6 Months of Case Law Under the New FRCP

A digest of the most prominent judicial opinions issued after amendments to the Federal Rules of Civil Procedure on December 1, 2015
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**Case Law Digests**

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Six months have passed since the December 1, 2015 amendments to the Federal Rules of Civil Procedure (FRCP) took effect.

What has been the impact of the new rules on civil litigation and discovery? In particular, Rule 26(b)(1) and Rule 37(e) have attracted a sizeable amount of jurisprudence, as both courts and parties grapple with the applications of these new rules.

To aid today’s practitioner, Kroll Ontrack analyzed the most significant judicial opinions in the last six months relating to Rule 26(b)(1) and Rule 37(e). Also included is a digest of case citations sorted by circuit pertaining to the FRCP amendments under Rule 26(b)(1) and Rule 37(e). While not exhaustive, this list provides a starting point for research relating to how courts are interpreting the new FRCP language.

To view a copy of the 2015 FRCP Amendments and Advisory Committee notes, visit: http://www.ediscovery.com/2015frcp/.

Special thanks to Tom Allman, for providing initial case law research and reflections on the impact of the new amendments.
Rule 26(b)(1)

The amended Rule 26(b)(1) has resulted in nuanced, yet universal, changes to how parties and judges define the scope of discovery in a civil litigation matter. In the first six months since the 2015 amendments, courts have struggled with the removal of the “reasonably calculated” language and have grappled with the additional emphasis on proportionality. The proportionality factors alone have developed a growing body of case law, as pioneering lawsuits have fleshed out how the courts weigh the factors. Looking at the totality of the case law, one theme clearly emerges—there is no substitute for specificity. Both parties are required to state with specificity why they are requesting or objecting to discovery. This development has created a harsh reality for litigants whose motions failed based on the lack of specificity. Contained within this section is a series of noteworthy cases for each of these aspects under the new Rule 26(b)(1), illustrating some of the highlights and interpretations from courts across the nation.

The selected Rule 26(b)(1) cases are divided into three sections, determined by the most significant themes within the judicial opinions:

- Discovery Must Be Both Relevant and Proportional
- The Factors Determine What Is “Proportional”
- Court Will Not Allow Broad Discovery Requests or Objections
Of the 154 opinions surveyed referencing Rule 26(b)(1) in the first six months after the 2015 amendments, 67 opinions specifically mention ESI in the scope of discovery.

All data, even that on a personal device, may be discoverable.

- **3 Cases** involved social media
- **25 Cases** involved email
- **5 Cases** involved video/audio recordings
- **12 Cases** involved disputes over search terms
- **3 Cases** involved texts or cell records
- **2 Cases** involved vehicle operation data
- **29 Cases** involved business data

*Some opinions listed more than one data source.*
Discovery Must Be Both Relevant and Proportional


The Factors Determine What Is “Proportional”


Courts Will Not Allow Broad Discovery Requests or Objections

If one statement could summarize the entirety of Rule 26(b)(1) jurisprudence in the last six months on relevance and proportionality, it would be this:

Courts are still adjusting to the new standards. Some jurisdictions are providing clear guidance to their litigants, such as in Bentley v. Highlands Hospital, illustrating the parameters of a relevant and proportional discovery request. Others have created some consternation, such as the court in Wit v. United Behavioral Health. The Wit court cited an obsolete Supreme Court opinion, Oppenheimer Fund v. Sanders, 437 U.S. 340 (1978), to support a broad interpretation of “relevance” in order to replace the now missing “reasonably calculated” language.

Despite the confusion surrounding the terms, many courts are taking the spirit of the new amendments to heart. A major thrust of the amendments is to encourage consideration of proportionality “up front,” before the expenses and costs of burdensome and disproportionate discovery accumulate. This requires judges to play an active role in managing discovery by no longer tolerating broad discovery requests, and, in the spirit of amended Rule 1, expecting greater cooperation between parties to keep discovery manageable.

**Facts:** Defendant objected to interrogatories as burdensome, and argued that it would be necessary to develop software to access the information relating to over 150,000 insurance claims, which were stored on separate databases. This retrieval would require individual cross-referencing of the claims. The court required the defendant to comply with the discovery request because the defendant had refused to allow direct access to the databases, citing concerns of divulging “highly confidential, trade secret information.”

