, had Rule 37(e) been applied, the result might have been the same. On the fact presented, the court could have found a failure to take "reasonable steps" coupled with a "bad faith" finding equivalent to an "intent to deprive."

Some courts have implied a belief that there are no limits on use of their inherent authority posed by Rule 37(e), which is clearly wrong. The District court in *Internmatch v. Nxtbigthing*[193] argued that it "has not been decided" if Rule 37(e) barred it from exercising its inherent authority." In *Friedman v. Phila. Parking Authority*,[194] a court

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[187] Chambers, 501 U.S. at 46.
[188] CAT3 v. Black Lineage, *supra*, at *7.
[189] 2016 WL 3792833, at *7 (D. Del. July 12, 2016)(finding intent to deprive and bad faith).
[190] 2016 WL 3179461] (D. Ariz. June 1, 2016).
[191] *Id*. at *14.
[192] 813 F.3d 1233, 1243 (9th Cir. 2016), *petition for writ of certiorari granted*, 2016 WL 3219065 (Sept. 29 2016). The Haeger panel also concluded that it did not need to decide the highly related issue of whether a bad faith finding must be supported by "clear and convincing evidence" since both it and the preponderance standard were met in that case. 813 F.3d, 1243.
[193] 2016 WL 491483, at *4, n. 6 (N.D. Cal. Feb. 8, 2016).
[194] 2016 WL 6247470, at ¶ 77 (E.D. Pa. March 10, 2016).

asserted that it was "vested with broad discretion to fashion an appropriate remedy under our inherent powers to stop litigation abuse."[195]

Preclusion of Rule 37(b) & (c)

Rule 37(b) authorizes sanctions for a failure to obey an order to "provide or permit discovery"[196] without a showing of fault, much less an "intent to deprive."[197] Most orders under the civil rules typically require no showing of fault when violated and certainly none impose the carefully tailored requirements of Rule 37(e).

As a result, some requesting parties routinely seek preservation orders at the outset of cases in order to provide a mechanism for courts to order sanctions "not otherwise available under Rule 37(e)."[198]

In *Matthew Enterprise v. Chrysler*, the court refused to consider Rule 37(b) as the guiding principle in the preservation context because the predominant issue was the failure to preserve, not breach of a discovery order entered after a motion to compel. It applied Rule 37(e) exclusively.[199] The *Matthews* approach seems appropriate when failures to preserve are the core of the motion.

In *Roadrunner Transportation Services v. Tarwater*, for example, the Ninth Circuit noted that if Rule 37(e) had been applicable in a spoliation dispute, it would have governed despite the fact that the lower court had "explicitly ordered [the party] to preserve 'all data' on his electronic devices."[200] A preference for Rule 37(e) over Rule 37(b) was also noted in *Ninoska Granados v. Traffic Bar*.[201]

Even if the duty to preserve arises from a court order on the topic, such as general provisions of a scheduling order issued under Rule 16, a court should apply the limitations under Rule 37(e) since the "specific takes precedence over the general" in such a case.[202] The careful balancing of competing policy issues was involved in the consideration of Rule 37(e) and deserves respect.

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[195] The Court had made the same comment earlier in DVComm v. Hotwire, 2016 WL 6246824 (E.D. Pa. Feb. 3, 2016).
[196] Rule 37(b)(2)(A)("fails to obey an order to provide or permit discovery").
[197] *But compare* Bonilla v. Rexon Industrial Corp., 2015 WL 10792026, at n. 11 (S.D. Ind. Aug. 19. 2015)("Rule 37(b) sanctions require that there be "bad faith" on the party of the violating party" in the Seventh Circuit).
[198] Kristen L. Burge, ABA LITIGATION NEWS, 24 (noting advice of ABA Pretrial Practice & Discovery Committee that parties should seek an ESI order at an early stage to "leave open the possibility" for courts to sanction violations of such an order).
[199] 2016 WL 2957133, at n. 47 (N.D. Cal. May 23, 2016)("the issue with respect to these emails is spoliation and not compliance with the court's previous order on the motion to compel).
[200] 642 Fed.Appx. 759 (9th Cir. March 18, 2016)(discussing Rule 37(e) if it had been applied).
[201] 2015 WL 9582430, at n. 6 (S.D.N.Y. Dec. 30, 2015)(Francis, M.J.)("[t]o the extent that any of the material lost consists of [ESI], the provisions of recently-amended Rule 37(e) of the [FRCP] apply"); *accord,* Applebaum v. Target, 831 F.3d 740 (6th Cir. Aug. 2, 2016).
[202] Jablonski & Dahl, *The 2015 Amendments to the [FRCP]: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation*, 82 DEF. COUNSEL J. 411, 432 (2015).

In *First Financial Security v. Freedom Equity Group*,[203] therefore, the court applied Rule 37(b) to resolve issues involved failures to adhere to prior orders to produce but appropriately applied Rule 37(e) to issues involving failure to preserve text messages. In *Prezio Health v. John Schenk & Spectrum Surgical Instruments,*[204] however, the court incorrectly ignored Rule 37(e).[205] A similar result may have occurred in the case of *In re Ajax Integrated*.[206]

Rule 37(c) raises similar issues where a party contends that the failure to identify ESI at the time of initial disclosures as required under Rule 26(a) is rooted in a failure to preserve. In *Marquette Transportation v. Chembulk,*[207] a court refused to apply Rule 37(c) and turned to Rule 37(e) for guidance where ESI which was believed to have been missing because of a failure to take adequate steps to preserve was subsequently restored.

Assessment

The Rules Committee, through its Discovery Subcommittee, sought to address two inter-related problems in drafting Rule 37(e); over-preservation of ESI arising from concerns that severe sanctions will be imposed "if a court finds [a party] did not do enough"[208] and the lack of uniformity among the Circuits in dealing with the issue.[209]

Amended Rule 37(e) has decisively resolved the circuit split on the minimum culpability required for use of harsh spoliation by requiring a showing of "intent to deprive," rejecting *Residential Funding*. There is acceptance, even in Circuits like the Second, Sixth and Ninth, that harsh measures are no longer available for merely negligent failures to preserve.

The Rule has succeeded in doing so without unfairly "insulat[ing]" spoliation which warrants censure when "intent to deprive" is not shown.[210] If the predicate

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[203] 2016 WL 5870218 (N.D. Cal. Oct. 7, 2016). *See also* First Financial Security v. Lee, 2016 WL 881003 (D. Minn. March 8, 2016)(resolving motions involving failures to produce emails and deleted text messages under Rule 37(b) without citing Rule 37(e)).
[204] 2016 WL 111406 (D. Conn. Jan. 11, 2016).
[205] *Cf.* John M. Barkett, *The First 100 Days (or so) of the 2015 Civil Rules Amendments*, 38 ("[t]here was no mention of amended Rule 37(e), which might mislead uncareful readers, but based on the facts there did not have to be given the violation of the court order requiring production"), copy at http://www.frcpamendments2015.org/uploads/5/8/6/3/58636421/barkettfirst100days.pdf;
[206] In re Ajax Integrated, 2016 WL 1178350 (N.D. N.Y. March 23, 2016)(Rule 37(b) applied where deletion of files occurred after order issued for forensic examination).
[207] 2016 WL 930946 (E.D. La. March 11, 2016).
[208] Committee Note (describing the excessive effort and money being spent on preservation in order to avoid the risk of severe sanctions).
[209] Minutes, Civil Rules Advisory Committee, April 10-11 (2014), at lns. 755-759)("[t]here is a great need for a rule to address the consequences of losing ESI. Over-preservation and the lack of uniformity in dealing with loss are real problems. It would be good to deal with the circuit disagreements, even if nothing else can be accomplished").
[210] *Cf.* Richard Moriarty, *And Now For Something Completely Different: Are the Federal Civil Discovery Rules Moving Forward into a New Age or Shifting Backward Into A "Dark" Age?*, 39 AM. J. TRIAL ADVOC. 227, 264 (2015)("Moriarty").

conditions exist, "serious sanctions," depending on the degree of prejudice involved, are available for losses of ESI under subdivision (e)(1). There also remains, however, a role for the use on inherent sanctioning authority for "bad faith" misconduct, should it be necessary.

The Rule has been less successful in regard to reducing over-preservation by providing a "safe harbor" for those that take reasonable steps to preserve. To some courts, it is tempting to simply employ the approach of *Zubulake* or *Pension Committee* and conclude the party must have failed to take "reasonable steps" for there to have been a loss.[211] Reasonable steps can, however, include careless, inadvertent, or even negligent actions, especially when proportionality concerns are also considered and if that is all that is shown, the presumption ought to be that the showing has not been made.

The ongoing risks to the success of Rule 37(e) appear to be if courts *routinely* permit juries to hear evidence and receive argument about the failures to preserve under (e)(1) or inappropriately ignore subdivision (e)(2) limitations in favor of using inherent authority.[212] Accordingly, it is not surprising that parties continue to be cautious about revamping existing preservation practices to reduce over-preservation.[213]

It is also not clear that the Rule has reduced the filing of baseless "gotcha" spoliation motions. Courts may and should be prepared to use the methods available to them to address that practice, which has no place in the courts.[214] There is a "temptation for sanctions disputes to overtake and consume merits litigation" which "should be avoided."[215]

The sheer number of court decisions which have ignored Rule 37(e) in circumstances where the rule applies is somewhat surprising. It may be that with the passage of time and increased education this will diminish. Some courts may feel it is

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[211] Living Color v. New Era Aquaculture [2016 WL 1105297](S.D. Fla. March 22, 2016). In a thorough and methodical opinion applying Rule 37(e) to dispute with a sympathetic former employee who failed to disable the auto-delete feature of his cell phone after litigation began, no measures were found to be available under either Rule 37(e)(1) or (2). However, the court appears to equate a finding that some ESI was lost with a finding that there had been a failure to take reasonable steps. (at *5).

[212] *See, e.g.* Virtual Studios v. Stanton Carpet, 2016 WL 5339601, at *11 (June 23, 2016). The willingness of courts to routinely permit juries to hear evidence of spoliation undermines the cabining of authority to sanction in subdivision (e)(2). Courts should take FRE 403 to heart and refrain from asking the jury to assess the "intent to deprive" issue to minimize the risk of undue prejudice where no intent to deprive exists.

