Spoliation After Amended Rule 37(e)

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This memorandum assesses the impact of amended Rule 37(e) (“Rule 37(e)” or “the Rule”) on the resolution of claims of spoliation of electronic information in civil litigation in the federal courts. The Rule applies only to failures to preserve ESI, in contrast to the initial proposal for amended Rule 37(e) as released for public comment.2

The Rule serves as a procedural remedy for spoliation during the discovery process, not as the basis for a substantive claim for damages. The duty to preserve is owed to the courts, not to the opposing party, and its breach does not support an independent federal cause of action for damages.3 As the Sixth Circuit explained, “a spoliation ruling

1 © 2017 Thomas Y. Allman. Mr. Allman is a former General Counsel and Chair Emeritus of the Sedona Conference® Working Group 1 on Electronic Discovery. An earlier version of this Memorandum appeared as Amended Rule 37(e): What’s New and What’s Next for Spoliation? 101 JUDICATURE 46 (Summer 2017), at https://law.duke.edu/sites/default/files/centers/judicialstudies/judicature/may2017_rule37.pdf.
2 The Preliminary Draft of Proposed Amendments to the Federal Bankruptcy and Civil Rules (hereinafter “2013 PROPOSAL,”) are available http://www.hib.uscourts.gov/news/archives/attach/preliminary-draft-proposed-amendments.pdf. Rule 37(e), in that draft, applied to failures to preserve “discoverable information that should have been preserved.”
3 Victor Stanley v. Creative Pipe, 269 F.R.D. 497, 525 (D. Md. 2010). For courts sitting in diversity, however, such independent state tort claims may be adjudicated part of the case. See, e.g., Williams v. BASF Catalysts LLC, 765 F.3d 306, 315 (3rd Cir. Sept. 3, 2014)(remanding to District Court to exercise jurisdiction over a spoliation claim under New Jersey law).
[typically] is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters.4

Perhaps the most important aspect of the Rule is the requirement that harsh measures imposed to address spoliation may not be employed without a specific finding of an “intent to deprive” the other party of the “information’s use in the litigation.” It has “changed the rules” by overruling Residential Funding Corp. v. DeGeorge Fin. Co. (“Residential Funding”)5 which authorizes such remedies based on negligent or grossly negligent preservation conduct.6

In an important departure from past practice, a finding of culpability is not required to utilize remedial or curative measures to address prejudice in the absence of such intent to deprive. By requiring an “intent to deprive” for harsh measures, it is hoped to mitigate confusion which has “caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.”7

Introduction

In traditional usage, spoliation involves the destruction or significant alteration of evidence or the failure to preserve it for another’s use in pending or reasonably foreseeable litigation in violation of a duty to preserve.8 Courts are accustomed to crafting their own, largely (but not entirely) evidentiary responses based on Circuit-based historical principles, based on a common law duty to preserve.

Prior to 2006, the Federal Rules were silent on the treatment of spoliation and the duty to preserve. The case law – and it was substantial and well developed – treated spoliation as litigation abuse subject to remediation under inherent authority.9 In 2006, a limitation designed to deal with sanctions issued “under these rules” was added to Rule 37 to deal with ESI lost due to the routine, good faith operation of information systems.10

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5 306 F.3d 99, 107 (2nd Cir. 2002).
7 Committee Note.
8 The typical definition used is that of the Second Circuit in West v. Goodyear Tire & Rubber, 167 F.3d 776, 779 (2d Cir. 1999)(“the destruction or significant alteration of evidence” or “the failure to preserve property for another’s use as evidence”).
10 Rule 37(f)(2006) provided that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”
However, since the Rule did not foreclose use of inherent power, it was largely ineffectual. In addition, its failure to provide “clear guidance” on when the duty to preserve was triggered and what it entailed engendered substantial criticism.

In 2010, at the seminal Duke Litigation Conference convened by the Civil Rules Advisory Committee (the “Rules Committee”), the inadequacies of the initial Rule were thoroughly discussed by a panel of jurists, practitioners and in-house counsel. The Panel unanimously recommended revising or replacing it with an approach to spoliation which would make it unnecessary for courts to rely on inherent authority.

Ultimately, after extensive public comments and a number of final adjustments by the Rules Committee, the Supreme Court approved as amended version of Rule 37(e) developed under supervision of the Standing Committee of the Judicial Conference (the “Standing Committee”). It became effective on December 1, 2015 as part of the 2015 Rules Amendments.

**Amended Rule 37(e)**

As adopted, with minor grammatical changes from the original text recommended by the Rules Committee, amended Rule 37(e) provides:

“Failure to 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 Amended Rule has been referred to or applied in close to one hundred thirty appellate and district court opinions to date.

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13 See Advisory Committee Makes Unexpected Changes to 37(e), Approves Duke Package, BNA EDISCOVERY RESOURCE CENTER, April 14, 2014 (“Rule 37(e) Revised Again”) (reproducing revised text as presented to and approved by the Committee at its Meeting), available at http://www.bna.com/advisory-committee-makes-n17179889550/.
However, at least eighty-five decisions involving allegations of spoliation of ESI have been resolved without considering Rule 37(e). In many of these cases, applying the Rule would have changed the outcome. When coupled with the mixed results from Circuit Courts as summarized in Appendix A, one is reluctant to over-generalize about the acceptance of the Rule.

Scope

The Supreme Court Order governing the Rule requires that it be applied to pending civil actions where the conduct at issue took place before enactment of the Rule, unless a court affirmatively finds it is not just or practicable to do so. Some courts have made that finding because of the “unfairness” of depriving a party of the ability to secure adverse inferences based on mere negligence.

Some courts treat audio or video recordings as if not within the scope of the Rule. In Oppenheimer v. City of LaHabra, for example, the court asserted that the Rule did not address destruction of video footage in digital form. However, another court noted that it “could think of no reason” why a digital audio recording “would not be ESI.”

Courts have divided over the treatment of a failure to preserve ESI and documents when both are lost in the same case. Some courts apply “two standards,” others apply Rule 37(e) alone and yet others ignore the Rule. A Member of the Rules Committee has predicted that “mixed ESI-tangible information cases will eventually yield to a Rule

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15 Id. (Appendix B)(listing fifteen cases where, in the Author’s opinion, the results would have differed).
17 See 2015 US Order 0017; 305 F.R.D. 457, 460 (April 29, 2015)(“[the Rules] shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending”). See also Rule 86 (a)(2)(amendments apply to proceedings after effective date in an action pending unless court determines it would be “infeasible or work an injustice”). See, e.g., Citibank v. Super Sayin’ Publishing, 2017 WL 946348 (S.D.N.Y. March 1, 2017)(applying Rule to conduct which took place over two years before the Rule took effect); ILWU-PMA v. Conn. General, 2017 WL 3459880 (N.D. Cal. Jan. 24, 2017)(applying rule to pre-effectice date conduct does not work an “injustice” since the party urging application benefits from its application).
22 In O’Berry v. Turner, 2016 WL 1700403 (M.D. Ga. April 27, 2016), a court applied Rule 37(e) to the loss of ESI and ignored the fact that it was the loss of the document that prompted the spoliation motion.
37(e) analysis [for both].” Rule 37(e) could and should be applied to both documents and ESI, leaving losses of tangible property as a separate matter outside the scope of the rule.

**Breach of Duty**

Rule 37(e), is available only when “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.” These criteria for determining if lost ESI “should have been preserved” are derived from the common law; “[the Rule] does not attempt to create a new duty to preserve.”

Courts routinely utilize pre-enactment case law to determine when measures under the Rule are available. In *Edelson v. Cheung*, for example, a court relied on cases derived from a pre-enactment Third Circuit decision. However, such reliance must yield to specific Rule 37(e) requirements which are in conflict, as was the case in *Eshelman v. Puma Biotechnology*, where the moving party did not establish that the lost ESI could not be restored or replaced.

Some courts mechanically apply all the requirements from the quoted phrase above (requiring a “yes” answer to all”) before ruling; others, not so much. In *Marshall v. Dentfirst*, a failure to demonstrate that the party acted with intent to deprive prompted denial of the motion without determining whether it also involved undertaking “reasonable steps.”

A related issue is the extent to which courts are precluded from use of inherent powers for losses of ESI. According to the Committee Note, the Rule “foreclose[s]” reliance on inherent authority. To some jurists, this applies “at least in factual situations to which the rule applies, i.e., where the information cannot be substituted from another source.” There are examples, however, where courts have imposed measures which seem to have been precluded or unavailable under the Rule. See “Preclusive Impact,” infra.

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25 The Author has argued that the Rule should apply to both ESI and documents, as is the case in Rule 34(a). Letter, Allman to Committee, November 16, 2013 (suggesting adopting of the distinction in the final version of the Rule), copy archived at [http://www.regulations.gov/#docketDetail;D=USC-RULES-CV-2013-0002](http://www.regulations.gov/#docketDetail;D=USC-RULES-CV-2013-0002).

26 Committee Note.


28 2017 WL 2483800 (E.D. N.C. June 7, 2917)

29 Id. at *5.


Duty to Preserve

The duty to preserve is triggered by commencement of litigation or when it “is reasonably foreseeable,” or, in the case of the party which initiates the action, once it has decided to proceed. If the loss or destruction occurs prior to that time, no breach of duty exists.32 Once “triggered,” the obligation to preserve typically endures for the duration of the litigation.33

A variety of events may alert a party to the prospect of litigation, but provide only “limited information” requiring a fact-specific examination. A duty to preserve based on possible litigation must be “predicated on something more than an equivocal statement of discontent.”35 As one court observed in the case before it, however, “the Court cannot fathom a reasonable defendant who would look at those facts and not catch the strong whiff of impending litigation on the breeze.”36

Events involving threats of litigation or institution of governmental investigations have led to conflicting decisions as to “trigger” of the duty in subsequent litigation.37 In Rockman Company v. Nong Shin Company, the court refused to find a duty was created with respect to civil litigation involving the domestic subsidiary of a Korean entity because of an earlier investigation in Korea of the parent company.38

A duty to preserve may also arise from a party’s own information-retention protocols without it necessarily meaning that the party also had such a duty with respect to litigation. In US Capitol Supply, Rule 37(e) was inapplicable because it did not arise from anticipation of litigation and the court sanctioned the party under the less stringent requirements of its inherent authority.39

What Must Be Preserved

The duty to preserve extends to all forms of relevant, discovery information which is under the control of the party and which is or may be sought in the pending or anticipated

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34 Id.
38 229 F. Supp.3d 1109, at “Duty to Preserve” (N.D. Cal. Jan. 19, 2017)(collecting cases and treating duty to preserve as uniquely enforceable only by a specific party, not a “free-floating or shifting duty which other parties could latch onto”)(internal cites to Point Blank Solutions, supra, omitted).
39 2017 WL 1422364, at *10 (D.D.C. April 19, 2017)(“by its express terms” Rule 37(e) does not govern the instant spoliation motions).
litigation. This includes ESI which is accessible through reasonable efforts taking into account proportionality considerations.40

Judge Francis has famously cautioned, however, that proportionality is “too amorphous” a concept to provide a complete defense to a party challenged retrospectively about decisions as to “what files it may delete or backup tapes it may recycle.”41 True enough. Private and governmental entities should not be able to excuse a failure to make reasonable efforts merely because of the expense involved nor should individuals be excused from taking reasonable steps because of inexperience.42 But nuanced decisions taking into account the burdens involved are inevitable, and should be respected when made in good faith based on the information then available.43

The Sedona Conference has spoken on these points. Sedona Principle 8 suggests that the primary sources should be those which are readily accessible.44 A Sedona Commentary suggests that “[i]f the burdens and costs of preservation are disproportionate to the potential value of the source of data at issue, it is reasonable to decline to preserve the source.” By way of example, it notes that “an employee’s local drive may not warrant forensic imaging in a straightforward commercial dispute, whereas it could be crucial to (and thus need to be preserved) in a trade secret case.”45