**Takeaway:** A party cannot make a blanket objection to a request as burdensome after rejecting a less burdensome compromise, as part of an effort to deny all discovery of the relevant information.

**Who:** Hon. Nanette K. Laughrey  
**When:** May 9, 2016  
**Where:** W.D. Mo.

“[Defendant] has offered no effective way for [plaintiff] to access the data that should have been shared in discovery long ago. Such an obstructionist approach cannot be rewarded.”


**Facts:** The defendant issued subpoenas to the plaintiff’s shareholder. However, the court prohibited the discovery, finding that while the information may be relevant, the “[defendant] never attempts to demonstrate that the discovery is in any way proportional to the needs of this case.”

**Takeaway:** Even relevant information is not discoverable under the amended rules if the request is not proportional to the needs of the case. In short, proportionality trumps relevance.

**Who:** Hon. Debra McVicker Lynch  
**When:** March 24, 2016  
**Where:** S.D. Ind.

“[Defendant] beats the drum of ‘relevancy.’ It asserts that all of its depositions and document requests are ‘relevant.’ That’s not good enough.”

**Facts:** The plaintiff, in a medical negligence action, motioned to compel discovery, which included employment contracts, bylaws, corporate governance structure, policies and protocols, and information regarding advertisements. The court granted the motion to compel discovery for two of the eighteen disputed requests. The two granted requests were relevant, narrow in scope, and discoverable, unlike the sixteen which were denied.

**Takeaway:** Judges have a substantial role in discovery disputes, limiting the potential for discovery abuse.

**Who:** Hon. Edward B. Atkins  
**When:** February 23, 2016  
**Where:** E.D. Ky.

"Discovery requests are not limitless, and while plaintiffs should have sufficient access to the information necessary to investigate their claims, they must be prohibited from taking 'fishing expeditions' in hopes of developing meritorious claims along the way."


**Facts:** The defendant issued subpoenas to the plaintiff’s past employers to demonstrate that the plaintiff was “untruthful about some of the events of his prior employment . . . [and that he] was not an ‘exceptional’ waiter.” The court granted the motion to quash the subpoenas because the plaintiff’s conduct with previous employers had no bearing on his lawsuit against this employer.

**Takeaway:** Discoverable evidence must have some obvious and direct relationship to the claims or defenses of a case, and courts will not hesitate to prevent third party discovery that does not seek information of that nature.

**Who:** Hon. James L. Cott  
**When:** January 25, 2016  
**Where:** S.D.N.Y.

"That Rule was amended this year, and this [reasonably calculated] language, long relied on by counsel to seek wide-ranging discovery, has now been eliminated."
**Facts:** The defendant, claiming attorney-client privilege, objected to producing redacted information in discovery. The court, construing relevance broadly due to the 1978 Supreme Court opinion in *Oppenheimer*, held that some of the redacted information was indeed discoverable, despite the privilege. The court was aware of the fact that the *Oppenheimer* decision was interpreting relevance at a time that “subject matter” jurisdiction was still in the rule (it was deleted in the 2015 Amendments).

**Takeaway:** Despite the new amendments and their emphasis on proportional discovery, some courts will still interpret relevance broadly. While use of *Oppenheimer* has been criticized, it is consistent with Supreme Court and other Circuit case law, and probably is not causing courts to allow inappropriately broad discovery.

*Who:* Hon. Joseph C. Spero  
*When:* January 21, 2016  
*Where:* N.D. Cal.

“Traditionally, the relevance requirement of Rule 26(b)(1) has been construed broadly.”

**Facts:** The defendants requested additional discovery to prove that the contents of a tube were, in fact, what the plaintiff claimed. The court denied this discovery, stating that requiring the additional discovery “would be like requiring GM to produce discovery on Buicks and Chevys in a patent case about Cadillacs simply because all three happen to be cars.”

**Takeaway:** The days of unlimited discovery requests are over; a discovery request needs to be narrowly tailored and relevant to the case at hand. The court demands a showing of why the requested information is needed.

