Amended Rule 37(e): Case Summaries

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This Memorandum summarizes the individual holdings of decisions which did or could have applied Rule 37(e) as of April, 2018, and is supportive of the Author's Memorandum on the implementation of Rule 37(e).[2]

Appendix A. Appendix A includes descriptions of the 190 decisions, including those of appellate courts,[3] which the Author has identified as having applied or mentioned Rule 37(e) since it became effective on December 1, 2015.[4] The summaries are presented in alphabetical order, not as rendered chronologically.

In the main, the results conform to the outcomes expected from the amended Rule, including rejection of the use of *Residential Funding* logic to justify measures such as adverse inferences when the underlying preservation conduct involved negligence. A substantial number of decisions would have granted adverse inference instructions but for Rule 37(e). However, courts have not been reluctant to impose remedial measures where the conduct was deemed negligent.

Appendix B. Appendix B describes the over 105 decisions, including those of appellate courts,[5] which have not referenced the Rule in factual contexts where it could or should have been

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[1] © 2018 Thomas Y. Allman. An earlier version of this Memorandum is available from the Duke Judicial Center at https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/judicature/2017rule37etodaycasesummaries.pdf.

[2] Thomas Y. Allman, *Spoliation of ESI and Amended Rule 37(e)*(2018)(copy available from Author at tyallman@earthlink.net). An earlier version is available 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.

[3] ML Healthcare Services v. Publix Super Markets, 881 F.3d 1293] (11th Cir. 2018); MPLA v. Gateway Community College, 2018 WL 1659671 (2nd Cir. 2018); Archer v. York City School District, __ Fed. Appx. __, 2017 WL 4279652 (3rd Cir. Sept. 27, 2017)(email deletion not intentional to suppress or withhold evidence); Regeneron Pharma v. Merus, __ F.3d __, 2017 WL 3184400 (Fed. Cir. July 27, 2016)(applying 2nd Cir. Authority); Helget v. City of Hays, __ Fed. Appx. __, 2017 WL 33525, n. 7 (10th Cir. Jan. 4, 2017); Applebaum v. Target, 831 F.3d 740 (6th Cir. Aug. 2, 2016); Mazzei v. The Money Store, 656 Fed. Appx. 558 (2nd Cir. July 15, 2016) and Roadrunner Transp. v. Tarwater, 692 Fed. Appx. 759 (9th Cir. March 18, 2016). See Appendix A attached hereto.

[4] *See* 2015 US Order 0017; Proposed Rules, 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").

[5] Lewis v. McLean, __F.3d. __, 2017 WL 3097864 (7th Cir. July 21, 2017)(unexplained retention of only part of surveillance video); Integrated Direct Marketing v. May, 690 Fed. Appx. 822 (4th Cir. May 30, 2017)(deletion of files from hard drive); Alston v. Park Pleasant, ___Fed. Appx. ___, 2017 WL 627381 (3rd. Cir. Feb. 15, 2017)(sale of ESI storage devices without retention of ESI); Champion Pro Consulting v. Impact Sports, 845 F.3d 104 (4th Cir. Dec. 22, 2016)(lost or deleted text messages; NFL Mgt. Council v. NFL Players Association, 820 F.3d 527 (2nd Cir. April 25, 2016)(deletion of text messages).

applied. In one week in the summer of 2017, for example, district courts in Atlanta,[6] New York City[7] and Philadelphia[8] resolved spoliation allegations involving lost ESI without mentioning Rule 37(e). Some courts found it not to be just and practicable to apply the Rule to proceedings instituted before the Rule became effective; in other cases, both lawyers and courts may have been unaware of the Rule.

In yet other cases, courts seem to believe that digital information is not covered by the Rule when it is found in a tangible container [9] whether it be a laptop, cell phone,[10] camera, server or motor vehicle.[11] However, the Eleventh Circuit has recently made it clear that preservation issues involving surveillance video is assessed by Amended Rule 37(e).[12]

APPENDIX A
Cases explicitly citing Rule 37(e)

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

2. **Adcox v. UPS,** [2016 WL 6905707] (D. Kan. Nov. 11, 2016). In a thoughtful opinion applying Rule 37(e) to potential failures to preserve, the court ordered curative measures, such as additional discovery, without explicitly finding a failure to take reasonable steps, but decided not to issue an adverse inference at trial because it found no 'bad faith or intentional omission" on the part of UPS. The court stressed the Committee Note comment that a court should exercise caution to ensure that the remedies "fit the wrong" committee by a non-producing party.

