Applying Amended Rule 37(e)

Thomas Y. Allman[1]

Amended Rule 37(e) replaces the current rule with a revised approach to the preservation and loss of electronically stored information ("ESI") which should have been preserved. It does so by providing a safe harbor for reasonable preservation conduct and by limiting the availability and scope of sanctions to instances of prejudice and, as to case-determinative sanctions, a showing of "intent to deprive." It rejects case law allowing courts to impose sanctions for inadvertent loss or negligent but harmless loss of ESI.

The rule applies to all cases filed after December 1, 2015 and, "insofar as just and practicable," to then-pending proceedings.[2] An alphabetical summary of all decisions referencing Rule 37(e) since its enactment appears in Appendix A. Appendix B summaries decisions which have not utilized the rule where it could or should have been applied.

Introduction

Prior to enactment of the amended version of Rule 37(e), allegations of spoliation were addressed in federal courts through the inherent power to regulate litigation abuse or, if a court order existed, Rule 37(b). The trigger, scope and duration of the duty to preserve was viewed as a common law development inherent in the spoliation doctrine which was applicable. The previous version of Rule 37(e), enacted in 2006 was largely irrelevant to the planning and management of the duty.[3]

---

[1] © 2015 Thomas Y. Allman. Mr. Allman is Chair Emeritus of the Sedona Conference® Working Group 1.
[2] The text of amended Rule 37(e) and the Committee Note is available at 305 F.R.D. 457, 568 (2015).
[3] The former rule stated "what courts *could not do* in the event of lost ESI without providing any guidance on what measures the court *could* take." Joseph F. Marinelli, *New Amendments to the [FRCP]: What's the Big Idea?*, 2016- FEB BUS. L. TODAY 1, at *5 (February 2016)(emphasis in original); *see also* 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").

A Panel at the 2010 Duke Conference, on which the author served, unanimously recommended that the time had come for a new approach.[4]

During the two years after the Duke Conference, a variety of draft approaches to a new rule were studied, including some that undertook to establish detailed preservation guidelines. Ultimately, this effort was abandoned as unworkable and the Advisory Committee decided to take the duty to preserve as established while crafting a rule that addressed the actions a court could take when ESI was lost.[5]

Rule 37(e) is intended to bring "consistency and coherence" to the ways that courts handle claims of failure to preserve ESI.[6] The Chair of the Subcommittee that drafted the rule has explained that "[w]e felt this approach would promote reasonable steps to preserve ESI, cure any prejudice, and deter intentional failure to preserve ESI."[7] The Committee also sought to address concerns about over-preservation of ESI due to lack of uniformity among the Circuits.

Pending Cases

The amendment governs all pending proceedings involving loss of ESI due to a failure to preserve, insofar as just and practicable. The Rules Enabling Act authorizes retrospective application of rules except to the extent that a court concludes that it would not be feasible to do so or would work an injustice. A number of courts have, in fact, refused to apply the rule for that reason.[8]

Most courts have found it equitable to apply Rule 37(e) to pending disputes.[9] The Second, Sixth and Ninth Circuits have referenced the rule on appeal.[10] Some courts have not applied it because neither party sought its application. [11] However, a large number of trial courts have ignored it in cases where it could have been applied without explaining

---

[4] June 14, 2014 Report of the Advisory Committee to the Standing Committee, 305 F.R.D. 457, 524 (20-15. The Report, as ultimately transmitted to Congress for its review, also contains the text of the final Rule and the Committee Note to which reference is made herein. *Id*., 565-578.

[5] Report at Advisory Comm. Mtg Agenda Book, March 22-23, 2012, at 2 (page 250 of 644), copy at http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-march-2012.

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

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

[8] Learning Care Grp. V. Armetta, 2016 U.S. Dist. LEXIS 79536 (D. Conn. June 17, 2016)("unfair" to apply Rule 37(e) since spoliation issue was raised "prior to the application of the new rules"); Thomas v. Butkiewicus, 2016 WL 1718368 (D. Conn. April 29, 2016)(same); McIntosh v. US, 2016 WL 1274585 (S.D. N.Y. March 31, 2106)(makes no sense to apply it to motions already briefed); Stinson v. City of New York, 2016 WL 54684 (S.D. N.Y. Jan. 5, 2016)(same).

[9] CAT3 v. Black Lineage, 2016 WL 154116, at *5 (S.D. N.Y. Jan. 12, 2016)("[t]he new rule places no greater *substantive* obligation on the party preserving ESI")(emphasis added).

[10] Mazzei v. Money Store, 2016 WL 3902256 (2nd Cir. July 15, 2016); Lorie Applebaum v. Target, 2016 WL 4088740 (6th Cir. Aug. 2, 2016) and Roadrunner Transportation v. Tarwater, 2016 WL 1073104 (9th Cir. March 18, 2016).

[11] Thurman v. Bowman, 2016 WL 1295957 (W.D. N.Y. March 31, 2016)(neither party advocated for it).

their reasoning. In many of those cases, applying Rule 37(e) would have changed the results.[12]

Rule 37(e)

Amended Rule 37(e), as revised immediately before its adoption by the Rules Committee,[13] replaces the 2006 version of the rule[14] and 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.

Rule 37(e) takes the duty to preserve as it is established by case law and does not purport to create a rule-based duty to preserve. However, before a court is empowered to impose any of the measures under subsections (e)(1) or (e)(2), it must first determine that

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

If a court cannot determine that all of these predicate requirements are met, the request for relief from spoliation under the rule must be denied.

Scope of the Rule

Rule 37(e) applies only to losses of ESI, not losses of other forms of discoverable information. However, it is unfortunate that the Committee did not at least urge that courts treat spoliation of documents and ESI alike.[15] The issue is especially problematic

---

[12] *See* Appendix B.

[13] 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).

[14] Rule 37(e)(2006): "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

[15] For a case involving spoliation of documents which would have been decided differently had the Rule applied, *see* Terrell v. Central Wash. Asphalt, 2016 WL 973046 (D. Nev. March 7, 2016).

when both ESI and hard copy is lost due to the same conduct.[16] One court has applied "separate legal analyses" within the same case to accommodate the distinction.[17] Another simply refused to apply Rule 37(e).[18]

A better result would be for courts to apply the Rule to both losses of ESI and information in the form of documents where possible, a distinction present in Rule 34.[19] Moreover, while the reluctance to include losses of physical property is understandable,[20] an exception could be made for circumstances when the rule is not "up to the task" when loss of physical property compels measures under inherent authority to preserve the integrity of the litigation process.[21]

This would also have the beneficial value of resolving the confusion about whether deletion of digitally recorded videotape involves physical property. In *Wichansky v. Zowine*, a court did not apply Rule 37(e) to the loss of videotape,[22] in contrast to *Martinez v. City of Chicago*, where the opposite conclusion was reached in regard to video content uploaded from police cars.[23] Other courts, including one Circuit,Court, appear to have split on the topic.[24]

The Duty to Preserve

As noted, for Rule 37(e) to apply, the ESI at issue must have been lost after the duty to preserve attached.[25] That is determined by the "extent to which a party was on notice that litigation [is] likely and that the information would be relevant."[26] Unless the loss

---

[16] *See* Jessica Jimenez v. Menzies Aviation, 2016 WL 3232793 (N.D. Cal. June 13, 2016)(involving treatment of paper and electronic records of same information); *as well as* Star Envirotech v. Redline, 2015 WL 9093561 (C.D. Cal. Dec. 16, 2015)(same).

[17] Best Payphones v. City of New York, 2016 WL 792396, at *7 (E.D. N.Y. Feb. 26, 2016); *cf.* DuBois v. Board of Comm., 2016 WL 868276 (N.D. Okla. March 7, 2016)(resolving issues involving video tapes and documents without mentioning Rule 37(e)).

[18] CTB v. Hog Slat, 2016 WL 1244998 (E.D. N.C. March 23, 2016).

[19] See Zbylski v. Douglas County School District, 2015 WL 9582280 (D. Colo. Dec. 31, 2015).

[20] *See* Silvestri v. GM, 271 F.3d 583, 593 (4th Cir. 2001)(permitting sanctions as a matter of due process without required showing of culpability); June 2014 Committee Report, 305 F.R.D. 457, 512 at 527 (2015)("repeated efforts made clear that it is very difficult to craft a rule that deals with failure to preserve tangible things").

[21] There is often no principled distinction involved. *See, e.g.* Vitamins Online v. Heartwise, 2016 WL 3747582 (D. Utah July 11, 2016)(failure to preserve samples).

[22] 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]").

[23] Martinez v. City of Chicago, 2016 WL 3538823 (N.D. Ill. June 29, 2016)(Dow, J).

[24] Orologio v. The Swatch Group, __Fed. Appx. __, 2016 WL 3454211, at *2 & *8 (3rd Cir. June 16, 2016)(Rule 37(e) ignored in regard to spoliation of "hard-copy" video tapes); Thomley v. Bennett, 2016 WL 498436 (S.D. Ga. Feb. 8, 2016)(applying Rule 37(e) to "loop-type" video recording); Thomas v. Butkiewicus, 2016 WL 1718368 (D. Conn. April 29, 2016)(applying to video surveillance tape)..

[25] Marshall v. Dentfirst, 313 F.R.D. 691(N.D. Ga. March 24, 2016)(inapplicable because no evidence missing ESI existed at earliest time duty attached).

[26] Committee Note.

occurred in "anticipation of litigation" then what "should have been preserved' is a matter of business judgment, not legal judgment.[27]

Once the duty is triggered, a party is expected to take reasonable and proportionate action to preserve relevant and discoverable ESI[28] under its custody and control. This may involve use of a litigation hold or affirmative action as required under the circumstances, and may involve key custodians or data repositories. The Committee Note observes that "a variety of events may alert a party to the prospect of litigation, but may provide only limited information about it.