*Who:* Hon. Paul S. Grewal  
*When:* January 13, 2016  
*Where:* N.D. Cal.

“No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence.”

**Facts:** The plaintiff and defendant filed cross motions to compel voluminous discovery, which included over 100 requests for production, as well as three years of text messages. Using the newly amended Rule 26(b)(1), the court denied a majority of the requested discovery due to a lack of either relevance or proportionality because “[f]ederal litigation is not a vehicle for a pro se litigant to seek volumes of information which are unrelated to the claims.”

**Takeaway:** Some courts remain confused about the appropriate definition of “relevance” but instinctively are reaching appropriate results.

**Who:** Hon. Tom Schanzle-Haskins

**When:** January 4, 2016

**Where:** C.D. Ill.

“[W]hen the terms ‘relevant’ or ‘relevancy’ are used in this order and opinion, they refer to the requirement that the request must be reasonably calculated to lead to discovery of admissible evidence.”

7th Circuit
The Factors Determine What Is “Proportional”

A key aspect of the amended Rule 26(b)(1) was to insert the phrase “proportional” into the Federal Rules for the first time. This was accompanied by the relocation, rewording, and addition to a list of factors to help determine if a request is unduly burdensome, and thereby making the discovery not proportional to the needs of the case.

The new factor added, relating to access of information, has been interpreted in *Doe v. Trustees*, as emphasizing that a party with better access to information must also have a stronger burden to produce, paired with a stronger showing to escape the call to produce. The key to proportional discovery, however, is the need for parties and courts to promote the “just, speedy, and inexpensive determination of every action and proceeding.”

**Facts:** The plaintiffs wanted additional searches for ESI that would cover additional periods of time. The court granted the search for documents that were created after the filing of the claim, but denied the search for documents created years before the filing because the plaintiffs did not sufficiently explain that the need for these documents was proportional.

**Takeaway:** The proportionality factors need to be kept in mind and utilized when both requesting and objecting to discovery.

**Who:** Hon. Terence P. Kemp

**When:** March 7, 2016

**Where:** S.D. Ohio

“[T]here is no reason why both sides should not be required to address the issue of proportionality.”


**Facts:** The plaintiff requested the court to compel discovery that asked for information regarding all employees that the defendants had from ten years ago to the present, as well as any documentation on their employment details and their disciplinary history. Because the defendants already provided the information regarding the employees that plaintiff specifically requested, the court denied the remaining broad requests.

**Takeaway:** Courts will take into consideration the resources of the parties when considering a discovery request.

**Who:** Hon. Sharon L. Ovington

**When:** February 8, 2016

**Where:** S.D. Ohio

“Although Plaintiff does not have access to all the requested information, the other proportionality factors — mainly Defendants’ resources and the burden and expense of production—outweigh the production’s likely benefit to Plaintiff.”

**Facts:** The defendants, two global corporations, objected to a discovery request, stating that it was too broad as the request asked for information about the use of equipment at any location, at any time, and by any person. The defendants also did not provide a witness to be deposed because the burden would be too high. The court agreed that the request was too broad, and allowed the defendant to respond to a narrower version of the request in writing.

**Takeaway:** The court will weigh the needs of both parties, to make sure that one is not unduly burdened, and that the other is not deprived of critical information.

**Who:** Hon. Maria-Elena James  
**When:** January 12, 2016  
**Where:** N.D. Cal.

"With this balance of factors in mind, the Court shall permit [defendant] to respond . . . in writing . . . [plaintiff] has not explained why such a mechanism would not provide what it needs, and there is no reason it will not."


**Facts:** The plaintiffs requested the court to compel additional discovery, which included prior complaints or charges of sexual assault which were brought by other current students and past students at Boston College. The court granted the motion for discovery, with some redactions made in order to protect the non-party students’ privacy.

**Takeaway:** As a result of the inclusion of a new factor in the proportionality analysis, it is clear that the party with more information and resources must show a higher burden with the proportionality factors to evade discovery.

**Who:** Hon. Marianne B. Bowler  
**When:** December 16, 2015  
**Where:** D. Mass.

"[D]efendant[] has relative and far superior access to the information which necessitates a stronger showing of burden and expense."

