Applying Amended Rule 37(e): A Rule-Based Spoliation Doctrine for ESI

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Rule 37(e), enacted as part of the 2015 Amendments, applies to spoliation allegation involving losses of ESI in cases filed after December 1, 2015 and, "insofar as just and practicable," to then-pending proceedings. It purports to foreclose reliance on use of inherent authority to determine whether certain measures should be used under those circumstances.[2]

In some cases involving loss of ESI, however, courts have ignored the rule entirely[3] or have refused to apply it to existing disputes[4] since parties did not raise the issue.[5] Some courts argue that it "has not been decided" if a court is actually precluded from use of inherent power by the existence of Rule 37(e)[6] and have asserted the right to apply inherent power at their discretion.[7]

Rule 37(e) has supplied the rule of decision for imposing measures in a number of reported cases as of this date, as reflected in the Appendix to this Memorandum.[8] In

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[2] Committee Note, 38 (the rule "forecloses reliance on inherent authority" to determine "when certain measures should be used").

[3] Harfouche v. Stars on Tour, 2016 WL 54203 (D. Nev. Jan. 5, 2016)(spoliation of "deleted" documents); Laferrera v. Camping World, 2016 WL 1086082, at *5 (N.D. Ala. March 21, 2016); Carter v. Butts County, 2016 WL 1274557, at *8 (M.D. Ga. March 31, 2016)(assessing loss of digital photos).

[4] Charles T. Mcintosh v. US, 2016 WL 1274585, at *31 (S.D. N.Y. March 31, 2016)(applying the "familiar law of Residential Funding and its progeny).

[5] Thurmond v. Bowman, __ F.Supp.3d __, 2016 WL 1295957, at n. 6 (W.D. N.Y. March 31, 2016)("neither party has advocated for the retroactive application of the current version of Rule 37").

[6] Intermatch v. Nxtbigthing, 2016 WL 491483, at n. 6 (N.D. Cal. February 8, 2016).

[7] *See, e.g.*, Freidman v. Philadelphia Parking Authority, 2016 U.S. Dist. LEXIS 32009, at Para. 76-84 (March 10, 2016)(finding no basis for Rule 37(e) sanctions, but sanctioning under Rule 37(a) and reserving authority to impose further evidentiary rulings, "short of an adverse inference" under inherent authority after further discovery).

[8] CAT3, 2016 WL 154116 (S.D. N.Y. Jan. 12, 2016) (precluding use of evidence)[spoliation motion "withdrawn" per Stip., 2016 WL 1584011 (April 6, 2016)]; Nuvasive v. Madsen Medical, 2016 WL

some decisions, relief was denied under the Rule because of a failure to meet necessary pre-conditions[9] or because the court left issues open for trial.[10]

There has been disagreement as to whether, taken as a whole, Rule 37(e) constitutes a substantial change from the current law of spoliation as it applies to ESI.[11] This Memorandum evaluates these decisions in light of that issue. As the Committee Chair noted at that time of adoption, the rule "is a good rule," but "[w]e will learn more from how it works."

(1) Scope

The E-Discovery Panel at the 2010 Duke Litigation Conference initially recommended adoption of a comprehensive civil rule governing the trigger, duration and nature of the duty to preserve as well as the consequences of a failure to act.[12] The final version of Rule 37(e), unlike the initial 2013 proposal,[13] is a simplified version

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305096 (S.D. Cal. Jan. 26, 2016)(inadequate litigation hold justifies presentment of evidence); Ericksen v. Kaplan Higher Education (D. Md. Feb. 22, 2016)(willful destruction of email precludes introduction of some evidence); Brown Jordan v. Carmicle, 2016 WL 815827 (S.D. Fla. March 2, 2016)(party failed to take reasonable steps to preserve email); Core Laboratories v. Spectrum Tracer, 2016 WL 879324 (W.D. Okla. March 7, 206)(adverse inference granted without finding of intent to deprive);

[9] Bry v. City of Frontenac, 2015 WL 9275661 (E.D. Mo. Dec. 18, 2015)(alternative holding based on lack of intent to deprive); Thomeley v. Bennett, 2016 WL 498436 (S.D. Ga. Feb. 8, 2016)(prisoner denied relief because lost video not shown to have caused prejudice nor overwritten with intent to deprive); Marten v. Plattform Advertising, 2016 WL 492743 (D. Kan. Feb. 8. 2016)(refusing to use "hindsight" or "perfection in detm'g scope of duty to preserve); Best Payphones v. City of New York, 2016 WL 792396 (E.D. N.Y. Feb. 26, 2016)(negligent failure to preserve ESI not unreasonable under Rule 37(e) given it did not result in prejudice); Marquette Transportation v. Chembulk, 2016 WL 930946 (E.D. La. March 11, 2016)(no sanctions since ESI on hard drive was discovered and later produced); Living Color v. New Era, 2016 WL 1105297 (S.D. Fla. March 22, 2016)(not actionable spoliation under Rule 37(e) since no prejudice resulted from lost text messages and failure to turn off auto-delete was not done with intent to deprive); Marshall v. Dentfirst, 2016 WL 1222270 (N.D. Ga. March 24, 2016)(ESI did not exist at time duty attached nor did its loss cause prejudice or result from an intent to deprive or bad faith); Orchestratehr v. Trombetta, 2016 WL 1555784, at *10-13 (N.D. Tex. April 18, 2016).

[10] SEC v. CKB168 Holdings, 2016 U.S.Dist. LEXIS 16533 (E.D.N.Y. Feb. 2, 2016); Freidman v. Phila. Parking Auth., 2016 U.S. Dist. LEXIS 32009 (March 10, 2016)(making interim award of fees under Rule 37(a)(4)); Accurso v. Infra-Red Services, 2016 WL 930686 E.D. Pa. March 11, 2016)(leaving issues open and may raise at trial in light of evidence).

[11] 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 Henry J. Kelston, *What You Need to Know About the New Rule (37)e)*, TRIAL, January 2016, 21 ("Tadler and Kelston")("unlike earlier drafts that were considered and rejected, the final version of Rule 37(e) is only a modest adjustment in the developing law of preservation and spoliation").

[12] The Panel "reached a consensus that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure." John G. Koeltl, Progress in the Spirit of Rule 1, 60 DUKE L. J. 537, 544 (2010).

[13] A Summary of Comments is found in the Agenda Book for the May 2014 Standing Committee Meeting, at 331. Individual written comments are archived under the numbers referenced in the Summary at http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002.

applicable to ESI losses alone, which relies heavily on the common law.[14] In its final form, the amended rule provides:

> 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.

The Committee did not republish the revised proposal for further comment since it had had "the full benefit of public input [and] every issue ha[d] been fully explored."[15]

ESI Exclusivity.

The Rule 37(e) pointedly excludes "documents" and "tangible" things from the scope of its coverage since "there is a well-developed body of law for losses of things other than ESI."[16] This implies acceptance of two parallel, but inconsistent, spoliation doctrines in the same case. In *Stinson v. City of New York*, the District Judge noted that a "thorny" issue could existed "where a party failed to preserve *both* ESI and hard-copy evidence."[17] (Emphasis added) In *Best Payphones v. City of New York*, the court handled that scenario by applying "separate legal analyses" to each context.[18]

Thus, most post-December 1, 2015 decisions involving spoliation of tangible property have simply ignored Rule 37(e)[19] although some explain why they are doing

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[14] 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 approved by Rules Committee).
[15] April 2014 Minutes at lns. 1309-1331.
[16] April 2014 Minutes at lns. 927-939 (the loss of a unique tangible object is also difficult to capture in a rule and the abundance of ESI makes is likely that ways can be found to work around the loss).
[17] Stinson v. City of New York, 2016 WL 54684, at n. 5 (S.D. N.Y. Jan. 5, 2016).
[18] Best Payphones v. City of New York, 2016 WL 792396, at *7 (E.D. N.Y. Feb. 26, 2016)(concluding that negligent failure to preserve did not justify relief under either Second Circuit case law or under Rule 37(e) given the lack of prejudice); *cf.* McCarty v. Covol Fuels No. 2, 2016 WL 611736 (6th Cir. Feb. 16, 2016)(resolving issues without mentioning Rule 37(e)).
[19] Trujillo v. Ametek, 2016 WL 853052 (S.D. Cal. March 4, 2016)(refusing to impose adverse inference for negligent conduct in failing to collect air samples); Oil Equipment v. Modern Welding, 2016 WL 705984 (Feb. 23, 2016)(dismissing action because of bad faith failure to preserve).

so.[20] There is some confusion around the margins about whether specific items are ESI or tangible property.[21] In *Mayer Rosen Equities v. Lincoln National Life*,[22] for example, the court treated scanned documents as tangible property.[23]

The Committee has indicated a willingness to "think seriously about extending [the Rule] to other forms of information."[24] It has been instructive, to the Author at least, to note that at least half of the decisions involving spoliation since the rule went into effect have involved tangible property, often in the form of documents. Given the issues unique to tangible property claims other than documents,[25] this suggests that spoliation of documents and ESI should be treated by the same principles, following the structure of Rule 34, which makes that distinction.[26]

In *Zbylaski v. Douglas County School District*,[27] for example, the court cited the Committee Note to Rule 37(e) to help determine trigger in a case involving hard copy documents.