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[6] Wiedeman v. Canal Insurance, 2017 WL 2501753 (N.D. Ga. June 9, 2017)(failure to preserve ECM data after truck accident).
[7] In re GM LLC Ignition Switch Litigation, 2017 WL 2493143 (S.D.N.Y. June 9, 2017)(failure to preserve SDM data).
[8] Brown v. Certain Underwriters, 2017 WL 2536419 (E.D. Pa. June 12, 2017).
[9] Doe v. County of San Mateo, 2017 WL 6731649 (N.D. Cal. Dec. 29, 2017). *Compare* Wooten v. Barringer, 2017 WL 5140519, at *4 (N.D. Fla. Nov. 6, 2017)("the video recordings (which presumably are digital) constitute ESI") *with* Petit v. Smith, 2014 WL 4425779, at 6 (D. Ariz. Sept. 9, 2014)(the [proposed] rule is concerned more with operation of systems).
[10] Browder v. City of Albuquerque, 187 F. Supp.3d 1288 (D.N.M. May 9, 2016)(loss of cell phone treated as tangible property).
[11] Wiedeman v. Canal Insurance, 2017 WL 5563246 (N.D. Ga. Nov. 20, 2017)(ECM data recorder in truck).
[12] Mt. Healthcare Services v. Publix Super Markets, __F.3d __, 2018 WL 747392, at *10 (11th Cir. Feb. 7, 2018)(the rule applies to "spoliation of electronically stored video like the video at issue here").

3. **Aguility Public Whsg. v. DOD**, [2017 WL 1214424] (D.D.C. March 30, 2017). In rejecting the argument that inherent authority, not **Rule 37(e),** applied to ESI which could not be replaced except by additional discovery, the court stated the rule foreclosed reliance on inherent authority "at least in factual situations to which the rule applies, i.e., where the information cannot be substituted from another source." The court cited to Living Colors, 2016 WL 1105297 at *5 and CAT3, 164 F. Supp.3d 488, 496-98 for the discussion of the meaning of "lost" under **Rule 37(e).**

4. **Air Products v. Wiesemann** [2017 WL 758417] (D. Del. Feb. 27, 2017). A District Judge refused to sanction Air Products for the wiping of laptops belonging to former employees which came to light only after initial disclosures because the moving party named only one of them as a subject of search terms until after being notified that the wiping had occurred. The court also refused to sanction for lost emails which were available from another source, citing CAT3 v. Black Lineage. According to the court "[p]ure speculation is not enough" to find that relevant ESI was destroyed. The court noted that the party had "not met the threshold requirement under Fed. R. Civ. P. 37(e) of showing that ESI [on a server] was actually lost." The court cited to Rule 37(e) and noted that sanctions are determined under "two different rubrics" depending on the type of evidence.

5. **Alabama Aircraft Industries v. Boeing** [319 F.R.D 730] (N. D. Ala. March 9, 2017), *request for certification for interlocutory appeal denied*, 2017 WL 4572484 (N.D. Ala. April 3, 2017). A former subcontractor of Boeing in a dispute over failure of joint bidding arrangement convinced a court that ESI of an unknown nature was "intentionally destroyed by an affirmative act with has not been credibly explained." (*15). Accordingly, without evidence of the missing contents and rejecting the possibility that it was available from other sources, the court stated that if the case goes to trial, the jury will be instructed that it may presume that the lost information was unfavorable to Boeing. The court applied **Rule 37(e)(2)** and concluded that the "type of unexplained, blatantly irresponsible behavior leads the court to conclude that Boeing acted with the intent to deprive" the moving party of "the use" of the ESI in connection with the claims. The court also awarded reasonable attorney's fees and costs to the movant in prosecuting the motion against Boeing, but not its counsel, without citing the authority for doing so.

6. [State Case] American Honda v. Thygesen [2018 WL 830321, 2018 OK 14, __P3d __](S.Ct. Okla. Feb. 13, 2018). Applying the 2006 version of Rule 37(e), as adopted verbatim in Oklahoma, the Supreme Court ordered the lower court to not enforce a sanction for destruction of design ESI long before the auto accident suit was filed or foreseeable, since the deletion was "the result of the routine operation of Honda's information-retention" stems. There was no indication it was operating the retention policy in bad faith. Quoting Steve Gensler it noted that this "safe harbor" did not protect a party who failed to implement a sufficient litigation hold once a lawsuit if filed or becomes likely and since there was no duty to preserve data for as long as one of the cars was on the road – antithetical to the design of the Oklahoma rule – and there was no "exceptional circumstance" – the lower court order was not authorized.