Facts: The plaintiffs moved the court to compel production of documents and ESI searches, estimated to cost the defendants over 4,000 hours in lawyer review time. After weighing the proportionality factors, the court granted the plaintiffs’ motion to compel in part and suggested that the parties, in the spirit of amended Rule 1, consider using phased discovery in developing a discovery plan.

Takeaway: While financial cost to a party can matter, “disproportionate” refers to the benefit and burden of production in regards to the entirety of the litigation, and both parties have an obligation to cooperate in achieving a discovery plan that satisfies that goal.

Who: Hon. Elizabeth Preston Deavers
When: December 9, 2015
Where: S.D. Ohio

“It is highly unlikely that Plaintiffs could discover similar information from another source or in another manner. Defendants are, therefore, in a unique position with respect to these documents.”
Courts Will Not Allow Broad Discovery Requests or Objections

Parties can no longer use broad objections to avoid discovery; the days of simply stating the “request is not proportional” are over.

Correspondingly, a party may not simply state that information requested is relevant and expect to be granted discovery. Cases such as *In re Takata Airbag Prods. Liab. Litig.* highlight that the sword of specificity is double-edged. Others, like *Rhone v. Schneider Nat’l Carriers, Inc.* emphasize that courts depend on parties to tell them *why* and *how* a request is burdensome. Both parties need to be prepared to argue why and how requests are, or are not, proportional and relevant. One thing is sure: courts are as committed as ever to ensuring that parties receive the appropriate amount of information they need to successfully argue their cases.

**Facts:** In a personal injury action, a motion to compel discovery on the plaintiff’s social media accounts (which included providing a portion of her “Download Your Info” report on Facebook), partially succeeded. The court ordered production of the information from the date of the accident to the present, despite plaintiff’s objections.

**Takeaway:** A broad discovery request does not mean that an objection can be broad: courts expect specific examples of how the discovery would be burdensome or overbroad, including costs.

**Who:** Hon. Noelle C. Collins  
**When:** April 21, 2016  
**Where:** E.D. Mo.

“Although Plaintiff maintains that [defendant’s] request is overbroad and asserts that such a production would be unduly burdensome, Plaintiff does not explain how it is overbroad or burdensome.”


**Facts:** Plaintiffs objected to a Special Master’s proposal allowing defendants to redact irrelevant information, claiming that it would impair discovery. The court allowed the redactions, but changed the proposal to emphasize that the redactions should not involve airbags, which was the focal point of the litigation.

**Takeaway:** Parties will no longer get everything they ask for in a broad discovery request.

**Who:** Hon. Federico A. Moreno  
**When:** February 29, 2016  
**Where:** S.D. Fla.

“[A] party is not entitled to receive every piece of relevant information. It is only logical, then, that a party is similarly not entitled to receive every piece of irrelevant information.”

**Facts:** The plaintiff asserted that the completed email searches were deficient, and additional searches were needed because they believed that the defendant possessed emails that were never produced in discovery. The plaintiff provided no basis for that belief. The court agreed with the defendant, on the record before it, since the new “search would result in hundreds of thousands of irrelevant emails.”

**Takeaway:** Like with other discovery, ESI requests need to be specific as well; parties need to be prepared to show that the information they expect from the search results cannot be found by other means.

**Who:** Robert J. Bryan  
**When:** February 19, 2016  
**Where:** W.D. Wash

“While the additional search terms could possibly yield some relevant results, Plaintiff has not provided specifics about what Plaintiff reasonably expects such a search to show.”


**Facts:** Defendant filed a motion to compel discovery, claiming that plaintiff did not “adequately respond” to its discovery demand. The court granted the motion, despite plaintiff’s broad objections, with a couple exceptions to protect irrelevant medical records.

**Takeaway:** The amendments have not changed the discovery burden: both the requesting and responding parties have a burden to explain why a discovery request should or should not be granted.