(2) Predicate Conditions

Rule 37(e) relies on a predicate showing of breach of a common law duty to preserve but adds several threshold requirements to its familiar requirements, based on "objective test[s]."[28]

Thus, before turning to subsections (e)(1) or (e)(2), a court must first determine:

- if ESI is "lost" after a duty to preserve attached; and
- whether it was lost because a party failed to take "reasonable steps" to preserve; and
- whether it can be restored or replaced through additional discovery.

If the answer to any of these questions is "no," the court "need proceed no further" and the request for sanctions "must be denied."[29] We examine each of these predicate conditions separately.

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[20] Safeco v. Knife River Corp., 2016 WL 901608, at n.3 (D. Idaho March 9, 2016)(Rule 37(e) applies only to [ESI]" and "does not impact the Court's inherent sanctioning authority when spoliation of tangible evidence is at issue").

[21] Dubois v. Board of County Comm., 2016 WL 868276 (N.D. Okla. March 7, 2016)(resolving issue of spoliation of video surveillance tapes without mention of Rule 37(e); *see also* McCabe v. Walmart, 2016 WL 706191 (D. Nev. Feb .22, 2016)(same).

[22] 2016 WL 889421 (S.D. N.Y. Feb. 11, 2016).

[23] *See also* First Financial Security v. Mai Lee, 2016 WL 881003 (D. Minn. March 8, 2016)(involving spoliation of text messages without discussion of Rule 37(e)).

[24] April 2014 Minutes at lns. 1277-1280 (noting need to monitor the rule closely).

[25] *See, e.g.*, Oil Equipment v. Modern Welding, 2016 WL 705984 (N.D. Ala. Feb. 23, 2016)(resolving spoliation of evidence involving underground storage tank without mentioning or applying Rule 37(e)).

[26] Letter Comment, Thomas Y. Allman, November 16, 2013 (existing Rule 34(a) distinguishes "designated tangible things" from "designated documents or [ESI]").

[27] 2015 WL 9583380, at *10 (D. Colo. December 31, 2015).

[28] Joseph, *supra*, 38 ("[s]ubjective states of mind such as good faith or intentionality (prevailing tests for adverse inference instructions under preexisting law) are not relevant as this threshold determination").

"Lost" After Duty Attached

The Rule applies to missing ("lost") ESI which is discoverable within the meaning of amended Rule 26(b)(1), *i.e*, "relevant to the claims or defenses" and "proportional to the needs of the case."[30] It is not necessary to show that the missing ESI would have been unfavorable to the party that lost it,[31] in contrast to losses of documents or tangible things which are not governed by the rule.[32] A showing of prejudice is now applicable at a different point in Rule 37(e) analysis, although its absence at that point is equally fatal to relief under the rule.[33]

Determining when a party should act "in the anticipation or conduct of litigation" is intensely fact-specific since the threat of litigation is ever present for many entities. According to the Note, the key is the "extent to which a party was on notice that litigation [is] likely and that the information would be relevant."[34] In *Thomley v. Bennett*, the court refused to consider an allegation of breach because of a delay in asserting the claim until after the relevant videotape had been recorded over.[35] In *Marten Transport v. Plattform Advertising*, the court held that the party had no knowledge or information from it should have known that the missing ESI would become relevant in the case.[36]

Reasonable Steps

Rule 37(e) is inapplicable if a party has undertaken "reasonable steps" even if some potentially relevant ESI remains missing.[37] It "does not call for perfection."[38]

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[29] Living Color v. New Era Aquaculture, 2016 WL 1105297, at *4 (S.D. Fla. March 22, 2016)(finding that since some of the lost text messages cannot be restored or replaced, the court would analyze (e)(1) and (e)(2) factors).

[30] State Farm v. Fayda, 2015 WL 7871037, at *2 (S.D. N.Y. Dec.3, 2015) (describing test of discoverability under amended Rule 26(b)(1)).

[31] Residential Funding v. DeGeorge, 306 F.3d 99, 108-109 (2nd Cir. 2002)("relevant" means more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence); *see also* Orbit One v. Numerex, 271 F.R.D. 429 (S.D. N.Y. 2010)(distinguishing discovery relevance from the unique "assistive" relevance required under the Second Circuit test).

[32] Compare Herandez v. VanVeen, 2016 WL 1248702, at *3 (March 28, 2016)("relevance" for spoliation purposes is a "two-pronged finding of relevance and prejudice" because the "the absence of the evidence must be prejudicial to the party alleging spoliation").

[33] Under Rule 37(e), the loss of relevant evidence that causes prejudice is a precondition for the remedial measures listed in subsection (e)(1). Where there is an intent to deprive – the core requirement for (e)(2) measures – prejudice is inferred. Committee Note, 47 ("[s]ubdivision €(2) does not require any further finding of prejudice").

[34] Committee Note, 39.

[35] 2016 WL 498436, at *14 and n. 18 (S.D. Ga. Feb. 8, 2016)(also noting that an intent to deprive had not been shown).

[36] Marten Transport v. Plattform Advertising, 2016 WL 492743, at *7 & *10 (D. Kan. Feb. 8, 2016)(neither party routinely take save, backup or maintain internet history files).

[37] Committee Note, 41 ("[b]ecause the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve"). By analogy, an entity that takes "reasonable steps" to ensure that its compliance programs are "generally effective" achieves protection under the US Sentencing Guidelines even though it may "fail[] to prevent or detect" a

That was the conclusion reached in *Marten v. Platform Advertising, supra*, even though some ESI was lost.[39] The court held that the party had taken 'reasonable steps' by earlier preserving emails and other ESI and it would not "use a 'perfection' standard or hindsight" in determining the scope of the duty to preserve.[40]

In contrast, the court in *Living Color* appears to have equated negligent conduct with a failure to take reasonable steps.[41] The party had failed to turn off an auto-delete function relating to text messages after the duty to preserve applied, which the court deemed to be at most negligent, but sufficient to justify making an analysis of subsection (e)(1) and (e)(2).[42] In *Brown Jordan v. Carmicle*, a corporate executive was found to have failed to take reasonable steps at the time litigation was anticipated.[43] In *CAT3 v. Black Lineage*, the court held that an unsuccessful attempt to falsify and alter ESI in the preservation process was not consistent with "reasonable steps."[44]

In *Best Payphones*,[45] a party did not implement a litigation hold because it mistakenly believed that that ESI would be available later. The court could not conclude that the party had "acted unreasonably as is required for the Court to issue sanctions under Rule 37(e)."[46]

Some have argued that courts will "almost certainly" consider whether the litigant has followed "standard preservation practices" of the past decade.[47] In *Pension Committee*, for example, the failure to use a written litigation hold was deemed *per se* sanctionable, since required by "contemporary standards."[48] Consistency with good preservation practices certainly plays a role,[49] but a good faith, albeit imperfect,

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criminal offense. USCG Guidelines Manual, §8B2.1, Para. (b). *See discussion at* November 15-16, 2010 Rules Committee Minutes, at lines 687-690.

[38] Committee Note, 41.

[39] Marten Transport v. Platform Advertising, 2016 WL 492743, at *10 (D. Kan. Feb. 8, 2016)(since no duty was breached "the Court need not reach" the issue of whether measures under Rule 37(e) are appropriate).

[40] *Id*. *10.