In *Marten Transport v. Plafform Advertising*, the court held that there was no breach of duty because the triggering occurred after the ESI had already been overwritten under routine procedures.[29] In *O'Berry v. Turner*, the duty arose "at the very latest" when an injured party's counsel faxed a "spoliation letter" demanding preservation by the defendants.[30] In *Best Payphones v. City of New York*, a plaintiff was held to be under a duty to preserve evidence once it decided to bring an action.[31]

A duty to preserve may also arise from statutory requirements, administrative regulations,[32] orders entered in the case or "a party's own information-retention protocols."[33] However, the mere fact that a party has "an independent obligation to preserve" does not mean that it had "such a duty with respect to the litigation."[34]

The 2015 Amendments authorize scheduling orders to include references to preservation limitations or obligations. Courts continue to enjoin potential spoliation, if a

---

[27] John J. Jablonski and Alexander R. Dahl, *The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation*, 82 DEF. COUNS. J. 411, 423 (2015)("Jablonski and Dahl").

[28] The relevancy test applied as a threshold requirement under Rule 37(e) differs from the unique "assistive" relevance required in the Second and Ninth Circuits for spoliation purposes. Herandez v. VanVeen, 2016 WL 1248702, at *3 (D. Nev. March 28, 2016)(a "two-pronged finding of relevance and prejudice").

[29] 2016 WL 492743, at *10 (D, Kan. Feb. 8, 2016)(finding no duty triggered prior to deletion of internet browsing history); *accord* Jennifer Saller v. QVC, 2016 WL 4063411, at *5 (E.D. Pa. July 29, 2016)("far from certain" that data had not been overwritten at the time the duty attached under Rule 37(e)).

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

[31] Best Payphones v. City of New York, 2016 WL 792396, at *4 (S.D. N.Y. Feb. 26, 2016).

[32] Austrum v. Federal Cleaning Contractors, 149 F.Supp.3d 1343 (S.D. Fla. Jan. 8, 2016)(applying EEOC regulation requiring retention of "personnel records" for a year and, if a charge is filed, until its disposition); *but see* 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).

[33] In CTB v. Hog Slat, 2016 WL 12444998, at *12 (E.D. N.C. March 23, 2016), the court assessed loss of data against a records retention policy which covered both ESI and hard copy. In Coale v. Metro-North Railroad, 2016 WL 1441790, at *2 (S.D. N.Y. April 11, 2016), a court noted there was no automatic requirement that a party preserve evidence for purposes of litigation because of a self-imposed obligation.

[34] Committee Note.

basis exists.[35] In *Leroy Bruner v. American Honda Motor Co.*,[36] for example, the court required prospective use of a litigation hold[37] and the court in *Shein v. Cook* granted an *ex parte* order citing as authority the provisions of Rules 26(a) and 37(e).[38]

Neither Rule 26(b) nor Rule 37(e) nor the Committee Notes describe the impact of amended Rule 26(b)(1) on the scope of the duty to preserve. It surely plays a role, however. The ESI should be both relevant and "proportional to the needs of the case," with no duty to preserve transitory data ordinarily overwritten absence notice of the need to do so. In *Marten Transport v. Plattform Advertising*, for example, there was no reason to conclude that the browsing history of a former employee should be preserved.[39]

Rule 37(e), and other 2015 Amendments, suggest and encourage robust and candid discussions on the scope of preservation, preferably resulting in party agreements, perhaps prodded by local rules and practices.[40] In *Martinelli v. Johnson & Johnson*, the parties agreed on the types of ESI outside the scope of preservation, as spelled out in a Stipulated ESI and Hard Copy Protocol.[41]

"Reasonable Steps"

Rule 37(e) incorporates a "reasonable steps" threshold requirement, rejecting a *per se* approach based on the mere loss of ESI. The Committee Note observes that "perfection in preserving all relevant [ESI] is often impossible" and that "proportionality" is a consideration.

The "reasonable steps" assessment embraces a "form of culpability[42] and calls for a case-by-case approach by courts.[43] It is informed by the business judgment rule. Compliance efforts "must be reasonable, not perfect." There is a "vast difference between an inadequate or flawed effort . . . and a conscious disregard for those duties."[44] The

---

[35] *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 but scope of order limited per John B. Goetz, 531 F.3d 448, 459 (6th Cir. 2008)); *cf.* Micolo v. Fuller, 2016 WL 158591 (W.D. N.Y. Jan. 13, 2016).

[36] 2016 WL 2757401 (S.D. Ala. May 12, 2016).

[37] Rule 37(b) may provide an independent source of authority to deal with breach of court orders, raising unique issues as to the interplay with Rule 37(e) provisions. *See* Alternative Sources of Authority, infra.

[38] Schein v. Cook, 2016 WL 3212457, at *5 (N.D. Cal. June 10, 2016).

[39] 2016 WL 492743, at *10 (D. Kan. Feb. 8, 2016)(neither party routinely retained computer internet history when replacing computers).

[40] *See, e.g.*, DEL. FED. CT. DEFAULT STANDARD(2011), Para. 1(b), copy at http://www.ded.uscourts.gov/ (ESI that need not be preserved absent a showing of good cause by the requesting party).

[41] 2016 WL 1458109 (E.D. Cal. April 13, 2016).

[42] Hon. Paul Grimm (Chair of Discovery Subcommittee), quoted in Minutes, Civil Rules Advisory Committee, April 10-11, 2014, at lns. 940-943 ("the revised proposal . . . is limited to circumstances in which a party failed to take reasonable steps to preserve information that should have been preserved, thus embracing a form of 'culpability'").

[43] Rimkus v. Cammarata, 688 F. Supp. 2d, 613 (S.D. Tex. Feb. 19, 2010)("[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).

[44] Lyondell Chemical v. Ryan, 970 A.2d 235, 243 (S.Ct. Del. 2009)(applying business judgment rule).

assessment should be made without the benefit of hindsight "because no matter what methods [were] employed, an after-the-fact critique can always conclude that a better job could have been done."[45]

Only if the loss of the ESI at issue is due to a failure to take "reasonable steps" is the rule applicable. For parties that do so, Rule 37(e) serves as a "safe harbor."[46] In *Best Payphones v. City of New York*[47] a party acted reasonably in failing to implement a litigation hold at a time it mistakenly believed that that ESI would be available later.[48]

Courts appear, however, to equate the failure to use of a litigation hold with a lack of reasonable steps, despite the intent of the Rules Committee to reject strict liability.[49] In *Living Color v. New Era Acquastructure*, for example, a failure to disable an auto-delete function relating to text messages was sufficient to find a failure to take reasonable steps[50] and in *Matthew Enterprises v. Chrysler*, the preservation efforts were simply "not enough."[51]

Where egregious conduct is involved, it is unlikely to qualify as "reasonable steps." In *GN Netcom v. Plantronics*, an executive deleted massive amounts of email under conditions which led the court to conclude that his conduct was "the opposite" of taking reasonable steps and was not excused by his belief that IT personnel would continue to have access to the deleted email.[52] In *DVComm v. Hotwire*, a similar conclusion was reached where the party had "double deleted" crucial information.[53]

In *CAT3 v. Black Lineage*," an unsuccessful attempt to falsify ESI was deemed inconsistent with taking "reasonable steps."[54] Similarly, in *Brown Jordan v. Carmicle*, egregious conduct contributed to the conclusion that reasonable steps had not been taken.[55] A more problematic example is *O'Berry v. Turner*, where the party printed a hard copy of

---

[45] Rhoads Industries v. Building Materials Corp., 254 F.R.D. 216, 226 (E.D. Pa. 2009)(applying "reasonable steps" criteria in FRE 502).
[46] Matthew Enterprise v. Chrysler Group, 2016 WL 2957133, at *1 (N.D. Cal. May 23, 2016); *see also* Kurtz and Mauler, *A Real Safe Harbor: The Long-Awaited Proposed FRCP Rule 37(e)*, 62-AUG FED. LAW. 62, 66 (2015)(citing guidance in the Sedona Commentary on Legal Holds: The Trigger and the Process (2010) as exemplars whose implementation evidence taking of reasonable steps).
[47] Best Payphones v. City of New York, 2016 WL 792396, at *5 (S.D. N.Y. Feb. 26, 2016)("the Court cannot find that Mr. Chaite acted unreasonably as is required for the Court to issue sanctions under Rule 37(e)"); *but cf*. Browder v. City of Albuquerque, 2016 WL 3397659, at n. 4 (D.N.M. May 9, 2016)(in case ignoring Rule 37(e) finding lack of litigation hold warrants sanctions and jury instruction allowing inferences).
[48] *Id*. at *4 & 5 (noting that a failure to take reasonable steps would be required).
[49] Minutes, Standing Committee Meeting, May 2014, 6 (quoting Chair of Rules Committee as stating that the "reasonable steps" language is intended to emphasize rejection of strict liability).
[50] Living Color v. New Era Aquaculture, 2016 WL 1105297 (S.D. Fla. March 22, 2016).
[51] 2016 WL 2957133, at *1 & *3 (N.D. Cal. May 23, 2016)("despite [the party's] belated best efforts, these communications are lost forever").
[52] 2016 WL 3792833, at *6 (D. Del. July 12, 2016).
[53] 2016 U.S. Dist. LEXIS 13661 (E.D. Pa. Feb. 3, 2016).
[54] 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").
[55] 2016 WL 815827, at *37 (S.D. Fla. March 2, 2016)(the party acted with intent to deprive).

data stored electronically without safeguarding it was held to have failed to take reasonable steps as well as acting with an "intent to deprive."[56]

Additional Discovery

If a breach of duty through a failure to take reasonable steps exists, the court must first determine whether "additional discovery" would mitigate the prejudice by restoring or replacing the missing ESI. If ESI is available from other sources, there is no need to proceed further. The "additional discovery" may involve recreation of lost information or the undertaking of further discovery from additional custodians or from sources that would be considered inaccessible.[57]

The Committee Note suggests, however, that "substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative."

In *Fiteq v. Venture Corporation*,[58] copies of deleted emails were subsequently produced and in *Living Color v. New Era Aquaculture*, the "great majority" of email was not "lost" because it was replaced.[59] In both cases, Rule 37(e) was held inapplicable. The Court in *Fiteq* also emphasized that the moving party had not met the obligation to demonstrate that "other responsive documents ever existed."[60]

In *CAT3 v. Black Lineage,* further discovery did *not* adequately "restore" or "replace" lost emails because it placed the authenticity of both the original and subsequently produced email at issue.[61] Accordingly, the court did not have to face the issue it had earlier raised; namely, its authority to address litigation abuse in that instance through use of its inherent sanctioning authority.