[213] H. Christopher Boehning and Daniel J. Toal, *New Rule 37(e) Overrules Second Circuit on Sanctions for Loss of ESI*, New York Law Journal, Volume 251, No. 105 (June 3, 2014).

[214] *See* Williams v. CVS Caremark, 2016 WL 4409190 (E.D. Pa. Aug. 18, 2016)(unreasonable allegation of spoliation of digital record of video surveillance earned counsel sanctions under 28 U.S.C. § 1927); Carin Miller v. Experian Information Services, 2016 WL 5242985, at *8 (S.D. Ohio Sept. 22, 2016)(applying Rule 11 sanctions to spoliation motions which lacked evidentiary support and "are consistent with an intent to drive up the costs of this lawsuit to extort a settlement").

[215] Transystems Corp. v. Hughes Assocs., 2016 U.S. Dis. LEXIS 85548 (M.D. Pa. June 30, 2016).

unjust to apply the rule to pending cases.[216] Others may be unsure whether the rule actually "forecloses" the routine use of existing Circuit law in that particular instance. In *Barnett v. Deere & Company*,[217] for example, a court refused to apply Rule 37(e) because the Fifth Circuit "has not clarified" whether its prior spoliation jurisprudence has been abrogated or amended by the Rule.

Finally, it is useful to recall that the Rules Committee was well aware of the possible inconsistencies which might result when documents and physical property losses were excluded from the new rule.[218] It was noted when the rule was adopted that "if it works, we can think seriously about extending it to other forms of information."[219] As a minimum, echoing Rule 34(a), documents should be included and, candidly, so should tangible property as well.[220]

[216] *Cf.* Learning Care v. Armetta, 315 F.R.D. 433, at *5 (D. Conn. June 17, 2016)(it would be unjust if the moving party were not entitled to the relief under pre-amendment case law, since they "raised the issue in September, 2015, prior to the application of the new rules.")
[217] 2016 WL 4544052, at n. 1 (S.D. Miss. Aug. 31, 2016).
[218] Minutes, Civil Rules Advisory Committee, April 10-11, 2014, at 1271-1274 ("it must be recognized that some cases may present serious questions whether a particular bit of lost information qualifies as ESI – our running example has been a printout of a vanished e-mail message").
[219] *Id*., at lines 1278-1280.
[220] *See, e.g.*, Rule 34(a)(1)(A) and (B): distinguishing between "documents or ESI" and "tangible things").

APPENDIX A
(Cases explicitly citing Rule 37(e))

1. **Accurso v. Infra-Red Services** [169 F.Supp.3d 612] (E.D. Pa., March 11, 2016)(Pratter, J). In ruling on final pre-trial motions in a dispute with former employee, defendants were denied an adverse inference for destruction of emails without prejudice since no evidence was offered establishing the elements of **Rule 37(e). The court noted they were free to raise** the issue at trial "in light of what is received into evidence," but cautioned that a witness would not be allowed to testified as to an opinion that the employee intentionally destroyed evidence. The court applied the new rule because it was "procedural in nature" and observed (n. 6) noted that did not appear to have "substantively altered the moving party's burden" in the Third Circuit of showing that ESI was destroyed in "bad faith" in requesting an adverse inference.

2. **Andra Group v. JDA Software** [2015 WL 12731762] (N.D. Tex. Dec. 9, 2015). The court refused to find that **Rule 37(e)** applied to non-party subject to subpoena even if there was a common law duty to preserve as to that party (*16).

3. **Applebaum v. Target** [831 F.3d 740] (**6th Cir**. Aug. 2, 2016). Sixth Circuit affirmed refusal of trial court to instruct a jury that the failure to produce any repair history records warranted an adverse inference. The court had instructed the jury that if it found that the defendant had disposed of the bike and had not shown a reasonable excuse for doing so, it could infer that the brakes had not been repaired. The Sixth Circuit (Sutton, J.) found no error in refusing to given an additional adverse inference instruction and noted that she had offered no evidence that some of the records even existed, much less that Target had control over them and destroyed them with a culpable state of mind. Moreover, **under amended Rule 37(e),** to the extent she sought an adverse inference for spoliation of electronic information, the rule required her to show an intent to deprive her of its use, since "a showing of negligence or even gross negligence will not do the trick," citing to the Committee Note.

4. **Arrowhead Capital Finance v. Seven Arts** [2016 WL 4991623, at *20 (S.D.N.Y. Sept. 16, 2016]. In assessing conduct involving a failure to move or copy ESI on server, the court noted that it "could be seen as reckless," citing the **Rule 37(e)** requirement that a party take reasonable steps to preserve discoverable electronic information.

5. **Akinbo JS Hashim v. Ericksen** [2016 WL 6208532] (E.D. Wisc. Oct. 22, 2016). Prisoner motion for judgment based on failure to retain copy of menu of food served denied because there was no evidence that any defendant destroyed it in bad faith, citing, *inter alia*, **Rule 37(e)(2**).

6. **Bagley v. Yale** [315 F.R.D. 131, 153] (D. Conn. June 14, 2016). Court reserved ruling on a spoliation motion under **Rule 37(e)** seeking sanctions for failure to take reasonable steps to preserve relevant documents and ESI. The court ordered production of information describing litigation holds or preservation notices along with lists of individuals from to the litigation hold was delivered and from whom information was requested.

7. **Barnett v. Deere & Company**, 2016 WL 4544052 (S.D. Miss. Aug. 31, 2016). In product defects case involving lawn mower design, a court denied motion for sanctions because of lost documents and ESI because of destruction of electronic records was pursuant to retention policy as applicable under Circuit law and there was no showing that duty to preserve had attached at the time, since more than the mere possibility of litigation is required. The court did not apply **Rule 37(e)** because it was not timely raised by plaintiff and because the Fifth Circuit "has not clarified" whether its prior spoliation jurisprudence has been abrogated or amended by the Rule. The court noted that it would not have granted the motion even if **Rule 37(e)** had applied, but noted that at trial the party could cross-examine witnesses about the circumstances.

8. **Best Payphones v. City of New York** [2016 WL 792396] (E.D.N.Y., Feb. 26, 2016). In an action by provider of pay telephones challenging regulatory impact, the court refused to impose evidence preclusion or an adverse inference under Circuit law and **Rule 37(e**) for the negligent failure to retain and produce documents and emails. The court applied "separate legal analyses" but found that the failure to pursue the availability of evidence from third parties other sources negated any finding of prejudice and barred relief under both Circuit law and **Rule 37(e)**. **(at *6)** The court found that the party had not "acted unreasonably as is required" under **Rule 37(e)** given the flux in email preservation standards at the time. Attorney fees were awarded under Rule **37(a)(5)(A)** since material that should have been produced was furnished in response to a Rule 37 motion and the court appeared to also argue that it had inherent authority to award attorneys' fees and cost to punish and deter egregious conduct.

9. **BMG Rights Management v. Cox Communications** [2016 WL 4224964] (E.D. Va. August 8, 2016). District Court accepted recommendation of Magistrate Judge for a permissive spoliation instruction rather than dismissal or preclusion as contemplated by the Advisory Committee note to **Rule 37(e).** While a finding of intentionality was made, lesser measures were sufficient in light of all the evidence.

10. **Brown Jordan v. Carmicle** [2016 WL 815827](S.D. Fla., March 2, 2016). The court found that the party had failed to take "reasonable steps" under **Rule 37(e)** to preserve ESI by engaging in egregious conduct and that the ESI could not be restored. The court also found that the party acted with "intent to deprive," thus permitting the court to presume the missing ESI was unfavorable in a bench trial.

11. **Bry v. City of Frontenac** [2015 WL 9275661] (E.D. Miss. Dec. 18, 2015). A failure to retain dash camera data was not santionable because of qualified police immunity. The court also stated that remedies under **Rule 37(e)** were not available because there was also no evidence of intent to deprive.

12. **Bruner v. American Honda** [2016 WL 2757401] (May 12, 2016). The court ordered a (belated) use of a litigation hold because "a party has a duty to preserve ESI if that party "reasonable anticipates litigation," **citing Rule 37(e).**

13. **CAT3 v. Black Lineage** [2016 WL 154116](S.D. N.Y. Jan. 12, 2016)(Francis, M.J.)[Case dismissed & Motion withdrawn, 2016 WL 1584011]. Given the failure to take reasonable steps and the inability to restore challenged ESI, Plaintiffs were precluded **under Rule 37(e)(1)** from relying on their altered version of lost email which caused legal prejudice by "obfuscate[ing]" the record by placing authenticity of both original and subsequently produced email at issue. Attorneys' fees were also awarded because of the economic prejudice of "ferreting out" the malfeasance and seeking relief. The measures were "no more severe than necessary" under **(e)(1)** to cure prejudice. While **Rule 37 (e)(2)** also applied because the party "acted with intent to deprive," drastic measures are not mandatory under **(e)(2)** or inherent powers. If Rule 37(e) had been inapplicable, the court could have imposed sanctions because of "bad faith" conduct pursuant to inherent power. The court also described the rule as more lenient with respect to sanctions and found it just and practicable to apply it.

14. **Coale v. Metro-North Railroad** [2016 WL 1441790] (D. Conn. April 11, 2016). In an FELA case involving the impact of missing substances in a slip and fall case, the court noted that **Rule 37(e)** applies only to ESI and does not impact the court's inherent sanctioning authority when spoliation of tangible evidence is at issue. Accordingly, the court applied *Residential Funding* in a case involving loss of substances. While a "self-imposed obligation to preserve evidence" for internal purposes does not create an automatic duty to preserve that evidence for litigation, the court concluded that it was on notice that it that the fruits of its investigation may be relevant to future litigation and should have been preserved.