[41] Living Color v. New Era Aquaculture, 2016 WL 1105297 (S.D. Fla. March 22, 2016).

[42] *Id*. *6 ("simply acted negligently in erasing the text messages either actively or passively").

[43] 2016 WL 815827, at *37 (S.D. Fla. March 2, 2016)(also presuming that missing ESI was unfavorable because the court found the party acted with intent to deprive).

[44] 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").

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

[46] *Id*. at *4 & 5 (noting that a failure to take reasonable steps would be required).

[47] Wison Elser Client Alert, December 1, 2015 (citing (1) issuing a formal legal hold (2) identifying ESI locations and key players (3) conducting custodian and IT interviews (4) suspending routine deletion (5) monitoring employee compliance and (6) amending and reissuing hold when appropriate).

[48] Pension Committee v. Banc of America, 685 F. Supp. 2d 456 (S.D. N.Y. May 28, 2010) at 471 (a "failure to adhere to contemporary standards can be considered gross negligence [listing examples]"), *abrogated in part by* Chin v. Port Authority, 685 F.3d 135, 162 (2nd Cir. July 10, 2012)(rejecting *per se* aspect of litigation holds).

[49] Rimkus Consulting v. Cammarata, 688 F.Supp.2d 598, 613 (S.D. Tex. Feb. 19, 2010)(speaking of "consistency" with established preservation practices); *see also* Chin, *supra*, 685 F.3d 135 at 162 (the better approach is to "consider [the failure to adopt good preservation practices] as one factor" in the determination of whether discovery sanctions should issue).

adherence to pre-existing policies and practices remains an important consideration, along with transparency and cooperation.[50]

Proportionality is also part of the calculation of reasonableness.[51] One of the "driving forces" behind the enactment of Rule 37(e) was concern over the burdens and costs of preserving information in anticipation of litigation.[52] The Committee Note makes the point that a party may "act reasonably by choosing a less costly form of information preservation." The "reasonable steps" requirement "does not require extraordinary, excessive, disproportionate or unduly burdensome actions."[53]

However, while the Committee Note cautions against the use of hindsight in assessing preservation conduct, a unilateral pre-litigation failure to preserve based on proportionality necessarily risks second-guessing at a later point. Once litigation commences, discussions among parties and with the court about proportionality issues can be important, especially in light of the enhanced opportunities to do so under the 2015 Amendments.[54] In *Fleming v. Escort*,[55] for example, a failure to consult was decisive where the burdens associated with preservation were avoidable.

Restoration/Replacement

Rule 37(e) is also inapplicable if "lost" ESI can be "restored or replaced" through additional discovery. The final version of the rule, as presented at the April 11, 2014 Rules meeting, changed the role of "additional discovery" from an optional remedy into a precondition to availability of the measures in the Rule.[56] If ESI is available from other sources, there is no need to proceed further.

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[50] Committee Note, 41 ("the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps"). (2015)(transparency and cooperation with opposing counsel may serve as persuasive indicia of reasonableness and a defense to a possible Rule 37(e) motion).

[51] Committee Note, Rule 37(e)(2015), 41 ("[a]nother factor in evaluating the reasonableness of preservation efforts is proportionality").

[52] Marten Transport, *supra*, 2016 WL 492743, at *10 (D. Kan. Feb. 8, 2016)(the "general intent" was to "address the excessive effort and money being spent on ESI preservation"); Fleming v. Escort, Inc., 2015 WL 5611576, at n. 2 (D. Idaho Sept. 22, 2015)(Rule 37(e) acknowledges the "high cost of preserving [ESI]").

[53] Thomas Y. Allman, *A Second Look at "Reasonable Steps": A New Role for a Familiar eDicovery Concept*, 15 DDEE 485 (2015), available at http://www.bna.com/second-look-reasonable-n57982063525/ (last accessed March 9, 2016).

[54] *Id*. 40 (parties should promptly seeking judicial guidance about the extent of reasonable preservation if they are unable to agree on disputed issues). Early service of discovery requests, authorized by amended Rule 26(d)(2)(A), may also help facilitate such discussions under amended Rule 26(f).

[55] 2015 WL 5611576, n. 2 (D. Idaho Sept. 22, 2015)('assuming that preserving [the subject of the motion] would impose a heavy burden, [the party] should have contacted [it opponent] to work out the logistics").

[56] April 2014 Minutes at lns. 805-808 (only if additional discovery "does not work" to address the loss is a court entitled to order measures under the rule). The preceding draft allowed, but did not require, additional discovery as a curative measure without proof of prejudice or culpability once entitlement was shown. *See* text of Rule 37(e)(1), Subcommittee Report, March, 2014, 15 (text and Draft Committee Note at April 2014 Agenda Book, 383 and 386 of 580).

In *CAT3 v. Black Lineage*, *supra*, the court found that a forensic examination of altered email had not adequately "restored" or "replaced" disputed ESI, since confusion remained as to the authenticity of both.[57]

The "additional discovery" may involve recreation of lost information or the undertaking of further discovery from otherwise inaccessible sources as part of the case management authority of the Court. While relevant ESI is typically found in accessible or "active" sources, it may also may exist in backup media, legacy systems or on distributed devices such as personal smartphones or "in the cloud." The duty to preserve in such sources is tempered by the "accessibility" limitations added in 2006 by Rule 26(b)(2)(B). ESI which requires additional steps to retrieve is often not required to be preserved absent notice.[58]

The Note suggests, however, that "substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative."[59]

(3) Measures Available

Rule 37(e) provides a rule-based version of the spoliation doctrine designed to achieve a uniform and predictable process when the predicate conditions are met. The presence of the word "or" between subdivisions (e)(1) and (2) has led some to conclude that the Rule authorizes *either* curative measures *or* sanctions," but not both.[60] However, the better reading is that the court *may* invoke the authority of *either or* both subdivisions; however, if harsher measures are to be imposed, the court (or the jury) must first find an "intent to deprive another party of the information's use in the litigation."[61]

The basic distinction is that when predicate conditions are met, subsection (1) of the rule authorizes measures to remediate prejudice while subsection (2) requires a showing of "intent to deprive" for potentially case-dispositive relief, thus resolving the inter-Circuit split on the topic.

Both subsections require prejudice, but in the case of subdivision (e)(2), no explicit showing prima facie showing is needed, as it is necessarily inferred from the high degree of culpability involved.[62] We treat the subsections separately.

(A) Curing Prejudice

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[57] CAT3, Inc. v Black Linage et al, 2016 WL 154116, at *6 (S.D. N.Y. Jan. 12, 2016).
[58] Delaware Fed. Ct. Default Standard (2011), Para. 1(b), copy at http://www.ded.uscourts.gov/ (listing categories of ESI that need not be preserved absent a showing of good cause by the requesting party).
[59] Committee Note, 42.
[60] Patricial W. Hatamyar Moore, *The Anti-Plaintiff Amendments to the [FRCP] and the Pro-Defendant Composition of the Federal Rulemaking Committees,* 83. U. CIN. L. REV. 1083, 1124 (2015).
[61] Committee Note, 47 ("[i]f the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it").
[62] Committee Note, 47 ("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]").

Subdivision (e)(1) of Rule 37(e) provides that a court may order measures no greater than necessary to cure the prejudice caused by covered losses without predicate showings of culpability.[63] This excludes measures which "have the effect" of those permitted under subdivision (e)(2) only on a finding of an intent to deprive."[64] The Note famously states that "[m]uch is entrusted to the court's discretion."[65]

However, under subdivision (e)(1), courts may impose what amounts to "serious sanctions"[66] as well as what appears to be a virtually automatic award of expenses and fees associated with bringing the motion, successful or not.[67]

Prejudice. A showing of "prejudice" requires an actual, not speculative, threat to the ability to present a claim or defense in the case. The materiality of the missing ESI to the case is highly relevant.[68] The prejudice must not be avoidable by seeking information from other sources or involve the loss of ESI which is immaterial to the issues in the case.[69]

The Committee Note does not assign the burden to demonstrate prejudice to a specific party, consistent with criticisms of the Initial Proposal.[70] Instead, the Committee Note leaves the issue to the discretion of the court[71] and parties are expected

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[63] The Subcommittee responded to a prescient public comment by the Hon. James C. Francis IV, January 10, 2014 (proposing that Rule 37(e) be revised to authorize remedies "no more severe than that necessary to cure any prejudice to the innocent party unless the court finds that the party that failed to preserve acted in bad faith"). *See* Discovery Subcommittee Meeting Notes, Feb. 8, 2014, 6; available in April 2014 Rules Committee Meeting Agenda Book (at 410).