Sedona Principle 9 explains that absent a showing of special need and relevance, “deleted, shadowed, fragmented, or residual” ESI need not be preserved.46 Similar limitations are proscribed under the Seventh Circuit Guidelines,47 local District or guidelines rules and are often included in negotiated protocols. Principle 1 of the Commentary on Proportionality in Electronic Discovery provides that when determining the scope of preservation, the “burdens and costs of preserving relevant [ESI] should be weighed against the potential value and uniqueness of the information.”48

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41 Orbit One Communications v. Numerex Corp., 271 F.R.D. 429, 436 & n. 10(S.D. N.Y. Oct. 26, 2010)(arguing that no court would excuse preservation “merely because the monetary value of anticipated litigation was low.”).
42 Committee Note (“The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts”).
43 Hon. Elizabeth D. Laporte and Jonathan M. Redgrave, A Practical Guide to Achieving Proportionality Under New [FRCP] 26, 9 FED. CTS. L. REV. 19, 69-71 (2015)(appropriate to act based on facts know regarding the nature, type and number of claims that are (or maybe be brought).
44 The Sedona Principles, Third Ed. 2017 Public Comment Version
45 Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible (July 2008), 10 SEDONA CONF. J. 281, 291-93 (2009); see also Sedona Principle 5 (Third Ed. 2017 Public Comment Version (duty to preserve does not require “disproportionate steps”); see also Sedona Principle 9 (Third Ed. 2017 Public Comment Version).
47 18 SEDONA CONF. J. J (forthcoming 2017). It also cautions, in Comment 1.a that “at the preservation stage parties should be wary of applying too narrow a definition of what constitutes relevant ESI.”
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The case law makes it clear that ephemeral information typically need not be preserved even if arguably relevant. In Columbia Pictures v. Bunnell, there was no duty to preserve data retained briefly in RAM until an order was issued to do so “following a careful evaluation of the burden” in light of its relevance and “the lack of other available means to obtain it.” Special considerations apply in assessing preservation obligations for databases and the information found within them.

The Committee Note cautions that “hindsight” should not blind courts to that reality, a premise which is equally applicable when assessing whether “reasonable steps were undertaken.” In Marten Transport v. Platform Advertising, the court found no duty to preserve an internet browsing history at a time when the party did not know or have reason to know that it would be relevant in the case.

Relevance

The duty to preserve applies only to ESI that is or is reasonably expected to be relevant to claims or defenses. The Rule itself speaks only of preserving ESI, apparently on the assumption that it is obvious that the ESI must be relevant to the claims or defenses. The Committee Note explains that potential litigants have a duty to preserve relevant information. Ninoska Granados v. Traffic Bar, for example, stresses that it must be shown that the missing ESI actually existed and that it was relevant.

After the 2015 Amendment to Rule 26(b)(1), the moving party is not entitled to seek sanctions for failures to preserve ESI merely because it may be “potentially relevant.” As stated in Air Products v. Wiesemann, “[p]ure speculation is not enough.” In Horn v. Tuscola County, a motion was denied because the inferences sought about the missing content were “not relevant to [the party’s] liability.”

In Hefter Impact Technologies v. Sport Maska, the court that while it was “less than ideal” to fail to suspend a policy of deleting email backups upon notice of potential litigation, that did not support a finding that “any relevant emails were in fact destroyed.”

Traditionally, the burden of demonstrating relevance rests with the movant. Not surprisingly, however, courts are prepared to shift the burden of proof to the non-moving party when it has engaged in sufficiently egregious misconduct. In GN Netcom v.

50 245 F.R.D. 443, 448 (C.D. Cal. Aug. 24, 2007)(data in RAM is not too ephemeral to be discoverable but absent notice there is no duty to preserve).
52 See also discussion at “Reasonable Steps,” infra.
Plantronics, for example, the court placed the burden on the corporate employer to show that the lost ESI was not relevant.\textsuperscript{59}

Some Circuits require the moving party to demonstrate that the ESI bears such relevance to the claim or defense “that its destruction causes prejudice.”\textsuperscript{60} This reflects the fact that the more relevant the missing ESI, the more likely there is prejudice from its loss. In \textit{Victor Stanley v. Creative Pipe}, the point was made that a finding of ‘relevance’ for purposes of spoliation sanctions is a two-pronged finding of relevance and prejudice”).\textsuperscript{61}

In \textit{Snider v. Danfoss}, the court aptly noted that it makes good sense to restrict the rule to losses of relevant ESI for several reasons, “including the lack of prejudice in the loss of irrelevant ESI”).\textsuperscript{62}

“Reasonable Steps”

The amended Rule applies only if the party is shown to have failed to take “reasonable steps,” which involves an assessment of the behavior as against objective standards – a showing of culpability is not required. The duty to preserve requires only that a party make reasonable efforts to preserve, not achieve perfection.\textsuperscript{63} Sedona Principle 5 explains that “it is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant [ESI].”\textsuperscript{64}

The Rule does not define “reasonable steps,” nor does it list (as did the initial 2013 version)\textsuperscript{65} the factors to be considered. The Committee Note does indicate that “proportionality” is a factor in evaluation reasonableness,\textsuperscript{66} including the sophistication of the party and its resources\textsuperscript{67} and that the routine, good-faith operation of an electronic

\begin{itemize}
\item \textsuperscript{59} 2016 WL 3792833 (D. Del. July 12, 2016).
\item \textsuperscript{60} See, e.g., Automated Solutions v. Paragon Data Systems, 756 F.3d 504, 514 (6th Cir. 2014)(“‘relevant’ means [that] the party seeking an adverse inference must aduce sufficient evidence from which a reasonable trier of fact could infer that the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction”).
\item \textsuperscript{61} 269 F.R.D. 497, 532 (D. Md. Sept. 9, 2010)(“
\item \textsuperscript{62} 2017 WL 2973464, at *4 (N.D. Ill. July 12, 2017).
\item \textsuperscript{63} Ariana Tadler and Henry Kelston, \textit{What you Need to Know About the New Rule 37(e)}, 52-JAN TRIAL 20, 22 (2016)(“reasonableness is the standard against which efforts to preserve are judged; perfect preservation is neither expected nor required”).
\item \textsuperscript{64} The Sedona Principles, Third Edition, Principle 5 (2017 Public Comment Version).\textsuperscript{65} [Then] Rule 37(e)(4)(A)-(D) listed factors for courts to consider, including extent of notice of likely litigation and of relevant information; “reasonableness of the party’s efforts to preserve; proportionality of the efforts to anticipated or ongoing litigation; and whether court guidance was sought on unresolved disputes. \textit{Cf. Arizona RCP 37(g)(1)(C)(2017)} (the nature of the issues, the probative value of the ESI and accessibility and difficulty in preserving, as well as the timeliness of the actions taken and the relative burdens and costs in light of proportionality issues - as well as whether the information was lost as a result of the good-faith operation of an information system).
\item \textsuperscript{66} The Committee Note to Rule 37(e) pointedly couples it endorsement of the use of proportionality with the statement that while a party may act “reasonably by choosing a less costly form of information preservation, “ it should be “substantially as effective as more costly forms.”
\item \textsuperscript{67} See, e.g., Prezio Health v. Schenk, 2016 WL 111406 (D. Conn. Jan. 11, 2016)(assessing the loss of ESI during migration of data to a new smartphone without relying on Apple store technicians).
\end{itemize}
information system is a relevant factor. In Marten v. Platform Advertising, for example, the court found that a failure to preserve an internet browsing history was not a failure to take “reasonable steps” because it resulted from recycling of a computer consistent with standard business practices.

However, it is clear that a loss of ESI is only one factor in assessing whether “reasonable steps” were undertaken, in contrast to earlier case law under which something akin to a per se rule applied. In Konica Minolta Bus. Solutions v. Lowery, the moving party was not entitled to relief under Rule 37(e) “even if it is shown that the ESI was lost [because] [s]anctions are not automatic.”

Thus, while parties should normally put in place a “litigation hold” once they anticipate litigation, a delay in implementing it may be reasonable when all the circumstances are considered. It is clear that the failure to institute a written litigation hold is not a per se indication of a failure to take reasonable steps. A reliance on other sources, such as an email archiving, can be compliant and useful.

Negligent or reckless preservation efforts may, however, suffice to negate a finding of reasonable steps. In Matthew Enterprise v. Chrysler, for example, a “lackadaisical” approach to preservation barred the conclusion that a party had taken

69 Id. at *9 – 10 (deletion pursuant to recycling program consistent with existing practices).
70 Konica Minolta Business Solutions v. Lowery Corp., 2016 WL 4537847, at *6 (E.D. Mich. Aug. 31, 2016) (“[the moving party] is not entitled to relief under 37(e), even if it is shown the ESI was lost”).
72 Terral v. Ducote, 2016 WL 5017328, at *3 (W.D. La. Sept. 19, 2016)(video was deleted automatically in absence of timely request).
73 In Archer Daniels Midland v. Chemoil, an eight month delay in issuing a retention notice which did not result in prejudice was not subjected to measures. 2016 WL 9051173, *4 (C.D. Ill. Oct. 19, 2016)(resolving issue without citation to Rule 37(e)).
76 Wali Muhammad v. Mathena, 2017 WL 395225 (W.D. Va. Jan.27, 2017)(negligent conduct was sufficient to show a failure to take reasonable steps).
77 Arrowhead Capital Finance v. Seven Arts, 2016 WL 4991623, at *20 (S.D.N.Y. Sept. 16, 2016)(failure to transfer ESI to new server or to make payments to assure continued access to current server).
“reasonable steps to preserve ESI.” Courts rarely find that “reasonable steps” were undertaken when “poor” preservation practices are followed.

Thus, in ILWU-PMA Welfare Plan v. Conn. General, the court held that a party had not taken “reasonable steps” because it failed to make copies of ESI before disposing of certain servers. In Jackson v. Haynes & Haynes, an individual failed to take “reasonable steps” because she failed to make copies of ESI on a cell phone before returning it to Verizon. In Brown Jordan v. Carmicle, a sophisticated former executive failed to take reasonable steps when he did not retain relevant ESI on his iPads and laptops while pursuing litigation against his former employer.

However, when an “intent to deprive” is lacking or there is no discernable prejudice, some courts simply deny the motion under the Rule 37(e) without determining if the party took “reasonable steps.” This approach provides and supplements the “de facto” form of safe harbor intended by the Rule to address concerns over the type of unfairness which underlies over-preservation. It is, in fact, the ultimate expression of the intent of the Rule in rejecting Residential Funding logic.

Thus, in Hefter Impact Technologies v. Sport Maska, the court found there was insufficient evidence that the party acted with the requisite intent or that the moving party would suffer prejudice despite the wiping of a laptop before reviewing it for requested ESI. In FTC v. Directv, the lack of prejudice from failing to retain copies of interactive websites mitigated against such a finding. In Marshall v. Dentfirst, given the lack of “intent to deprive,” the court denied a spoliation motion without bothering to determine whether or not the party had taken “reasonable steps.”