15. [STATE case] **Cook v. Tarbert Logging** [190 Wash. App. 448, 360 P.3d 855] (C.A. Wash. Oct. 1, 2015). In state court action discussing nature of the duty to preserve, Court of Appeals cited to then-proposed **Rule 37(e)** as transmitted to Congress by the Supreme Court [Proposed Amendments to the FRCP, 305 F.R.D. 457, 467-468 (2015)] to illustrate its point that by acknowledging a federal common law duty, in contrast to state courts, "[t]he federal courts have been able to avoid dealing with state substantive law in making spoliation rulings in diversity cases by viewing such rulings as evidentiary in nature and thereby not subject to the Erie doctrine."

16. **Core Laboratories v. Spectrum Tracer Services** [2016 WL 879324] (W.D. Okla. March 7, 2016). In action for damages from appropriation of trade secrets, the failure to preserve emails at the time of switching to a new email service was said to

have caused "prejudice' under **Rule 37(e)(1)** because it deprived the party of all information about certain issues in those emails. However, the court ordered an adverse inference jury instruction that the lost email would have been unfavorable without also finding an "intent to deprive." The court selectively quoted from *Turner v. Public Service*, 563 F.3d 1136, 1149)(10th Cir. 2009) implying that a showing of prejudice is the only factor that is relevant to entitlement of "spoliation sanctions." The opinion is ambiguous as to whether or not reasonable steps were taken.

17. **CTB v. Hog Slat [2016 WL 1244998] (E.D. N.C. March 23, 2016).** Adverse inference instruction was recommended because of "willful" destruction of underlying data from Survey Monkey (*13-14). Although **Rule 37(e) not mentioned,** nor was "intent to deprive" found, a footnote stated that the amended rules applied because "none of the changes in the amendments" affect the resolution of the motions. The finding of willfulness was because of "the manifest relevance of this evidence." **[NOTE: Case also included in Appendix B due to ambiguity].**

18. **DVComm v. Hotwire Communications** [2016 WL 6246824] (E.D Pa. Feb. 3, 2016). Permissive adverse inference jury instruction awarded under **Rule 37(e)(2)** because the destruction of emails was done with "intent to deprive," applying five additional factors as part of assessment, despite a lack of bad faith. Party failed to take reasonable steps and the lost ESI could not be restored or replaced. Since Rule 37(e)(2) applied, it did not need to examine its ability to impose additional non-monetary sanctions based on its inherent power, which "without limitation" also applies. (¶55). The Court rejected the conclusion in CAT3 that a higher standard of proof was required for sanctions under Rule 37(e) since analysis of the state of mind was not unusual, applying a higher standard might allow a spoliator to benefit and the party was only seeking an adverse inference. (¶51).

19. **Ericksen v. Kaplan** [2016 WL 695789](D. Md. Feb. 22, 2016). District Judge adopted Magistrate Judge's report recommending sanctions for use of "CCeaner" and "Advance System Optimizer" shortly before a scheduled forensic inspection to determine if certain ESI had been created by Plaintiff. The Order precluded reliance on challenged email and letter under **Rule 37(e)(1)** and permitted defendants to present evidence relating to the loss to the jury and ordered payment of reasonable attorney fees, perhaps under **Rule 37(a).** The measures would "cure the prejudice" created by the loss of evidence by eliminating any risk that the email and letter be deemed authentic. [The Magistrate Judge concluded [under pre-Rule 37(e) principles] that the party "willfully"[but not in bad faith] ran the software despite knowing some ESI could be lost. [2015 WL 6408180]].

20. **Emmanuel Palmer v. Ryan Allen** [2016 WL 5402961] (E.D. Mich. Sept. 28, 2016). Rule 37(e) applied to alleged destruction of video in prisoner case (it was later found), noting that *Applebaum* (831 F.3d 740 (6th Cir. 2016)) and *Konica Minolta* applied the new rule to cases initiated before the rule became effective because the "spirit and principles underlying them have not materially changed in a manner adverse to [the moving] party."

21. **Feist v. Paxfire** [2016 WL 4540830] (S.D. N.Y. Aug. 29, 2016). In action seeking statutory and actual damages under the Wiretap Act, where the court purported to apply Rule 37(e), the court barred a party from asserting evidence in opposition to a summary judgment motion or at trial. The court found it was not reasonable for a sophisticated plaintiff to utilize a "cleaner" after it filed suit, and while it "does not conclude that [the party] acted intentionally to deprive" she must "bear the risk" of running the cleaner and the court would "presume" that any missing cookies would have been "unfavorable." It also precluded the party from arguing "that statutory damages are to be awarded in this case."

22. **Fiteq. v. Venture Corp**.[2016 WL 1701794] (N.D. Cal. April 28, 2016) Rulings on pretrial motions in a dispute over an operating agreement relating to a Singapore efforts involving credit cards did not result in measures under **Rule 37(e)** because missed email of an executive was "restored or replaced" once the employees former computer was located. The moving party failed to prove that other responsive documents ever existed and duplicates were produced by other parties to whom they had been sent. The Court acknowledged that it was foreclosed from use of inherent authority.

23. First American Title v. Northwest Title [2016 WL 4548398] (D. Utah Aug. 31, 2016). In action against former employees who formed a competing business, hiring other former employees, the court methodically applied **Rule 37(e)** to several losses of ESI. In some example, relief was denied since it was not shown that the ESI could not be restored through additional discovery or where no prejudice was shown. In others, it was applied when the new enterprise failed to take reasonable steps to maintain documents and thumb drive brought over by ex-employees. As to those materials, the court permitted the introduction of evidence and argument under **(e)(1) before the jury,** but since there was no evidence of intent to deprive, denied evidence preclusion, an adverse inference, or monetary sanctions under subdivision **(e)(2)**. **In dicta, the court noted that while an oral litigation hold was not per se violative of Rule 37(e), it was problematic.**

24. **First Financial Security v. Freedom Equity Group** [2016 WL 5870218] (N.D. Cal. Oct. 7, 2016). In an opinion mixing **Rule 37(e)** measures with those under **Rule 26(b),** the court recommended a permissive jury instruction against a newly formed entity of former employees for actions of its "agents" in deleting text messages under **Rule 37(e)** because it inferred a shared intent of the "agents" of the defendant to deprive the moving party of the use of the deleted text messages. The failure to produce a database in native format pursuant to a series of court orders was sanctioned by a permissive inference under **Rule 37(b)** by allowing a jury to infer particular facts needed in the claim on the merits, primarily on procedural grounds to punish delay and avoidance of orders, without finding bad faith. The court does not acknowledge an earlier Minnesota decision involving the same parties and some of the same issues. First Financial Security v. Lee, 2016 WL 881003 (D. Minn. March 8, 2016)(resolving motions without citing Rule 37(e)(listed in Appendix B).

25. **Fleming v. Escort** [2015 WL 5611576] (D. Idaho Sept. 22, 2015). In authorizing an adverse inference for failure to preserve samples of products using challenged source codes illustrating changes at issue in patent litigation, the court acknowledged that **Rule 37(e)** was drafted to deal with costly and burdensome efforts to preserve, but questioned unilateral decisions not to preserve on that basis, which it sanctioned, applying pre-enactment Ninth Circuit authority finding spoliation merely because of failure to preserve, without a requirement of culpability.

26. **Friedman v. Phila. Parking Auth.** [2016 WL 6247470](E.D. Pa. March 10, 2016)(Opinion); see also 6246814 (Order). **Rule 37(e)** was not applicable for delay in production of ESI since there was no showing that ESI was "lost" (¶69) nor that the party acted with an "intent to destroy" since negligence or gross negligence is insufficient (¶73). However, while court had power to act under inherent authority to remedy litigation misconduct ((¶75), attorney's fees were awarded under **Rule 37(a)** as a more "tailored" remedy (¶76). After additional discovery, the party "may move for evidentiary rulings, short of an adverse inference, relating to the failure to preserve" for a specified period. "Absent prejudice," the court could not define the scope of the evidence to be admitted or argued to the jury. (¶85). The Court also rejected the conclusion in CAT3 that a higher standard of proof was required for sanctions under Rule 37(e) since analysis of the state of mind was not unusual, applying a higher standard might allow a spoliator to benefit and the party was only seeking an adverse inference. (¶58-59).

27. **G.P.P v. Guardian Prot. Products** [2016 U.S. Dist. LEXIS Aug. 8, 2016] (E.D. Calif.) Sanctions denied as to email not lost, since under **Rule 37(e)** it can be restored or replaced, but further discovery ordered as to non-email ESI identified so as to determine if it is in fact lost, which would implicate Rule 37(e).

28. **Global Material Technologies v. Dazheng Metal Fibre** [2016 WL 4765689, at *9] (N.D. Ill. Sept. 13, 2016). In U.S. action against Chinese steel fiber metal supplier whose claims were limited to a trade secret claim by the preclusive impact of Chinese court proceedings, the Court entered a default judgment on liability (leaving damages for trial) under **Rule 37(e)** because the court concluded that when the parties "discarded one source of electronic evidence and failed to preserve others, they did so deliberately and in order to prevent [the moving party] from obtaining that evidence and using it" in the ligation. The court did not find it necessary to make a finding of prejudice because it was not required under **Rule 37(e)(2) (*10)** and it applied Circuit standards (in addition) in finding that default was appropriate because lesser sanctions were not adequate to reflect the seriousness of the egregious conduct.

29. **GN Netcom v. Plantronics** [2016 WL 3792833] (D. Del. July 12, 2016). After concluding under **Rule 37(e)** that a senior executive of a party had failed to take reasonable steps to preserve emails which could not be restored or replaced, despite major corporate efforts to meet its obligations, the Court imposed monetary sanctions involving fees and expenses under subdivision **(e)(1)** to partially address prejudice,

ordered payment to the moving party of a $3M **punitive monetary sanction** (three times the penalty imposed by the party on its executive who deleted the emails at issue), use of a permissive adverse inference instruction under **Rule 37(e)(2)** and expressed a willingness to impose evidentiary sanctions if warranted as the case progressed to trial. The court found that substantial deletions by the executive were "the opposite of having taken reasonable steps" and that the entity could have done more. The conduct was attributable to the employer, and was "buttressed" by actions of counsel and the party in the initial refusal to acknowledge retention of an expert (Stroz) and permit them to complete an analysis of the missing email. (*7-8) The court applied Circuit law to shift the "heavy burden to show lack of prejudice" to the bad faith spoliator, which it did not meet. (*9-12)

30. **Gonzalez-Bermudex v. Abbott** [2016 WL 5940199, at *25] (D. P.R. Oct. 9, 2016). In an Amended Opinion involving an employment claim, the court cited **Rule 37(e)** in provisionally denying an adverse inference for failure to preserve ESI after finding threshold requirements were met because there were not yet enough facts of record to make a finding of "intent to deprive." The court held that it would be "revisited" at trial after presentation of evidence. It replaced an initial opinion dated the same day (which is still available on WESTLAW) under which the court applied First Circuit case law in ordering mandatory inference jury instruction without finding a failure to take reasonable steps or intent to deprive. [2016 WL 5899147 (D. P.R. Oct. 9, 2016)].