[64] Committee Note, 44.

[65] Committee Note, 44. The Initial Proposal was more specific. *See* Appendix B, Rule 37(e)(1)(A)("[a court may] permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure").

[66] Joseph, Rule 37(e), *supra*, at 39-40 (including (1) directing that designated facts be taken as established; (2) prohibiting the party from supporting or opposing designated claims or defenses; (3) barring introduction of designated matters; (4) striking pleadings; (5) introducing evidence of failure to preserve; (6) allow argument on failure to preserve; and (7) giving jury instructions other than adverse inference instructions).

[67] Increasingly, courts are invoking Rule 37(a) or inherent sanctioning power as a justification for doing so. *See* Freidman v. Phila. Parking Auth. 2016 U.S. Dist. LEXIS 32009, at Para. 77 (E.D. Pa. March 10, 2016).

[68] Committee Note, 43.

[69] Best Payphones v. City of New York, 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 Second Circuit case law [as to hard copy documents] or under Rule 37(e)").

[70] Sekisui American v. Hart, 945 F.Supp.2d 494, at n. 51 (S.D. N.Y. Aug. 15, 2013)("I do not agree that the burden to prove prejudice from missing evidence lost as a result of willful or intentional misconduct should fall on the innocent party").

[71] Committee Note, 43 (placing the burden on the party that did not lose it may be "unfair" in some situations).

to contribute the information in their possession that may assist it in assessing prejudice.[72] Courts have had little difficulty to date in assessing its existence.[73]

Adverse Inferences. One of the goals of Rule 37(e) is to eliminate the routine use of adverse-inference instructions based on mere negligence or gross negligence. Thus, subdivision (e)(2) requires a showing of "intent to deprive" and the Committee Note states that the rule "rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp*., 306 F.3d 99 (2nd Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."[74]

Courts have generally accepted the change. In *Nuvasive v. Madsen*, the court vacated an earlier decision to impose an adverse inference instruction, rendered before the rule was effective,[75] because "the record does not support a finding of intentional spoliation."[76] The same result obtained in *SEC v. CKB168 Holdings* for the same reasons.[77]

In *Accurso v. Infra-Red Services*, the court noted that Rule 37(e) did not "substantively alter" the burden of showing "bad faith" in Circuits like the Third Circuit.[78] Had it been in effect, however, it arguably could have barred the use of adverse inference jury instructions in cases such as *Zubulake V*,[79] *Pension Committee*[80] and *Sekisui v. Hart.*[81]

A surprising number of courts ignore the rule or impose adverse inference instructions despite it.[82] In *Benefield v. MStreet Entertainment*, for example, a failure to preserve text messages led to "a spoliation instruction to the jury" without reference to

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[72] June 2014 Report, Rules Appendix B-17 ("each party is responsible for providing such information and argument as it can; the court may draw on its experience in addressing this or similar issues, and may ask one or another party, or all parties, for further information").

[73] In Cat3, *supra*, 2016 WL 154116, at *9 (S.D. N.Y. Jan. 12, 2016), the court found prejudice where the conduct "obfuscate[d] the record" and the moving party had been put to the burden and expense of "ferreting out the malfeasance and seeking relief from the Court."

[74] Committee Note, 45. *See* Residential Funding Corp, 306 F.3d at 109 ("each party should bear the risk of its own negligence").

[75] 2015 WL 4479147 (S.D. Cal. July 22, 2015).

[76] 2016 WL 305096, at *3 (S.D. Cal. Jan. 26, 2016).

[77] 2016 U.S. Dist. LEXIS 16533 (E.D. N.Y. Feb. 2, 2016)("the existing record is not sufficiently clear" at this time, although the SEC can renew its motion at trial based on evidence there adduced).

[78] Accurso v. Infra-Red Services, 2015 WL 930686 (E.D. Pa. March 11, 2016)(denying motion for adverse inference because of a failure to establish threshold requirements or that the party acted with intent to deprive).

[79] Zubulake v. UBS Warburg ("Zubulake V"), 229 F.R.D. 422, 439-440 (S.D. N.Y. July 20, 2004).

[80] Pension Committee v. Banc of America, 685 F. Supp. 2d 456, 496-497 (S.D. N.Y. May 28, 2010.

[81] Sekisui American, *supra*, 945 F.supp.2d at 509-510.

[82] *See, e.g.,* Prezio Health v. Schenck, 2016 WL 111406 (D. Conn. Jan. 11, 2016)(allowing permissive instruction in reliance on Residential Funding for loss of email metadata without finding prejudice or an "intent to deprive"). *See also* Star Envirotech v. Redline Detection, 2015 WL 9093561, at *6 (C.D. Cal. Dec. 16, 2015)(imposing adverse inference for discovery misconduct – which may have included spoliation of ESI - without discussing the existence of Rule 37(e) intent requirements).

the Rule or to any basis for concluding that an intent to deprive existed.[83] In *Core Laboratories v. Spectrum Tracer*, the court cited circuit precedent in finding it appropriate to give an adverse inference instruction simply because some email could have been lost and prejudicial.[84]

Admission of Spoliation Evidence. The Committee Note states that subdivision (e)(1) permits courts to allow presentment of evidence to a jury regarding the loss of ESI and to give instructions to assist in evaluation of such evidence, but not the type of instruction that requires a showing of specific intent to deprive.[85] Thus, in *Nuvasive v. Madsen Medical*, *supra,* the Court stated it would allow the aggrieved party to "present evidence to the jury regarding the loss" of ESI while instructing that it "may consider such evidence along with all other evidence in the case in making its decision."[86]

In doing so, the Committee may have been influenced by *Mali v. Federal Insurance*, a Second Circuit decision announced while the rule was pending, in which a instruction was deemed to be "no more than an explanation of the jury's fact-finding powers."[87]

Admission of evidence of failure to preserve is clearly justifiable where "there is a proper evidentiary aspect to lost information, something that is not a sanction."[88] In *Ericksen v. Kaplan Higher Education*, for example, a party was precluded from presenting evidence that could not be verified as authentic (given the willful running of a data destruction program) in order to cure any prejudice caused by the inability of the moving party to counteract the precluded evidence.[89]

However, the *Ericksen* court also permitted – without explanation - the general introduction of evidence related to loss of evidence without a finding of intent to deprive. This may have been an overreach.[90] Such action should not be permitted to punish or to provide an alternative remedy for a moving party which has failed to show the requisite intent and seeks a second bite of the apple.[91]

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[83] Benefield v. MStreet Entertainment, 2016 WL 374568, at *6 (M.D. Tenn. Feb. 1, 2016)(refusing to prohibit party that lost the messages from relying on other text messages).
[84] 2016 WL 879324, at *2 (W.D. Okla. March 7, 2016)("the Court finds that the lack of information available because of [the] email loss is prejudicial").
[85] Committee Note, 44 & 46.
[86] 2016 WL 305096, at *3 (S.D. Cal. Jan. 26, 2016).
[87] 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").
[88] April 2014 Minutes, at lns. 101-103 (giving example of introduction of evidence of spoliation of metadata in regard to document introduced by opponent to make its point).
[89] Ericksen v. Kaplan Higher Education, 2016 WL 695789, at *2 (D. Md. Feb. 22, 2016)("[it eliminates] any risk that the jury deems the [letter and email] authentic").
[90] Committee Note, 44 ("care must be taken" that curative measures under (e)(1) does not have the effect of measures permitted under (e)(2) only on a finding of intent to deprive").
[91] 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 absent proof of 'intent to deprive'")(emphasis in original).