On the other hand, when there is evidence of an “intent to deprive,” courts routinely find that the challenged preservation practices were not reasonable under the Rule. In Ericksen v. Kaplan, a party improperly used “CCleaner” and “Advance System Optimizer shortly before submitting a laptop computer for a forensic examination. In CAT3 v. Black

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81 Id., at *6 (the party depended on a third party to retain and preserve the ESI, which did not).
Lineage,\textsuperscript{89} altering emails was inconsistent with taking reasonable steps\textsuperscript{90} and also indicated that the party had “acted with the intent to deprive.”\textsuperscript{91}

Similarly, in \textit{GN Netcom v. Plantronics}, deletions of emails by a top executive, coupled with half-hearted measures by his employer were “the opposite of taking reasonable steps to preserve ESI” and were undertaken with an “intent to deprive.”\textsuperscript{92} In \textit{Alabama Aircraft Industries v. Boeing}, a failure to credibly explain deletions did not constitute “reasonable steps” and were undertaken in bad faith and with an intent to deprive.\textsuperscript{93}

Note: While Rule 37(e) is technically inapplicable unless a moving party shows that a party failed to take reasonable steps to preserve, that does not give courts license to ignore the rejection of its heightened finding of intent to deprive if it addresses lost ESI under inherent powers. The Supreme Court noted in \textit{Dietz v. Bouldin}\textsuperscript{94} that inherent powers should not be used when “contrary to any express grant of or limitation on the district court’s power contained in a rule or statute.” In the unlikely event that ESI is lost despite a party having taken reasonable steps, any assessment under inherent powers should be governed by the “intent to deprive” standard of Rule 37(e)(2).\textsuperscript{95}

\textbf{Restore or Replace}

Only if ESI cannot be “restored or replaced” through additional discovery can it be said that it is “lost” and are measures available. It is only when the ESI is truly “lost” that the Rule may apply.\textsuperscript{96}

The Committee Note explains that since ESI “often exists in multiple locations, loss from one source may be harmless when substitute information can be found elsewhere.” Accordingly, the “initial focus” should be on whether the lost information can be “restored or replaced through additional discovery.” It is irrelevant, at this juncture, why the ESI is missing provided that it was under the control of the party.\textsuperscript{97} In \textit{Konica Minolta Bus.}

\textsuperscript{90} \textit{Id.} at 500.
\textsuperscript{91} \textit{Id.} at 501.
\textsuperscript{92} 2016 WL 3792833, at *6 (D. Del. July 12, 2016). The court was also “not convinced that [the party] took all the reasonable steps it could have taken to recover deleted emails after discovering that [the executive] had instructed others to delete emails. (at *7).
\textsuperscript{93} 2017 WL 930597, at *15 (N.D. Ala. March 9, 2017)(“sufficient circumstantial evidence” of intent to delete or destroy) and *11 (intentional destruction is a failure to take reasonable steps).
\textsuperscript{94} ___ U.S. ___, 136 S. Ct. 1885, 1892 (2016).
\textsuperscript{95} See also James C. Francis IV & Eric P. Mandel, \textit{Limits on Limiting Inherent Authority}, 17 SEDONA CONF. J. 613, 662 (2016)(the limitation of sanctions resulting from specific intent to deprive “is not a gap” to be filled by the exercise of inherent of inherent authority).
\textsuperscript{97} Cf Committee Note (explaining that a lack of control might exist when a computer room was flooded or a cloud service failed or a software attack disrupted a storage system “and so on”).
Solutions v. Lowery, the court ordered additional discovery as to the availability of replacement information despite a showing of intentional deletion.\textsuperscript{98}

Thus, in Marquette Transportation v. Chembulk,\textsuperscript{99} the fact that data from a voyage data recorder (VDR) from a capsized vessel was initially believed to be missing did not lead to relief under the Rule because it was restored later through a subpoena of a witness who had been given and retained a downloaded copy.\textsuperscript{100} The court acted even though the failure to take reasonable steps at the time of the incident ultimately cost the moving party what turned out to be unnecessary expenses in hiring an expert.\textsuperscript{101}

In Brackett v. Stellar Recovery, the loss of an audio recording was not sanctioned under the Rule because the party was “able to locate another copy.”\textsuperscript{102} In Living Color v. New Era Acquaculture\textsuperscript{103} the court declined to order relief given “the abundance of preserved information” even though not all the missing texts were replaced. In Timms v. LZM, however, the Fifth Circuit upheld sanctions when a party seeking to replicate missing text messages from an iphone was unable to produce two copies, among many, from a cloud application.\textsuperscript{104}

While some courts have argued that the ESI must be restored or replaced in the same form,\textsuperscript{105} the court in Eshelman v. Puma Biotechnology found the rule satisfied where the deleted information could be established through deposition testimony.\textsuperscript{106} However, in TLS Mgt. and Mktg. Servs. V. Rodriguez-Toledo, the court found that measures were available under Rule 37(e) because not the ESI that “might have been” stored on a laptop and hard drive (since deleted) “including – say, metadata” could be recovered “from the

\textsuperscript{100} There were allegations that the missing VDR data had been deleted after the incident. However, the Captain later produced a full copy.
\textsuperscript{101} The court denied a motion for sanctions in the form of monetary damages Rule 26(c) because the matter “involves VDR data,” which is ESI. \textit{Id.} at *2.
\textsuperscript{102} 2016 WL 1321415 (E.D. Tenn. Feb. 24, 2016). Some courts erroneously argue that the fact that emails could be secured from other sources goes to “the type of sanctions” and not “the question of whether sanctions are appropriate” under the Rule. Learning Care v. Armetta, 315 F.R.D. 433, 439 (D. Conn. June 17, 2016).
\textsuperscript{103} 2016 WL 1105297, at *5 (S.D. Fla. March 22, 2016)(as least some of the text messages issue were not replaced and are lost).
\textsuperscript{104} 657 Fed. Appx. 228, ftn. (5th Cir. July 5, 2016)(the sanctions were imposed under Rule 37(b) and there is no mention of Rule 37(e).
\textsuperscript{105} Agility Public Warehousing v. DOD, 2017 WL 1214424 (D.D.C. March 30, 2017)(the Committee Notes “appear to contemplate” that replacement of the information must come from an electronic source and “not from depositions or some other form of discovery”).
\textsuperscript{106} 2017 WL 2483800, at *4-5 (E.D. N.C. June 7, 2017)(where there was no policy to susptend and the party was unaware of the 90-day default retention policy of Google). The court compared its conclusion to the fact patterns leading to the opposite conclusion in Keim v. ADF Midatlantic, 2016 WL 7048835 at *6 (S.D. Fla. Dec. 5, 2016)(author of missing text messages was deceased); Jenkins v. Woody, 2017 WL 362475, at *9 (E.D. Va. Jan 21, 2017)(inconsistent testimony by witnesses to missing video ) and McQueen v. Aramark, 2016 WL 6988820, at *4 (D. Utah Nov. 29, 2016)(inadequate memory of witnesses to events).
information transferred to the cloud-computing service and the USB flash drive (which remained).\textsuperscript{107}

Courts differ on the allocation of the burden of showing an inability to restore or replace. In \textit{Fiteq v. Venture Corporation}, the moving party failed to present “persuasive evidence” that the ESI could not be restored or replaced.\textsuperscript{108} In \textit{Bird v. Wells Fargo Bank}, however, the court granted leave to file a motion for sanctions under Rule 37(e) to the extent the defendant was unable to restore or replace a terminated employee’s email box.\textsuperscript{109}

According to the Committee Note, “substantial measures” should not be used to restore or replace information that is “marginally relevant or duplicative.” The amended Rule does not limit the court’s powers to authorize additional discovery and ESI deemed inaccessible under Rules 26(b)(2)(B) may be sought and the expenses involved may be allocated to the non-moving party under Rule 26(c)(1)(B), if appropriate.

In \textit{CAT3 v. Black Lineage}, the court observed that if compliance with the restore or replace requirement results from bad faith conduct, thus negating application of the rule, the court retains the inherent authority to deal with the underlying bad faith conduct.\textsuperscript{110}

Prejudice

An explicit finding of prejudice is required for purposes of curative or remedial measures under subsection (e)(1) and a finding of “intent to deprive” results in a presumption of prejudice under subsection (e)(2).\textsuperscript{111} Absent a showing of prejudice, no remedies are available.\textsuperscript{112} In \textit{Citibank v. Super Sayin’ Publishing}, an adverse inference was not imposed where Citibank failed to “adequately establish prejudice from the spoliation, as required by the current Rule 37(e).”\textsuperscript{113} It is not enough that a party acted with reprehensible intent.\textsuperscript{114}

\begin{footnotesize}
\textsuperscript{107} 2017 WL 115743, at \textsuperscript{(D. P.R. March 27, 2017).
\textsuperscript{108} 2016 WL 1701794, at *3 (N.D. Cal. April 28, 2016).
\textsuperscript{109} 2017 WL 1213425, at *7 (March 3, 2017).
\textsuperscript{110} 164 F. Supp.3d 488, 498 & 501 (S.D. N.Y. Jan. 12, 2016)(“[s]poliation designed to deprive an adversary of the use of evidence in litigation qualifies as bad faith conduct”).
\textsuperscript{111} Committee Note. This supplies the finding of prejudice required by courts under the Rule.
\textsuperscript{113} 2017 WL 946348 (S.D. N.Y. March 1, 2017); accord Zamora v. Stellar Ngt., 2017 WL 1372688, at *2 (W.D. Mo. April 11, 2017)(a district court in the Eighth Circuit applying Rule 37(e) must make a finding of “prejudice to the opposing party” before an adverse inference is warranted).
\textsuperscript{114} The Standing Committee approved the draft Committee Note adopted by the Rules Committee only after it deleted the statement 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” at the suggestion of a member of the Standing Committee. Minutes, Std. Comm. Meeting, May 29-30, 2014, at n. 2. In a Memo, May 22, 2014 to the Chair of Standing Committee from the Chair of the Rules Committee, it was explained Member of the Standing Committee [now Justice Gorsuch] had “questioned the wisdom” of suggesting that severe measures could be imposed “when no prejudice resulted from the loss.”
\end{footnotesize}
Prejudice is not defined, but historically refers to the interference with the ability to go to trial or with the rightful decision in the case.\textsuperscript{115} The Committee Note stresses, however, that any evaluation of prejudice “necessarily includes an evaluation of the information’s importance in the litigation.” As noted in \textit{Simon v. City of New York}, no measures are available under the Rule if the ESI “would not have made a difference” at the trial.\textsuperscript{116} One court found it sufficient, however, that the party had “plausibly suggest[ed]” that the material deleted relevant information.\textsuperscript{117}

While the burden of proof on the issue normally rests with the movant, it may be shifted to the non-moving party under some circumstances.\textsuperscript{118} In \textit{Global Material Tech. v. Dazheng Metal Fibre},\textsuperscript{119} for example, the court ordered a default judgment on liability under Rule 37(e) after presuming prejudice because the non-moving party had acted with an intent to deprive. In \textit{Alabama Aircraft v. Boeing}, a post enactment decision, the court found that Boeing had acted in bad faith in connection with deletion of certain ESI and shifted the burden to it.\textsuperscript{120}

The Committee Note provides that each party is responsible for providing such information and argument as it can and the court may draw on its own experience and ask the parties for further information. It also observes that it may be reasonable to require the party seeking relief to prove prejudice when the content is fairly evident, or may appear to be unimportant or the abundance of preserved information may appear sufficient to meet the needs of all parties.

The Incompetent Spoliator

The Rule 37(e) Committee Note was amended by the Standing Committee to make it clear that remedies under the Rule are not available merely because of reprehensible intent. It is typically left to a court’s inherent authority to deal, if at all, with the “incompetent spoliator,” i.e., a situation despite an intent to deprive, the action of counsel...

\textsuperscript{115} Leon v. IDX Systems, 464 F.3d 951, 959 (9th Cir. 2006)(the “ability to go to trial or threatened to interfere with the rightful decision of the case”). \textit{But see also} CAT3 \textit{v. Black Lineage}, 2016 WL 154116, at *9 (S.D.N.Y. Jan. 121, 2016)(finding prejudice because the moving party had been put to burden and expense of “ferreting out the malfeasance and seeking relief from the Court”).