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

8. **A.O.A. v. Rennert** [2018 WL 11251827, at *3 (E.D. Miss. March 12, 2018)] Refusing sanctions under **Rule 37(e)** because "nothing before me indicates [that the] process of changing computer systems was unreasonable" and the evidence indicates that the failure to preserve was not an attempt to suppress the truth, and circumstantial evidence "demonstrating undue delay in responding to requests" is "insufficient to show intent to suppress relevant evidence," citing Hallmark Cards v. Murely, 703 F.3d 456, 462 (8th Cir. 2013) as well as, at *2, Applebaum v. Target Corp., 831 F.3d 740, 745 (6th Cir. 2016)("a showing of negligence or even gross negligence will not do the trick").

9. **Applebaum v. Target** [831 F.3d 740] (**6th Cir**. Aug. 2, 2016). Sixth Circuit affirmed refusal of trial court to instruct a jury that the failure to produce any repair history records warranted an adverse inference (2015 WL 13050013). The court had instructed the jury that if it found that the defendant had disposed of the bike and had not shown a reasonable excuse for doing so, it could infer that the brakes had not been repaired. The Sixth Circuit (Sutton, J.) found no error in refusing to given an additional adverse inference instruction as to records and noted that she had offered no evidence that some of the records even existed, much less that Target had control over them and destroyed them with a culpable state of mind. Moreover, **under amended Rule 37(e),** to the extent she sought an adverse inference for spoliation of electronic information, the rule required her to show an intent to deprive her of its use, since "a showing of negligence or even gross negligence will not do the trick," citing to the Committee Note.

10. **Aronstein v. Thompson Creek Metals** [2017 WL 1519390, at *2] (D. Colo. April 27, 2017). The court denied a motion under **Rule 37(e)** regarding alleged missing documents and ESI from a computer and shared drive because affidavits establish that all documents on laptop were transferred to another folder and have been maintained. The court also refused to allow an amendment to add tort claims for spoliation because of a failure to "plausibly allege that any evidence was spoiled in this case."

11. **Arrowhead Capital Finance v. Seven Arts** [2016 WL 4991623, at *20 (S.D.N.Y. Sept. 16, 2016]. In a complex cases involving attempts to enforce a judgment against a deadbeat party moving assets around to avoid it, the court in assessing egregious discovery conduct noted that a failure to move or copy ESI on server "could be seen as reckless," citing the **Rule 37(e)** requirement that a party take reasonable steps to preserve discoverable electronic information.

12. **Bagley v. Yale** [2016 WL 7407707 (D. Conn. Dec. 12, 2016). In a follow-up to its earlier decision [315 F.R.D. 131, 153] (D. Conn. June 14, 2016) ordering production of lists of individuals to whom litigation hold were delivered and from whom information was requested, the court ordered their production (and survey results from recipients) over objections based on attorney client privilege and an inadequate predicate showing of possible spoliation. The court noted that they were issued in batches and implied that the delays in doing so might be deemed culpable "or even negligent" and that a recent court opinion had implied that a sufficient indefensible failure to issue a litigation hold might justify an adverse inference in

Stimson v. City of New York, 2016 WL 54684 (S.D.N.Y. Jan. 5, 2016). The court noted that amended **Rule 37(e)** does not apply to "old-fashioned documentary evidence" and that the Committee Note rejects Residential Funding.

13. **Baher ABdelgawad v. Mark Mangieri** [2017 65574483} (W.D. Pa. Dec. 22, 2017). In a case involving QuickBook files in digital form and certain documents which resulted in "a spoliation argument as to a combination of paper and electronic documents," the court applied separate standards in assessing the loss of each.

14. **BankDirect v. Capital Premium Financing** [2018 WL 1616725] (N.D. Ill. April 4, 2018). The Magistrate Judge recommended that the intent to deprive issue im a *Rule 37(e)(2*) case [only remedies sought] be resolved by a jury, citing Cahill v. Dart, 2016 WL 7034139, at *4 (N.D. Ill. 2016), and the Committee Note. As an alternative, it proposed use of a "permissive spoliation instruction" under which the jury would be "informed" of the destruction of the emails and told that they could consider the deletion in considering the claim and counterclaim. The Magistrate judge made repeated comments about the lack of credibility about the motivation for delayed failure to interrupt automatic deletions from an archive, but completely exonerating outside counsel from any role in the matter ("Lawyers only know what their clients tell them about historical facts." (*7).