Nor should evidence of discovery misconduct be admitted beyond that needed to address any potential prejudice.[92] FRE 403 cautions that a court should not admit evidence when its probative value is outweighed by a danger of "undue prejudice," "confusing the issues" or "misleading the jury." In *Delta/AirTran Baggage Fee Antitrust Litigation*, the court did not permit evidence of spoliation to go to the jury because it would "transform what should be a trial about [an] alleged antitrust conspiracy into one on discovery practices and abuses."[93]

Preclusion of Evidence. The Committee Note suggests that evidence preclusion is appropriate provided it does not prevent a party from offering evidence on "the central or only claim or defense in the case.[94] As noted, in *Ericksen v. Kaplan*, *supra*, a Magistrate Judge recommended[95] and the District Court agreed, after a de novo review, that preclusion would "cure the prejudice created."[96]

Monetary Sanctions, including attorney fees. Rule 37(e), in contrast to Rule 37(a) and (b), does not specifically authorizes the award of monetary sanctions, including attorney fees.[97] Nonetheless, courts apparently assume that the broad authority under subsection (e)(1) extends to such an award provided it is limited to that necessary to cure prejudice. It would appear that courts intend to authorize this award regardless of whether other measures under the rule are imposed or not.

The problem is that the linkage to curing prejudice to the presentment of a claim or defense is tenuous and remote. In *CAT3 v. Black Lineage*, the court made an award of attorney fees because it "ameliorates the economic prejudice imposed on the defendants and also serves as a deterrent to future spoliation."[98] Others argue that an award is justified because a party was "forced" to file a motion.[99]

Another approach is to rely upon another section of Rule 37 to authorize the award. In *Best Payphones v. City of New York*, *supra*, the court invoked Rule

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[92] Decker v. GE Healthcare, 770 F.3d 378, 397-398 (6th Cir. 2014)(noting that the court was "careful" not to overemphasize the importance of the failure and declining to give an instruction that would have given a lot more importance [to lost or discarded documents] than appropriate).
[93] In re Delta/AirTran Baggage Fee Antitrust Litigation, 2015 WL 4635729, at *14 (N.D. Ga. Aug. 3, 2015).
[94] Committee Note, 44.
[95] 2015 WL 6408180, at *6 and n. 6 (D. Md. Oct. 21, 2015)("all these remedies" are "consistent with the 2015 revisions to Rule 37(e)").
[96] Ericksen v. Kaplan Higher Education, 2016 WL 695789 (D. Md. Feb. 22, 2016)(emphasizing that under Rule 37(e) it was required [by (e)(1)] to impose measures "no greater than necessary to cure the prejudice).
[97] It was regarded as a "commonplace measure" by the Discovery Subcommittee. *See* Minutes, March 4, 2014, 4. However, it was also explicitly listed in the Initial Proposal.
[98] 2016 WL 154116, at *9 & 10 (S.D. N.Y. Jan. 12, 2016).
[99] In Kramer v. Ford, Civ. No. 12-1149 (Feb. 4, 2016), the court held that sanctions could not be applied under Rule 37(e), but that Rule 37(c)(1)(A) authorized sanctions in the form of reasonable costs and attorney fees because they were "forced to file a motion to recover the [ESI]").

37(a)(5)(A)[100] since there had been production of some ESI after a motion to produce was filed.[101] This is clearly beyond the stated scope of that Rule.

A more intellectually honest approach would be to concede that the award is being made not under Rule 37(e), but by use of inherent authority to remedy litigation abuse. However, that would require a showing of bad faith, especially if attorneys fees are being reimbursed via such an approach. As the Circuit Court of Appeals noted in reversing such an award in *Pari v Daioleslam*,[102] inherent power is not "a grant of authority to . . . undermine the American rule on the award of attorneys' fees."[103]

Since courts appear determined to invoke monetary sanctions without any authority to do so, otherwise compliant parties will need to accept the fact that a negligent or careless failure to preserve is likely to result in paying the costs of a resulting "gotcha" motion, which will effectively undercuts or eliminates any incentive not to over-preserve.

Sanctioning Counsel. Rule 37(e) speaks only of imposing measures on a "party" and does, as other rules do, explicitly authorize the imposition of measures on counsel in contrast to other provisions of Rule 37.[104] In *Sun River Energy v. Nelson*,[105] the Tenth Circuit Court of Appeals refused to allow sanctions against counsel under Rule 37(c), which was also silent on the topic.[106]

As with monetary sanctions, courts applying Rule 37(e) largely ignore the silence in the rule. In *CAT3*, for example, the only reason the court did not sanction counsel was that "there was no evidence of culpability on [their] part."[107] Moreover, in *HM Electronics*, flatly stated that it could sanction counsel "under the proposed amended Rule 37."[108]

The better practice would be for sanctions against counsel to rest on the specific authority of Rule 37(b)(if preservation orders violated) or the provisions of 28 U.S.C.

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[100] 2016 WL 792396, at *7-8 (E.D. N.Y. Feb. 26, 2016).
[101] *Id*. The court apparently rested its ruling on the fact that the non-moving party had finally turned over documents [which may or may not have included ESI] which "should have been provided" when initially requested.
[102] 778 F.3d 116 (D.D.C. Feb. 10, 2015).
[103] *Id*. at 131 (noting the distinction between measures which are fundamentally penal (fees) and those that are remedial).
[104] *Cf*. Granados v. Traffic Bar, 2015 WL 9582430, at *6 (S.D. N.Y. Dec. 30, 2015)(sanctioning attorney and party under Rule 37(d) since the rule authorizes sanctions against the "attorney advising that party or both").
[105] 800 F.3d 1219 (10th Cir. Sept. 2, 2015).
[106] *Id*. 1226 (reversing as "overbroad" an interpretation of Rule 37(c)(1) sanctioning authority referring to "the party" to include counsel because of a "trend" towards the extension of sanctions to counsel).
[107] 2016 WL 154116, at n. 7 (S.D. N.Y. Jan. 12, 2016). The court offered to allocate the award between party and counsel if requested. *Id*.
[108] 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").

§1927 (if bad faith and vexatious conduct is involved).[109] Rule 26(g) is also well suited to address the practical problems of oversight of preservation and production by the party.[110] Further clarification and discussion of this issue is warranted, however, but in the meantime, courts appear determined, as with monetary sanctions, to routinely sanction counsel if and when their involvement is sufficient to justify doing so.

(B) Harsh Sanctions

Subdivision (e)(2) represents a dramatic change from the Initial Proposal, which broadly barred imposition of any "sanction" (including an adverse inference instruction) unless it was shown that a party had acted "willfully" or in "bad faith" and also caused "substantial prejudice in the litigation."[111]

As revised, the simplified subdivision restricts use of certain listed measures unless it is shown that the party acted "with intent to deprive" the non-moving party of the use of the missing ESI in the litigation. The specified measures include:

- 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, or
- dismissal of the action or entry of a default judgment.

The Committee Note indicates that functionally equivalent measures are also precluded without a showing of intent to deprive.[112] The Committee specifically rejected *Residential Funding Corp. v. DeGeorge Financial Corp*., 306 F.3d 99 (2nd Cir. 2002), which authorized the giving of adverse-inference instructions on a finding of negligence or gross negligence.[113]

Intent to Deprive. The "intent to deprive" standard is akin to "bad faith," but "defined even more precisely."[114] However, such a finding does not require a court to adopt any of the listed harsh measures, since "the remedy should fit the wrong" and

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[109] In Brown v. Tellermate Holdings, the court implied that conduct not reaching the level of bad faith would be sufficient under 28 U.S.C. §1927 ("without a finding that the lawyer subjectively knew that his conduct was inappropriate").

[110] *See, e.g.*, 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)

[111] *See* Appendix B. The Initial Proposal also contained a "Silvestri" exception, later dropped as unique to losses of tangible property. Proposed Rule 37(e)(1)(B)(ii)(2013)(if a party's actions "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation").

[112] Committee Note, 44 (care must 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).

[113] Committee Note, 45. *See* Residential Funding Corp, 306 F.3d at 109 ("each party should bear the risk of its own negligence").