\textsuperscript{118} Residential Funding \textit{v. DeGeorge}, 306 F.3d 99, 109 (2nd Cir. 2002)(“[w]here a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party”).

\textsuperscript{119} 2016 WL 4765689, at *10 (N.D. Ill. Sept. 13, 2016).

\textsuperscript{120} 319 F.R.D. 730, 744 (N.D. Ala. March 9, 2017)(citing cases holding that a bad faith spoliator should not be easily able to excused misconduct by claiming that the missing information was of minimal import).
or parties do not result in actual prejudice to the ability to present a case or reach the correct decision.\textsuperscript{121}

\textbf{Available Measures}

Rule 37(e) differs markedly from the 2006 version. Instead of merely stating what a court could not do, the amended version comprehensively states the authority of a court to act when ESI which should have been preserved is missing.\textsuperscript{122} If the loss results in prejudice, subdivision (e)(1) permits curative measures no greater than necessary to address prejudice.\textsuperscript{123} Much is left to the discretion of the Court.\textsuperscript{124}

Subdivision (e)(2), however, provides that a court “\textit{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,}” but “\textit{only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation.}” The Committee describes these as “very severe measures \textit{[intended] to address or deter failures to preserve.”}\textsuperscript{125}

The Committee Note explains that “the better rule for the negligent or grossly negligent loss of [ESI] is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.”

The following is a description of the types of measures which have been or are likely will to be utilized under subdivisions (e)(1) or (e)(2) – or both.

\textbf{1. Monetary Sanctions/ Fines}

Historically, some courts have impose monetary sanctions payable to the courts, sometimes described as fines, for spoliation.\textsuperscript{126} That is clearly prohibited under Rule 37(e), and is likely precluded under inherent authority in the absence of special proceedings. As

\textsuperscript{121} Cf. Enmon v. Prospect Capital Corp., 675 F.3d 138, 145 (2nd Cir. 2012)(sanctions for bad-faith conduct of counsel under inherent authority does not require proof of disruption of the litigation, since the focus in that context is on the “purpose rather than the effect”).

\textsuperscript{122} Joseph F. Marinelli, \textit{New Amendments to the Federal Rules of Civil Procedure, 2016-FEB Bus. L. TODAY} 1 (2016)(listing ways in which the amendments “overhaul the 2006 version of Rule 37(e) to address several of its shortcomings”).

Subdivision (e)(1) provides that “\textit{upon finding prejudice to another party from loss of the information, \textbf{[the court] may order measures no greater than necessary to cure the prejudice.”}

\textsuperscript{123} For a catalog of remedial measures in a case not applying Rule 37(e), \textit{see} Browder v. City of Albuquerque, 209 F.Supp.3d 1236 (D. N.Mex. July 20, 2016)(order to produce regardless of privilege; striking part of a party’s proof; allowing questioning about missing evidence; and imposing costs to create substitute for spoliated data). While Rule 37(b) contains a useful list of some analogous measures, it also includes reference to civil contempt, which is unlikely to be available under Rule 37(e).

Subdivision (e)(2) provides that “\textit{only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation.}” The Committee Note suggests that “curative measures” under (e)(1) which “have the effect” of the listed measures under (e)(2) are permissible only if there is also a showing of “intent to deprive.”

\textsuperscript{125} United States v. Philip Morris, 327 F.Supp. 2d 21 (D.DC. 2004)(ordering payment of $2.75M into Court Registry).
explained in *Cache La Poudre v. Land O’Lakes*,¹²⁷ and noted in the recent Supreme Court ruling in *Goodyear Tire v. Haeger*, when a sanction is imposed “pursuant to civil procedures,” it must be compensatory rather than punitive in nature.”¹²⁸

In *GN Netcom v. Plantronics*,¹²⁹ however, a court acting under Rule 37(e) levied a “punitive” monetary sanction of $3M payable to the moving party in response to the bad-faith conduct of a senior executive and an unwillingness of the party to initially acknowledge wrongdoing. It is plausible but unlikely that the court intended to address economic prejudice caused by the non-moving party’s conduct given that it also made a separate award of fees and expenses.

An analysis of the award of attorney’s fees and of “punitive monetary sanctions” are two separate and distinct matters.¹³⁰ It is much more likely that this represented an assertion of inherent power to address egregious litigation abuse. However, as noted in *Goodyear Tire*, a sanction is properly treated as compensatory (and does not require procedural safeguards) only if it is calibrated to the damages caused by the bad-faith acts on which it is based.¹³¹

2. Attorney’s fees

Under the “American Rule,” each litigant is responsible for its own attorney’s fees and costs, with exceptions where statutes and Rules provide otherwise or bad faith conduct requires the exercise of inherent authority to deal with litigation abuse.

Rule 37(e), unlike other subsections of Rule 37,¹³² does not expressly authorize such awards,¹³³ “economic prejudice”¹³⁴ has been incurred in bring the motion,¹³⁵ building on support for use of this logic in cases not involving spoliation.¹³⁶ Some courts have

¹²⁷ *Cache La Poudre v. Land O’Lakes*, 244 FRD 614, 637-638 (D. Colo. 2007)(monetary sanction payable to the other party since awarding a “fine” might constitute a criminal contempt award and require additional procedural safeguards, citing Phillip Morris as an example of a fine).
¹²⁸ 581 U.S. __, 137 S.Ct. 1178, 1186 (2017)(may not impose amounts as punishment without procedural guarantees applicable in criminal cases).
¹³¹ 137 S.Ct. 1178, 1186.
¹³² Snider v. Danfoss, 2017 WL 2973464, at *5 and n. 11 (N.D. Ill., July 12, 2017)(the rule is silent and “the Advisory Committee Notes are shockingly silent on the issue as well”).
¹³³ The Minutes of the Discovery Committee and the Rules Committee are ambiguous. The initial draft rule expressly authorizes such as an award as part of curative measures, but after it was dropped, the Members seemed to accept it would continue to be used.
¹³⁶ Star Envirotech v. Redline, 2015 WL 9093561, at *9 (C.D. Cal. Dec. 16, 2015) (noting that it took a motion to compel, a motion for contempt, a motion for sanctions and three orders from the court to “dislodge” the party from its ESI and documents).
noted this omission and questioned the authority to act under the Rule as well as the “shocking” failure to deal with the issue in the Committee Note, given its obvious relevance to virtually every case where spoliation allegations are made.

Some courts rely instead on Rule 37(a) in a transparent attempt to avoid the possible preclusive impact of Rule 37(e). In Best Payphones v. City of New York, for example, the court refused measures for failures to preserve ESI and documents, but imposed attorney’s fees because material that should have been produced was furnished in response to the filing of the motion seeking sanctions. A similar result was reached in Friedman v. Philadelphia Parking Authority, where the court awarded fees and costs of filing the motion under Rule 37(a) despite failing to find that the prerequisites to Rule 37(e) had been met.

Both Best Payphones and Friedman have been criticized by a Member of the Rules Committee as an inappropriate use of the Rule to award fees when the requirements of Rule 37(e) are not satisfied. In Marshall v. Dentfirst, a court held that the Rule was inapplicable in a case where Rule 37(e) motion was denied. Similarly, in Wal-Mart Stores v. Cuker Interactive, an attempt to employ Rule 37(a) a motion for spoliation sanctions was rebuffed by the observation that the Rule in that respect motions to compel disclosure or discovery.

In First Financial Security v. Freedom Equity Group, the court relied on Rule 37(b)(2)(C) to shift attorney’s fees “reasonably incurred in the course of bringing a sanctions motions” where the non-moving party had violated discovery orders.

Finally, a large number of courts routinely assert their inherent authority to award attorney’s fees when the failure to preserve is found to have constituted bad faith, often without even citing the source of that authority. Thus, in Ottoson v. SMBC Leasing, for example, a District Judge asserted that it had authority to award attorney’s fees and costs

137 Newman v. Gagan, 2016 U.S. Dist. LEXIS 120501 (N.D. Ind. Sept. 7, 2016), adopting 2016 U.S. Dist. LEXIS 123168, at *20-21 (N.D. Ind. May 10, 2016)(if Rule 37(e) were applied, the new rule “does not specifically list attorney’s fees as an available sanction”).
140 Friedman v. Phila. Parking Authority, 2016 WL 6247470, at *9 (E.D. Pa. March 10, 2016)(describing “mandatory” sanctions under Rule 37(a)(4),(5) as an “appropriately tailored remedy” because filing the motion for sanctions “resulted in” production of documents which should have been produced earlier.
141 John M. Barkett, The First 100 Days (or So) of Case Law under the 2015 Amendments to the Federal Rules, April 14, 2016.
142 313 F.R.D. 691, n. 9 (N.D. Ga. March 24, 2016)
to “punish” and sending the message that “egregious conduct will not be tolerated.”\textsuperscript{146} In \textit{Blumenthal Distributing v. Herman Miller},\textsuperscript{147} a court awarded attorney’s fees and expenses because of “willful actions” that taken together “amount to more than gross negligence.” Some courts, such as \textit{Alabama Aircraft Industries v. Boeing}, simply treat an award of attorney’s fees as a natural appendage to decisions awarding measures authorized under Rule (e)(2).\textsuperscript{148}

Regardless of the source of the authority to sanction a party by requiring it to reimburse the moving party, some courts are prepared to allocate some or all of the amounts to attorneys who are culpable in the underlying conduct. In \textit{Alabama Aircraft, supra}, the court appeared to assume it had the authority under the Rule to impose costs directly on counsel.\textsuperscript{149} The court in \textit{CAT3 v. Black Lineage},\textsuperscript{150} limited itself to a willingness to allocate a share of fees and costs awarded to counsel, consistent with prior practice.\textsuperscript{151}

3. Forensic Examination

In \textit{TLS Mgt. and Mktg. Services v. Rodriquez-Toledo}, a court ordered “a forensic examination” of an external hard drive as an “additional” sanction under Rule 37(e)(1) because it “may ameliorate the prejudice caused by the spoliation of ESI.”\textsuperscript{152}

In \textit{Coyne v. Los Alamos}, an agreement by an individual plaintiff to furnish an iphone for examination to locate missing text messages backfired when the Magistrate Judge recommended case terminating sanctions, having found that the contents of the phone were erased shortly before it was furnished for examination.\textsuperscript{153}

A forensic examination of ESI storage devices, including information held in complex data bases, typically requires intrusive and often costly intervention and is not routinely available other than, as above, where a basis for spoliation exists. In \textit{Genger v. TR Investors},\textsuperscript{154} direct access was justified in a pre-enactment decision because of the absence of emails which should have been on the server or workstations. As noted in \textit{Covad Communications}, it is not sufficient that a party claims that there are, for example,

\textsuperscript{146} 2017 WL 29927136, at *11 (S.D. N.Y. July 13, 2017)(“[e]ven outside the context of a Rule 37(e) dispute”).
\textsuperscript{147} 2016 WL 6609208 (C.D. Cal. July 12, 2016)(R&R); findings and recommendations adopted by the District Judge at 2016 WL 6901696 (C.D. Cal. Sept. 2, 2016)).
\textsuperscript{148} 2017 WL 930597, at *16 (N.D. Ala. March 9, 2017)(invoking (e)(2) to justify permissive adverse instruction and also finding it “appropriate” to require Boeing to pay reasonable attorney’s fees and costs in prosecuting this motion”).
\textsuperscript{150} 164 F. Supp. 3d 188 (S.D.N.Y. Jan. 12, 2016).
\textsuperscript{152} 2017 WL 115743 (D. P.R. March 27, 2017).
\textsuperscript{153} 2017 U.S. Dist. LEXIS 67021 (D. N.M. March 21, 2017). The Magistrate Judge did not allude to or mention Rule 37(e), without explanation.
\textsuperscript{154} 26 A.3d 180, 192 (Del. Sup. Ct., July 18, 2011).
fewer e-mails from a person or about a subject or transmitted in a given time than the party
expected to find.”  