15. **Barbera v. Pearson Education** [2017 WL 66156586, at *2] (S.D. Ind. Dec. 28, 2017). The District Court denied sanctions under Rule 37(e) because it did not find a mistake in the Magistrate Finding that there was no evidence that the party acted in bad faith or with intent to deprive in failing to preserve emails.

16. **Barcroft Media v. Coed Media** [2017 WL 4334138] (S.D.N.Y. Sept. 28, 2017). Measures are not available under Rule 37(e) where website screenshots were preserved and are in possession of plaintiff, who listed them as trial exhibits, since they are not "lost" and several remain on the websites and the party retains screen shots. The Motion for sanctions borders on frivolous and, moreover, there is no evidence they acted with intent to deprive or that any prejudice has occurred and the non-moving party does not deny the authenticity of the screenshots nor that they hosted them.

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

sanctions "were greater than necessary to cure the [purported] prejudice," **citing Rule 37(e)(1). [2016 WL 6694827, at *3]. It is possible that the court implied that Rule 37(e) might be held to be applicable, by analogy, to losses of tangible property (?).**

18. **Barry v. Big M Transportation** [2017 WL 3980549] (N.D. Ala. Sept. 11, 2017). The court refused to impose harsh measures on the owner of tractor-trailer or the driver under **Rule 37(e)** for failure to preserve ECM data after an accident because it was not convinced either had acted with intent to deprive, given the plausible the explanation by the owner that the data would have been gone by that time, even though mistaken. (*7) Moreover, the plaintiff was not prejudiced to such an extent that severe measures were warranted, given that the experts were able to arrive at opinions on the causes. In addition, the driver had no custody or control over the evidence following the accident. (*8). It did find that the owner was guilty of spoliation because the litigation was reasonably forseeable at the time the data was lost and the prejudice from the loss of the most accurate data on the speed. (*6-7)The court nonetheless decided to inform the jury that the ECM data was not preserved and would allow the parties to present evidence and argument at trial regarding the failure to preserve. (*15).

19. **Belanus v. Dutton** [2017 WL 1102727] (D. Mont. March 23, 2017). In prisoner case seeking sanctions on multiple grounds, the court refused to enter an adverse interference under **Rule 37(e)(2)** because the moving party "cannot establish the intent to deprive" because a surveillance video was automatically overwritten before the defendants had notice of lawsuit and they were not provided with timely notice that preservation was requested.

20. **Below v. Yokohama Tire** [2017 WL 764824] (W.D. Wisc. Feb. 27, 2017). A District Judge dealing with a failure to preserve other tires from a truck referred, at *2, to the issue of "why other steps were not take to preserve similar evidence, including possible electronic evidence that must be preserved under Fed. R. Civ. P. Rule 37(e)." The court found that the failure to do so "falls somewhere between negligence and gross negligence, but perhaps short of bad faith or intentional conduct requiring an adverse inference instruction. It ordered, however, that plaintiffs could not argue that defendants failed to explore or prove something if prevented from doing so by plaintiffs' negligence in preserving evidence." The court agreed that plaintiffs could not use it as a sword, even if defendants could not use it as a shield.

21. **Benedict v. Hankook Tire** [2018 WL 738903, at *15 (E.D. Va. Feb. 6, 2018)]. A District Court made it clear that under Rule 37(e), however, it is the role of Rule 37(e) to provide the legal standards for the inferences to be drawn from missing evidence, and barred an expert from expressing his inferences. It held that he may discuss the absence of documents to the extent he is explaining he has received no information on the topic, but is not authorized to imply that the party should have kept the documents or would have done so had they adopted certain practices.

22. **Best Payphones v. City of New York** [2016 WL 792396] (E.D.N.Y., Feb. 26, 2016). In an action by provider of pay telephones challenging regulatory impact, the court refused to impose evidence preclusion or an adverse inference under Circuit law and **Rule 37(e**) for the negligent failure to retain and produce documents and emails. The court applied "separate legal analyses" but found that the failure to pursue the availability of evidence from third parties

other sources negated any finding of prejudice and barred relief under both Circuit law and **Rule 37(e)**. **(at *6)** The court found that the party had not "acted unreasonably as is required" under **Rule 37(e)** given the flux in email preservation standards at the time. Attorney fees were awarded under Rule **37(a)(5)(A)** since material that should have been produced was furnished in response to a Rule 37 motion and the court appeared to also argue that it had inherent authority to award attorneys' fees and costs to punish and deter egregious conduct.