31. **Hawley v. Mphasis** [302 F.R.D. 37] (S.D. N.Y. July 22, 2014). Pre-effective date description of **Rule 37(e)** as moving away from a negligence standard for spoliation under which "any intentional destruction suffices" and which need not be directed at the spoliation "to the other party's detriment." (*47).

32. **Henry Schein v. Cook** [2016 WL 3212457] (N.D. Cal. June 10, 2016). A court cited Rule **37(e)** and Rule 26(a) as a basis for an *ex parte* preservation order and a request to order a mirror image of a former employee in a trade secrets case, deeming it a "reasonable request" The court ordered the party to avoid "altering, damaging, or destroying any evidence, electronic or otherwise, that is related to this litigation."

33. **HM Electronics v. R.F. Technologies** [2015 WL 4714908, at *30] (S.D. Cal. Aug. 7, 2015). Pre-effective date recommendation that the District Court impose an adverse inference instruction and other sanctions under Rule 37(b) and inherent powers because the conduct was in breach of discovery orders. The court opined that the result would have been the same if **Rule 37(e)** had been applied. The recommendation was terminated as moot by virtue of settlement, which also vacated the sanctions [2016 WL 1267385, n. 4 (S.D. Cal. March 15, 2016)].

34. **In re Bridge Construction Services** [2016 WL 2755877] (S.D. N.Y. May 12, 2016). **Rule 37(e)** is not applicable to loss of physical property. It has "changed the rules" and no adverse inference is available for losses of ESI unless the party that destroyed the ESI acted with intent to deprive another party of the use in the litigation.

35. **In re Ethicon** [2016 WL 5869448] (S.D. W. Va. Oct. 6, 2016). In follow-up to earlier decision in the MDL adverse to all plaintiffs prior to 2015 amendments, a court denied a motion by one plaintiff under **Rule 37(e)** for additional sanctions under either **(e)(1)**(no prejudiced shown) or **(e)(2)**(no intent to deprive) because of the loss of custodial file. The court held the rule applicable because the threshold requirements outlined in the rule were satisfied and the movant had demonstrated that not "all" of the emails and electronic documents were restored or recovered by other means. The finding of no prejudice to "her case as a whole' was made despite finding that the movant was burdened from having to piece together information from various sources. Similar decisions were reached as to the same custodial file in 2016 WL 5869449 and 5858996 involving two other individual plaintiffs on the same date.

36. **Internmatch v. Nxbigthing** [2016 WL 491483] (N.D. Cal. Feb. 8, 2016). Declining to find allegations of a power surge credible, a court ordered adverse inference instruction under its inherent authority for willful failure to preserve ESI. In footnote 6, it stated that whether it must make findings under **Rule 37(e)** before exercising its inherent authority "has not been decided," but nonetheless also found that the party "acted with the intent to deprive."

37. **Konica Minolta Business Solutions v. Lowery Corporation** [2016 WL 4537847] (E.D. Mich. Aug. 31, 2016). In a case involving potential spoliation of emails by former employees who formed a competitive firm, the court ordered more discovery to determine if that reasonable steps had not been taken, since the Rule would not be applied if they had since "[s]anctions are not automatic." The court also ordered more discovery to determine if there was an ability to restore or replace the lost information.
    The opinion is a pithy, well-written playbook outlining the "four predicate elements" to use of **Rule 37(e),** and includes a finding that it was just and practicable to apply the new Rule (no changes in a manner "adverse" to the party).

38. **Learning Care v. Armetta** [315 F.R.D. 433] (D. Conn. June 17, 2016). Court declined to apply **Rule 37(e)** because the issue had been raised in September, 2015 at a time when Second Circuit authority would not have barred an adverse inference for negligence. The negligent wiping of hard drive of laptop was sanctioned by an award of reasonable attorney's fees to deter the party from "doing it again" which was deemed proportionate to the prejudice involved.

39. **Leroy Bruner v. American Honda** [2016 WL 2757401] (S.D. Ala. May 12, 2016). The duty to preserve inherent in **Rule 37(e)** was invoked to justify an order requiring a litigation hold to prevent the deletion of email.

40. **Lexpath Techs. Holdings v. Brian R. Welch** [2016 WL 4544344] (D. N.J. Aug. 30, 2016). In action by former employer against employee now in competition, the court granted sanctions after finding that "spoliation" had occurred under Circuit law and ignoring the requirement to show that the loss occurred because of a lack of

"reasonable steps." It determined that spoliation resulted from an "intent to deprive" and under **Rule 37(e)2)** the court expressed an intention to let the jury presume that the missing information was unfavorable.

41. **Living Color v. New Era Aquaculture** [2016 WL 1105297](S.D. Fla. March 22, 2016). In a thorough and methodical opinion applying Rule 37(e) to dispute with a sympathetic former employee who failed to disable the auto-delete feature of his cell phone after litigation began, no measures were found to be available under either **Rule 37(e)(1)** or **(2).** (However, the court appears to equate a finding that some ESI was lost with a finding that there had been a failure to take reasonable steps. (**at *5**). The prejudice was minimal from deletion of text messages, the bulk of which were secured from recipients, and there was no direct evidence of an intent to deprive. It was not a nefarious practice to delete text messages as soon as received or thereafter under the circumstances. The court found that the former employee's description of the missing content as unimportant was credible and the court noted that the abundance of preserved information was sufficient to meet the needs of the moving party, citing Committee Note to Rule 37(e)).

42. **Marquette Transportation v. Chembulk** [2016 WL 930946] (E.D. La. March 11, 2016). **Rule 37(e)** was not applicable since missing data was ultimately produced because it had been downloaded onto a DVE/CD-ROM which was later secured. However, **Rule 37(e)** barred a request for costs of expenditures for expert during period before the full data set was recovered because of the failure to disclose in initial disclosures under Rule 26(a) or to supplement under Rule 37(c). The court held that **Rule 37(c)** was inapplicable "since the matter involves VDR data, which is electronically stored information ("ESI"), FRCP 37(e) applies."

43. **Marshall v. Dentfirst** [313 F.R.D. 691](N.D. Ga. March 24, 2016). No measures were available under **Rule 37(e) (or if the Rule did not apply, under Eleventh Circuit standards, which are "substantially similar")** for failure to retain browsing history or emails of terminated employee since there was no evidence that they existed when the duty to preserve attached after filing of an EEOC charge. Even if they had existed when the computer was wiped and recycled there was no evidence that the party acted in "bad faith" or with "intent to deprive" under **Rule 37(e)(2).** Moreover, there was no prejudice from their loss since there was no evidence it was relied upon in the termination process and the party can depose them on the topic. **Rule 37(a)(5)(A)** did not allow award of attorney fees and expenses since the motion was not granted (n.9).

44. **Marten Transport v. Plattform Advertising** [2016 WL 492743](D. Kan. Feb. 8, 2016) No measures were available under **Rule 37(e)** because the duty to the browsing history of an employee's former computer upon movement of the employee to a new work station did not arise at the outset of the lawsuit. The party was not under notice at that time that that it would be at issue in the suit and the company practices followed in reassigning the computer and recycling were evidence of

routine, good faith operations to be considered, per **Rule 37(e) Committee Notes**. (*9) The court noted that while the employee was a key player, the party had earlier taken reasonable steps to preserve her emails and other ESI prior to the time she moved to a new work station. It refused to use a "perfection standard" or "hindsight" in determining the scope of the duty to preserve. (*10).

45. **Martinez v. City of Chicago** [2016 WL 3538823] (N.D. Ill. June 29, 2016)(Dow, J.) Adverse inference instruction under existing Seventh Circuit principles denied because the plaintiff failed to meet the burden of showing police videos (which had been uploaded and later deleted) had been destroyed in "bad faith." The court noted but refused to rule on the interaction between Rule 37(e) and Seventh Circuit rulings on adverse inferences because the Circuit had not yet ruled [at *24] ("the Committee [Note] is silent on how the amendment impacts presumptions based on document retention policies"). It noted that it had authority to admit evidence concerning the loss and its likely relevance but since the party had only sought an adverse inference, it had "no occasion" to determine if a less severe remedy might be available. [n.11].

46. **Matthew Enterprise v. Chrysler** [2016 WL 2957133] (N.D. Cal. May 23, 2016). **Rule 37(e)(1)** measures were applied after a "lackadaisical" preservation effort where no effort was made by plaintiff to have outside vendor retain communications (which were deleted after 2 years) and previous email was not retained when switching email providers. These efforts did not qualify for the "genuine safe harbor" under the Rule for parties that take "reasonable steps." Prejudice existed because lost customer communications "could" have contained information whose loss denied Chrysler the ability to undercut statistical evidence by anecdotal evidence of customer communications. **Rule 37(e)(2)** measures were inapplicable because of the absence of "intentional spoliation." As a remedy, Chrysler would be allowed to use evidence of communications post-price discrimination period, to support arguments as to reasons for choosing dealership and present evidence and argument about spoliation of communication lost if Plaintiff offers testimony. Moreover, "if the presiding judge deems it necessary," it can provide instructions to assist the jury in evaluation. The court refused to assess the conduct under **Rule 37(b)** because the issue "is spoliation and not compliance with" the court's order on motion to compel.")(n. 37 & 47).