The Eleventh Circuit noted in the case of In re Ford Motor Company, involving
access to databases, that a party is “unentitled to this kind of discovery without – at the
outset – a factual finding of some non-compliance with [the] discovery rules.” In Borum v. Smith, however, a court ordered a Hospital to permit a plaintiff to inspect medical
records in electronic format on the hospital’s computer system “to develop a complete understanding” of records without requiring any showing of inadequacy in production or refusal to produce the records.  

4. Preclusion

Preclusion of the admission of evidence or any reference to it at trial is traditionally
available to address the prejudice resulting from the failure to preserve. There is a
substantial line of cases, for example, where preclusion of expert testimony followed
destruction of the relevant product during its examination by the expert. The Committee
Note approves of its use to cure prejudice under subdivision (e)(1).

Thus, preclusion is available to “offset prejudice caused by failure to preserve other
evidence that might contradict the excluded items of evidence.” In Ericksen v. Kaplan, use of an email at trial was precluded by the court because of the failure to preserve ESI which might have rebutted its authenticity. In Cahill v. Dart, a party was prohibited from offering testimony about what had been seen on a missing video tape segment.

However, a court may not prevent a party “from offering any evidence in support
of, the central or only claim or defense in the case” without a showing of the intent required
under subsection (e)(2). In Feist v. Paxfire, a court barred a party from asserting evidence on a narrow issue likely to have been the subject of the missing ESI and barred an argument that statutory damages should be awarded.

Preclusion has also been used to prevent unfair negative inferences from missing
ESI which should have been preserved. In Below v. Yokohama Tire, the court barred
arguments of a failure to explore or prove a contention. In Wali Muhammad v. Mathena,

156 In re Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003).
158 Ohio Casualty Company v. Cox, 2014 WL 5106333, at *11 (E.D. Ky. Sept. 25, 2014)(preventing use or reference to missing records where “clear culpability and borderline deceit“ in order to meet the “prophylactic, punitive and remedial rationales” underline the spoliation doctrine).
159 Unigard Security Insur. v. Lakewood Engineering, 982 F.2d 363 (9th Cir. 1992)(affirming exclusion of testimony of expert under inherent power given that destruction of evidence precluded opportunity to inspect and rendered “unreliable virtually all of the evidence” that a jury could consider).
jurors were instructed they should not assume that the lack of corroborating objective evidence undermined certain testimony.\footnote{164 2017 WL 3955225 (W.D. Va. Jan. 27, 2017).}

5. Establishing Facts

Courts are prepared to infer the existence of facts whose existence is barred by a failure to preserve ESI. In \emph{Security Alarm v. Alder Holdings}, for example, a court permitted an inference of a fact dealing with liability, but since that inference did not extend to the issue of damages, an element of the claim, summary judgment was granted.\footnote{165 2017 WL 506237, at *3-4 (D. Alaska Feb. 7, 2017).} In \emph{Integrated Direct Marketing v. Drew May}, however, the Fourth Circuit found that there was no abuse of discretion in refusing to draw a factual inference which would have barred a summary judgment because there was insufficient evidence to support a finding of spoliation.\footnote{166 \textit{__Fed. Appx. __}, 2017 WL 2333845, at *2 (4\textsuperscript{th} Cir. May 30, 2017). The court made no mention of Rule 37(e), even though the issue below involved the deletion of files from a hard drive.}

In \emph{Morrison v. Veale, M.D.},\footnote{167 2017 WL 372980 (M.D. Ala. Jan. 25, 2017).} a Magistrate Judge in an FSLA action recommended that the time reported by the party on time cards be “deemed admitted and must be accepted as true,” for all remaining phases of the litigation as a sanction for having “deliberately” logged on to its former employers email in bad faith. Similarly, in \emph{Jackson v. Haynes & Haynes}, the individual pursuing an FSLA claim found itself unable to contest a summary judgment with summary notes because it had failed to take reasonable steps to preserve contemporaneous ESI relating to hours worked.\footnote{168 2017 WL 3173302, at *3 (N.D. Ala. July 26, 2017).}

In \emph{SEC v. CKB168 Holdings}, the court noted that while it had not recommended that “certain facts be established,” since there was no showing of intent to deprive, a forceful argument of counsel might very well cause the jury to reach that conclusion.\footnote{169 2016 U.S. Dist. LEXIS 18624 (E.D.N.Y. Feb. 12, 2016).}

6. Spoliation Evidence

Courts historically have permitted juries to hear evidence of spoliation and to draw their own conclusions about the implications to be drawn, with argument by counsel on the topic. In \emph{Russell v. U. of Texas},\footnote{170 234 F. Appx. 195, 208 (5\textsuperscript{th} Cir. June 28, 2007).} for example, the Fifth Circuit approved the lower court allowing a jury to hear that information was destroyed and agreed that the jury “was free to weigh this information as it saw fit.”

The practice is endorsed by the Committee Note as a remedial measure available under subdivision (e)(1) to address prejudice.\footnote{171 Committee Note (“[a court may allow] the parties to present evidence to the jury concerning the loss and likely relevance of information . . . . if no greater than necessary to cure prejudice.”). The remedy is most often offered as an alternative to an adverse inference. In \emph{Storey v. Effingham County}, for example, the court}
decided to tell the jury that “the video was not preserved” and to allow the parties to present evidence and argument at trial, although there will be no instruction that the destroyed evidence is “unfavorable” to the defendants. (emphasis in original).

In Virtual Studios v. Stanton Carpet, the court declined to authorize an adverse inference because the party was “negligent or careless” at most, but nonetheless allowed the moving party to introduce evidence of the loss of email and to make an argument about its effect.\(^\text{172}\) In Security Alarm Financing v. Alarm Protection, the court instructed the jury that the party had failed to preserve but, because it could not conclude the party acted with an intent to deprive, it admitted evidence of spoliation so that the jury could assess it.\(^\text{173}\)

Shaffer v. Gaither (“Shaffer I”) represents a more subtle use of spoliation evidence. The court decided to permit a defendant to secure evidence, by cross-examination, of the absence of texts which had they existed, would have been harmful to it. The court noted that the jury would be “free to decide whether to believe denials of their existence.”\(^\text{174}\)

This practice has risks, especially when juries are instructed that they may consider the evidence in their deliberations on the merits. It may distract the jury from the essential claims of the case and “the jury might make an adverse inference on its own, based on the arguments and evidence presented.”\(^\text{175}\) Moreover, a jury may see the spoliating party in a light which unduly prejudices its ability to fairly resolve the issues on the merits.\(^\text{176}\)

Indeed, in Mueller v. Taylor Swift\(^\text{177}\) the court decided to allow the plaintiff to be cross-examined in front of the jury” regarding the record of his spoliation of evidence, as described” in its opinion (emphasis in original) because it wanted the jury to decide if it an adverse inference was warranted and whether or not there was any prejudice from the failure to preserve.\(^\text{178}\)

FRE 403 gives a court discretion to limit evidence which overemphasizes the importance of the missing evidence.\(^\text{179}\) In Delta/AirTran Baggage Fee Antitrust Litigation, the court barred introduction of such evidence because it would “transform what should be

\(^\text{174}\) 2016 WL 6594126, at *2 (D. N.C. Sept 1, 2016). At the time the duty to preserve attached, litigation had been threatened in which the texts would have been central to the case and the cell phone containing them was destroyed (perhaps innocently) without copies having been made. A number of witnesses had seen them, however..
\(^\text{175}\) Adler and Kelston, supra, 52-JAN TRIAL 20, 21 (1916).
\(^\text{176}\) Gorelick et al, Destruction of Evidence § 2.4 (2014)(“DSTEVID s. 2.4”) (once a jury is informed that evidence has been destroyed the “jury’s perception of the spoliator may be unalterably changed” regardless of the intent of the court); see also Maguire and Vincent, Admissions Implied From Spoliation or Related Conduct, 45 YALE L.J. 226 (1935)(“juries may damn litigants on general principles [and] once a verdict is rendered by Philip drunk, effective revision by Philip sober is difficult to achieve”).
\(^\text{178}\) Id., at *5-*7 (dealing with failure to preserve the entire surreptitiously recorded a two hour audio of the meeting where the Plaintiff was fired). The court viewed this use of the jury as just because “the remedial effects of the Court’s sanction will be proportionally scaled t the deree of Plaintiff’s culpability and the degree of the resulting prejudice.”
\(^\text{179}\) Fed. R. Evid. 403 provides that a court may act to prevent “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”
a trial about [an] alleged anti-trust conspiracy into one on discovery practices and abuses.”

Other courts have limited the arguments of counsel, such as “directly or impliedly stat[ing] that the Court has made a finding of wrongdoing.”

A particularly nuanced balance existed in preparation for a bellweather trial in the General Motors LLC Ignition Switch Litigation. Because the failure to preserve at issue had “little or no relevance or probative value,” the court granted a motion in limine to preclude GM from presenting evidence and argument that the plaintiff had failed to preserve spoliated SDM data because it would “plainly risk unfair prejudice” under FRE 403. The court indicated, however, that it would allow the jury to be told that the SDM data was unavailable “in a neutral manner” that does not suggest either party was responsible.

The Texas Supreme Court in Brookshire Brothers v. Aldridge held that it was an abuse of discretion to admit evidence of spoliation which was “unrelated to the merits and served principally to highlight” the culpability of the party, as compared to “nonspeculative testimony” on the subject. This has been criticized by some. However, it is similar to the approach approved by the Sixth Circuit in Decker v. GE Healthcare, where the lower court did not abuse its discretion by curtailing testimony as to the destruction of missing documents to the “relevant fact that there were potentially gaps in the evidence.”

7. Striking Pleadings

A traditional remedy for discovery violations under Rule 37(b) is “striking pleadings in whole or in part.” Although no reported decisions involving Rule 37(e) have yet done so under that Rule, the Committee Note gives a back-handed endorsement to its use by cautioning that an “inappropriate” measure under the Rule would be “an order striking pleadings related to, or . . . in support of, the central or only claim or defense in the case,” if done without a finding of “intent to deprive.”

In Sell v. Country Life Insur., where the court did not rely on Rule 37(e) (but should have), a court struck an answer and entered a default judgment after finding serious discovery misconduct, including a failure to preserve e-mail. This would have been appropriate under subdivision (e)(2) since the conduct appears to have supported finding an “intent to deprive.”

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183 438 S.W. 3d 9, 28-29 (July 3, 2014).
185 770 F.3d 378, 397 (6th Cir. 2014).
186 Rule 37(b)(2)(A)(iii)(for failing to obey and order to provide or permit discovery).
188 The court applied Ninth Circuit case law in exercising its inherent authority, including a requirement of a finding that the conduct was willful and done in bad faith to respond to abusive litigation practices under Leon v. IDX Systems, 464 F.3d 951, 958 (9th Cir. 2006).
8. Jury Instructions

Courts routinely instruct juries about their responsibility in evaluating spoliation evidence because “[s]uch an instruction is not a punishment. It is simply an explanation to the jury of its fact-finding powers.”\textsuperscript{189} The Committee Note to Rule 37(e) explains that a court may allow “the parties to present evidence to the jury concerning the loss and likely relevance of information and [may instruct] the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision.”