**Who:** Hon. David L. Horan  
**When:** December 7, 2015  
**Where:** N.D. Tex.

 “[A] party seeking to resist discovery . . . bears the burden of making a specific objection and . . . [the] party seeking discovery . . . may well need to . . . make its own showing of many or all of the proportionality factors.”
Organizations often preserve massive amounts of ESI at tremendous expense and effort in order to avoid the risk that inadvertent or merely negligent behavior could lead to case-terminating sanctions, as some Circuits permitted.

The 2015 amendments attempted to make adequate data preservation a realistic goal for organizations, requiring only that “reasonable steps” be taken to preserve the information. However, what constitutes “reasonable steps” under the new FRCP amendments? If evidence was preserved and then lost, what level of intent is needed before a court will impose sanctions? If ESI is intentionally destroyed, is a court required to take action only through Rule 37(e)? Each of these questions will be handled in the following sections, with the most recent and relevant case law opinions highlighting the expectations from the courts in the first six months since the 2015 FRCP amendments took effect.

The selected Rule 37(e) cases are divided into three sections, determined by the most significant themes within the judicial opinions:

- Parties Must Take “Reasonable Steps”
- Sanctions Require a Finding of Intent or Bad Faith
- Courts are Relying on Their Inherent Power
Sanctions Case Law: Metrics at a Glance

Of the opinions applying Rule 37(e) in the first six months since the FRCP amendments, courts issued sanctions 40% of the time.

The most common sanction issued was an adverse inference. When not granting sanctions, courts cited lack of intent or bad faith as the most common reason.

**What Sanctions Were Granted**
- “Adverse inferences” were granted as a sanction: 8 times.
- “Monetary sanctions” were granted: 7 times.
- “Evidence preclusion” granted: 3 times.
- “Default judgment” was granted once.

**Why Sanctions Were Not Granted**
- Not enough evidence of intent or bad faith was cited: 9 times.
- No proof that the “missing” ESI ever existed was cited: 6 times.
- Party was not harmed by the fact the ESI was missing was cited: 5 times.
- The missing data was “restored through other methods” was cited once.
- Party took “reasonable steps” to preserve data cited once.

*Some cases had more than one reason why sanctions were or were not granted*
The opinions considering Rule 37(e) sanctions contained a myriad of data sources, with email and business data ranking the highest. The case counts below specifically referenced the following data sources:

- 12 cases involved emails
- 12 cases involved non-email business data
- 4 cases involved text messages
- 3 cases involved portable devices
- 2 cases involved video
- 2 cases involved phone call recordings
- 2 cases involved internet browsing history
- 1 case involved social media

*Some cases listed more than one data source*
FRCP 37(e): Case Summaries at a Glance

Parties Must Take “Reasonable Steps”

Sanctions Require a Finding of Intent or Bad Faith

Courts Are Relying on Their Inherent Power
At first glance, the requirement that a party only take “reasonable steps” to preserve ESI—and not perfect steps to preserve—seems like a prudent obligation under amended Rule 37(e).

However, it has proven to be difficult for courts to determine when a party has met its “reasonable steps” obligation. In general, a few trends have emerged in the jurisprudence. First, a party needs to prove that there is, indeed, ESI missing, such as is seen in FiTeq Inc. v. Venture Corp. Second, the definition of “reasonable steps” varies from case to case, and party to party, as is seen in Best Payphones, Inc. v. City of New York. In Best Payphones, *in which* the court had to conduct, simultaneously, two separate analyses, since both ESI (covered by the Rule) and documents (not covered) were involved. Finally, courts are paying more attention to non-email digital communication, indicating that parties need to be aware that the duty to ESI preserve can begin early, and extend to more types of electronic data than just email.
**FitEq Inc. v. Venture Corp., 2016 U.S. Dist. LEXIS 60213 (N.D. Cal. Apr. 28, 2016)**

**Facts:** The plaintiff sought sanctions in response to deleted emails, which the defendants claimed were restored through later discovery. The court held that sanctions could not be granted under Rule 37(e) because there was no proof that any additional “missing” emails existed.

**Takeaway:** A party needs more than an inference that evidence was permanently destroyed for a court to grant relief under Rule 37(e).