Measures Available

Rule 37(e) authorizes measures to address spoliation of ESI once the threshold conditions are satisfied. While the rule eschews use of the term "sanctions," it is intended to and subsumes the full range of evidentiary, monetary and case-determinative punitive sanctions, while adopting a methodology for the selection process.[62] References to and use of that terminology blends with the framework of the Rule in the emerging case law.

---

[56] O'Berry v. Turner, 2016 WL 1700403, at *3 (M.D. Ga. April 27, 2016)(noting "irresponsible and shiftless behavior").
[57] See, eg., In re Delta/AirTran Baggage Fee Antitrust Litigation, 770 F. Supp.2d 1299, 1311 (N.D. Ga. Feb. 22, 2011)(
[58] Fiteq v. Venture Corporation, 2016 WL 1701794 (N.D. Cal. April 28, 2016).
[59] Living Color v. New Era Aquaculture, 2016 WL 1105297, at *5 (S.D. Fla. March 22, 2016)("sanctions under Rule 37(e) are simply not available in relation to those text messages").
[60] Fiteq, *supra*, at *3.
[61] CAT3, Inc. v Black Linage et al, 2016 WL 154116, at *7(S.D. N.Y. Jan. 12, 2016).
[62] Cf. Geiger v. Z-Ultimate Self Defense Studios, 2015 WL 176224, at *1 (D. Colo. Jan. 13, 2015)("[b]ecause it was impossible to fashion a proportional evidentiary sanction to address the spoliation,

At the core of Rule 37(e) are two subdivisions authorizing measures available; one focused on remediation of prejudice and other authorizing and cabining the use of harsh measures to punish and deter.[63] The subsections are not mutually exclusive; in cases where the requisite "intent to deprive" required by subsection (e)(2) exists, courts are also authorized to award "lesser measures" under subsection (e)(1), as necessary.[64]

Subdivision (e)(1)

Subdivision (e)(1) of Rule 37(e) provides that a court may order measures "no greater than necessary" to cure prejudice caused by loss of ESI without a predicate showing of culpability. Absence prejudice, no "curative" measures are available. The goal is to remediate – not punish – and the rule "does not require the court to adopt measures to cure every possible prejudicial effect."[65]

The Committee Note lists typical measures available.[66] Although not listed in the rule or Note, they include monetary sanctions, including attorneys' fees, upon an adequate showing of prejudice.[67] Other potential remedies have been the subject of speculative comments by courts.[68]

The principal limitation on use of subsection (e)(1) is provided by subdivision (e)(2), discussed *infra*, which mandates a finding of an "intent to deprive" the other party of its use of the missing ESI in the litigation before harsh measures are available.[69] Absent such a finding of intentional conduct, but in the presence of prejudice, the Committee Note famously observes that "[m]uch is entrusted to the court's discretion."

Prejudice

The Committee Note describes the required showing of "prejudice" as involving 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

---

but some sanction is necessary to deter future misconduct and to make clear that the destruction or alteration of evidence is not tolerated, I imposed a monetary sanction").

[63] Both assume the presence of prejudice, but in the case of subdivision (e)(2), the moving party need not make a showing of prejudice, as it is necessarily inferred from the high degree of culpability involved.

[64] See, e.g., GN Netcom v. Plantronics, 2016 WL 3792833, at *12-14 & n. 9 (D. Del. July 12, 2016)("[i]n arguing for the most severe type of sanction, a dispositive sanction, GN did not forego the other, less severe otpions the Court is required to consider under Rule 37(e)").

[65] Committee Note.

[66] Including "forbidding the party that lost evidence from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions as to which subdivision (e)(2) applies."

[67] *See* Discovery Committee Minutes, Minutes, April 10-11, 2014 Agenda Book at 440 of 580 (it is "a commonplace measure that the rule can properly recognize").

[68] DVComm v. Hotwire Comm., 2016 U.S. Dist. LEXIS 13661, at ¶47 (Feb. 3, 2016)("striking pleadings" and "directing designated facts be taken as established").

[69] The Committee Note cautions that striking pleadings or precluding offering evidence related to the "central or only claim or defense in the case").

impaired the non-spoliating party's ability to go to trial or threatened to interfere with the rightful decision of the case."[70]

The rule does not assign the burden to demonstrate prejudice to a specific party. The Committee Note observes that it may be fair to place it on the moving party when the content of the missing information is fairly evident or appears to be unimportant or if existing evidence is sufficient to meet the needs of the parties.

In *Core Laboratories v. Spectrum Tracer Services*,[71] the court found "prejudice' from conduct which the party from all information about certain key. In *CAT3 v. Black Lineage*,[72] the court found placing the authenticity of email at issue was prejudicial because if required the moving party to seek relief.[73]

In contrast, in *Marshall v. Dentfirst* the loss of the internet browsing history of a terminated employee was not prejudicial when not relied upon in making termination decisions."[74] In *Living Color v. New Era Aquaculture*, "minimal" prejudice[75] did not justify measures under the rule because the preserved information was sufficient to meet the needs of the moving party.

Courts also failed to find prejudice in *Best Payphones v. City of New York*,[76] *Fiteq v. Venture*[77] and *Matthew Enterprise v. Chrysler*. [78]

Evidence Preclusion

According to the Committee Note, an order precluding use of evidence is appropriate to redress prejudice.[79] In *Ericksen v. Kaplan*, use of certain disputed emails and documents was precluded in order to "cure the prejudice created" by the destruction of information.

In *CAT3 v. Black Lineage*, the court precluded reliance on certain emails whose authenticity was placed in doubt by the destruction of earlier versions.[80]

---

[70] Leon v. IDX Systems, 464 F.3d 951, 960 (9th Cir. 2006).
[71] 2016 WL 879324 (W.D. Okla. March 7, 2016).
[72] 2016 WL 154116 (S.D. N.Y. Jan. 12, 2016)[subsequently dismissed, 2016 WL 1584011 (April 6, 2026)].
[73] *Id.* at *6, *8 & *10 ("multiple versions of the same document at the very least "obfuscates" the record).
[74] 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).
[75] Living Color v. New Era Aquaculture, 2016 WL 1105297 (S.D. Fla. March 22, 2016).
[76] 2016 WL 792396, at *5-6 (E.D. N.Y. Feb. 26, 20160("although the evidence was relevant, [the parties] have not shown that they are prejudiced by its destruction, and therefore, there has been no spoliation under . . . under Rule 37(e)").
[77] 2016 WL 1701794 (N.D. Cal. Aril 28, 2016)(duplicates recovered from emails produced by other parties).
[78] 2016 WL 2957133, at *4 (N.D. Cal. May 23, 2016)("since Chrysler has not 'come forward with plausible, concrete suggestions' about what the internal emails might have contained" it has "failed to show prejudice' from their loss).
[79] Committee Note (provided that it does not prevent a party from offering evidence on "the central or only claim or defense in the case).
[80] CAT3 v. Black Lineage, 2016 WL 154116, at *10 (S.D. N.Y. Jan. 12, 2016).

Monetary Sanctions, Fines & Attorney's Fees

Rule 37 (e)(1) has been interpreted to authorize imposition of monetary sanctions, including attorney's fees, when designed to reduce financial prejudice. In *CAT3 v. Black Lineage*, the award "ameliorates the economic prejudice imposed on the defendants and also serves as a deterrent to future spoliation."[81] The court in *Best Payphones v. City of New York* appears to have acted under its inherent powers,[82] ignoring the required showing of bad faith conduct.[83]

Other courts have chosen to rely on Rule 37(a)[84] to authorize reimbursement of attorneys' fees where the motion has had the practical effect of producing additional ESI.[85] In *Friedman v. Phila. Parking Auth.*, the court described this as preferable to relying on inherent authority.[86] This has been criticized as "inappropriate."[87] On the other hand, the Seventh Circuit has noted in passing that a lower court "could" have invoked rule 37(a)(5)(A) which "authorizes the award of attorneys' fees incurred as a result of discovery abuse."[88]

In *GN Netcom v. Plantronics*,[89] a court awarded, as "an appropriate component of relief for the prejudice," monetary sanctions in the form of fees and costs.[90] However, it also awarded a $3M "punitive monetary sanction," payable to the moving party. It pushes the envelope to argue that *both* the compensatory and punitive awards were justified under subsection (e)(1). They involve "two separate and distinct" inquiries.[91]

The court, by making the $3M punitive sanction payable to the moving party, apparently sought to avoid the procedural requirements for punitive sanctions designed to vindicate a courts authority.[92] It may have been a close call, given the description of the

---

[81] 2016 WL 154116, at *9 & 10 (S.D. N.Y. Jan. 12, 2016).
[82] 2016 WL 792396, at *7 (court has discretion to punish and deter the litigant's conduct).
[83] Joseph v. Linehaul Logistics, 549 Fed. Appx. 607, 608 (9th Cir. Dec. 9, 2013)("[b]ad faith must be found before a federal court can award attorneys' fees as a sanction under its inherent authority").
[84] Ericksen v. Kaplan, 2016 WL 695789 (D. Md. Feb. 22, 2016) and Marshall v. Dentfirst, 2016 WL 1222270 (N.D. Ga. March 24, 2016).
[85] 2016 WL 792396, at *8 (E.D. N.Y. Feb. 26, 2016).
[86] 2016 U.S. Dist. LEXIS 32009, at ¶¶ 77-885 (E.D. Pa. March 10, 2016)("a more appropriately tailored remedy" than relying on inherent power to award fees).
[87] John M. Barkett, *The First 100 Days (or So) of Case Law Under the 2015 Amendments to the Federal Rules*, 16 DDEE 178 (April 14, 2016), copy at http://www.bna.com/first-100-days-n57982069891/.
[88] Alberto Martinez v. City of Chicago, Nos. 15-2752, 15-3410, at 3 (7th Cir. May 23, 2016).
[89] 2016 WL 3792833 (D. Del. July 12, 2016).
[90] *Id*. at *13.
[91] Official Committee of Unsecured Creditors of Exeeter Holdings, by2015 WL 5027899, at n. 25 (E.D. N.Y. Aug. 25, 2015)("any decision by this court [as to fees]wold not necessarily be equally applicable to an award of punitive monetary sanctions").
[92] 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 and not punitive because "[n]ot one dime was awarded to the government or the court"); *see also* HM Electronics v. R.F. Technologies, 2016 WL 1267385, at *4 (N.D. Cal. March 15, 2016)("if the sanction primarily aims to vindicate the authority of the court by punishing the offending party, the sanction is punitive").

purpose cited by the court.[93] However, if inherent authority was invoked, its use arguably implicates the stated foreclosure of use of such authority in matters otherwise covered by Rule 37(e).