Thus, a court may give instructions which simply tell the jury “how to evaluate evidence that is already coming into the case.”\textsuperscript{190} The Rule also has no impact on the “discretion of courts to give traditional missing evidence instructions based on a party’s failure to present evidence it has in its possession at time of trial.”\textsuperscript{191}

In \textit{BMG Rights Mgt. v. Cox Comms.}, a court alerted the jury to the ‘fact’ of spoliation, identified the missing evidence, and permitted the jury to consider that fact in their deliberations.\textsuperscript{192} In \textit{Nuvasive v. Madsen Medical} both parties were to be allowed to present evidence regarding the loss and the jury could consider the evidence along with other evidence in the case.\textsuperscript{193}

However, as the Second Circuit noted in \textit{Mazzei v. Money Store}, “under current Rule 37(e)(2), an adverse inference instruction may be given “only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation.”\textsuperscript{194} It thus rejects the logic that a lesser standard is sufficient because an adverse inference merely fills a gap by placing the risk of an erroneous evaluation of the missing evidence on the party responsible for its destruction.\textsuperscript{195} In \textit{Regeneron Pharmaceuticals v. Merus}\textsuperscript{196} the Federal Circuit, applying Second Circuit authority, confirmed this result in the ESI preservation context, as did the Sixth Circuit in \textit{Applebaum v. Target}.\textsuperscript{197}

In \textit{Virtual Studios v. Stanton Carpet}, for example, a court refused to authorize an adverse inference instruction since the party was “negligent or careless” at most.\textsuperscript{198} Nor, for that matter, may the court itself draw such a presumption when “ruling on a pretrial

\textsuperscript{189} Mali v. Federal Insurance, 720 F.3d 387, 393 (2nd Cir. June 13, 2013).
\textsuperscript{190} Callahan v. Toys “R” Us – Delaware, 2017 WL 2191578, at *6 (D. Md. May 18, 2017)( without such an instruction “the jury would have been free to speculate for themselves” about the evidence and “what significance this should have in their deliberations”).
\textsuperscript{191} Committee Note.
\textsuperscript{194} 656 Fed. Appx. 558 (2nd Cir. July 15, 2016).
\textsuperscript{195} \textit{Id.} (holding that Byrnie v. Town of Cromwell, 243 F.3d 93, 106 (2nd Cir. 2001) is “superseded in party” by the Rule).
\textsuperscript{196} _ F.3d __, 2017 WL 3184400, at n. 7 (Fed. Cir. July 27, 2017).
\textsuperscript{197} 831 F.3d 740 (6th Cir. 2016)(“a showing of negligence or gross negligence does not justify adverse inferences).
motion or presiding at a bench trial. In contrast, such an inference was authorized in *Alabama Aircraft Industries v. Boeing*, based on “unexplained, blatantly irresponsible [preservation] behavior;” The cases collecting the decisions under the “intent to deprive” standards are discussed *infra*, “Intent to Deprive.”

The formulation of the instruction is committed to the courts discretion, with all the risks and opportunities for prejudice discussed *supra* in connection with the admission of evidence of spoliation at trial. In *Montgomery v. Iron Rooster*, for example, the Magistrate Judge recommended that the court “give an instruction to the jury that [the non-moving party] had a duty to maintain potential ESI contained on her phone” and “any inference to draw from the failure to preserve texts on her phone”). Other examples exist.

9. Dismissals or Default Judgments

Dismissals or default judgments (including summary judgments) are typically imposed for spoliation only when “the offending party is seriously at fault, and the Circuits have developed a variety of factors to govern their use.” For example, since courts prefer to try cases on their merits it is often important to show that a lesser remedy will not meet the remedial, punitive or deterrence goals involved. Some Circuits also require proof to be established by clear and convincing evidence.

Rule 37(e)(2) requires a showing of an “intent to deprive” when a dismissal or default judgment is sought. In *Global Material Tech. v. Dazheng Metal Fibre*, a default judgment was imposed under those circumstances because an adverse inference would not be sufficient to punish the party for their dishonesty. In *Roadrunner Transportation v. Tarwater*, the Ninth Circuit affirmed a dismissal based on findings of the lower court the “intent to deprive” of Rule 37(e) had been satisfied.

In *Organik Kimya v. ITC*, the Federal Circuit approved entry of a default judgment because such measures should be available to “deter those who might be tempted” to act with an intent to deprive in the absence of such a deterrent.

Some courts contend that they may order dismissals under their inherent powers even if an intent to deprive does not exist. In *Shaffer v. Gaither (“Shaffer II”)*, where the

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199 Committee Note. Moreover, counsel is barred from arguing what it believes may have been in absent emails since it would defeat to purpose of the inference and require the other party to attempt to disprove the assertion without the benefit of the records. Swofford v. Eslinger, 2009 WL 10671171, at *2 (M.D. Fla. Dec. 1, 2009).
202 Vodusek v. Bayliner Marine, 71 F.3d 148, 156 (4th Cir.) (courts may dismiss grant summary judgments in response to spoliated evidence).
204 Shepherd v. ABC, 62 F.3d 1469, 78 (D.C.Cir. 1995).
206 642 F. Appx. 759 (9th Cir. March 18, 2016).
court had earlier held the showing was lacking, the court implied that it would have granted a dismissal under its inherent authority if the conduct had “rise[en] to the level” that [was] utterly inconsistent with the orderly administration of justice or undermine[d] the integrity of the process.

**Intent to Deprive**

A primary goal of Rule 37(e) is to provide a single, uniform framework for analyzing the availability of measures for spoliation of ESI. The desired outcome, as summarized by Chief Justice Roberts, is that only if the loss is “the result of one party’s intent to deprive the other of the information’s use in litigation” may the court impose certain “prescribed sanctions.” Thus, Rule 37(e) “rejects cases such as Residential Funding v. DeGeorge, 306 F. 3d 99, 108 (2nd Cir. 2002), that authorize the giving of adverse inference instructions on a finding of negligence or gross negligence.”

Subdivision (e)(2) instead requires a showing of an “intent to deprive another party of the information’s use in the litigation” before the listed measures or their functional equivalents are authorized. This is because only “a party’s intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence.”

As explained by the Committee Note, “[i]nformation lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have.” The “better” approach is to limit “the most severe measure to instances of intentional loss or destruction.”

The “intent to deprive” standard is intended to provide a clear, easily understood standard in contrast to confusing terms like “willfulness” and “bad faith,” both of which appeared in the initial draft of the Rule. It is not enough to show that the party acted “willfully,” as was the case in Zubulake v. UBS Warburg (“Zubulake V”). In CTB, Inc, v. Hog Slat, Inc., the court explained that satisfying such a requirement does not necessarily

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211 Id.
212 Committee Note.
213 See, e.g., Aramburu v. Boeing, 112 F.3d 1398, 1407 (10th Cir. 1997) (“[m]ere negligence . . . is not enough because it does not support an inference of consciousness of a weak case”); accord McCormick, EVIDENCE § 273 at 660-61 (1972).
214 (Then) Rule 37(e)(1)(B) permitted “an adverse inference jury instruction, but only” if the party’s actions “caused substantial prejudice in the litigation and were willful or in bad faith.”
indicate that the party acted for the purpose of depriving the adversary of the evidence.\textsuperscript{216} In \textit{Rogers v. Averitt Express}, the court noted that a finding of intentionality is not enough.\textsuperscript{217}

In its final form, it resembles the “bad faith” requirement utilized in some Circuits\textsuperscript{218} but is “clearer, easier to apply, and most directly tailored to the conduct” which Rule 37(e) is intend to deter or redress.\textsuperscript{219} It supersedes contrary precedent relying on \textit{Residential Funding} logic in the Second, Fourth,\textsuperscript{220} Sixth,\textsuperscript{221} Ninth\textsuperscript{222} and D.C. Circuits.\textsuperscript{223}

Several Circuit Courts agree. In \textit{Mazzei v. The Money Store}, for example, the Second Circuit confirmed that the Rule requires a finding of “intent to deprive” before an adverse inference instruction may be given, superseding existing precedent.\textsuperscript{224} In \textit{Applebaum v. Target}, the Sixth Circuit noted that “a showing of negligence or even gross negligence will not do the trick” for measures listed Rule 37(e)(2).\textsuperscript{225} In \textit{Regeneron Pharmaceuticals v. Merus}\textsuperscript{226} the Federal Circuit, applying Second Circuit authority, confirmed this interpretation.

Similarly, in \textit{Roadrunner Transp. Services v. Tarwater}, the Ninth Circuit has explained that under the Rule, a default judgment was appropriate where the party “acted with the intent to deprive.”\textsuperscript{227} However, several Circuits have yet to acknowledge or apply the Rule even though they have had opportunities to do so. \textit{See, e.g., Appendix}. Moreover, a number of lower courts have avoided applying the Rule to failures to preserve ESI, often resulting in outcomes that differ from those that would be required under the Rule.\textsuperscript{228}

\subsection*{Relation to “Reasonable Steps”}

The assessment of the “intent” of the party in carrying out preservation efforts and whether they constitute “reasonable steps” are intimately related - but involve separate tests

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{216}] 2016 WL 1244998, at *9 (E.D. N.C. March 232, 2016).
\item[\textsuperscript{217}] 215 F. Supp. 3d 510 (M.D. La. March 6, 2017)(“[t]hat the documents were destroyed intentionally no one can doubt, but ‘bad faith’ means destruction for the purpose of hiding adverse information).\textsuperscript{216}
\item[\textsuperscript{219}] Guzman v. Jones, 804 F.3d 707 (5th Cir. 2015)(“[b]ad faith, in the context of spoliation, generally means destruction for the purpose of hiding adverse evidence”); Bracey v. Grondin, 7121 F.3d 1012, 1020 (7th Cir. 2013)(a finding of “bad faith” requires, in addition to intentionality, that there be a showing of “destruction for the purpose of hiding adverse information”); Hallmark Cards v. Murley, 703 F.3d 456, 460 (8th Cir. 2013)(“there must be a finding of intentional destruction indicating a desire to suppress the truth”).
\item[\textsuperscript{219}] In Re Adoption of the Virgin Islands Rules Of Civil Procedure, 2017 WL 1293844 (Supreme Court of the Virgin Islands, April 3, 2017)(explaining refusal to use “fraud or “bad faith”).
\item[\textsuperscript{220}] Buckley v. Mukasey, 538 F.3d 306 (4th Cir. 2008).
\item[\textsuperscript{221}] Beaven v. U.S. Dept. of Justice, 622 F.3d 540, 554 (6th Cir. 2010).
\item[\textsuperscript{222}] Glover v. BIC, 6 F.3d 1318, 1329 (9th Cir. 1993).
\item[\textsuperscript{223}] Grosdidier v. Broadcasting Board, 709 F.3d 19, 28 (D.C. Cir. 2013).
\item[\textsuperscript{224}] 656 Fed. Appx. 558 (2nd Cir. July 15, 2016).
\item[\textsuperscript{225}] 831 F.3d 740 (6th Cir. Aug. 2, 2016).
\item[\textsuperscript{226}] ___ F.3d ___, 2017 WL 3184400, at n. 7 (Fed. Cir. July 27, 2017).
\item[\textsuperscript{227}] 642 Fed. Appx. 759, n. 1 (9th Cir. March 18, 2016).
\item[\textsuperscript{228}] Thomas Allman, \textit{Amended Rule 37(e): Case Summaries – Duke University School of Law}, May 2017 (Appendix)(updated copy available online)(highlighting fifteen decisions which most likely would have been resolved differently had the “intent to deprive” standard been applied)(copy available online).
\end{enumerate}
\end{footnotesize}
which do not always yield consistent results. In *Jackson v. Haynes & Haynes*, the court decided that the party failed to take “reasonable steps,” but that under the facts of that case, they were not motivated by an “intent to deprive.” In *O’Berry v. Turner*, however, a court found that the “minimal” preservation efforts which were not deemed to be “reasonable” were also, under the all the circumstances, undertaken with an intent to deprive.