23. **Bird v. Wells Fargo Bank** [2017 WL 1213425, at *7 (March 3, 2017)] A 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. The court stepped in and ordered scope of discovery and timing after the parties had failed to do so despite active court guidance on the topic. In doing so, the Bank revealed that it had purged the plaintiff's email after her termination ("in accordance with its neutral practice") and could not say if the email files could be reconstructed.

24. **Blasi v. United Debt Services** [2017 WL 680496] (S.D. Ohio Feb. 21, 2017), the court refused to enter a default judgment, despite evidence of intentional destruction of SI in violation of the Rule, in deference to additional discovery to see if some or all of the prejudice could be cured by lesser sanctions. The court spoke of violating obligations under the Federal Rules and **it is unclear if it referred to Rule 37(e), Rule 37(b) or both.**

25. **Blumenthal Distributing v. Herm**an Miller [2016 WL 6609208] (C.D. Cal. July 12, 2016); . In a long and repetitive R&R [whose findings and recommendations were adopted by the District Judge at 2016 WL 6901696 (C.D. Cal. Sept. 2, 2016)], a Magistrate Judge recommended use of an adverse inference under Rule 37(b) with respect to the withholding or spoliation of evidence. It "additionally" recommended an award of monetary sanctions in the form of attorney's fees and expenses under Rule 37(e) related to a forensic analysis and the taking of depositions to determine the "cause underlying" the inability to export emails from an EMC email archive as well as the lack of ESI produced, while noting that the rule was intended to foreclose reliance on inherent authority. However, the Magistrate Judge also noted that due to the "willful actions" that taken together "amount to more than gross negligence," the monetary sanctions are "also available under the court's inherent powers," citing, inter alia, Chambers. The District Judge imposed the reasonable costs and attorney's fees "for the reasons stated in the R&R" at "52-56." However, in assessing the deletion of emails, the Magistrate Judge ignored the "intent to deprive" requirement and relied upon Residential Funding and Zubulake in recommending that the jury should be instructed to presume the missing emails were adverse because the party acted with a "conscious disregard" of its obligations, "but not necessarily deliberate intent." The District Judge merely stated that it would include an adverse inference instruction at trial "[a]s proposed in the R&R at 49. **It is not clear why the Magistrate Judge ignored (and the District Judge implicitly adopted) use of Rule 37(e) as to part, but not all, of its recommended sanctions**.

26. **BMG Rights Management v. Cox Communications** [199 F.Supp. 3d 958] (E.D. Va. August 8, 2016). In a rare post trial opinion, the District Court applied Rule 37(e) in assessing the jury instruction it had utilized which gave what amounted to a permissive spoliation instruction and allowed the defendant to "identify" the spoliation issue in its opening stated. It held that the

Magistrate Judge had made of finding of "spoliation" and of "intentionality" [apparently considering that equivalent to an "intent to deprive" under (e)(2)] but concluded that lesser remedies under (e)(1) sufficed "to redress the loss" citing the Committee Note as supporting permitting the party to present evidence and argument regarding the loss. The court gave an instruction alerting the jury to the "fact" of spoliation, identified the missing evidence and permitted the jury to consider the fact in their deliberations (*19), which served the [Silvestri list of] prophylactic, punitive, and remedial rationales underlying the spoliation doctrine. The District Court also held that the Magistrate Judge had properly rejected preclusion of evidence as the "equivalent of dismissal."

27. **Bouchard v. U.S. Tennis Association** [2017 WL 3868801] (S.D.N.Y. Sept. 5, 2017). In dismissing a motion for sanctions under Rule 37(e), the court held that the absence of a use of a litigation hold was not dispositive where the party had "fully complied" with its preservation obligations in regard to the videotapes at issue, noting that the failure to adopt good preservation practices is only "one factor in the determination," citing Chin v. Port Auth. Of New York & New Jersey, 658 F.3d 135, 162 (2nd Cir. 2012). The court found it "reasonable" that the party saved only the footage immediately outside the locker room where the slip and fall at the U.S. Open occurred, not the footage of the fitness center, simply because the footage "might" become relevant.