47. **Mazzei v. The Money Store** [2016 WL 3902256] (**2d Cir.** July 15, 2016). The Second Circuit affirmed denial of an adverse inference noting that "under the current" **Rule 37(e)**, it could be granted only upon finding that the party acted with an intent to deprive and that the court "specifically found that defendants did not act with such intent." The Panel noted that *Byrnie v. Town of Cromwell* was "superseded in part by Fed. R. Civ. P. 37(e)(2015)." [The lower court (Koeltl, J.) had found that although the party willfully failed to preserve, there was "no evidence of bad faith 'in the sense that the defendants were intentionally depriving the plaintiff of information for use in this litigation." [internal quotes omitted]. 308 F.R.D. 92, 101 (S.D.N.Y. May 29, 2015).

48. **McFadden v. Washington Area Transit Authority** [2016 WL 912170] (D.D.C. March 7, 2016). Court noted that removal of website posting [relating to soliciting business in District] could have been found to have resulted from "intent to deprive" and sanctioned under **Rule 37(e)(2).**

49. **McIntosh v. US** [2016 WL 1274585 (S.D.N.Y. March 31, 2016). Court refused to apply **Rule 37(e)** to deletion of video surveillance tape because it would make no sense to apply it to a case briefed before the new rules came into effect.

50. **Newman v. Gagan** [2016 U.S. Dist. LEXIS 123168, at *20-21] (N.D. Ind. May 10, 2016). In a case finding bad faith failure to preserve by a preponderance of the evidence but noting that it did not rise to the level of clear and convincing evidence under Circuit authority to grant dismissal under inherent power, the court recommended adverse inference. It refused to award attorney's fees as well, noting that if **Rule 37(e)** had applied, it "does not specifically list attorney's fees as an available sanction." It held, apparently, that the Rule was inapplicable because the motion for sanctions and the actions involved took place before the amendments took effect on December 1, 2015.

51. **Ninoska Granados v. Traffic Bar** [2016 WL 9582430 (S.D. N.Y. Dec. 30, 2015) Motion for sanctions dismissed as premature without showing that missing evidence existed and that it was relevant. To the extent it was ESI, Judge Francis implied that **Rule 37(e)** would apply rather than **Rule 37(b),** despite the presence of a discovery order which, under the court's view, applied to spoliation which occurred before the order was issued. (at n.4 & 6). The court also refused to apply its inherent power because of a lack of bad faith.

52. **Nuvasive v. Madsen Medical** [2016 WL 305096] (S.D. Cal. Jan. 26, 2016) Chief District Judge vacated his earlier decision to impose a permissive jury instruction [2015 WL 4479147] at an upcoming trial because **Rule 37(e)** applied and there was no finding that the party had "intentionally" failed to preserve text messages so they could not be used in the litigation. Court had already decided to allow both sides to present evidence regarding the other side's failure to preserve, presumably to address the prejudice from mutual failures to preserve. The court quoted the Committee Note to demonstrate that this was a "remedy or recourse" available under the Amended Rule. The court stated that it "will instruct the jury it can consider such evidence along with all other evidence in the case in making its decision."

53. **O'Berry v. Turner** [2016 WL 1700403](M.D. Ga. April 27, 2016) A mandatory adverse inference was imposed under **Rule 37(e)** because it was "beyond the result of mere negligence" to make a single hard copy of downloaded ESI without taking further steps to preserve. The copy was placed in a file folder, ultimately moved to a new building and not reviewed until much later, when it was found missing. The court concluded that all the facts "when considered together" lead the court to but "one conclusion – that [defendants] acted with the intent to deprive Plaintiff of the use of this information at trial." The "minimal" effort undertaken to preserve was a

failure to take "reasonable steps." There no discussion of the "prejudice," if any, caused by loss of the data.

54. **Official Committee of Unsecured Creditors of Exeter Holdings**, 2015 WL 5027899 (E.D. N.Y. Aug. 25, 2015). In pre-effective date decision, the court noted that Rule 37(e) would "scale back some of the more stringent guidance offered in Residential Funding" (n. 19) It also labeled requests for "punitive monetary sanctions" and "attorneys' fees and costs" as "two separate and distinct inquiries." (n. 25).

55. **Orchestratehr v. Trombetta** [2016 WL 1555784] (N.D. Tex. April 18, 2016). No adverse inferences available under **Rule 37(e)** where former employee deleted emails before resigning since no evidence of destruction in bad faith or with the requisite intent to deprive Plaintiffs of their use in the litigation.

56. **Palmer v. Allen** [2016 WL 5402961] (Sept. 28, 2016). Motion for sanctions under Rule 37(e) for destruction of jail video by non-party dismissed because of the dismissal of the defendant from the action on the merits via summary judgment.

57. **Puente Ariz. v. Arpaio** [2016 U.S. Dist. LEXIS 104883] (D. Ariz. August 9, 2016). Court applied circuit spoliation standards, not Rule 37(e), because it does not apply "because the evidence allegedly lost [notes taken during a meeting] is not ESI."

58. **Richard v. Inland Dredging** [2016 WL 5477750] (W.D. La. Sept. 29, 2106). Court refused to reach request for adverse presumption or inference under Rule 37(e)(2) because the four predicate elements of the Rule were not met because there was no showing that digital copies of the photographs existed which could have been lost or should have been preserved. In addition, even if (e)(2) applied, there was no showing that the sinking of the barge on which the laptop on which they were stored was lost because of actions intended to destroy or hide evidence.

59. **Roadrunner Transportation v. Tarwater** [642 Fed. Appx. 759] (**9th Cir.** March 18, 2016). **Ninth Circuit** affirmed default judgment and attorney's fees award for willful destruction of emails and files on laptop in a case where the court had ordered the party to preserve all data on its electronic devices. The court noted that the district court findings would lead to the conclusion under Rule 37(e) that the party acted with the intent to deprive and the district "even if" it were just and practicable to apply the rule. **No mention was made of Rule 37(b).**

60. **Robertson v. USAA** [2016 WL 5864431] (S.D. Fla., Sept. 22, 2016). **Rule 37(e)** measures not available regarding failure to preserve computer notes re application for renewal of insurance because no evidence of intent by defendants to deprive plaintiffs of the information or "otherwise acted in bad faith."

61. [State Case] Sarach v. M&T Bank [2016 WL 3353835] (N.Y. App. Div 4th Dept. June 17, 2016). In a thoughtful dissent to a New York case granting an adverse inference based on mere negligence, the Judge explained that "[o]ne of the reasons"

that Federal **Rule 37(e)** was amended to bar use of negligent or even grossly negligent behavior involving loss of ESI was "to address business concerns about over-preservation of ESI."

62. **Saller v. QVC** [2016 WL 4063411] (E.D. Pa. July 29, 2016). In action by former employee based on discrimination based on disability and denial of FMLA where moving counsel did not "even allude" to **Rule 37(e)**, court rejecting the intimation that spoliation had occurred since it was "far from certain" that the documents (or ESI from which the documents were generated) were lost because of Defendant's failure to take reasonable steps since they were overwritten before the litigation began.

63. **Schein v. Cook** [2016 WL 3212457] (N.D. Cal. June 10, 2016). Court cited **Rule 37(e)** in connection with an ex parte preservation order.

64. **SEC v. CKB168 Holdings** [2016 U.S. Dist. LEXIS 16533](E.D. N.Y. Feb. 2, 2016). A court withdrew its earlier recommendation for an adverse inference in light of **Rule 37(e)** since the deficiency could not be said to the result of an "intent to deprive" under the record before the court. However, if the case goes to trial and the SEC makes the requisite showing of intent associated with the loss of ESI, the SEC was authorized to renew its motion under the Rule.

65. **Shaffer v. Gaither** [2016 U.S. Dist. LEXIS 118225] (W.D. N.C. Sept. 1, 2016). Court refused dismiss an action **under Rule 37(e)(2)** where text messages lost when cell phone dropped in bathroom since court could not conclude the party acted with an intent to deprive. To cure prejudice involved, the party can examine witnesses who read the texts in front of jury, which will be "free to decide whether to believe that testimony." Court found that party had failed to take reasonable steps to preserve **under Rule 37(e)** by printing out the texts, making an electronic copy or sequestering the phone. The court did not rule out giving a spoliation or modified spoliation instruction at trial and allowed the moving party to "explore" in front of the jury circumstances surrounding the destructions of the texts.

66. **Stinson v. City of New York** [2016 WL 54684] (S.D.N.Y. Jan. 5, 2016). Court refused to apply **Rule 37(e)** because motion was fully submitted prior to effective date of new Rule. The court granted a permissive adverse inference based on gross negligence without finding any prejudicial impact and noted that the amended rule set "new standards" for federal courts but raised a thorny issue of application where a party fails to preserve both ESI and hard-copy evidence.

67. **Terral v. Ducote** [2016 WL 5017328 (W.D. La. Sept. 19, 2016). A failure to preserve surveillance video in a prisoner excessive force action pursuant to a routine retention policy did not meet the moving party's burden to show a failure to take reasonable steps under **Rule 37(e)**.

68. **Thomas v. Butkiewicus** [2016 WL 1718368] (D. Conn. April 29, 2016). Court refused to apply **Rule 37(e)** to loss of video surveillance tape (clearly ESI) as unjust

since the issue would likely have been resolved before the effective date if new counsel had not been substituted. The court described Rule 37(e) as "procedural" and noted that it "overrules" Second Circuit precedent on state of mind required for an adverse inference.

69. **Thomley v. Bennett** [2016 WL 498436] (S.D. Ga. Feb. 8, 2016). Court refused to apply **Rule 37(e)** where loop-type video of prison incident was recorded over before there was demand for its production at a time when they had no reason to know it should be preserved. In n.18, the court also stated that there was no showing that the criteria of (e)(1) was met or that defendants had acted with an intent to deprive.