Imposition of a "fine" for failure to preserve would raise serious issues if payable to the court and not intended to alleviate prejudice. It would not be authorized by subsection (e)(1) nor sufficient compensatory to escape the requirements attendant upon punitive measures.[94]

Counsel Sanctions

Rule 37(e), does not explicitly authorize measures against counsel, only the party. In *Sun River Energy v. Nelson*,[95] the Tenth Circuit Court of Appeals refused to interpret Rule 37(c)(1), which also referred only to the party, to authorize counsel sanctions, a conclusion that should apply to Rule 37(e).[96]

However, in *dicta* in *HM Electronics*, a court opined that it could sanction counsel "under the proposed amended Rule 37."[97] In *CAT3*, the only reason the court did not sanction counsel was that "there was no evidence of culpability on [their] part."[98] Similarly, in *Friedman v. Phila. Parking Auth*, the court held that responsibility to pay monetary sanctions under Rule 37(a) would be imposed only to the party, since there was no evidence that outside counsel had "directed this evasive strategy."[99]

Admission of Evidence of Spoliation

Subdivision (e)(1), according to the Committee Note, does not restrict a court from submitting evidence of spoliation to a jury and instructing that it may draw conclusions from the evidence, if done in such a way as to be no greater than necessary to address prejudice.[100]

---

[93] 2016 WL 3792833, at *13 (bad faith intent to deprive, prejudice caused, difficulties in getting to the bottom of the story and unwillingness to acknowledge wrongdoing as the basis for its actions).
[94] *Compare* Passlogiz v. 2FA Technology, 708 F.Supp.2d 378, 422 (S.D. N.Y. April 27, 2010)(imposing $10K fine payable to court for failure to institute a legal hold) *with* Alter v. Rocky Point School District, 2014 WL 4966119, at *12 (E.D. N.Y. Sept. 30, 2014)(imposing $1.5 monetary sanction payable to moving party for negligent loss of ESI).
[95] 800 F.3d 1219, 1226 (10th Cir. Sept. 2, 2015).
[96] Shira A. Scheindlin, Electronic Discovery and Digital Evidence in a Nutshell (2nd Edition), 323 ("Rule 37(e) 'measures,' unlike the sanctions available under Rule 37(b), appear to be only against the party").
[97] HM Electronics v. RF Technologies, 2015 WL 4714908, at *30 (S.D. Cal. Aug. 7, 2015)("[e]ven if subsection (e) applied . . . [there is a sufficient showing] to warrant the same sanctions"); *vacated as moot*, 2016 WL 1267385 (S.D. Cal. March 15, 2016).
[98] 2016 WL 154116, at n. 7 (S.D. N.Y. Jan. 12, 2016).
[99] 2016 U.S. Dist. LEXIS 32009, at ¶83 (E.D. Pa. March 10, 2016); *cf.*,Markey v. Lapolla Industries, 2015 WL 5027522, at *24 (E.D. N.Y. Aug.25, 2015)(sanctioning attorneys but not parties where attorneys failed to provide adequate guidance and oversight).
[100] Moreover, subsection (e)(2) does not limit the discretion of courts to give "traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial." An

One example is where the evidence helps offset any risk the jury might inappropriately deem other evidence conclusive or authentic, as was the case in *Ericksen v. Kaplan Higher Education*.[101] In *Davis v. Crescent Electric*, where the authenticity of an email was questioned, the court left it for the jury to determine.[102] In *Wichansky v. Zowine*, where the parties had not advocated application of Rule 37(e), it was admitted to overcome the minimal prejudice suffered from the loss of videotape.[103]

In *Matthew Enterprise v. Chrysler*,[104] the court noted that evidence of spoliation would be admissible to counter testimony, if offered, on a contentious point in the case. In *Freidman v. Phia. Parking Auth.*,[105] the court spoke of authorizing "evidentiary rulings, short of an adverse inference," including argument before the jury, if a party could show prejudice through additional discovery.[106]

Spoliation evidence and argument on its significance has also been deemed appropriate as a general matter. In *Nuvasive v. Madsen Medical*, the court did so as a "remedy or recourse" citing the Committee without further explanation.[107] In *Accurso v. Infra-Red Services*[108] and *SEC v. CKB168 Holdings*,[109] courts assumed that spoliation evidence would be admitted at trial and further relief under Rule 37(e) might follow if justified.

However, the Committee surely did not intend to allow everyone who fails as a matter of law to meet the requirements for serious spoliation sanctions to re-argue the issue to the jury as a consolation prize or back-handed attempt to punish.[110] In *General Motors Ignition Switch Litigation*, for example, the court questioned the basis for such a conclusion.[111] In *Delta/AirTran Baggage Fee Antitrust Litigation*, the court barred such

---

example of such an instruction was implicitly approved by a Sixth Circuit Panel in Lorie Applebaum v. Target, 2016 WL 4088740 (6th Cir. Aug. 2, 2016)(Sutton, J.).

[101] Ericksen v. Kaplan Higher Education, 2016 WL 695789, at *2 (D. Md. Feb. 22, 2016).

[102] 2016 WL 1637309 (D. S.Dak. April 21, 2016)(refusing adverse inference because no finding of bad faith and only minimal prejudice).

[103] 2016 U.S. Dist. LEXIS 37065, *32-34 (D. Ariz. March 22, 2016)(Campbell, J.). The court did not apply Rule 37(e) because "the parties do not contend that the lost information [photos and videotape] constitutes [ESI]"

[104] 2016 WL 2957133 (N.D. Cal. May 23, 2016).

[105] 2016 US Dist. LEXIS 32009, at ¶¶ 77 and 85 (E.D. Pa. March 10, 2016).

[106] *Id*. ¶85 (absent prejudice, "we cannot define the scope of this evidence which could be admitted or argued to the jury); *accord* (as to authority under inherent power) Benefield v. MStreet Entertainment, 2016 WL 374568, at *6 (M.D. Tenn. Feb. 1, 2016).

[107] 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).

[108] 2016 WL 930686 (E.D. Pa. March 11, 2016)

[109] 2016 U.S. Dist. LEXIS 16533 (E.D. N.Y. Feb. 2, 2016).

[110] 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).

[111] 2015 WL 9480315 (S.D. N.Y. Dec. 29, 2015)(noting lack of cases holding that "a party may introduce evidence of spoliation and then argue spoliation to the jury where, as here, it fails as a matter of law to meet the requirements for serious spoliation sanctions").

evidence because it would "transform what should be a trial about [an] alleged antitrust conspiracy into one on discovery practices and abuses."[112]

Even if the purpose is merely to explain a jury's fact-finding role under *Mali* logic,[113] admission of spoliation untethered to addressing prejudice risks undermining the fairness of the trial. FRE 403[114] 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."

Subsection (e)(2)

Subdivision (e)(2) cabins the use of certain measures or their equivalents unless it is shown that the party acted "with intent to deprive" the moving party of the use of the missing ESI in the litigation.

The Committee Note explains this as an explicit rejection of *Residential Funding Corp. v. DeGeorge Financial Corp*.,[115] under which missing ESI may be presumed to be adverse if destruction occurred without a showing of bad faith, provided a duty to preserve existed.[116] As the Chair of the Standing Committee recently noted writing for a Panel in the Sixth Circuit, "a showing of negligence or even gross negligence will not do the trick."[117]

Instead, only when an "intent to deprive" is found may a court order any of the following case-dispositive 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.

Care must also be taken to ensure that "curative measures under subdivision (e)(1) do not have the effect of measure that are permitted" only on a finding of intent to deprive. One court has noted that there is "little difference between an adverse inference instruction and an instruction that plaintiffs 'breached the duty to preserve evidence.'"[118]

---

[112] In re Delta/AirTran Baggage Fee t Litigation, 2015 WL 4635729, at *14 (N.D. Ga. Aug. 3, 2015).
[113] 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").
[114] 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).
[115] 306 F.3d 99 (2nd Cir. 2002),
[116] In re Bridge Construction Services of Florida, 2016 WL 2755877, at ¶17 (S.D. N.Y. May 12, 2006)(Koeltl, J.).
[117] Lorie Applebaum v. Target, __F.3d. __, 2016 WL 4088740 (6th Cir. Aug. 2, 2016)(Sutton, J.).
[118] Haley v. Kolbe & Kolbe Millwork, 2014 WL 6982330, at *2 (W.D. Wisc. Dec. 10, 2014)(denying requested sanction under (then) standard of Circuit court requiring proof of destruction "for the purpose of hiding adverse information").

The Committee Note cautions, however, 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.

Intent to Deprive

The "intent to deprive" standard bears a close relationship to the requirement of "bad faith" already in use in some Circuits, but is "defined even more precisely."[119] It is similar to the "intentional destruction of evidence indicating a desire to suppress the truth" or "for the purpose of hiding adverse information,' as required in the Seventh[120] and Eighth[121] Circuits, respectively. To some, it is the "toughest" standard that could have been applied.[122]

A finding of "willful" conduct is not sufficient[123] In *Roadrunner Transportation v. Tarwater*, the Ninth Circuit affirmed entry of a default judgment where the party acted "willfully" in deleting data because the underlying conduct would also have supported a finding of "intent to deprive" had the rule been in effect.[124] In *Mazzei v. The Money Store*,[125] the Second Circuit reached the same conclusion because "under the current" Rule 37(e), an adverse inference required a finding that the party acted with an intent to deprive and the lower court "specifically found that defendants did not act with such intent."[126]

No "Intent to Deprive"

A majority of courts facing the issue have not found an "intent to deprive" within the meaning of the amended Rule. In *Living Color Enterprises v. New Era Aquaculture*,[127] the court declined to do so where a party failed to negate the auto-delete feature of his

---

[119] June 2014 Report, Rules Advisory Committee, 305 F.R.D. 457, 512 at 528 ("This intent requirement is akin to bad faith, but is defined even more precisely. The Committee views this definition as consistent with the historical rationale for adverse inference instructions").