[114] June 2014 Report, at Rules Appendix B-17.

severe measures should not be used when the "the information lost was relatively unimportant or lesser would be sufficient to redress the loss."[115]

In *Orchestratehr v. Trombetta*, the court refused to find an intent to deprive when there was only "equivocal evidence" about a party's state of mind at the time he deleted emails.[116] In *Bry v. City of Frontenac*, for example, the court sustained a summary judgment because "the Court finds no evidence indicating that Defendants acted 'with the intent to deprive another party of the information's use in the litigation.'"[117]

The "intent to deprive" requirement is not satisfied by a showing of merely reckless conduct or the type of "willful" conduct which is not intended to deprive the other of specific evidence in the case.[118]

Role of the Jury. The Note states, without expressing a preference, that the jury may be tasked to determine if "intent to deprive" exists.[119] However, as one commentator put it, "[t[he Advisory Committee Note is opaque on this issue" and does not "indicate why or when the issue is appropriately left to the jury."[120]

Party intent is a mixed question of law and fact. The Texas Supreme Court, for example, recently ruled that a "judge, not jury, must determine whether a party has spoliated evidence and, if so, the appropriate remedy." Commentators argue in favor of court responsibility to determine existence of spoliation since a judge is "trained in the law."[121]

If a court decides to utilize the jury, it must make a preliminary determination that sufficient evidence of intent exists before submitting it to a jury.[122] Absent such a finding, the jury should not consider the issue. The point was made at the Committee Meeting that "if a court does not find the intent to exist, it will not ask the jury to do so."[123] This is analogous to subdivision (e)(1), *supra*, where a jury is not empowered to receive spoliation evidence without a predicate finding that prejudice exists.

Over-Preservation. The "intent to deprive" test is intended provide a measure of certainty which would "give comfort that will reduce over-preservation, at least in some measure."[124] A primary goal of adopting Rule 37(e) was to resolve the competing requirements among the Federal Circuits for imposing harsh sanctions, given the

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[115] Committee Note, 47.
[116] 2016 WL 1555784, at *12 (N.D. Tex. April 18, 20116).
[117] Bry v. City of Frontenac, 2015 WL 9275661, at n. 7 (E.D. Mo. Dec. 18, 2015)
[118] April 2014 Minutes at lns. 1173-1176.
[119] Committee Note, 46-47 ("If a court were to conclude that the intent finding should be made by a jury").
[120] Joseph, *supra*, 40 (it is a "question of conditional relevance for the jury under FRE 104 (b)).
[121] *See* 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)() *and also* Norton, Woodward and Cleveland, Fifty Shades of Sanctions, 64. S.C.L. REV. 459 (Spring 2013)(
[122] In Nuvasive, *supra*, 2016 WL 305096, at *2, the court found that "the record does not support a fining of intentional spoliation."
[123] April 2014 Minutes at lns. 1147 & 1174-1176.
[124] April 2014 Minutes at lns 974-982 (quoting the Chair of the Discovery Subcommittee).

excessive effort and money being spent on preservation in order to avoid the risk of severe sanctions "if a court finds [a party] did not do enough."[125]

It remains to be seen if parties that rely on unnecessarily over-broad practices will move to a more strategic approach based on reasonable policies and procedures. Some argue this will not occur because it is based on an erroneous assumption about the need to do so.[126] On the other hand, courts may not apply the predicate requirements of Rule 37(e) as intended, and parties may chose not to run the risk of financing an opponent's "gotcha" motions, given the virtually automatic award of attorney fees for bringing even unsuccessful motions.

Prejudice. Subdivision (e)(2) does not require a showing of prejudice as a predicate to use of the listed measures.[127] As noted above, 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 this as a "change in the law" permitting a court to sanction a party based solely on their intent, not the results of their actions.[128] That is simply not the case. The Standing Committee amended the Committee Note to clarify that no authority to act under subdivision (e)(2) exists in the absence of prejudice.[129]

Prejudice remains a *de facto* precondition which is presumptively inferred (and can be rebutted) when there is finding of intent as required by the subdivision.[130] This accords with existing case law.[131] As noted in *Sekisui v. Hart*,[132] *supra*, "[w]hen evidence is destroyed intentionally, such destruction is sufficient evidence from which to conclude that the missing evidence was unfavorable to that party."

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[125] Committee Note, 38 (describing the excessive effort and money being spent on preservation in order to avoid the risk of severe sanctions "if a court finds [a party] did not do enough").
[126] Tadler and Kelston, *supra*, 24 ("Rule 37(e) likely will have little effect on the preservation practices or expenses of large corporations [because] the notion that the circuit split forced over-preservation was dubious from the start").
[127] Committee Note, 47.
[128] Joseph, *supra*, 41.
[129] 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, available at http://www.uscourts.gov/rules-policies/archives/meeting-minutes/committee-rules-practice-and-procedure-may-2014.
[130] Committee Note, 47. *See, e.g.*, April 2014 Minutes, at lns. 1162-1165 (quoting Committee Member speculating that there is either a "very low threshold on prejudice, or the burden is shifted").
[131] Joseph, *supra*, 39 (courts have developed a number of approaches that assist in determining prejudice, including the degree of intentionality, whether the destruction occurred during the case and the materiality of the spoliated evidence to the case).
[132] 945 F.Supp.2d 494 (S.D. N.Y. Aug. 15, 2013)

Thus, if an incompetent spoliator, acting with the requisite "intent to deprive," tries but fails to cause prejudice, any sanctions against that party would not lie under Rule 37(e) but, if at all, under use of inherent "gap-filling" power as discuss in more detail in Section (4)("Preclusive Effect").

(4) Preclusive Impact

According to the Committee Note, Rule 37(e) "authorizes and specifies measures a court may employ" if ESI that "should have been preserved is lost" and is intended to "foreclose" reliance on inherent authority to "determine when certain measures should be used."[133] Although not expressly stated, this "foreclosure" impact also applies to other provisions of Rule 37.

The Committee Notes are a "particularly reliable indicator of legislative intent" because they are "contemporaneously drafted by the same entity charged with drafting the rules.[134]

Inherent Power

In *Chambers v. NASCO*, the Supreme Court held that a courts inherent power "extends to a full range of litigation abuses" and while it may be limited by statute and rule, a court is not forbidden to sanction bad-faith conduct simply because it could also be sanctioned under the Rules. However, the Court also held that when there is no "need" to resort to a courts inherent powers (or other rules),[135] a court should "ordinarily" rely on the Rules unless "in the informed discretion of the court," they are not "up to the task."[136]

As a minimum, therefore, a court should "first look to newly amended Rule 37(e) and disregard prior spoliation law based on 'inherent authority' which conflicts with the standards established in Rule 37(e)."[137] The expression of intent as to the scope of a rule "to displace the inherent power" should be given effect.[138]

Several courts have insisted that they retain authority to issue adverse inferences, even if at odds with the requirements of Rule 37(e). In *Freidman v. Phia. Parking Auth*., the court asserted it retained its authority to exercise inherent authority but deferred to an imposition of monetary sanctions based on Rule 37(a) as a "more appropriately tailored"

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[133] Committee Note, 38 (the rule "forecloses reliance on inherent authority" to determine "when certain measures should be used").
[134] Republic of Ecuador v. Mackay, 742 F.3d 860, 865 (9th Cir. 2014).
[135] *Chambers*, *supra*, at n. 14.
[136] *Id*. at 50. *See* United States v. Aleo, 681 F.3d 290, 310 (6th Cir. May 15, 2012)(Sutton, J. concurring).
[137] Living Color v. New Era Aquaculture, 2016 WL 1105297, at n. 2 (S.D. Fla. March 22, 2016).
[138] *Cf. Chambers*, *supra*, at n. 32 (1991)(citing to Committee Note which did not expressly indicate any intent to displace use of inherent power as an additional tool in a particular Rule 16 context).

remedy" for failure to preserve ESI under the circumstances.[139] Others courts have reached the same conclusion[140] or, at least, are ambiguous.[141]

In *Cat3 v. Black Lineage*,[142] for example, the court noted that inherent power would have been available if it had become "necessary"[143] to act because Rule had been rendered inapplicable by egregious misconduct.[144] As it turned out, the court was able to apply Rule 37(e) to the case at hand. It concluded, under the circumstances, that "it cannot be said that the lost ESI has been "restored or replaced" because of the doubt on the authenticity of the emails recovered by additional discovery.[145]

CAT3 has led some to warn that a non-moving party that prevails in showing the Rule does not apply to its conduct may find that "sanctions may still be a threat" under pre-Rule Circuit principles.[146] A more accurate statement is that inherent power presents "a viable alternative to sanction spoliation-related conduct that may not strictly satisfy the new Rule's elements."[147] However, the Rule cannot be simply ignored if a court disagrees with the impact of its predicate conditions in constituting a de factor safe harbor.[148]