70. **Thurman v. Bowman** [2016 WL 4240050] (W.D.N.Y. August 10, 2016). The District Court applied Circuit case law in affirming that the movement of Facebook posts to "private" was not sanctionable because the contents remained available. A failure to institute a litigation hold did not alone establish the relevance of any missing ESI as a matter of law, since it occurs only "in the most egregious cases," which this case was not. In a footnote, it noted that the Magistrate Judge applied current law because "neither party advocated for retroactive application" of Rule 37(e). **The Magistrate's had commented [2016 WL 1295957 (March 31, 2016)] that the outcome would have been the same since the deletion did not cause prejudice nor was it done with an intent to deprive**.

71. **U.S. v. Ind. Univ. Health** [2016 WL 4592210] (S.D. Ind. Sept. 2, 2016). In case not involving spoliation, the court cited **Rule 37(e)(2)** as an example of where "the Court-as-factfinder is free to evaluated the credibility of, and assign weight to, all offered evidence."

72. **U.S. v. Safeco** [2016 WL 901608] (D. Idaho March 9, 2016). Court exercising inherent power refused to sanction loss of tangible property (notebook) because the court was not persuaded conduct was "willful or done in bad faith." The court noted that **Rule 37(e)** requires a finding of "bad faith intent" but that it applies only to ESI, not missing tangible evidence.

73. **US v. Woodley** [2016 WL 1553583] (E.D. Mich. April 18, 2016). **Rule 37(e)** does not apply to allegations of government spoliation of surveillance video in a criminal case.

74. **Virtual Studios v. Stanton Carpet** [2016 WL 5339601] (N.D. Ga. June 23, 2016). Court applied **Rule 37(e)(1)** but not (e)(2), to a case where reasonable steps were not taken by the plaintiff to preserve emails which would have been helpful in resolving disputed testimony about the terms of a contractual relationship. The court permitted the defendant to introduce evidence concerning the loss of emails and argue to the jury about "the effect of the loss."

75. **Wadelton v. Department of State** [2016 WL 5326402, at *4 (Sept. 22, 2016). The duty to preserve in anticipation of litigation under **Rule 37(e)**'s trigger provisions are

inapplicable in regard to FOIA requests since there is no statutory requirement to preserve ESI or documents prior to receipt of a FOIA request.

76. **Wichansky v. Zowine** [2016 U.S. Dist. LEXIS 37065] (D. Ariz. March 22, 2016)(Campbell, J.). Court declined to apply **Rule 37(e)** in regard to motions for sanctions involving spoliation of audio and videotapes where little prejudice and marginal relevance. The court denied an adverse inference because the court did not wish to put its "thumb on the scale," but parties were allowed to present admissible evidence on the topic to overcome any prejudice suffered from loss.

77. **Zbylski v. Douglas County School District** [154 F.Supp.3d 1146] (D. Colo. Dec. 31, 2015). In case involving missing hard copy notes and documents, court applied the language from the Committee Note to **Rule 37(e)** in assessing onset of the duty to preserve as measured from the time of notice of potential litigation but not necessarily the specific litigation before the court.

APPENDIX B
(Cases Ignoring Rule 37(e) that should have applied it)(includes "digital" recordings)

1. Benefield v. MStreet Entertainment [2016 WL 374568] (M.D. Tenn. Feb. 1, 2016). Court imposed "spoliation instruction" for failure to preserve text messages that "should have been preserve" **without mentioning Rule 37(e**) or making an finding of elevated culpability. **Rule 37(e) should have been applied; result would be different.**

2. Botey v. Green [2016 WL 1337665] (M.D. Pa. April 4, 2016). Adverse inference denied **under Pennsylvania state law without mention of Rule 37(e)** for loss of documents and data records since the merely careless conduct involved did not reach intentionality. **Rule 37(e) should have been applied; unlikely different result.**

3. Brice v. Auto-Owners Insur. [2016 WL 1633025] (E.D. Tenn. April 21, 2016). In insurance recovery case, entry of a summary judgment against plaintiff based on negligent deletion of text and emails was too "harsh" but court did authorize use of an adverse inference under Sixth Circuit authority at trial without mentioning Rule 37(e). **Rule 37(e) should have been applied; result would be different.**

4. Browder v. City of Albuquerque [2016 WL 3946801] (D. N.M. July 20, 2016)("electronic data"); [2016 WL 3397659, at *8 and n. 4] (D. N.M. May 9, 2016)(text messages on cell phone). In the July decision involving loss of "electronic data, such as the video footage here" by former police officer after accident, court sanctioned without mentioning Rule 37(e) because of "questionable information management" practices [citing Phillip Adams, 621 F. Supp. 2d 1173, 1193 (D. Utah 2009) and allowed the plaintiff to present evidence of the spoliation since lacking bad faith and only minimal prejudice. In the May ruling dealing with loss of cell phone lost after several years court allowed jury to "make any inference they believe appropriate" without mentioning Rule 37(e) because of failure to issue litigation hold (discussing *Pension Committee* and *Chin*) because it had "reason to suspect" there was consciousness of a weak case. **Rule 37(e) should have been applied; result would likely to have been the same.**

5. Buren v. Crawford County [2016 WL 4124092] (E.D. Mich. Aug. 3, 2016). Assessment of loss of audio recordings from lapel microphone made without any mention of Rule 37(e). Court orders evidentiary hearing to clarify questions of fact, which it lists. **Rule 37(e) should have been applied; result would likely to have been the same.**

6. Carter v. Butts County [2016 WL 1274557] (M.D. Ga. March 31, 2016). Adverse inference granting rebuttable presumption and evidence preclusion awarded under Eleventh Circuit authority **without mentioning Rule 37(e)** for destruction of

electronic copy of crime report and downloaded photos by police officer acting in bad faith. Attorney who signed responses sanctioned under **Rule 26(g). Rule 37(e) should have been applied; result would likely to have been the same.**

7. Confidential Informant v. USA [2016 WL 3980442] (U.S. Ct. of Claims, July 21, 2016). In assessing alleged spoliation of tape recording (which Gov't denied existed), court uses Residential Funding inherent power logic, **without mentioning Rule 37(e). Rule 37(e) should have been applied; result would likely to have been the same.**

8. Cooksey v. Digital [2016 WL 5108199] (S.D.N.Y. Sept. 20, 2016)(Koeltl, J.)(without mentioning Rule 37(e), compliant seeking spoliation sanctions dismissed as frivolous where no evidence of destruction or prejudice when party accused of spoliation by removing accused (libel) article from website preserved a screenshot). **Court could and perhaps should have cited Rule 37(e) "reasonable steps" safe harbor, but since triggering is common law obligation, it was not essential to case.**

9. CTB v. Hog Slat [2016 WL 1244998] (E.D. N.C. March 23, 2016). Adverse inference instruction was recommended because of "willful" destruction of underlying data from Survey Monkey (*13-14). Although **Rule 37(e) not mentioned,** nor was "intent to deprive" found, a footnote stated that the amended rules applied because "none of the changes in the amendments" affect the resolution of the motions. The finding of willfulness was because of "the manifest relevance of this evidence." **[NOTE: Case also included in Appendix A because of ambiguity in footnote implying the rule had been applied].**

10. Dallas Buyers Club v. Doughty [2016 WL 1690090] (D. Ore. April 27, 2016, amended April 29, 2016 [as 2016 WL 3085907]). **Without citing to Rule 37(e),** court stated that jury will be permitted as an "evidence-weighing" matter to presume adverse information was contained on cell phone which was destroyed under Ninth Circuit authority which raises a presumption that missing information was adverse without a showing of bad faith. **Rule 37(e) should have been applied; result likely different.**

11. David Mizer Enterprises v. Nexstar Broadcasting [2016 WL 4541825] (Aug. 31, 2016). In breach of contract action where a hard drive had crashed before the filing of the lawsuit, there was no mention of Rule 37(2). **It would have made no difference had it been cited.**

12. Davis v. Crescent Electric [2016 WL 1637309] (D. S.Dak. April 21, 2016). In case where party sought sanctions for fabricating an email, the court, **without reference to Rule 37(e)** decided to leave it for the jury to determine, but urged the parties to consider an alternative to avoid delaying the trial on an issue peripheral to the issues in the case, given FRE 403. **Rule 37(e) should have been applied; unclear exact impact of Rule 37(e) had it been utilized.**

13. Dubois v. Board of County Comm. [2016 WL 868276] (N.D. Okla. March 7, 2016). Sanctions denied in case involving loss of surveillance video and photographs because of lack of evidence that parties acted in bad faith in losing or destroying them as required in Tenth Circuit. **Rule 37(e) should have been applied; result would likely to have been the same.**

14. EEOC v. Office Concepts [2015 WL 9308268] (N.D. Ind. Dec. 22, 2015). Court refused to sanction recycling of hard drive and deletion of email after termination of employee because even if the duty to preserve was triggered by notice of the EEOC policy in 29 CFR § 1602.14, since the emails were not material and the EEOC was not prejudiced because it had alternative sources. **No mention of Rule 37(e).** The court relied on Bracey v. Grondin, 712 F.3d 1012, 1019 (7th Cir. 2013)(no bad faith unless "for the purpose of hiding adverse information"). **Rule 37(e) should have been applied; result would likely to have been the same.**

15. Erhart v. Bofl [2016 WL 5110453](S.D. Cal. Sept. 21, 2016). In an action by whistleblower for retaliatory firing, the court refused to impose sanction in the form of a terminating sanction, adverse inference or monetary sanctions without mentioning **Rule 37(e)** because moving party had not suffered any meaningful prejudice from loss of ESI content on files which forensic examinations showed could largely be located elsewhere. **While Rule 37(e) should have been applied, the result would have been the same.**

16. Evans v. Quintiles Transnational [2015 WL 9455580] (D.S.C. Dec. 23, 2015) The court concluded that it was "not in a position to make" credibility findings and was "inclined" to provide the jury with guidance so they could determine if the alleged computer files ever existed and, if so whether the requisite degree of culpability existed**. Rule 37(e) was not mentioned. Rule 37(e) should have been applied; result would likely to have been the same.**