[120] Bracey v. Grondin, 712 F.3d 1012, 1019 (7th Cir. 2013)(denying adverse inference in absence of showing of bad faith).

[121] Greyhound Lines v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007).

[122] Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure*, 83 U. CIN. LAW REV. 1083, 11125 (2015)("Moore")(the toughest standard to prove that the Advisory Committee could have adopted).

[123] In comparison to prior cases like *Sekisui v. Hart*.945 F. Supp.2d 494, 506 (S.D. N.Y. 2013)(sanctioning despite lack of culpability because it "does not change the fact that the ESI was willfully destroyed").

[124] 2016 WL 1073104, at n. 1 (9th Cir. March 18, 2016)(noting admissions, expert findings of deletion and overwriting through user-initiated process and deletion of emails and files after receiving preservation demands and after being ordered by court to preserve "all data" on devices); *accord CTB v. Hog Slat*,[124] a court recommended an adverse inference instruction because of "willful" destruction of data[124] while applying the rule.[124]

[125] 2016 WL 3902256] (2nd Cir. July 15, 2016)(finding that Byrnie v. Town of Cromwell was "superseded in part by Ref. R. Civ. P. 37(e)(2015)."

[126] Judge Koeltl's finding was 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).

[127] 2016 WL 1105297 (S.D. Fla. Mach 22, 2016).

cell.[128] In *Nuvasive v. Madsen Medical*, the mere fact that some text messages had been deleted was not indicative of an intent to deprive[129] any more than similar text deletions were in *SEC v. CKB168 Holdings*.[130] In latter two cases, the courts vacated pre-December 1, 2015 rulings allowing adverse inference instructions because of a lack of evidence of an "intent to deprive."[131]

In *Orchestratehr v. Trombetta*, the court refused to find an intent to deprive based on "equivocal evidence" about a party's state of mind at the time he deleted emails.[132] Similarly, in *Accurso v. Infra-Red Services*, the court refused to find "intent to deprive" given the lack of any basis for such a conclusion, but left the issue open for renewal at the trial.[133]

A finding that the party had undertaken a good-faith implementation of policy was important in *Marshall v. Dentfirst*,[134] where the court refused to find that wiping of computer records during a company-wide upgrade was taken with intent to deprive Plaintiff of the use of information in this litigation.[135] Other lower court opinions refusing to find the requisite intent include *Accurso v. Best Payphones v. City of New York*,[136] *Bry v. City of Frontenac*,[137] *Friedman v. Phila. Parking Auth.*,[138]*Matthew Enterprise v. Chrysler*[139] *Thomley v. Bennett*[140] and *Thurmond v. Bowman.*[141]

Absent the new Rule, many of these decisions would have authorized adverse inferences under decisions in the Second, Ninth and Sixth Circuits. Indeed, the "intent to deprive" requirement likely would have barred use of such instructions in decisions such as *Zubulake V*,[142] *Pension Committee*[143] and *Sekisui v. Hart.*[144] As a minimum, it requires that courts conform to the core requirement that adverse inferences are not available merely from the loss of ESI.[145]

---

[128] *Id*. at *6.
[129] 2015 WL 4479147, at *2 (S.D. Cal. July 22, 2015).
[130] 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).
[131] 2016 WL 305096 (S.D. Cal. Jan. 26, 2016)(Nuvasive); 2016 U.S. Dist. LEXIS 16533 (E.D. N.Y. Feb. 2, 2016)(SEC).
[132] 2016 WL 1555784, at *12 (N.D. Tex. April 18, 20116).
[133] 2016 WL 930686, at *4 (E.D. Pa. March 11, 2016).
[134] 313 F.R.D. 691 (N.D. Ga. March 24, 2016).
[135] *Id.* at 701.
[136] 2016 WL 792396 (E.D. N.Y. Feb. 26, 2016).
[137] 2015 WL 9275661, at 7 (E.D Mo. Dec. 18, 2015).
[138] 2016 U.S. Dist. LEXIS 32009, at ¶73 ((E.D. Pa. March 10, 2016).
[139] 2016 WL 2957133 (N.D. Cal. May 23, 2016)(no "intentional spoliation").
[140] 2016 WL 498436, at n. 18 (S.D. Ga. Feb. 8, 2016).
[141] 2016 WL 1295957, at n. 6 (W.D. N.Y. March 31, 2016)(if Rule 37(e) had been applied).
[142] Zubulake v. UBS Warburg ("Zubulake V"), 229 F.R.D. 422, 439-440 (S.D. N.Y. July 20, 2004).
[143] Pension Committee v. Banc of America, 685 F. Supp. 2d 456, 496-497 (S.D. N.Y. May 28, 2010.
[144] Sekisui American v. Hart, 945 F.supp.2d 495, 509-510 (S.D. N.Y. Aug. 15, 2013).
[145] *Cf.* Fleming v. Escourt, 2015 WL 5611576 (D. Idaho Sept. 22, 2015)(acknowledging impending arrival of amended Rule 37(e), but justifying adverse inference because "it is enough that the party [acted] at a time it had notice of its potential relevance to the litigation").

Examples of Intent to Deprive

In *Brown Jordan v. Camicle*,[146] a court found "intent to deprive" when an executive with substantial IT experience deleted information.[147] In *CAT3 v. Black Lineage*, it was "more than reasonable to infer" that the intentional altering of emails was done in order to manipulate ESI for purposes of the litigation.[148] In *DVComm v. Hotwire*, the court found "substantial circumstantial evidence" that the "double deletion" of crucial information was done with an intent to deprive. The court utilized five factors in reaching its conclusion.[149]

In *O'Berry v. Turner*, the loss of the only copy of subsequently deleted ESI could "only" have resulted if defendants had "acted with the intent to deprive."[150] In *GN Netcom v. Plantronics*, the court concluded that a top executive "acted in bad faith with an intent to deprive" because the court "[could] only conclude that at least part" of the motivation was to deprive the party of the discovery.[151]

In *Internmatch v. Nxbigthing*[152] a court utilized its inherent authority in issuing adverse inference for willful failure to preserve because it "has not been decided" if it must make the findings required by Rule 37(e). It nonetheless added that the party "acted with the intent to deprive," under the rule because the party had failed to communicate preservation obligations and the excuse that a power surge had caused some of the problems was not credible.

Use of the Jury

The assessment of "intent to deprive" is typically nade by the court in an evidentiary hearing[153] or in the course of a bench trial.[154] Courts have not typically utilized juries. As Professor Nance has pointed out, admitting evidence of litigative behavior invites 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."[155]

---

[146] 2016 WL 815827 (S.D. Fla. March 2, 2016).
[147] *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").
[148] CAT3 v. Black Lineage, 2016 WL 154116 at *8-9 (S.D.N.Y. Jan 12, 2016).
[149] DVComm. v. Hotwire, 2016 U.S. Dist. LEXIS 133661, at ¶¶37, 38, 52-62 (Feb. 3, 2016).
[150] 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").
[151] 2016 WL 3792833, *7 at (D. Del. July 12, 2016).
[152] 2016 WL 491483 (N.D. Cal. Feb. 8, 2016).
[153] O'Berry v. Turner, 2016 WL 1700403, at *2 (M.D. Ga. April 27, 2016).
[154] Saima Ashraf-Hussan v. Embassy of France, 130 F. Supp. 3d 337, 340 (D.D.C. Sept. 17, 2015)("courts must remain circumspect in their drawing of inferences before the actual evidence is presented. This is particularly so in bench trials where prejudice is less likely").
[155] 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).

Moreover, given the structure of the Rule, if the jury decides that an "intent to deprive" does not exist so as to invoke subsection (e)(2) measures - by definition possible without a predicate showing of prejudice - it will have nonetheless heard potentially damaging testimony which under subsection (e)(1) would have been be denied to it. This undermines the cabining of such inferences by the "intent to deprive" standard and risks unfairness in cases where, in fact, prejudice is lacking.[156]

Some courts which ignore Rule 37(e) have allowed a jury to decide whether the requisite degree of culpability existed.[157] The Texas Supreme Court, however, has held that a "judge, not jury, must determine whether a party has spoliated evidence and, if so, the appropriate remedy."[158]

Prejudice

While subdivision (e)(2) does not explicitly require a showing of prejudice,[159] it may be presumed from the existence of an "intent to deprive."[160] The Committee Note explains that "the finding of intent required by the subdivision can support not only an inference that the information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information [and] Subdivision (e)(2) does not require any further finding of prejudice."

Some see the lack of prejudice requirement as an important "change in the law" permitting a court to sanction a party based solely on their intent, not the results of their actions.[161] However, the Standing Committee rejected this interpretation in striking such language from the Note.[162] A Judge noted in an ABA Litigation summary of the new rulethat "as a practical matter" she could not see "courts issuing sanctions under (e)(2)" in the absence of prejudice even though the rule does not require it.[163]

---

[156] Ariana J. Tadler & Henry J. Kelston, *What You Need to Know About the New Rule 37(e)*, 52-JAN Trial 20, 23 (2016)("Regardless of whether the jury makes the inference, it will still have heard damaging evidence and arguments about the circumstances that caused the information loss"); *cf.* Scheindlin and Orr, *supra*, 83 FORDHAM L. REV.1299, 1315 (2014)("courts may [despite (e)(2)] issue a Mali-type permissive instruction that leaves all factual findings, including whether spoliation occurred, to the jury").

[157] Evans v. Quintiles Transnational, 2015 WL 9455580 at *5 & 10 (D.S.C. Dec. 23, 2015)(ignoring amended Rule 37(e), which was in effect at the time).

[158] Brookshire Brothers v. Aldridge, 57 Tex. Sup. Ct. J. 947, 438 S.W. 3d 9, 2014 WL 2994435, at *29 (S.C. Tex. July 3, 2014); *see also* Norton, Woodward and Cleveland, *Fifty Shades of Sanctions*, 64 S.C.L. REV. 459 (Spring 2013).