Other Provisions of Rule 37

The Committee Note to Rule 37(e) is silent about the intended impact of Rule 37(e) on other provisions of Rule 37 or the extent to which the Supreme Court intends Rule 37(e) to "occupy the field" so as to preclude supplementation by other overlapping rules.[149] A classic example is when the conduct which led lost ESI, which cannot be

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[139] 2016 US Dist. LEXIS 32009, at Paras. 77 and 85 (E.D. Pa. March 10, 2016).
[140] Internmatch v. Nxtbigthing, 2016 WL 491483, at n. 6 (N.D. Cal. Feb. 8, 2016)("whether a district court must now make findings set forth in Rule 37 before exercising its inherent authority to impose sanctions for the spoliation of electronic evidence has not been decided").
[141] Core Laboratories v. Spectrum Tracer Services, 2016 WL 879324, at *2 (W.D. Okla. March 7, 2016)(citing Rule 37(e) and Turner v. Public Service, 563 F.3d 1136, 1149 (10th Cir. 2009).
[142] CATt3, *supra*, 2016 WL 154116 (S.D.N.Y. 2016).
[143] *Id*. at *7. ("[w]here 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")(emphasis added).
[144] *Id*. (inherent powers apply "where the conduct at issue is not covered by one of the other sanctioning provisions," quoting Chambers, 401 U.S. at 50).
[145] *But see Id* at *10 (S.D. N.Y. Jan. 12, 2016)(to exercise inherent power it would have been required to find 'bad faith (citing United States v. Int'l Brotherhood of teamsters, 948 F.2d 1338, 1345 (2nd Cir. 1991)[and ignoring the lesser negligence standard of Residential Funding]).
[146] Paul Hastings, *The New Federal Rule of Civil Procedure 37(e): What have the First Three Months Revealed?*, at 4 (March 2016).
[147] Etish, Signs of Life? – Judge Francis Opines that "Inherent Authority" to sanction Spoliation Related Conduct Survives Amended Rule 37(e), http://www.ediscoverylawalert.com/
[148] The rule is intended to exempt a party from curative or punitive measures if it took "reasonable steps" to preserve or if the "lost" ESI can be restored or replaced. It would totally negate the intentional choices made by the Supreme Court and Congress in adopting Rule 37(e).
[149] Although a slightly different context, the "preemption" of state action is implied when federal law so thoroughly occupies a legislative field as to make it reasonable to draw that inference. Montalvo v. Spirit Airlines, 508 F.3d 464, 470 (9th Cir. 2007).

replaced, can be fairly said to be in breach of a preservation order (such as a case management order) and is also the result of a failure to take reasonable steps to preserve.

Is it necessary to show an intent to deprive to authorize an adverse inference or is it sufficient to show merely negligent conduct? Cases applying Rule 37(b) typically do not require a showing of culpability, let alone the "intent to deprive" standard required under Rule 37(e).

Rule 37(b) provides sanctions for failures to comply with an order to "provide or permit" discovery. The court in *HM Electronics v. R.F. Technologies* held that there was no reason to believe that Rule 37(e) would have barred it from issuing sanctions under Rule 37(b) for failures to preserve in defiance of a related court order.[150] Surely this is incorrect, had the court done so without a finding of intent to deprive. It seems clear that the more onerous standard - intent to deprive - should apply where ESI is involved to reflect the Rule 37(e) policy.

It would be illogical to believe that the Supreme Court (and the Rules Committee) intended to authorize courts to ignore the strong policy for a uniform treatment of losses of ESI due to failures to preserve.

There appears to be confirmation of this logic in regard to a recent case involving Rule 37(c), which some courts have applied to challenges for failures to preserve[151] to the exclusion of Rule 37(e) and in derogation of its provisions.[152] In *Marquette Transportation v. Chembulk*, however, the court made it clear that if ESI is involved, it is Rule 37(e)'s tests that determine if sanctions are appropriate.[153] In that case, sanctions were denied because "the full data contained on the VDR was discovered and produced."[154]

[150] HM Electronics v. R.F. Technologies, 2015 WL 4714908, at *30 (S.D. Calif. Aug. 7, 2015)("[e]ven if subsection (e) applied instead of subsection (b), the court would reach the same result on this record since the parties "intended to deprive" plaintiff of the use of the information and prejudice existed because of the destruction and delayed production).
[151] *See, e.g.,* Star Envirotech v. Redline Detection, 2015 WL 9093561, at *5 (C.D. Cal. Dec. 16, 2015).
[152] Benefield V. MStreet Entertainment, 2016 WL 374568, at *6 (M.D. Tenn. Feb. 1, 2016)(ordering spoliation instruction at trial merely because there was "no justification for [the party's] failure" to preserve text messages"); *but compare* Montoya v. Orange County, 2013 WL 6705992, at *5 (C.D. Cal. Dec. 18, 2013)("Rule 37(c)(1) is an improper basis . . to seek sanctions" for spoliation).
[153] 2016 WL 930946 (E.D. La. March 11, 2016).
[154] *Id.*, at *3.

APPENDIX A

Revised Rule 37(e) Cases (as of April 18)

Case	Cir.	Failure	Defense	Result	Comment on Rule
HM Electronics v. R.F. Technologies, 2015 WL 4714908 (SDCal Aug 7, 2015)	9th	Delayed production in violation of order	ESI was produced in time for trial	Harsh sanctions under 37(b) and 26(g)	**If new Rule 37(e) applied, it would not preclude Rule 37(b) sanctions (*30)**
Official Creditors v. Haltman, 20115 WL 5027899 (EDNY Aug. 25, 2015)	2nd	Lost emails, backups and data on computer	Varied	Adverse inference	**New rule "scales back" stringent guidance in Residential Funding (n. 19)**
Fleming v. Escort, 2015 WL 5611576 (D. Idaho. Sept 22, 2015)	9th	Failure to retain examples of source codes	No prejudice because can recreate	Sanctioned for bad faith in forcing open market purchaes	**Notes that new rule responds to "high cost" of preserving ESI**
Star Envirotech v. Redline, 2015 WL 9093561 (C.D. Cal. Dec. 16, 2015)	9th	Failure to preserve electronic copies	Kept hard copies; did not act with culpable state of mind	No sanctions worthy spoliation under Zubulake	**Rule 37(e) not mentioned**
Bry v. City of Frontenac, 2015 WL 9275661 (EDMo. Dec 18, 2015)	8th	Failure to preserve dash cams	Taped over pursuant to SOP	Qualified immunity for overwriting	**Did not act with intent to deprive under Rule 37(e) (n.7)**
Granados v. Traffic Bar, 2015 WL 9582430 (S.D.N.Y. Dec. 30 2015)	2nd	Adv. Inference sought for loss of ESI and docs	No showing of loss of relevant evidence or bad faith conduct	Motion for sanctions denied as premature	**Rule 37(e) applicable if it is shown that ESI involved lost**
Zbylski v. Douglas County, 2015 WL 9583380 (D. Colo. Dec. 31, 2015)	10th	Destruction of personnel action notes	Inadequate evidence of notice	No adverse inference but preclusion	**Rule 37(e) re "notice" cited as consistent (no ESI involved)**
Elie Harfouche v. Stars on Tour, 2016	9th	Deletion of ESI by	Intent not attributable	Even if duty existed,	**Fails to consider impact of Rule**