**Who:** Hon. Beth Labson Freeman  
**When:** April 28, 2016  
**Where:** N.D. Cal.

“[Plaintiff] has failed to prove that other responsive documents ever existed . . . [and] failed to offer persuasive evidence to show that the ESI was not ‘restored or replaced through additional discovery.’”


**Facts:** The defendant objected to sanctions resulting from his egregious conduct in losing his personal iPad, and the destruction of files on his computer. The court found an “intent to deprive” under Rule 37(e), and granted an adverse inference sanction, stating that, “in light of his educational and professional background and that fact that he has at all relevant times been represented by counsel” the defendant knew that he was destroying evidence.

**Takeaway:** There is a high correlation between a failure to take reasonable steps and a finding of intent to deprive.

**Who:** Hon. Robin L. Rosenberg  
**When:** March 2, 2016  
**Where:** S.D. Fla.

“[T]he Court now concludes that [defendant] should have preserved [ESI] . . . in anticipation of litigation, and that this information was lost because [defendant] failed to take reasonable steps to preserve it.”

**Facts:** The plaintiff’s principal destroyed ESI and documents that it was under a duty to preserve. The court declined to impose adverse inferences, in part because the principal mistakenly believed that he was preserving the evidence, and also because the defendants “[were] not prejudiced by the destruction of the evidence.”

**Takeaway:** What constitutes “reasonable steps” varies according to the sophistication of the party and the state of preservation case law at the time of the failure to preserve (2003-2004).

**Who:** Hon. Vera M. Scanlon  
**When:** February 26, 2016  
**Where:** E.D.N.Y.

“The Court . . . finds the record lacks significant evidence that Plaintiff acted with the willfulness or with the carelessness required to sustain a finding of gross negligence.”


**Facts:** Defendants claimed that they could not produce relevant ESI because of a lightning strike and power surge. Skeptical of the defendants’ story, the court imposed sanctions under its inherent power, noting that they made no effort to attempt to preserve the damaged ESI. The court refused to concede that it was required to adhere to Rule 37(e) threshold findings, although it seems clear that the party failed to take reasonable steps to preserve.

**Takeaway:** Allegations of natural causes for a loss of ESI which are not plausible and cannot be supported by weather records are unlikely to persuade a court that a party met its preservation obligations.

**Who:** Hon. Jon S. Tigar  
**When:** February 8, 2016  
**Where:** N.D. Cal.

“There is no evidence that Defendants took any steps to preserve relevant information after the litigation began.”

**Facts:** Even though a duty to preserve had generally attached, no such duty applied to the subsequent loss of the Internet search history of an employee due to routine business practices, which occurred at a later time when it was not known it would be an issue. The court noted that the plaintiff acted reasonably, in part because most businesses do not preserve internet search history.

**Takeaway:** The intent of Rule 37(e) is to curtail excessive efforts made to preserve ESI, and as a result, courts expect "reasonable" efforts, and not perfection.

**Who:** Hon. Teresa J. James  
**When:** February 8, 2016  
**Where:** D. Kan.

"The Court will not use a 'perfection' standard or hindsight in determining the scope of Plaintiff's duty to preserve ESI."
FRCP 37(e): Sanctions Require a Finding of Intent or Bad Faith

Even if ESI is destroyed, courts will not impose sanctions unless there is a finding that the party acted intentionally to prevent the evidence from being used by an opposing party.

The courts have set a high bar for what constitutes intent, and as in seen in *Orchestrator, Inc. v. Trombetta*, it takes more than suspicious conduct. While honest mistakes are not enough to warrant sanctions, when it happens that a party, such as the one in *O’Berry v. Turner*, acts irresponsibly to preserve evidence, a court may infer a finding of intent. These cases illustrate how crucial it is for parties to have an ESI preservation process in place, and not to leave employees responsible for preserving their own ESI.

**Facts:** Defendants preserved ESI pertaining to vehicle operation data and the driving log after an auto accident only by printing off a single paper copy, and then allowing the ESI to be deleted due to routine procedures. This paper copy was then lost during transfers to a new office. The court granted sanctions by inferring intent to deprive under Rule 37(e)(2), stating that preserving ESI in this manner was “simply irresponsible.”