[159] Minutes, Std. Comm. Meeting, May 29-30, 2014, at n. 2.

[160] 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]").

[161] Joseph, *supra*, 41.

[162] 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.

[163] Kristen L. Burge, *New Framework for ESI Spoliation Claims*, ABA LITIGATION NEWS, 23-24, Spring 2016, Vol. 41, No. 3 (quoting Chair of the ABA Standing Comm. on Judicial Improvements), copy at https://apps.americanbar.org/litigation/litigationnews/top_stories/021616-esi-spoliation.html.

Proportionality

The Committee Note stresses that courts should use caution in applying measures under subdivision (e)(2).[164] The "remedy should fit the wrong" and "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." This is consistent with the general principle that the choice of sanctions should be guided by the "concept of proportionality" between offense and sanction.[165]

Alternative Sources of Authority

Notably, the rule is silent on the topic of the use of inherent sanctioning authority for a failure to preserve ESI which should have been preserved. It is also silent on the "interplay" between Rule 37(e) and other sources of sanction authority in Rule 37, especially Rule 37(b) and (c). Both topics deserve further reflection.

Inherent Power

The Committee Note states that Rule 37(e) "forecloses reliance on inherent authority or state law" to "determine when certain measures should be used." According to *CAT3*, this means that it had no authority "to dismiss a case as a sanction for merely negligent destruction of evidence, as would have been the case under *Residential Funding*."[166]

The validity of that conclusion depends on whether the intent of Congress can fairly be said to make the rule exclusive.[167] In *Chambers v. NASCO*,[168] the Supreme Court explained that a court's "inherent power extends to a full range of litigation abuses," and while it can be limited by "statute and rule" courts should not "lightly assume" that Congress intended to do so.[169]

In the case of Rule 37(e), even without reference to the Committee Note, it is highly unlikely that the Supreme Court and Congress intended to that courts could ignore the policy embodied in the "intent to deprive" standard or act inconsistently with it. Most courts - by applying the uniform "intent to deprive" standard of the rule - seem to agree.

---

[164] GN Netcom v. Plantronics**,** 2016 WL 3792833, at *14 (D. Del. July 12, 2016)(refusing to impose dispositive sanctions where adequate, alternative remedy available).
[165] Vitamins Online v. Heartwise, 2016 WL 3747582, at *5 (D. Utah July 11, 2016)(collecting cases).
[166] 2016 WL 154116, at *6 (interpreting Committee Note statement to the effect that the rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used").
[167] A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2025 & n. 95 (2011)(test is whether the constraint on discretion is directly mandated to the exclusion of others)(collecting cases).
[168] Chambers v. NASCO, 501 U.S. 32 (1991)(affirming award of attorney's fees for bad-faith conduct).
[169] *Id.*, 47-48.

The Supreme Court recently noted that where "specific powers" are spelled out in a civil Rule, they should govern to the exclusion of inherent power.[170]

In *Chambers*, the Court *also* noted, however, that inherent authority can be "invoked even if procedural rules exist which sanction the same conduct."[171] Thus, "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 the Rules are not up to the task, the court may safely rely on its inherent power.[172]

Thus, courts may ignore Rule 37(e) when it is not "up to the task" in dealing with bad faith conduct which impairs the judicial process. In *CAT3*, the court concluded that it *would* have had authority to sanction under its inherent powers if the litigation abuse in that case had prevented the court from applying Rule 37(e).[173] However, that proved unnecessary, as the court found that the [incompetent spoliator] party had failed to adequately replace or restore the emails at issue.

CAT3 is best seen, in the Author's view, as describing a classic example of a rule not being "up to the task." As has been pointed out, the court would otherwise have been be "forced into an untenable position of condoning bad faith intentional conduct by parties successful in skirting the rule."[174] It is a rare example, however, and likely to be the exception.

However, in the absence of appellate guidance, some courts question the extent and validity of assertion that inherent authority is "foreclosed" by Rule 37(e)."[175] In *Martinez v. City of Chicago*,[176] for example, a member of the Rules Committee refused to rule on the interaction between Rule 37(e) and Seventh Circuit rulings on adverse inferences because the "the Committee [Note] is silent on how the amendment impacts presumptions based on document retention policies."

---

[170] Deitz v. Bouldin, 579 U.S. ___ (2016), No. 15-58 (Slip Opinion) at 4 & 6.
[171] *Id*. 49. The Ninth Circuit has refused to require reliance on Rule 37 alone because it is not the exclusive means for addressing the adequacy of a discovery response. Haeger v. Goodyear Tire & Rubber, 813 F.3d 1233, 1244 (9th Cir. Feb. 16, 2016)(affirming bad faith sanctions imposed on counsel after case was closed).
[172] Chambers, *supra*, at 50.
[173] *Accord* Joseph, *supra*, 41 (citing case law based on inherent authority to deal with abusive litigation conduct which did not succeed in disrupting the litigation if the conduct was intended to do so).
[174] Kristen L. Burge, Addressing Altered Emails, Court Tests Limits of Amended Rule 37, ABA LITIGATION NEWS, June 2, 2016.
[175] Friedman v. Phila. Parking Authority, 2016 US Dist. LEXIS 32009, at ¶ 77 (E.D. Pa. March 10, 2016)("[w]ithout limitation, litigation misconduct may be otherwise sanctioned by the Court's inherent power. We are vested with broad discretion to fashion an appropriate remedy under our inherent powers to stop litigation abuse"); Internmatch v. Nxtbigthing, 2016 WL 491483, at *4, n. 6 (N.D. Cal. Feb. 8, 2016)("whether a district court must now make the findings set forth in Rule 37 before exercising its inherent authority" to sanction "has not been decided").
[176] 2016 WL 3538823, at *24 (N.D. Ill. June 29, 2016)(Dow, J.).

CAT3 also contains the ambiguous statement that "[i]n light of the findings here," dispositive measures "are available sanctions under either Rule 37(e) *or* the court's inherent authority." (emphasis added).[177] In *GN Netcom v. Plantronics*, the court imposed "punitive monetary sanctions" under conditions which make it plausible that it was exercising inherent authority in doing so, despite or as a supplement to Rule 37(e)[178]

Interplay of Rule 37(e) with Rule 37

The interplay with Rule 37(a) is discussed above in connection with subsection (e)(1) attorney fee awards, and is not further discussed here.

Rule 37(b) authorizes sanctions, including harsh measures,[179] for a failure to obey an order to provide or permit discovery[180] without require a showing of fault,[181] including citations for [civil] contempt.[182] Sanctions sought under Rule 37(b) and those sought under Rule 37(e) are typically seen as unrelated.[183] However some courts believe that Rule 37(e) should always yield to Rule 37(b) in the event of an order arguably has been violated. That may explain the lack of reference to Rule 37(e) in *Prezio Health v. John Schenk & Spectrum Surgical Instruments*.[184]

In that case, however, an alternative explanation might be that the spoliation occurred after the order to compel was entered. In *Matthew Enterprise v. Chrysler*, however, the court denied a motion for sanctions under Rule 37(b) in favor of applying Rule 37(e) because the predominant issue was the failure to preserve, not breach of a discovery order entered after a motion to compel.[185] A similar preference for applying Rule 37(e) where a failure to preserve was at issue, despite the existence of a discovery order, was noted in *Ninoska Granados v. Traffic Bar*.[186]

Nonetheless, in *First Financial Security v. Lee*, a court also relied on Rule 37(b) after the loss of thousands of text messages.[187] The non-moving party had asserted that

---

[177] 2016 WL 154116, at *10 (S.D. N.Y. Jan. 12, 2016).
[178] 2016 WL 3792833, *7 at (D. Del. July 12, 2016).
[179] But not an adverse inference instruction.
[180] Rule 37(b)(2)(A)("fails to obey an order to provide or permit discovery").
[181] *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).
[182] Moore, supra, at 1125 (emphasis in original).
[183] *See, e.g.*, Bagley v. Yale, 2016 WL 3264141, at *20 (D. Conn. June 14, 2016)(sanctions sought "under Fed. R. Civ. P. 37 against Yale for its failure to obey [an order to produce] and its failure to take reasonable steps to preserve relevant documents and [ESI]").
[184] 2016 WL 111406 (D. Conn. Jan. 11, 2016). *See* Barkett, *supra*, 38 ("there 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").
[185] 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).
[186] 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*, Lorie Applebaum v. Target, 2016 WL 4088740 (6th Cir. Aug. 2, 2016).
[187] 2016 WL 88103, at *8 (March 8, 2016).

the reason for the loss was accidental destruction. Another court stated that it would have applied subsection (b) where there was a violation of an order "to produce the ESI at issue"[188] as did the court in the case of *In re: Ajax Integrated*, where deletion of computer files occurred after an order issued for a forensic examination. [189]

Reconciling these decisions suggests that Rule 37(e), not Rule 37(b), should provide the standards when the issue is the remediation or punishment for spoliation, whether or not an order of production exists or even if the order required preservation.[190] Rule 37(b) does *not* authorize an adverse inference instruction, which is at the heart of Rule 37(e) and its principal innovation, as is the doctrine that harsh measures require a finding of culpability not usually required of a Rule 37(b) violation.[191]

Not surprisingly, however, some commentators have that requesting parties should routinely seek orders mandating preservation obligations in order to provide a mechanism for courts to order sanctions "not otherwise available under Rule 37(e)."[192]

Rule 37(c)

Rule 37(c) provides sanctions when a party has failed to provide information required as an initial disclosure or a supplement to such disclosures. In *Estakhrian v. Obenstine*, a court facing delayed production of ESI appropriately entered an adverse inference under Rule 37(c).[193] In *Marquette Transportation v. Chembulk*,[194] however, a court refused to apply Rule 37(c) and turned to Rule 37(e) for guidance where ESI had been missing but was subsequently restored.

Reconciling these opinions suggests that if the underlying reason for the delayed production rests on a failure to preserve, Rule 37(e) is presumptively preferable.