Thus, despite rejecting *Residential Funding*, the Rule may well permit adverse inferences based on “unreasonable” conduct which is, at the most, negligent or grossly negligent if an “intent to deprive” is found to exist, as appears to have been the case in *O’Berry*.

Moreover, even if the conduct is found to have been “reasonable,” the Rule is technically inapplicable, presenting the theoretical opportunity for courts using *Residential Funding* to impose adverse inferences for merely negligent or grossly negligent conduct. In that case, however, there are strong arguments that can be made to the contrary, since inherent powers should not be used when “contrary to any express grant of or limitation on the district court’s power contained in a rule or statute.”

However, when the conduct is especially egregious in its failure to conform to best preservation practices, it is almost always found to have been motivated by an “intent to deprive.”

The Decisions

An “intent to deprive” was not found to exist in *Below v. Yokohama Tire*, where the failure to preserve fell “somewhere between negligence and gross negligence, but short of bad faith or intentional conduct;” in *Estate v. County of Teller*, where a failure to prevent auto deletion was “at most, the result of negligence;” in *Living Color v. New Era Aquaculture*, where deletion of text messages was not “a nefarious practice;” and in *McQueen v. Aramark Corp.*, where a delayed litigation hold was not “intentional.”

In *Orchestratehr v. Trombetta*, evasive testimony during a deposition was insufficient to show intent; as was the case in *Richard v. Inland Dredging*, where a barge

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229 A “reasonable steps” analysis is said to be “objective,” in that the culpability is irrelevant. It is the “intent to deprive” test that forces a court or jury to subjectively analyze the underlying motivation.


231 2016 WL 1700403 (M.D. Ga. April 27, 2016)( a file folder containing the only copy of downloaded relevant ESI was lost after an office move and the passage of time).


233 See cases collected in “Reasonable Steps,” supra.


was not sunk to hide or destroy a hard drive\textsuperscript{239} and in Virtual Studios v. Stanton Carpet, where a failure to preserve was ‘negligent or careless’ at most.\textsuperscript{240} In Jackson v. Haynes & Haynes, the party failed to take “reasonable steps” when she discarded a phone and lost access to a MacBook without making arrangements to email records to herself or her counsel.\textsuperscript{241}

In contrast, the failure to preserve was found to have been motivated by an “intent to deprive” in Alabama Aircraft Industries v. Boeing, based on “unexplained, blatantly irresponsible [preservation] behavior;”\textsuperscript{242} in Brown Jordan v. Carmickle, involving “deliberate deletion and destruction of evidence and lack of candor”\textsuperscript{243} and in CAT3 v. Black Lineage, where a party deliberately altered emails (without success).\textsuperscript{244} In Global Material Technologies v. Dazheng Metal Fibre, a party acted to prevent the moving party from obtaining ESI;\textsuperscript{245} in GN Necom v. Plantronics, the finding was based on double deletion of emails and the “totality of the record”\textsuperscript{246} and in Internmatch v. Nxbthing, where the party made “bogus claims” of power surges.\textsuperscript{247} As noted earlier, O’Berry v. Turner\textsuperscript{248} also involved a finding of intent to deprive based on all the circumstances.

**Procedure**

The finding of “intent to deprive” may be made by a court after an evidentiary hearing or relegated to a decision at trial, where the finding can be made by the court or the jury. Views differ on the merits of the use of a jury.\textsuperscript{249} However, if a jury is used, the instruction should make clear that the jury “may infer from the loss of the information that it was unfavorable “ only after finding that the party acted with the intent to deprive another party of the information’s use in this litigation.\textsuperscript{250}

In Epicor Software v. Alternative Technology,\textsuperscript{251} a court applying Rule 37(e) decided to utilize the jury to decide if an intent to deprive existed.\textsuperscript{252} In such a case, acting
as gatekeeper, the court must first determine if the potential for unfair prejudice to the alleged spoliator substantially outweighs the benefit of a jury instruction to the innocent party.\textsuperscript{253}

Courts should not make their findings based on “equivocal evidence” about the state of mind at the time of the failure to preserve.\textsuperscript{254} In \textit{Zamora v. Stellar Management Group}, the court ordered further discovery given that the memory of the witness could not be relied upon as a substitute although it was “somewhat sympathetic to a lay witness in contrast to a corporation subject to a formal litigation hold.”\textsuperscript{255}

### Standard of Proof

In \textit{CAT 3 v. Black Lineage}, \textit{supra}, the court utilized a clear and convincing evidence standard in making its assessment of the availability of Rule 37(e).\textsuperscript{256} A contrary conclusion – relying on the preponderance of the evidence - was reached in \textit{Friedman v. Phila. Parking Authority}.\textsuperscript{257}

In \textit{Omnigen Research v. Wang}, a court granted terminating sanctions after finding that “all the required elements for spoliation are met under the required preponderance of evidence standard.”\textsuperscript{258} In \textit{Jenkins v. Woody}, the court noted the divergence among courts as to the appropriate standard, but concluded that since the moving party was seeking “the most severe of sanctions,” it would apply a clear and convincing standard to the Motion.\textsuperscript{259}

### Attribution of Intent

Courts attribute an “intent to deprive” of individuals and agents to the entity on whose behalf they are acting. “Although the entity itself cannot have a state of mind, the actions of its agents can be imputed to it” for purposes of assessing what sanctions to be imposed.\textsuperscript{260} When multiple individual and governmental or private entities are involved, it is often necessary to avoid attributing intent of others to the particular defendants at issue.\textsuperscript{261}

\begin{footnotesize}

\textsuperscript{253} Scheindlin and Orr, \textit{The Adverse Inference Instruction}, \textit{supra}, 83 \textit{FORDHAM L. REV.} 1299, 1310 (2014).
\textsuperscript{254} Orchestratehr v. Trombetta, 178 F. Suppl3d. 476 (N.D. Tex. April 18, 2016)(despite giving evasive answers during deposition “the supporting evidence of intent or bad faith is not sufficient”).
\textsuperscript{255} 2017 WL 1372688, at *3 (W.D. Mo. April 11, 2017).
\textsuperscript{256} 164 F. Supp.3d at 498-499 (because party seeks terminating sanctions and the state of mind of the non-moving party is at issue). The clear and convincing evidence standard was applied without explanation in TLA Mgt. and Mrtg. Servs. V. Rodriguez-Toledo, 2017 WL 115743 (D. P.R. March 27, 2017).
\textsuperscript{258} 2017 WL 2260071, at *9 (D. Ore. May 23, 2017)(imposing sanctions under Rules 37(b), 37(e) and inherent authority).
\textsuperscript{260} In re Black Diamond Min. Co., 514 B.R. 230, 240 (E.D. Ky. July 22, 2014)(Prosecuting Attorney failed to make Sheriff’s office aware of need to preserve recordings before subject to routine destruction.)
\end{footnotesize}
In *First Financial Security v. Freedom Equity Group*, where a group of former employees were defendants, the court found that there was “shared intent” to deprive the moving party of the use of the deleted text messages.\(^\text{262}\) However, the acts of a disgruntled former employee in committing spoliation prior to resigning were not attributed to an employer in *Harfouche v. Stars on Tour*.\(^\text{263}\)

### Preclusive Impact

There is ambiguity in the decisions in regard to the degree of preclusive impact from Rule 37(e) when spoliation sanctions are sought under inherent powers or in reliance on other subsections of Rule 37. Although closely related, we treat the topics separately below.

#### Inherent Authority

Rule 37(e) was enacted to “discourage use of inherent authority [for ESI spoliation] by providing rules [which make] resort to inherent authority unnecessary.”\(^\text{264}\) The 2006 version of the rule did not exclude inherent authority, which provided an “end-around” the Rule, leading to it being largely ignored, especially by courts applying *Residential Fund* logic. Accordingly, the Committee Note states that Rule 37(e) “forecloses” use of certain measures when appropriate findings are made.\(^\text{265}\)

Courts are not precluded from using inherent authority merely because civil rules are also available to deal with the challenged conduct. In *Chambers v. NASCO*, the Supreme Court famously refused to rule out dealing with “bad-faith conduct” under inherent powers if an otherwise applicable rule is “not up to the task.”\(^\text{266}\) In *Goodyear Tire v. Haeger*, decided after the enactment of Rule 37(e), the Court confirmed that inherent power exists “to fashion an appropriate sanction for conduct “which abuses the judicial process.”\(^\text{267}\) Spoliation of ESI is a form of litigation abuse.

The current Chair of the Rules Committee has stated that courts are foreclosed from use of inherent authority “at least in factual situations to which the rule applies, i.e., where the information cannot be substituted from another source.”\(^\text{268}\) Thus, a court may impose

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\(^{265}\) Committee Note (2015) provides: “New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.”


an adverse inference under its inherent authority if courts find the Rule to be inapplicable by its “express terms.”

However, this is not the case in one key respect. The purpose of imposing the “intent to deprive” standard was to reject Residential Funding logic to the extent it permitted adverse inference awards based on negligent or grossly negligent conduct. This intent should be respected, even if the Rule is technically inapplicable, under those circumstances. As the Supreme Court noted in Dietz v. Bouldin, inherent powers should not be used when “contrary to any express grant of or limitation on the district court’s power contained in a rule or statute.” It also is a sensible interpretation of the “foreclosure” language in the Committee Note.

As one court has explained, “[i]f federal courts could simply fall back onto their inherent authority [to issue harsh measures for negligence], the goals of uniformity and standardization would be lost.” This is consistent with the Circuit opinions endorsing use of Rule 37(e).

Expansive Interpretations

There is a variety of provocative “dicta” in lower court opinions. In Cohn v. Guaranteed Rate, for example, a court expressed the view that it possessed “broad, inherent power to impose sanctions” which were “over and above the provisions of the Federal Rules.” Another court asserted that “[w]ithout limitation, litigation misconduct may be otherwise sanctioned by the Court’s inherent power.” In Ottoson v. SMBC Leasing, a court stated it had inherent authority to impose adverse inferences “in addition” to its

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269 U.S. v. Capitol Supply, 2017 WL 1422364, at *10 (D.D.C. April 19, 2017) (‘by its express terms” Rule 37(e) does not govern the instant spoliation motions). However, the court in Hsueh v. New York State was surely wrong in finding Rule 37(e) to be inapplicable because losses of ESI resulted from intentional deletion of the information. 2017 WL 1194706, at *4 (S.D.N.Y. March 31, 2017) (applying inherent authority because Rule 37(e) does not apply to “situations where, as here, a party intentionally deleted the recording”).

270 A party may be deemed to have failed to take “reasonable steps” – and the rule thus be found to be inapplicable - in some circumstances where there is a careless or negligent failure to act.


272 CAT3, supra, 164 F. Supp. 3d 488, 497-98 & 501 (S.D.N.Y. Jan. 12, 2016)(courts may not enter an adverse inference or “dismiss a case for a sanction for merely negligent destruction of evidence” under those circumstances). See also James C. Francis IV & Eric P. Mandel, Limits on Limiting Inherent Authority, 17 SEDONA CONF. J. 613, 662 (2016)(the limitation of sanctions resulting from specific intent to deprive “is not a gap” to be filled by the exercise of inherent of inherent authority).


274 Mazzei v. The Money Store, 656 Fed. Appx. 558 (2nd Cir. 2016); Applebaum v. Target, 831 F.3d 740 (6th Cir. 2016); Roadrunner Trans. v. Tarwater, 642 Fed. Appx. 759 (9th Cir. 2016) and Helget v. City of Hays 844 F.3d 1216, at n. 7 (10th Cir. Jan. 4, 2017).