**Takeaway:** Making a single physical copy of ESI may not satisfy a litigant’s duty to preserve evidence.

**Who:** Hon. Hugh Lawson  
**When:** April 27, 2016  
**Where:** M.D. Ga.

“Such irresponsible and shiftless behavior can only lead to one conclusion—that [defendants] acted with the intent to deprive Plaintiff of the use of this information at trial.”


**Facts:** The plaintiffs sought sanctions because a defendant deleted work emails per his personal custom, incorrectly believing that they would be preserved. The court declined to impose sanctions, stating because there was not enough evidence to show that the defendant acted in bad faith.

**Takeaway:** Even if evidence of intentional spoliation is suspicious, more evidence of intent is needed to warrant sanctions under Rule 37(e).

**Who:** Hon. David L. Horan  
**When:** April 18, 2016  
**Where:** N.D. Texas

“Even though the evidence is troubling…because the supporting evidence of intent or bad faith is not sufficient, the Court concludes that sanctions should not…be imposed.”

**Facts:** Text messages were deleted from a defendant’s phone after he failed to turn off the automatic deletion feature. Using the three part threshold test for analyzing Rule 37(e) applicability, the court found that defendant’s negligent failure to turn off this feature did not result in sufficient prejudice. In addition, the negligent failure was not sufficiently culpable to have the level of intent needed for sanctions under either subsection (e)(1) or (e)(2) to be applied.

**Takeaway:** A negligent failure to turn off an auto-delete feature may not be “reasonable steps” but it is also not sufficiently culpable to constitute an “intent to deprive.”

**Who:** Hon. William Matthewman  
**When:** March 22, 2016  
**Where:** S.D. Fla.

“[T]he Court does not find any direct evidence of either ‘intent to deprive’ or bad faith…There is nothing nefarious about such a routine practice under the facts presented here.”


**Facts:** The plaintiff successfully motioned the court to reconsider an adverse inference sanction (authorized before Rule 37(e) was applicable) where the plaintiff’s employees deleted text messages. The court granted the motion and revoked the sanction, but authorized the party to present evidence of spoliation to the jury and awarded attorney fees.

**Takeaway:** While adverse inferences require a finding that the evidence was intentionally destroyed, courts are prepared to allow juries to hear evidence of spoliation even in the absence of such a finding.

**Who:** Hon. Barry Ted Moskowitz  
**When:** January 26, 2016  
**Where:** S.D. Cal.

“[T]he adverse inference instruction that the Court was going to give falls within the measures that are not permissible absent a finding of intent.”

**Facts:** The plaintiff asked for sanctions against defendants, alleging that the ESI contained on police dashcams, videotapes, and telephone recordings, was destroyed. The court declined to impose sanctions because "[t]he uncontroverted evidence does not demonstrate that any exculpatory evidence ever existed," or when it did exist, the evidence was overwritten in accordance with standard operating procedures.

**Takeaway:** Rule 37(e) sanctions may not be appropriate when evidence is destroyed due to standard operating procedures, absent a preservation duty.

**Who:** Hon. Ronnie L. White  
**When:** December 18, 2015  
**Where:** E.D. Mo.

“Because there is no evidence of an intent to deprive another party of the use of this information, the remedies under . . . 37(e)(2) . . . are not available to Plaintiff.”
The new language in Rule 37(e) has led some parties to believe that only 37(e) applies to the spoliation of ESI.

However, some courts rely on their “inherent power” to sanction conduct as necessary, and are confidently moving beyond 37(e) if warranted. One example is in Cat3, LLC v. Black Lineage, Inc. Despite the controversy this opinion caused, it does not stand alone among the Circuits, with others echoing its sentiments. Parties need to be aware that even though Rule 37(e) is available to the courts, judges take seriously their ability to sanction inappropriate conduct, and may use whatever remedy they feel would best suit the facts at hand.

**Facts:** The defendants had an ineffective email storage system, leading the plaintiffs to request sanctions for the destruction of ESI. The court declined sanctions under Rule 37(e) because plaintiff had no evidence yet that ESI had been permanently destroyed, and instead awarded fees and costs under 37(a).