Assessment

Prior to implementation of amended Rule 37(e) there was substantial disagreement as to whether it had changed the law of spoliation.[195] Some argued that the rule would

---

[188] HM Electronics v. R.F. Technologies, 2015 WL 4714908, at *30 (S.D. Cal. Aug. 7, 2015)(dicta), recommended sanctions report terminated as moot, 2016 WL 1267385, n. 4 (S.D. Cal. March 15, 2016).
[189] 2016 WL 1178350 (N.D. N.Y. March 23, 2016)(refusing to rule on motion pending evidentiary hearing).
[190] *See, by analogy*, Montalvo v. Spirit Airlines, 508 F.3d 464, 470 (9th Cir. 2007).
[191] Jablonski & Dahl, *supra*, 82 DEF. COUNSEL J. 411 at 432 (even if the duty to preserve arises from a court order under Rule 37(b), a court should apply the limitations under Rule 37€ as a matter of guidance" since the "specific takes precedence over the general in such a case.").
[192] Kristen L. Burge, *supra*, 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).
[193] 2016 U.S. Dist. LEXIS 66143 (C.D. Cal. May 17, 2016).
[194] 2016 WL 930946 (E.D. La. March 11, 2016)
[195] Gregory P. Joseph, *New Law of Electronic Spoliation – Rule 37(e)*, 99 JUDICATURE 35 (Winter 2015)("Joseph")(it "will change dramatically the law of spoliation"); *but compare* Ariana J. Tadler and

have a positive impact on parties and on the administration of spoliation issues[196] while others, conceding the "status quo was unsatisfactory," argued it would unfairly "insulate" spoliation previously determined to merit severe sanctions.[197]

It does seem clear, seven months into the implementation, that the Amended Rule has clearly resolved the circuit split on culpability for harsh measures by imposing a more uniform approach to lost ESI. It has been applied fairly.

Thus, conduct anathema to the litigation process has been held to satisfy the "intent to deprive" standard and has been appropriately sanctioned in *Brown Jordan v. Carmicle, CAT3 v. Black Linegage, DVComm v. Hotwire, GN Netcom v. Plantronics* and *Internmatch v. Nxbigthing.* Only one case, *O'Berry v. Turner,* appears to have been a close call. Where the requisite intent did not exist, courts refused to impose harsh measures. This may help reduce over-preservation resulting because parties sought to avoid the risk of severe sanctions "if a court finds [a party] did not do enough."[198]

However, the "reasonable steps" safe harbor has had little impact. Courts have withheld or ignored that provision without adequate consideration to the proportionality and good faith of the conduct. In many cases, this has resulted in an award of monetary sanctions, including attorneys' fees, in the absence of prejudice or, at the most, minimal or speculative prejudice. This approach, bordering strict liability, undercuts the positive impact of the uniform national cabining of harsh measures and lessens the likelihood of a reduction in over-preservation.

Finally, the sheer number of courts which have ignored Rule 37(e) is both troubling and problematic.[199] There is no single explanation. Perhaps counsel and courts are unaware of the change. Or perhaps courts are unsure if it really "forecloses" their use of inherent authority under existing Circuit law. Or perhaps courts dislike treating ESI spoliation more leniently than the loss of documents, given the lack of a principled difference.

Henry J. Kelston, *What You Need to Know About the New Rule (37)e),* 52-JAN TRIAL 20 ("Tadler and Kelston")(the final version of Rule 37(e) is "only a modest adjustment" in the law).

[196] White and Case (Feb. 2016), *Steps Companies May Take to Comply with Revised Document Retention Requirements,* copy at http://www.whitecase.com/publications/article/steps-companies-may-take-comply-revised-document-retention-requirements#.

[197] 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").

[198] Committee Note (describing the excessive effort and money being spent on preservation in order to avoid the risk of severe sanctions).

[199] *See* Appendix B.

APPENDIX A
(Cases citing Rule 37(e))

1. **Accurso v. Infra-Red Services** [2016 WL 930686] (E.D. Pa., March 11, 2016)(Pratter, J). Adverse inference denied without prejudice under **Rule 37(e)** since there was no basis for a court to conclude that the party acted with intent to deprive the party of access to the information. The party may raise issue again at trial in light of what is received into evidence. The court noted that **Rule 37(e)** did not appear to substantially change the burden in Third Circuit of showing that the ESI was destroyed in "bad faith."

2. **Bagley v. Yale** [2016 WL 3264141, at *20] (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 whom information was requested.

3. **Best Payphones v. City of New York** [2016 WL 792396] (S.D. N.Y., Feb. 26, 2016). In an action seeking spoliation measures for failure to retain and produce document and emails, the court barred relief after applying separate legal analyses based on Circuit law and Rule 37(e). The court found that, as to tangible items, the party acted with negligence but the availability of the evidence from other sources negated any prejudice. The court also found that the loss of the emails resulted in no prejudice under Rule 37(e)(1), and, given that "preservation standards and practices for email retention" were in flux at the time, the party had not "acted unreasonably as is required "under Rule 37(e). Attorney fees were nonetheless awarded under Rule **37(a)(5)(A)** since additional discovery was furnished in response to a Rule 37 motion.

4. **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.

5. **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.

6. **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.

7. **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."

8. **Coale v. Metro-North Railroad** [2016 WL 1441790] (D.Conn. April 11, 2016). Noting **Rule 37(e)** but finding it "expressly cabined only to ESI the court applied *Residential Funding* in a case involving loss of substances. Contains a useful description of the relationship between a self-imposed duty to preserve under an investigations Manual and the triggering of the duty to preserve for litigation.

9. [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 rules in diversity cases by viewing such rulings as evidentiary in nature and thereby not subject to the Erie doctrine."

10. **Core Laboratories v. Spectrum Tracer Services** [2016 WL 879324] (W.D. Okla. March 7, 2016). A failure to preserve emails at the time of switching to a new email service caused "prejudice' under **Rule37(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)(2009) implying that a showing of prejudice is the only factor that is relevant to entitlement of "spoliation sanctions."

11. **DVComm v. Hotwire Communications** [2016 U.S. Dist. LEXIS 13661] (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).[200]

12. **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]].

13. **Fiteq. v. Venture Corp**.[2016 WL 1701794] (N.D. Cal. April 28, 2016) Measures under **Rule 37(e)** were not applied because missed email was "restored or replaced" once the employees former computer was located. The moving party failed to prove that other responsive documents ever existed. Moreover, there was no prejudice under **Rule 37(e)(1)** in the interim, since duplicates were produced by other parties to whom they had been sent. The Court acknowledged that it was foreclosed from use of inherent authority.

14. **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.

15. **Friedman v. Phila. Parking Auth.** [2016 U.S. Dist. LEXIS 32009](E.D. Pa. March 10, 2016) **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 defined the scope of the evidence to be admitted or argued to the jury. (¶85).

16. **GN Netcom v. Plantronics** [2016 WL 3792833] (D. Del. July 12, 2016). Applying **Rule 37(e)** to deletions of email by a top executive who instructed others to delete

[200] The same District Judge adopted similar language as to inherent authority in Friedman v. Phila. Parking Authority.

them, the court found that there was a failure to take reasonable steps and that the email could not be restored. The court found an "intent to deprive" (appearing to equate it with, and citing to "bad faith" rulings in the 3rd Circuit) and imposed a permissive adverse inference and monetary sanctions, including fees and costs, as well as a $3M "punitive monetary sanction," payable to the moving party.

17. **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).

18. **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)].

19. **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.

20. **Internmatch v. Nxbigthing** [2016 WL 491483] (N.D. Cal. Feb. 8, 2016). Declining to find allegations of a power urge 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."

21. **Jennifer Saller v. QVC** [2016 WL 4063411] (E.D. Pa. July 29, 2016). Although moving counsel did not "even allude" to **Rule 37(e)**, 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."

22. **Learning Care v. Armetta** [2016 U.S. Dist. LEXIS 79536] (D. Conn. June 17, 2016). Court declines to apply **Rule 37(e)** because the spoliation issue was raised prior to the application of the new rules. 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.

23. **Leroy Bruner v. American Honda** [2016 WL 2757401] (S.D. Ala. May 121, 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.

24. **Lorie Applebaum v. Target** [2016 WL 4088740] (**6th Cir**. Aug. 2, 2016). Sixth Circuit affirmed refusal of trial court to instruct a jury that the destruction of a bicycle at the heart of a products case permitted an adverse inference from the failure to produce any repair history records. The court had instructed the jury that it could infer that the brakes had not been repaired if the party disposed of the bike without a reasonable excuse for doing so. The Sixth Circuit (Sutton, J.) found no error in refusing to given an additional adverse inference instruction and noted that if it was sought for spoliation of electronic information, amended Rule 37(e) required an intent to deprive her of its use, since "a showing of negligence or even gross negligence will not do the trick."

25. **Living Color v. New Era Aquaculture** [2016 WL 1105297](S.D. Fla. March 22, 2016). While negligent failure to prevent auto-delete of some text messages meant that reasonable steps were not taken and thus some ESI was not, in fact, restored or replaced, no remedies were available under either **Rule 37(e)(1)** or **(2)** as to the remaining text messages not restored since prejudice was minimal 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. There was no prejudice since no nexus between missing messages and allegations of complaint, and t non-moving party's description of content as unimportant was credible and abundance of preserved information was sufficient to meet the needs of the moving party, citing **Committee Note to Rule 37(e)** (at *5).

    Marquette Transportation v. Chembulk [2016 WL 930946] (E.D. La. March 11, 2016). **Rule 37(e)** was not applicable because 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."

26. **Marshall v. Dentfirst** [313 F.R.D. 691](N.D. Ga. March 24, 2016). No measures were available under **Rule 37(e)** 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" in doing so. Moreover, there was no prejudice from their loss since the missing material was not relied upon in the termination. **Rule 37(a)** inapplicable to allow fees since the motion was not granted (n.9).

27. **Marten Transport v. Plattform Advertising** [2016 WL 492743](D. Kan. Feb. 8, 2016) No measures were available under **Rule 37(e)** because of the routine recycling of the browsing history of an employee's former computer upon movement of the employee to a new work station. While suit had been commenced earlier, the party was not under notice at that time that that the browsing history would be relevant to the suit and both parties followed the standard practice of wiping that history. Under Rule

37(e), "reasonable steps" to preserve suffice and the Rule "does not call for perfection." The court noted that while the employee was a key player, the party had earlier taken reasonable steps to preserve emails and other ESI prior to the time she moved to a new work station.