WL 54203 (D. Nev. Jan. 5, 2016)		former employee	to employer	intent not attributable	**37(e)**
Prezio Health v. John Schenck , 2016 WL 111406 (D.Conn.Jan.11, 2016)	2nd	Sensitive emails deleted	Other defendant responsible	Adverse infer. per Residential Funding & Mali	**Fails to consider Rule 37(e) rejection of *Residential Funding***
Stinson v. City of New York, 2016 WL 54684 (SDNY Jan.5, 2016)	2nd	Failure to preserve text messages & documents	No evidence existed	Adverse inference because "grossly negligent"	**Would it apply to failure to preserve "both ESI and hard-copy evidence"?**
Cat3 v Black Linage, 2016 WL 154116 (SDNY)(Jan 12, 2016), dism'd per 2016 WL 1584011)	2nd	Altering metadata on emails	The machine did it	Preclusion and attny fees applied under Rule	**Rule authorizes sanctions but if not inherent power could apply**
Nuvasive v. Madsen Medical, 2016 WL 305096 (S.D. Cal. Jan. 26, 2016)	9th	Failure to preserve text messages	No prejudice, no showing of intent	Revs'g (2015 WL 4479147)	**Evidence will be admitted and jury instruction given**
Benefield v. MStreet Enert'mt, 2016 WL 374568 (M.D. Tenn. Feb. 1, 2016)	6th	Failure to preserve text Messages	Unlikely to contain relevant info	"Spoliation instruction" if goes to trial citing Rule 37(c)	**NO MENTION OF NEW RULE despite invoking adverse inference**
DVComm v. Hotwire, 2016 US Dist. LEXIS 13661 (E.D. Pa. Feb 3, 2016)	3rd	Deletion of rough draft of key evidence	Does not recall deletions	Meets subjective intent to deprive std.	**Adverse inference; could have used inherent power (citing Cat3)**
SEC v. CKB168 Holdings, 2016 U.S. Dist. LEXIS 16533 (E.D.N.Y. Feb. 2, 2016)	2nd	Reconsidera tion of two adverse inferences	Modified to conform to new Rule 37(e)	If no ESI existed, Rule 37(e) precludes sanctions	**Existing record does not support "intent to deprive"; can renew the motion at trial**
Internmatch v. Nxtbigthing, 2016 WL 491483 (N.C. Cal. Feb. 8, 2016)	9th	Discarding of damaged electronic hard drives	Damaged by power surges	Unbelievable explanations permits	**Whether Rule 37(e) forecloses inherent power is undecided**
Marten Transport v. Platform	8th	Repurposed computer	Was unaware of	Since no duty to	**Party took reasonable steps**

Advertising, 2016 WL 492743 (D. Kan. Feb. 8, 2016)		lost internet history	requirement	preserve, Rule 37(e) inapplicable	**and rule does not require perfection**
Thomley v. Bennett, 2016 WL 498436 (S.D. Ga. Feb. 8, 2016)	11th	Video of taser incident	Autodelete before duty attached & no intent	Dismissed for failure to exhaust adm. claims	**No Rule 37(e) showing of prejudice of intent to deprive (n. 18)**
Mayer Rosen v. Lincoln, 2016 WL 889421 (S.D. N.Y. Feb. 2, 2016)	2nd	Destruction of docs after scanning	No intent to deprive and no prejudice	No sanctions	**Resolved without mention of Rule 37(e)**
McCarty v. Covol Fuels No. 2, 2016 WL 611736 (6th Cir. Feb. 16, 2016)	6th	Destruction of docs, cell phones,	Ordered to do so by state agency	Spoliation moot	**No mention of Rule 37**
Ericksen v. Kaplan, 2016 WL 695789 (D.Md. Feb. 22, 2016)	4th	Use of cleaner on hard drive of plaintiff	Not relevant to issues	Doc. & email precluded and evidence allowed	**Destruction not sufficient to dismiss under Rule 37(e)**
McCabe v. Wal-Mart, 2016 WL 706191 (D. Nev. Feb. 22, 2016)	9th	Slip & fall not on videotape or photos	None existed	No sanctions	**No mention of Rule 37(e)**
Best Payphones v. City of New York, 2016 792396 (E.D. N.Y. Feb. 26, 2016	2nd Cir.	**Failure to preserve emails and documents**	No duty, no prejudice, acted reasonably	No harsh measures under Circuit or Rule 37(e)	**"Separate" analyses applied; fees awarded under Rule 37(a)**
Brown Jordan v. Carmicle, 2016 WL 815827 (S.D. Fla. March 2, 2016)	11th Cir.	Failure to preserve ESI on iPad, laptops	No duty at the time	Reasonably anticipated at time of discharge	**Failure to take "reasonable steps" under Rule 37(e)**
McFadden v. METRO, 2016 WL 912170 (D.D.C. March 7, 2016	D.C.	Possible deletion of web material	Not yet determined	Party may have deleted page	**Court could find intent to deprive if original lost**
Core Labs v. Spectrum Tracer, 2016 WL 879324 (W.D. Okla. March 7, 2016)	10th	Deleted emails, hard drives	No relevant ESI lost	Sanctions lie if prejudice even though reasonable actions	**Opinion is unclear as to why court did not require a showing of intent to deprive**
Safeco v. Knife River, 2016 WL 901608 (D. Idaho, March 9, 2016)	9th	Hand-written notes destroyed	Inadvertent and not prejudicial	No sanction appropriate	**No impact since spoliation of tangible evidence**

Freidman v. Phila. Parking Auth., 2016 U.S. Dist. LEXIS 32009 (E.D. Pa March 10, 2016)	3rd	Deleted emails	Not prejudicial and copies available elsewhere	Declined to use inherent authority but could have	**Premature to apply (e)(1); awards attny fees under Rule 37(a)**
Accurso v. Infra-Red Services, 2016 WL 930686 (E.D. Pa. March 11, 2006)	3rd	Deletion of personal emails	Motion for adverse inference Denied	Premature under Rule 37(e)	**Motion may be renewed at trial after evidence admitted**
Marquette Transportation v. Chembulk, 2016 WL 930946 (E.D. La. March 11, 2016)	5th	Missing Data on DVD/CD-Rom not produced	Later found although reasonable steps not taken	No sanctions because restored and replaced	**Rule 37(c) sanctions denied because of Rule 37(e) provisions**
Roadrunner Transp. v. Tarwater, __Fed. Appx. __ , 2016 WL 1073104 (9th Cir. March 18, 2016)	9th	Deletion from laptop	Denial	Aff'd Dismissal and y fees w/o relying on Rule 37(e)	**Even if "just" to apply the Rule, the courts findings support intent to deprive**
Living Color v. New Era, 2016 WL 1105297 (S.D. Fla. March 22, 2016)	11th	Missing text messages	No prejudice	No basis for (e)(1) or (e)(2) sanctions	**"Intent to Deprive" may be harmonious with "Bad Faith"**
CTB v. Hog Slat, 2016 WL 1244998 (E.D. N.C. March 23, 2016)	4th	Document and Data not preserved	Followed retention policy	Adverse Inf. because "willful" failure	**Court says 2015 Amdt's applies but ignores Rule 37(e)**
Marshall v. Dentfirst, 2016 WL 1222270 (N.D. Ga. March 24, 2016)	11th	Browsing History and emails	No duty to preserve nor prejudice nor intent	Sanctions denied; R.37(a) thus inapplicable	**Considerations under Rule are substantially similar to cases**
Carter v. Butts County, 2016 WL 1274557 (March 31, 2006)	11th	Digital photo & camera not preserved	Not relevant	Rebuttable presumption & fees & $500 fine	**No Mention of Rule 37(e)**
McIntosch v. US, 2016 WL 1274585 (S.D. N.Y. March 31, 2016)	2nd	Videotape footage overwritten	Not relevant	Not just or practicable to apply Rule 37(e)	**Concedes unfavorable to pro se movant so ignores rule**
Thurmond v. Bowman, 2016 WL 1295957 (W.D. N.Y. March 31, 2016)	2nd	Deletion of some Facebook posts	Not relevant	Rule 37(e) not applied "retroactive" as nobody sought it	**Outcome would not be different if had applied Rule 37(e) (n.6)**
Botey v. Green,	3rd	Auto-	Conditions	Adverse	**Court applies**

2016 WL 1337665 (M.D. Pa. April 4, 2016)		deletion of trucker driving logs	required for spoliation missing	inference denied	**state principles of spoliation; no mention of Rule 37(e)**
Orchestratehr v. Trombetta, 2016 WL 1555784 (N.D. Tex. April 18, 2016)	5th	Deletion of emails prior to leaving employer	Ordinary course of business	Despite knowledge litigation likely no relief	**No showing of actions in bad faith or with intent to deprive under Rule 37(e)**

APPENDIX B

(Original Proposal 2013)

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

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~~(e) **FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION. 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 system,~~**

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.

(1) *Curative measures; sanctions.* If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may

(A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

(B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions:

(i) caused substantial prejudice in the litigation and were willful or in bad faith; or

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the ~~a~~ claims in the litigation.

(2) *Factors to be considered in assessing a party's conduct.* The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or

conduct of litigation, and whether the failure was willful or in bad faith. The factors include:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good-faith about the scope of preservation;

(D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

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