17. First Financial Security v. Lee [2016 WL 881003] (D. Minn. March 8, 2016). Failure to produce text messages and emails in violation of discovery order, including text messages lost through "accidental destruction," assessed under **Rule 37(b) without mention of Rule 37(e).** Court was unimpressed with argument that copies were available from third parties. **Rule 37(e) should have been applied because of allegations of ESI destruction; Rule 37(b) could have been precluded. An identical case in the N.D. Cal. subsequently applied Rule 37(e). First Financial Security v. Freedom Equity Group, 2016 WL 5870218 (N.D. Cal. Oct. 7, 2016)(without acknowledging earlier Minnesota case).**

18. Gibson v. C. Rosati [2016 WL 5390344] (N.D.N.Y. Sept. 27, 2016). Issue involving spoliation of five seconds of recorded video thought to have been inadvertently lost (it turned out it was not) resolved without reference to Rule 37(e). **Would have made no difference if had been cited.**

19. In re Abell [2016 WL 1556024] (D. Md. April 14, 2016). Final judgment and attorney's fees entered **without citation to Rule 37(e)** against parties who engaged in egregious misconduct involving spoliation of documents and ESI which was intended to deprive the Trustee and others of evidence. **Rule 37(e) should have been applied; result would likely to have been the same.**

20. In re: Ajax Integrated [2016 WL 1178350] (N.D. N.Y. March 23, 2016). Court analyzed motion for sanctions under Rule 37(b) **without mentioning Rule 37(e)** for deletion of file prior to forensic examination. Court decided to hold a separate evidentiary hearing to consider if sanctions were warranted. **Rule 37(e) should have been applied; would probably make a difference.**

21. Kazan v. Walter Kennedy, 2016 WL 6084934 (W.D. Wash. Oct. 18, 2016). Court found issue of spoliation of cell phone lost when it fell out of a boat on a fishing trip moot when in granted summary judgment in favor of party seeking sanctions for spoliation of the phone. **No mention was made of Rule 37(e),** but clearly the data on the phone, not the phone itself, was at issue. **Rule 37(e) would have made no difference, but the case highlights confusion over rule scope.**

22. Kristine Biggs Johnson v. Daniel Peay [2016 WL 4186956] (D. Utah Aug. 8, 2016). Loss of hard copy of missing electronic report not sanctioned sanction since not evidence of bad faith or actual prejudice, since the author's sworn statement is "a sufficient substitute for the document." **Excellent example of why Rule 37(e) should apply to both hard copy documents and ESI where same context exists.** Cf. *O'Berry v. Turner* [2016 WL 1700403] (M. D. Ga. April 27, 2016)(APPENDIX A).

23. LaFerrera v. Camping World RV Sales [2016 WL 1086082] (N.D. Ala. March 21, 2016). Adverse inference for loss of email denied in the absence of bad faith showing **without mention of Rule 37(e). Rule 37(e) should have been applied; result would likely to have been the same.**

24. Lexpath Techs. Holdings v. Brian R. Welch [2016 WL 4544344] (D. N.J. Aug. 30, 2016). In action by former employer against employee now in competition, the court granted sanctions after finding that "spoliation" had occurred under Circuit law and ignoring the explicit threshold requirements under **Rule 37** to show that the loss occurred because of a lack of "reasonable steps" and could not be restored or replaced by additional discovery. It did apply subdivision (e)(2) requirement that spoliation must have resulted from an "intent to deprive" to permit the jury presume that the missing information was unfavorable. **If the threshold requirements of Rule 37(e) had been considered, it seems likely that the Court would have reached the same result**.

25. Marla Moore v. Lowe's Home Centers [2016 WL 3458353] (W.D. Wash. June 24, 2016). Court refused to sanction deletion of email because it occurred prior to attachment of the duty to preserve. The court also held that the party did not act

"willfully or in bad faith." **No mention of Rule 37(e). Rule 37(e) should have been applied; result would likely to have been the same.**

26. Martin v. Stoops Buick [2016 WL 1623301] (S.D. Ind. April 25, 2016). Adverse inference denied under Seventh Circuit authority because deletion of emails and other ESI not shown, after evidentiary hearing, to have resulted from bad faith (destroyed for purpose of hiding adverse information). **Rule 37(e) should have been applied; result would likely to have been the same.**

27. McCabe v. Wal-Mart Stores [2016 WL 706191] (D. Nev. Feb. 22, 2016). No adverse inference where failure to preserve or destroying video surveillance did not result from conscious disregard of preservation obligation. **Rule 37(e) should have been applied; result would likely to have been the same.**

28. McCarty v. Covol Fuels [644 Fed. Appx. 372](**Sixth Cir**. Feb. 16, 2016). Sixth Circuit Panel **ignored Rule 37(e)** in affirming summary judgment for defendant despite its destruction of ladder, documents, text messages and phone call records on destroyed cell phones. The Court of Appeals held the spoliation issue to be moot since the summary judgment was issued on an independent ground. Moreover, defendants did not act in bad faith and loss of evidence did not preclude putting on a case, distinguishing *Silvestri*. **Rule 37(e) should have been mentioned since ESI was involved; but would probably not have altered outcome given that summary judgment was granted independently. Also demonstrates that Rule 37(e) could accommodate loss of tangible property in same context as documents and ESI.**

29. Montgomery v. Risen [2016 WL 3919809] (D.D.C. July 15, 2016). In action by party allegedly libeled in article, the court refused to address spoliation motion for failure to preserve software at issue, since it was prepared to grant summary judgment on the merits and the court "is hesitant to allocate judicial resources to this discovery dispute." The court **did not mention Rule 37(e)** but noted that it could have applied dismissal as a punitive spoliation sanction only if there had been proof by clear and convincing evidence that the party had destroyed the software in bad faith. **Would have made no difference to outcome**.

30. Moulton v. Bane [2015 WL 7776892] (D. N.H. Dec. 2, 2015). Applying First Circuit case law **without mention of Rule 37(e),** , the court refused to sanction loss of text messages as they were recovered from the only party with whom they were exchanged and from a forensic examination of the cell phone. The court noted that this reduced the prejudice, and that the circumstances did not support use of a "punitive" sanction such an adverse credibility inference. **Rule 37(e) should have been applied; result would likely to have been the same.**

31. Nelda Ayala v. Your Favorite Auto Repair, 2016 WL 5092588, *19 and n. 28 (E.D.N.Y. Sept. 19, 2016). In employee wage and hour bench trial, court precluded use of use of paper records after ESI records of same content were destroyed after order to preserve when server was allegedly stolen. After receiving preservation

notice parties took no steps to make a copy of contents of server or otherwise safeguard the electronic information stored in it. The court **does not mention Rule 37(e)** and states that it is not clear what state of mind is required, although the "bottom line" is whether the conduct is acceptable or unacceptable under Pension Committee. **Rule 37(e) should have been applied and it is not clear whether the court would have found an "intent to deprive." It apparently could have done so.**

32. NFL Management Council v. NFL Players Association [2016 WL 1619883] **(Second Cir.** April 25, 2016). NFL Commissioner was within his discretion to conclude player had deleted text messages since "the law permits a trier of fact to infer that a party who deliberately destroys relevant evidence . . . did so in order to conceal damaging information from the adjudicator." **Rule 37(e) should have been applied; result would likely to have been the same. Not clear why the Second Circuit failed to do so.**

33. Prezio Health v. John Schenk & Spectrum Surgical Instruments [2016 WL 111406] (D. Conn. Jan. 11, 2016). After ordering production of metadata, only five of eight emails from home AOL account were recovered when email transferred to a new ipad. Permissive adverse inference granted along with attorney's fees (**both *Residential Funding* and *Mali* are cited**) because the conduct was "grossly deficient." Neither Rule 37(b) nor **Rule 37(e)** are mentioned. **Rule 37(e) should have been applied, likely would have led to different result.**

34. Reyes v. Julia Place Condominium Homeowners Association [2016 WL 5871278, at n. 2] (E.D. La. Oct. 7, 2016). In case where only predicate evidence in class action was contained in hard drive destroyed before suit commenced, the court, **without considering Rule 37(e)**, refused to allow adverse inference to satisfy the non-moving party's burden in making a sufficient evidentiary showing of an essential element of proof in a case where it has the burden of proof in a case where hard drive destroyed and no mention made of Rule 37(e)). **Citing Rule 37(e) would not have made any difference in result.**

35. Sell v. Country Life Insur. Co [2016 WL 3179461] (D. Ariz. June 1, 2016). In an insurance claim by an individual seeking disability benefits, the court found that egregious discovery conduct by the party and its counsel in bad faith warranted striking of an Answer and entering a default judgment. The conduct included a failure to preserve emails. The court cited the statement in *Haeger v. Goodyear*, 813 F.3d 1233, 1243 (9th Cir. 2016) that Rule 37 is "not the exclusive means" for addressing the adequacy of discovery conduct as well as *Surowiec v. Capital Title* (Campbell, J.), 790 F.Supp.2d 997, 1010 (D. Ariz. 2011). **Raises difficult issue of whether Rule 37(e), which should have been applied in part, would have had a preclusive impact on use of inherent power regarding the other discovery breaches.** *Cf.* CAT3 v. Black Lineage [2016 WL 154116] (S.D. N.Y. Jan. 12, 2016).