275 2016 WL 7157358 (N.D. Ill. Dec. 8, 2016)(“Rule 37(e) describes some of the remedies that a court may order”).

authority to act under Rule 37(e), describing Residential Funding as merely “superseded by rule on other grounds.”277

In CAT 3 v. Black Lineage, the court opined that if missing ESI had been deemed to be replaced or restored because of bad faith conduct and thus Rule 37(e) were to be inapplicable (it was not, however), inherent authority would have been available.278 Similarly, in Shaffer v. Gaither (“Shaffer II”),279 a court opined that if the conduct had “rise[en] to the level” that [was] utterly inconsistent with the orderly administration of justice or undermine[d] the integrity of the process” (it didn’t), it could have dismissed the case even if the party had not acted with an intent to deprive.280

Other courts have simply pointed out the lack of authority under their individual Circuits without expressing their views. In Intermatch v. Nxbigthing, a court noted that it “has not been decided” whether “a district court must now make the finding set forth in Rule 37.”281 In Martinenz v. City of Chicago, the court simply observed that the Seventh Circuit had not yet addressed “how, if at all, the rule 37 amendment impacts its rulings on adverse inferences.”282

**Exercises of Inherent Authority**

Some courts assert the use of inherent authority - but mask the Rule’s preclusive impact by saying the same result would be achieved under the Rule. In ILWU-PMA Welfare Plan v. Conn. General,283 a District Judge concluded (as had the court in CAT3 v. Black Lineage284), that it could consider sanctions under “either Rule 37(e) or inherent power” when both sources led to the same result.285 This may – or may not - be inconsistent with the “foreclosure” Committee Note and with the concept of preclusion under Chambers.286

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278 164 F. Supp. 3d 488, 497 (S.D.N.Y. 2016)[“If Rule 37(e) were construed not to apply to the facts here, I could nevertheless exercise inherent authority to remedy spoliation under the circumstances presented”].
281 2016 WL 491483, at n. 6 (N.D. Cal. Feb. 8, 2016)(Tigar, J); *but see* Roadrunner Trans. v. Tarwater, 642 Fed. Appx. 759 (9th Cir. March 18, 2016)(affirming harsh remedy as consistent with intent to deprive standard of Rule 37(e) had it been “just and practicable” to have applied it below).
282 2016 WL 3538823 (N.D. Ill. 2016)(Dow, J)(noting that it need not resolve the issue since the moving party had not demonstrated that the videos in question had been destroyed in bad faith).
283 2017 WL 3459880 (N.D. Cal. Jan. 24, 2017)(Alsup, J). The court ducked the issue by finding that the party had acted both willfully and in bad faith and with “the intent to deprive another party of the information’s use in the litigation.”
285 Accord, Hsuch v. New York, 2017 WL 1194706, at *6 (S.D.N.Y. March 31, 2017)(adverse inference appropriate under either Rule 37(e) or inherent authority since party acted in bad faith and with an intent to deprive the party of the use of the recording).
286 In Brown Jordan Int’l v. Carmicle, 2016 WL 815827, at *37 (S.D. Fla. March 2, 2016), aff’d on other grounds, 846 F.3d 1167 (11th Cir. Jan. 25, 2017), the court imposed some measures under Rule 37(e) but rejected use of its inherent authority for others. There is dicta in a Tenth Circuit ruling which supports that
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Other courts appear to have channeled the statement in *Chambers v. NASCO* to the effect that while courts should ordinarily apply the rules, their limitations may be avoided when not “up to the task.” In *GN Netcom v. Plantronics*, this seems to have been the case when a court levied a “punitive” monetary sanction” of $3M under circumstances where it was not authorized by Rule 37(e).\(^\text{287}\)

This is most obvious when courts routinely award fees and costs despite the fact that in contrast to other parts of Rule 37, the Rule and Committee Note are silent on its authority to do so.\(^\text{288}\) It is true, however, that *CAT3 v. Black Lineage* sought to avoid this inconvenient fact by invoking authority under subsection (e)(1) through a creative version of prejudice.\(^\text{289}\) The problem is that the type of prejudice sought to be ameliorated by the Rule is that due to interference with the trial process, not the pocket book of one of the parties.

Typically, awards of attorney’s fees under inherent authority require a particularized showing of bad faith conduct. In *Best Payphones v. City of New York*, however, the Court ordered such payment even if no finding of bad faith was made and prejudice not shown.\(^\text{290}\)

**Conflicting Civil Rules**

The Committee Note is silent as to whether use of other subsections of Rule 37 is “foreclosed” by Rule 37(e) if both apply to the underlying conduct. Rule 37(e) is less likely to sustain harsh measures, since it requires an “intent to deprive.”\(^\text{291}\) In *Matthew Enterprise v. Chrysler*, the court refused to utilize Rule 37(b) authority for missing ESI because the issue is “spoliation and not compliance with” the court’s order on a motion to view as well.

\(^{\text{287}}\)2016 WL 3792833 (D. Del. July 12, 2016). The punitive award was neither employed to address prejudice nor was it the functional equivalent of a terminating measure available under (e)(2). It was, in fact, an aptly named punitive measure rendered outside the framework of Rule 37(e) to punish and deter. However it may not have met *Goodyear Tire & Rubber v. Haeger* standards (581 U.S.___, 137 S.Ct. 1178 (2017)), given that it was a punitive, not compensatory which appears to have been entered without providing the required procedural safeguards.


\(^{\text{291}}\)See, *e.g.*, First Financial Security v. Freedom Equity Group, 2016 WL 5870218, at *6 (N.D. Cal. Oct. 7, 2016)(a court does not need to find bad faith before it issues an adverse inference instruction as a sanction under FRCP 37(b)(2)).
compel. However, in *Timms v. LZM*, the Fifth Circuit upheld a dismissal of an action under Rule 37(b) involving missing text messages without considering Rule 37(e).

A number of courts routinely use Rule 37(a) to impose attorney’s fees and costs for failures to preserve. As noted earlier, it is hard to argue that Rule 37(e) precludes this use – it is silent on the topic - but there are real questions about the intended scope of the rule, since it appears to be confined to issues relating to motions to compel. The best argument for its non-precluded use is that the filing of the spoliation motion has led to production of information that should have been preserved. See Attorney’s Fees and Costs, *supra*.

In *Freidman v. Phil. Parking Auth.*, however, the court stretched the logic to an instance where there was no finding of missing information at all. Instead, the court awarded attorney’s fees and costs under Rule 37(a) because the filing of the motion had resulted in inducing the party and counsel to more “realistically understand their preservation obligation” and make additional production.

Some courts mask the issue of their source of authority by citing multiple sources on the apparent theory that one of more must surely be sufficient. In *Small v. Univ. Med. Ctr.*, a pre-Rule 37(e) decision, a Special Master recommended extraordinary relief under both inherent authority and Rule 37(b) – and would have done so under Rule 37(e) had it been in effect - because “[t]he level of intentional destruction of evidence by UMC shocks the conscience.” In *Omnigen Research v. Wang*, the court granted terminating sanctions under Rule 37(b), Rule 37(e) and inherent authority.

**Conclusion**

As then-Magistrate Judge Grewal explained in *Matthew Enterprise v. Chrysler Group*, a “genuine” safe harbor is intended for parties that take reasonable steps to preserve ESI. Choices about what and how to preserve, when made by parties acting in good faith, are entitled to substantial deference, as Sedona Principle 6 suggests, a principle derived from the business judgment rule.

Unfortunately, since not all courts are prepared to find that “reasonable steps” can exist despite the loss of ESI, the true protection - and the only real hope of addressing the unfairness resulting from excessive preservation - is the demonstration of a lack of intent.

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293 657 Fed. Appx. 228 (5th Cir. July 5, 2016)(the district court found her explanation “of why she did not produce” the text messages was “not credible” and made only a partial production of hard copies from a cloud-based application where they were stored).
295 Id. at 77-85 (“[w]e presently decline to exercise our inherent power as Rule 37(a) provides a more appropriately tailored remedy”).¶
298 The Sedona Principles, Third Edition (Public Comment Ed. 2017), Principle 6 (“Responding Parties are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving and producing their own electronically stored information”).
to deprive or a lack of prejudice. However, reliance on these aspects of Rule 37(e) is undermined by the fact that a substantial number of courts have ignored the culpability requirements that have replaced Residential Funding.299

The resulting unfairness affects individuals and entities alike. In Coyne v. Los Alamos National Security, for example, a discharged employee was denied her day in court by a dismissal based on a merely careless or negligent failure to retain texts of unknown significance.300 Similarly, in Browder v. City of Albuquerque, a police department was not permitted to defend itself without the “thumb on the scale” from an adverse inference imposed for a delay in issuing a litigation hold without an intent to deprive.301

With these uncertainties about the consequences of good faith and proportional preservation practices, it can hardly be surprising that compliant parties continue to undertake the maximum forms of preservation - reasonable or not – that they can afford or are willing to tolerate. This seems unlikely to change.302

The focus for further action, therefore, should be on reducing the acceptance of the Rule. Circuit Courts that have not already done so should clarify their intent to enforce Rule 37(e) to the exclusion of inconsistent prior case law. The responsibility (and opportunity) also lies with the lower courts themselves, and counsel appearing before them, to apply the Rule where it belongs.

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299 Examples of lower court decisions that would have been resolved differently had the rule been applied are included in Appendix B to Allman, supra, Amended Rule 37(e): Case Summaries – Duke University School of Law, May 2017 (available on line).


301, 187 F. Supp.3d 1288 (D. N.M. May 9, 2016)

302 After the Public Hearings, the Discovery Subcommittee reported that the likelihood that cost savings would be achieved by the (then version) of the draft Rule was “quite uncertain,” since many incentives remained for over-preservation. Subcommittee Report, Agenda Book, April 10-11, 2014 Meeting, at page 372 of 580 (citing the need for ESI in everyday operations, obligations imposed by statutes and regulation and the desire to preserve information that could be helpful in litigation). The final version of the Rule addressed some of these issues, but without broad acceptance, its full impact is not known.
## Appendix

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Applied?</th>
<th>Citation/Type of ESI/Holding</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st</td>
<td></td>
<td></td>
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<tr>
<td>2nd</td>
<td>Yes</td>
<td>Mazzei v. the Money Store, 656 Fed. Appx. 558 (2nd Cir. 2016)(databases)(current Rule 37(e) requires finding of intent to deprive to give adverse inference instruction).</td>
</tr>
<tr>
<td>5th</td>
<td>Ignored</td>
<td>Timms v. LZM, 657 Fed. Appx. 228 (5th Cir. July 2016)(texts)</td>
</tr>
<tr>
<td>6th</td>
<td>Yes</td>
<td>Applebaum v. Target, 831 F.3d 740 (6th Cir. 2016)(Sutton, J.)(electronic records)(a showing of negligence or gross negligence does not justify adverse inferences).</td>
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<tr>
<td>8th</td>
<td></td>
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<tr>
<td>9th</td>
<td>Yes</td>
<td>Roadrunner Trans. v. Tarwater, 642 Fed. Appx. 759 (9th Cir. Mar. 2016)(emails)(if Rule 37(e) had applied, dismissal appropriate since party acted with intent to deprive)</td>
</tr>
<tr>
<td>10th</td>
<td>Yes</td>
<td>Helget v. City of Hays, 844 F.3d 1216 (10th Cir. 2017 (internet-usage and email) (if applicable [spoliation claim forfeited] Rule 37(e) provides “further” guidance for failure to preserve)</td>
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<tr>
<td>D.C</td>
<td></td>
<td>See Nunnally v. D.C., 2017 WL 1080900, n. 10 (D.D.C. March 22, 2017 (acknowledging that Rule 37(e) forecloses reliance on inherent power but applying it nonetheless)</td>
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