**Takeaway:** Ineffective data storage may be enough to warrant a court to consider moving beyond Rule 37(e) and exercising its inherent authority.

**Who:** Hon. Mark A. Kearney

**When:** March 10, 2016

**Where:** E.D. Pa.

“**Without 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.**”


**Facts:** The plaintiff’s business owner (who styled himself the “Godfather of Technology”), had control of emails which were found to be “double deleted” and destroyed, thus straining his credibility. The court, while reserving its inherent power to impose other sanctions, found this remedy sufficient so that it need not examine the extent of its inherent authority.

**Takeaway:** Some courts do not accept the Committee Note statement that they are foreclosed by Rule 37(e) from use of inherent authority. This raises the risk that when a party has inadvertently destroyed ESI, 37(e) may not provide a “safe harbor” rule for lackadaisical preservation of evidence.

**Who:** Hon. Mark A. Kearney

**When:** February 3, 2016

**Where:** E.D. Pa.

“**Without limitation, litigation misconduct may also be otherwise sanctioned by the inherent power of the court.**”
Facts: In a trademark dispute, evidence emerged which indicated that the plaintiffs modified emails they intended to offer as evidence. The court granted sanctions, noting that if Rule 37(e) had not applied, it had inherent authority to remedy spoliation through its inherent power, provided bad faith had been present.

Takeaway: Parties need to be aware that even though Rule 37(e) applies solely to ESI, it is not the only remedy available to the court.

Who: Hon. James C. Francis IV
When: January 12, 2016
Where: S.D.N.Y.

"Where exercise of inherent power is necessary to remedy abuse of the judicial process, it matters not whether there might be another source of authority that could address the same issue."
The following is a compilation of court opinions regarding Rule 26(b)(1).

While not exhaustive, our hope is that this list, sorted by Circuit, will act as a starting point for any practitioner hoping to best implement the new amendments. **Bolded** cases are those that we felt were significant, “superstars” of the Circuit, if you will. Cases marked with the “*” are those that specifically mention ESI as a part of the Rule 26(b)(1) discovery process.

**DC Circuit**


*United States ex rel. Shames v. CA, Inc.*, 93 Fed. R. Serv. 3d (Callaghan) 1317 (D.D.C. 2016)*

**1st Circuit**


2nd Circuit


Certain Underwriters at Lloyd’s v. AMTRAK, 2016 U.S. Dist. LEXIS 64088 (E.D.N.Y. May 16, 2016)*


3rd Circuit


4th Circuit


Spring v. Bd. of Trs. of Cape Fear Cmty. Coll., 2016 U.S. Dist. LEXIS 47718 (E.D.N.C. Apr. 7, 2016)*


5th Circuit

Gondola v. USMD PPM, LLC, 2016 U.S. Dist. LEXIS 69667 (N.D. Tex. May 27, 2016)*


Swoboda v. Manders (In re Umarex, USA, Inc.), 2016 U.S. Dist. LEXIS 65788 (M.D. La. May 19, 2016)


In re Xarelto (Rivaroxaban) Prods. Liab. Litig., 312 F.R.D. 32 (E.D. La. 2016)*


6th Circuit


7th Circuit

In re Cook Med., Inc., 2016 U.S. Dist. LEXIS 62782 (S.D. Ind. May 12, 2016)


8th Circuit


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9th Circuit

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<td>2016</td>
<td>MP Nexlevel of Cal., Inc. v. CVIN, LLC</td>
<td>U.S. Dist. LEXIS 48621 (E.D. Cal. Apr. 11, 2016)</td>
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10th Circuit

N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs., 2016 U.S. Dist. LEXIS 61649 (D.N.M. May 10, 2016)*


11th Circuit

The following is a compilation of court opinions regarding Rule 37(e).

While not exhaustive, our hope is that this list, sorted by Circuit, will act as a starting point for any practitioner hoping to best implement the new amendments. Cases marked with the “¤” denote sanctions cases which either do not apply Rule 37(e) or do not mention it specifically.
3rd Circuit

4th Circuit

5th Circuit

6th Circuit

7th Circuit

8th Circuit

9th Circuit

10th Circuit

11th Circuit
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