36. Transystems Corp. v. Hughes Assocs [2016 WL 3551474] (M.D. Pa. June 30, 2016). Citing *Zubulake* and distinguishing 28 U.S.C. § 1927, court imposed nominal monetary sanctions for negligent failure to preserve ESI by the wiping of hard drives **without mentioning Rule 37(e)**. **Court probably would have found a failure to take reasonable steps (and applied (e)(1)) (it affirmatively mentions a duty to take reasonable steps to preserve based on Zubulake at *5)).**

37. U.S. Commodity Futures Trad. Comm. v. Gramalegui [2016 WL 4479316] (D. Colo. July 28, 2016). Party that agreed to provide emails and data but did not preserve until after subpoena was served was said to have failed to meet duty to preserve, and court ordered further discovery at expense of defendant **without mentioning Rule 37(e).** Court also awarded fees costs without specifying authority to do so. **Rule 37(e) should have been applied, likely would have led to different result.**

38. Williams v. CVS Caremark [2016 WL 4409190] (E.D. Pa. Aug. 2016). In case where counsel pressed allegations of spoliation of digital recording of altercation in store to extent that he was sanctioned under 28 U.S. C. § 1927, **court never mentioned Rule 37(e**) despite discussing a motion for Rule 37 sanctions. **Although not necessary to case, it would have been useful to have cited the new Rule.**

39. Xyngular Corporation v. Schenkel [2016 WL 4126462, at *21-22] (D. Utah Aug. 2, 2016). In litigation between corporation and shareholder in closely held corporation, the court entered sanction of dismissal of shareholder complaint for discovery misconduct centering around his acquisition of corporate documents prior to litigation by third party accessing servers and not through discovery. The court refused to find that the corporation had altered documents or otherwise committee spoliation by deleting electronic documents or reformatting a computer without mentioning Rule 37(e)(at *29). The court generally concluded that spoliation had not been proven by clear and convincing evidence (*30 & n.194 for std. of proof). **Rule 37(e), had it been applied, would probably have led to the same result since the information was not "lost" as it was apparently restored and replaced.**

APPENDIX C
(Cases Ignoring Rule 37(e) Involving Tangible Property and Documents)(includes hard copy "Videotape" cases)

1. Austrum v. Federal Cleaning [149 F. Supp.3d 1343] (S.D. Fla. Jan. 8, 2016). Court imposed rebuttable adverse inference because of loss of (hard copy) employment application despite concluding that the party had not "acted deliberately to hinder [plaintiff's] case." Discusses role of violation of Title VII recordkeeping regulation in triggering duty to preserve without showing anticipation of litigation. **Poster child for treating documents and ESI alike; case would have had different outcome had the ESI version of the application been lost.**

2. Beyer v. Anchor Insulation [2016 WL 4547123] (D. Conn. Aug. 30, 2016). In case involving disposal of carpeting that was videotaped while being removed from home, the court found that the party acted intentionally and placed its good faith in question, applying *Residential Funding* and *Pension Committee* to authorize adverse inferences. **Rule 37(e) could have been applied as analogy; result would be different.**

3. Estakhrian v. Obenstine, 2016 U.S. Dist. LEXIS 66143 (C.D. Cal. May 17, 2016). Court adopted awarding adverse inference instruction relating to delayed production of documents, including ESI, apparently under Rule 37(c). **No reason to mention Rule 37(e), which applies only if ESI is lost because of failure to preserve, not mere delay in production**.

4. Georgia Power v. Sure Flow Equipment [2016 WL 3870080] (N.D. Ga. Feb. 17, 2016). Sanctions not imposed for loss of strainer housings at power plant during conversion from coal to natural gas. No ESI involved. Confusing opinion based on state and federal case law. **Shows that Rule 37(e) could usefully apply tangible property to avoid confusion. Result would not have been different had Rule 37(e) been applied.**

5. Hernandez v. Vanveen [2016 WL 1248702] (D. Nev. March 28, 2016). Sanctions denied for failure to take drug test since it could not be determined if the missing information would have been relevant. **Shows that Rule 37(e) could usefully apply to tangible property which could easily have been recorded in ESI form. Result would not have been different had Rule 37(e) been applied.**

6. In re: General Motors Ignition Switch Litigation [2015 WL 9480315] (S.D. N.Y. Dec. 29, 2015). Court refused to sanction for failure to preserve automobile where plaintiff acted at most negligently and New GM suffered no prejudice, distinguishing Silvestri v. GM, 271 F.3d 583 (4th Cir. 2001) as a case where the destroyed evidence was the most critical evidence on the issue. Court placed severe restrictions on introduction of evidence of spoliation and argument because of risk of unfair prejudice and juror confusion, citing FRE 403. **Shows that Rule 37(e) could usefully apply to tangible**

property even in face of *Silvestri* allegations. Result would not have been different had Rule 37(e) been applied.

7. Jimenez v. Menzies Aviation [2016 WL 3232793] (N.D. Cal. June 13, 2016). In an employee wage and hour case, Court **ignored Rule 37(e)** in case where paper time records were destroyed for some employees but electronically records continued to exist. **While technically correct - the spoliation was of documents - it is an excellent example of when Rule 37(e) could apply to both hard copy documents and ESI because the same context exists.**

8. Kazan v. Walter Kennedy, 2016 WL 6084934 (W.D. Wash. Oct. 18, 2016). Court found issue of spoliation of cell phone lost when it fell out of a boat on a fishing trip moot when in granted summary judgment in favor of party seeking sanctions for spoliation of the phone. **No mention was made of Rule 37(e),** but clearly the data on the phone, not the phone itself, was at issue. **Rule 37(e) would have made no difference, but the case highlights confusion over rule scope.**

9. Mayer Rosen Equities v. Lincoln National Life [2016 WL 889421] (S.D. N.Y. Feb. 11, 2016). No spoliation of ESI existed merely because paper copies were scanned since experts were able to determine authenticity of underlying documents by use of the scanned copies. **Rule 37(e) should have been applied; result would likely to have been the same.**

10. McCabe v. Wal-Mart Stores [2016 WL 706191] (D. Nev. Feb. 22, 2016). No adverse inference where failure to preserve or destroying video surveillance did not result from conscious disregard of preservation obligation. **Rule 37(e) should have been applied; result would likely to have been the same.**

11. McCarty v. Covol Fuels [644 Fed. Appx. 372](**Sixth Cir**. Feb. 16, 2016). Sixth Circuit Panel **ignored Rule 37(e)** in affirming summary judgment for defendant despite its destruction of ladder, documents, text messages and phone call records on destroyed cell phones. The Court of Appeals held the spoliation issue to be moot since the summary judgment was issued on an independent ground. Moreover, defendants did not act in bad faith and loss of evidence did not preclude putting on a case, distinguishing *Silvestri*. **Rule 37(e) should have been mentioned since ESI was involved; but would probably not have altered outcome given that summary judgment was granted independently. Also demonstrates that Rule 37(e) could accommodate loss of tangible property in same context as documents and ESI.**

12. Orologio of Short Hills v. The Swatch Group [653 Fed. Appx. 134] (**Third Cir**. June 24, 2016). In affirming the District Court's refusal to sanction for destruction of "hard-copy" videotape contents, the Court of Appeals held that there was no abuse of discretion since "bad faith" was required, not mere negligence, under Bull v. United Parcel, 665 F.3d 68 at 79 (3d Cir. 2012). **Rule 37(e) should have been mentioned, at least; would not have changed the outcome. It is possible that the court**

treated the loss as one of tangible property given reference to "hard copy." Illustrates reason to treat tangible, documents and ESI alike.

13. Pierre v. Air Serv Security [2016 WL 5136256] (E.D.N.Y. Sept. 21, 2016). Spoliation of camera and videotape evidence resolved without mentioning Rule 37(e) by finding moving party failed to meet burden of proof of elements of spoliation. **Arguably based solely on failure to establish common law breach, and thus Rule 37(e) technically not (yet) involved.**

14. Philadelphia Gun Club v. Showing Animal Respect [2016 WL 5674256] (E.D. Pa. Oct. 3, 2016). In action against animal activists, court refused to deny summary judgment to defendants based on allegations of spoliation based on failures to produced "certain video footage" **without discussing Rule 37(e). Citing Rule 37(e) would have made no difference.**

15. Robbin L. Lologo v. Wal-Mart [2016 WL 4084035] (D. Nev. July 29, 2016). Sanctions for failure to preserve substances related to slip and fall [applesauce], video footage, sweep logs and names of witnesses denied for lack of culpability without citation to **Rule 37(e).** Although not the basis for the ruling, the court also seems to credit statement that no footage existed, mentioning that no depositions were taken of persons "with knowledge of the surveillance system." **Rule 37(e) should have been applied; not clear if would have led to different result.**

16. Star Envirotech v. Redline [2015 WL 9093561] (C.D. Cal. Dec. 16, 2015). **Rule 37(e)** not mentioned in decision involving failure to preserve hard copy advertising documents while retaining electronic copies which provide exemplars. The court refused to find that spoliation had occurred by the destruction of the hard copies ("difficult to imagine what nefarious purposes would have been served by destroying . . .other than [the stated] purpose of ensuring that the [out of date] materials were no longer disseminated")(*7). **Shows why treating documents and ESI under same rule is important; if the electronic copies had been destroyed not the hard copies, Rule 37(e) would apply. However, the result would have been the same since the party took "reasonable steps" to preserve the content.**

17. Stedeford v. Wal-Mart Stores, [2016 WL 3462132] (D. Nev. June 24, 2016). Court refused to dismiss case, but authorized preclusion of evidence and adverse inference **without citing Rule 37(e**) under its inherent authority where Wal-Mart allegedly failed to preserve portion of surveillance video that court was convinced, based in party on other Wal-Mart cases before it, that it must have had. In passing, the court noted that dismissal is only warranted when there is clear and convincing evidence of both bad-faith spoliation and prejudice to the opposing party, citing Micron Technologies. **Rule 37(e) should have been applied, likely would have led to different result.**

18. Terrell v. Central Washington Asphalt [2016 WL 973046] (D. Nev. March 7, 2016). Court to instruct jury that the loss of documents creates a rebuttable presumption that

if they had been produced they would show information favorable to movant and unfavorable to other party. **No mention of Rule 37(e).** No finding equivalent to "intent to deprive." **Shows that documents should be treat the same as ESI.**

19. U.S. Commodity Futures Trad. Comm. v. Gramalegui [2016 WL 4479316] (D. Colo. July 28, 2016). Party that agreed to provide emails and data but did not preserve until after subpoena was served was said to have failed to meet duty to preserve, and court ordered further discovery at expense of defendant **without mentioning Rule 37(e).** Court also awarded fees costs without specifying authority to do so. **Rule 37(e) should have been applied, likely would have led to different result.**

20. Woodrow Flemming v. Matthew J. Kelsh [2016 WL 2757398] (N.D. N.Y. May 12, 2016). Rule 37(e) ignored in discussion of preservation of "video recordings" of incident based on video footage of corrections officer using handheld video camera. Court cites *Residential Funding* standards in holding no evidence of culpable state of mind. **Rule 37(e) should have been applied, unlikely it would have led to different result.**