28. **Martinez v. City of Chicago** [2016 WL 3538823] (N.D. Ill. June 29, 2016)(Dow, J.) Adverse inference instruction under existing Seventh Circuit principles 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 adverse inference, it had "no occasion" to determine if a less severe remedy might be available. [n.11].

29. **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 to have its outside vendor retain communications (which were deleted after 2 years) and a failure to retain previous email when switching email providers. These efforts did not qualify for the "genuine safe harbor" under the Rule for parties that take "reasonable steps." Prejudice exist because lost customer communications "could" have contained information whose loss denied Chrysler's 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," 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 courts order on motion to compel.")(n. 37 & 47).

30. **Mazzei v. The Money Store** [2016 WL 3902256] (2nd 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 Ref. R. Civ. P. 37(e)(2015)." [the lower court (Koeltl, J.) 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).

31. **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 be found to have resulted from "intent to deprive" and sanctioned under **Rule 37(e)(2).**

32. **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.

33. **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, but implied that Rule 37(e) would not be applicable if ESI was involved.

34. **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."

35. **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 downloaded without taking further steps to preserve. The copy was placed in a file folder, ultimately moved to a new building and not sought 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 any "prejudice" caused by loss of the data.

36. **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).

37. **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 he destroyed them in bad faith or with the requisite intent to deprive Plaintiffs of their use in the litigation.

38. **Roadrunner Transportation v. Tarwater** [2016 WL 1073104] (9th Cir. March 18, 2016). **Ninth Circuit** affirmed default judgment and attorney's fees award for willful destruction of emails and files on laptop without applying **Rule 37(e).** The court noted that the district court findings would lead to the conclusion that the party acted with the intent to deprive and the district "even if" it were just and practicable to apply the rule.

39. [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."

40. **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."

41. **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.

42. **Stinson v. City of New York** [2016 WL 54684] (S.D. N.Y. Jan. 5, 2016). Court refused to apply **Rule 37(e)** because of motions 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.

43. **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.

44. **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 preserve. In n.18, the court also stated that there was no showing that the criteria of (1) was met (2) or that defendants had acted with an intent to deprive.

45. **Thurman v. Bowman** [2016 WL 1295957 (W.D. N.Y. March 31, 2016). Court refused to treat the movement of Facebook posts to "private" as santionable because the contents remained available. In a footnote, it was noted that it had not applied **Rule 37(e)** because neither party advocated for it, but if it had, the outcome would have been the same since it did not cause prejudice nor was it done with an intent to deprive.

46. **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.

47. **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.

48. **Wichansky v. Zowine** [2016 U.S. Dist. LEXIS 37065] (D. Ariz. March 22, 2016)(Campbell, J.). Court declined to apply **Rule 37(e)** to counter 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.

49. **Zbylski v. Douglas County School District** [2015 WL 9583380] (D. Colo. Dec. 31, 2015). In case involving missing hard copy notes and documents, court applied considered Committee Notes to **Rule 37(e)** in assessing onset of the duty to preserve.

APPENDIX B
Case Summaries (Cases Ignoring Rule 37(e))

1. Austrum v. Federal Cleaning [149 F. Supp.3d 1343] (S.D. Fla. Jan. 8, 2016). Court imposed rebuttable adverse inference 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. **The case demonstrates why ESI and Documents should be treated alike for Rule 37(e) purposes.**

2. Benefield v. MStreet Entertainment [2016 WL 374568] (M.D. Tenn. Feb. 1, 2016). Court imposed "spoliation instruction" for failure to preserve text messages without finding of elevated culpability because defendants failed to take sufficient steps and there was no justification for doing so. **No mention of Rule 37(e) and result would be different under Rule 37(e).**

3. 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. **Results would be no different if Rule 37(e) applied.**

4. Brice v. Auto-Owners Insur. [2016 WL 1633025] (E.D. Tenn. April 21, 2016). Adverse inference granted under Sixth Circuit authority for negligent deletion of email and text messages without mentioning Rule 37(e). **Result likely different under Rule 37(e).**

5. Browder v. City of Albuquerque [2016 WL 3946801] (D. N.M. July 20, 2016). A ruling on failure to apply a litigation hold to "electronic data, such as the video footage here" 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 related ruling dealing with loss of cell phone [2016 WL 3397659, at *8 and n. 4] court allowed jury to "make any inference they believe appropriate" 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. **Same result as to sanctions if Rule 37(e) applied, but arguable the court could find that the party took reasonable steps.**

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). Result would have been no different if Rule 37(e) cited.**

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). No difference in result would have occurred if Rule 37(e) applied.**

8. 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 since spoliation in Ninth Circuit raises a presumption that it was adverse and party need not act in bad faith. **Result likely different under Rule 37(e).**

9. 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. **Unclear impact of Rule 37(e) if it had been utilized.**

10. 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) ignored, without explanation, but might not have led to a different result.**

11. 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 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"). **Same result if Rule 37(e) had been applied.**

12. Estakhrian v. Obenstine, 2016 U.S. Dist. LEXIS 66143 (May 17, 2016). Court adopted Special Master Report awarding adverse inference instruction relating to delayed production of documents, including ESI, which should have been identified in response to Rule 26(a) or supplemented under Rule 26(e). Although citing to Rule 34 at one point and to Rule 37(c) at another, the court asserted that "purposeful sluggishness" was sufficient to support an adverse inference as well as an evidentiary prohibition. **Shows distinction between Rule 37(e) scope and that of Residential Funding; Rule 37(e) bars adverse inferences without an intent to deprive only if ESI is lost, not if its delayed**.

13. 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. Use of Rule 37(e) probably would not have made a difference.**

14. 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. **Not clear if Rule 37(e) should have been applied because of allegations of ESI destruction.**

15. Georgia Power v. Sure Flow Equipment [2016 WL 3870080] (Feb. 17, 2016). Sanctions not imposed for loss of strainer housings at power plant during conversion from coal to natural gas. Court analyzed under *Flury* (confusing) standards, as informed by Georgia law**.** No mention of Rule 37(e). **Shows that single standard should apply to ESI and tangible property to avoid confusion. Result would not have been different.**

16. Hernandez v. Vanveen [2016 WL 1248702] (D. Nev. March 28, 2016). Sanctions denied for failure to take drug test, perhaps with results recorded as ESI, since it could not be determined if the missing information would have been relevant. Rule 37(e) not mentioned. **Suggests all information should be subject to Rule 37(e) since no principled distinction.**

17. 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. **Shows value of applying Rule 37(e) to both documents and ESI given lack of principled distinction. Probably would not have made a difference.**

18. 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) probably would make a difference.**

19. 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. **Rule 37(e) might have allowed more leeway on evidence; shows that tangible property losses could be covered by same rule.**

20. Jessica Jimenez v. Menzies Aviation [2016 WL 3232793] (N.D. Cal. June 13, 2016). Court **ignored Rule 37(e)** in case where paper records destroyed for employees who recorded their time electronically but retained paper time cards without duplicate records. Case apparently involved only missing paper records. **Excellent example of why Rule 37(e) should apply to both hard copy documents and ESI given lack of principled distinction.**

21. 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). Would have made no difference if Rule 37(e) applied.**

22. 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. The court also held that the party did not act "willfully or in bad faith." **No mention of Rule 37(e). Applying the rule would not have made a difference.**

23. 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) not mentioned but would have have made a difference.**

24. 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) not mentioned but probably would not have made a difference.**

25. 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) not mentioned but probably would not have made a difference.**

.

26. McCarty v. Covol Fuels [2016 WL 611736](**Sixth Cir**. Feb. 16, 2016). Sixth Circuit Panel **ignored Rule 37(e)** in affirming summary judgment on independent basis despite destruction of text messages and phone call records on destroyed cell phones. Moreover, defendants did not act in bad faith and loss of evidence did not preclude putting on a case. **Rule 37(e) would probably not have altered outcome.**

27. 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." **Ignores Rule 37(e) but same result probably would have been imposed.**

28. Orologio of Short Hills v. The Swatch Group [2016 WL 3454211] (**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 if finding a lack of "bad faith" which was required, not mere negligence, under Bull v. United Parcel, 665 F.3d 68 at 79 (3d Cir. 2012). **No mention of Rule 37(e) was made. Use of Rule 37(e) would not have changed the outcome and its possible that the court treated the loss as one of tangible property.**

29. 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 under Second Circuit authority (**both Residential Funding and Mali cited**) because the conduct was "grossly deficient." Neither Rule 37(b) nor **Rule 37(e)** are mentioned but its plausible that the destruction occurred after the order, not before. **Rule 37(e), if applied, likely would have led to different result.**

30. Sell v. Country Life Insur. Co [2016 WL 3179461] (D. Ariz. June 1, 2016). Court struck Answer and entered a Default Judgment after finding that a party and its counsel had acted in willful and bad faith conduct during discovery, including a failure to preserve emails **without considering the impact of Rule 37(e)** citing 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). **Applying Rule 37(e) would have made an impact**.

31. 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 but retention of electronic copies. **Shows importance of treating documents and ESI under same rule; if the electronic copies had been destroyed not the hard copies, Rule 37(e) would apply. However, the result would have been the same.**

32. Stedeford v. Wal-Mart Stores, [2016 WL 3462132] (D. Nev. June 24, 2016). Court authorized preclusion of evidence and adverse inference **without citing Rule 37(e**) where party allegedly failed to copy to electronic disk part of record of slip and fall that court concluded should have existed. **Rule 37(e) would have led to different result.**

33. 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 it 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 given no principled distinction.**

34. Transystems Corp. v. Hughes Assocs [2016 U.S. Dist. LEXIS 85548] (M.D. Pa. June 30, 2016). Citing Zubulake and distinguishing 28 U.S.C. § 1927, court imposed sanctions for negligent failure to preserve ESI by the wiping of hard drives **without mentioning Rule 37(e)**. **Applying the rule probably would have changed the outcome**.

35. 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. **Unlikely to have changed outcome if Rule 37(e) applied.**