28. **Brackett v. Stellar Reovery** [2016 WL 1321415] (E.D. Tenn Feb. 24, 2016). The court refused to issue an adverse inference jury instruction regarding the contents of an audio recording after the party was able to find another copy, citing the fact that **Rule 37(e)** instructs a court to examine wither ISI is lost "*and* it cannot be restored or replaced." (emphasis in original.) It also denied sanctions as to missing call logs because the defendant was not acting in bad faith when its third party routinely destroyed it (and the recording), nor was it prejudiced by the destruction.

29. **Brewer v. BNSF** [2018 WL 2047581] (D. Mont. May 3, 2018). The District Judge adopted the findings and recommendations of the Magistrate Judge that the failure to show how any ESI was lost and, even if it were, how it prejudice him by preventing him from going to trial or interfering with the rightful outcome of the case. The court also noted that for the default sanction sought the failure to preserve must be intentional and requires more than gross negligence, which has not been shown. The court reserved the right "to impose a lesser sanction after evaluating how the parties present the evidence at trial."

30. **Brown Jordan v. Carmicle** [2016 WL 815827](S.D. Fla., March 2, 2016). As part of a bench trial regarding termination of a former executive (which it upheld), the court also ruled on motions for sanctions which it had deferred to determine if the missing evidence had been crucial to the entity's case, applying **Rule 37(e)** (*35). The court found that the executive should have preserved ESI, that it was lost because of a failure to take reasonable steps and that it could not be restored or replaced. The court also found that since the executive had acted with intent to deprive and presumed the lost information was unfavorable to him. It also would have drawn inferences adverse to the executive under its inherent power, since "deliberate deletion and destruction of evidence and lack of candor" constitutes bad-faith

litigation conduct even though the loss of ESI did not prejudice the entity. (*37). Separately, the court awarded judgment under CFAA the SCA and ordered payment of fees.

31. **Bry v. City of Frontenac** [2015 WL 9275661] (E.D. Miss. Dec. 18, 2015). A failure to retain relevant dash camera data, even if it did exist, was not sanctionable because it would not have captured the issues and because of qualified police immunity since if deletion occurred, it was the result of following standard procedures. The court also stated that remedies under **Rule 37(e)** would not have been available since there was also no evidence of intent to deprive.

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

33. **Cahill v. Dart** [2016 WL 7034139] (N.D. Ill. Dec. 2, 2016). Acting after a de novo review of a Magistrate Judge's Report (2016 WL 7093434 [which ignored Rule 37(e) but relied on Rule 37(c) as statutory authority to sanction]), the District Judge adopted a modified version of the R&R. It noted that it could have decided if an "intent to deprive" existed, but decided that it was best under the circumstances that the jury should make the decision as to whether prison officials had intentionally allowed a crucial party of a videotape segment to be overwritten in violation of **Rule 37(e)(2)** requirements (a "close call"), since it was also an element of a malicious prosecution claim. It also decided that in light of the substantial prejudice involved, the jury should be informed that the missing portions of the video were because the defendants had failed to fulfill their duty to preserve. (at *4). (The Magistrate Judge had recommended, and the District Court agreed, that a witness that had observed the missing video segment could not testify as to its content). The District Judge also noted that if the moving party argued that the actions were intentional destruction and the jury agreed, the jury would be instructed that it must presume that the lost evidence would have been unfavorable to the prison authorities in light of the prejudice involved. (The court quoted (n.3) the Committee Note to **Rule 37(e)** as to how the jury should be instructed if permitted to make the finding of intent). The moving party had sought fees before the Magistrate Judge but the judge did not address the request, as noted by the District Judge without further action.

34. **Carpenter v. All American Games** [2017 WL 4517081, at n. 4] (D. Ariz. Oct. 10, 2017)(Campbell, J.). The court found that a party had not shown he was entitled to an adverse inference instruction for failing to preserve the ability to access the contents of a website because the party "failed to address [Rule 37(e)] controlling law."

35. **CAT3 v. Black Lineage** [164 F.Supp.3d 488](S.D. N.Y. Jan. 12, 2016)(Francis, M.J.)[*Case dismissed & Motion withdrawn with prejudice, each party to bear their own costs and attorneys fees,* 2016 WL 1584011]. Given the failure to take reasonable steps and the inability to restore challenged ESI, Plaintiffs were precluded **under Rule 37(e)(1)** from relying on their altered version of lost email which caused legal prejudice by "obfuscate[ing]" the record by placing authenticity of both original and subsequently produced email at issue. Attorneys' fees were also awarded because of the economic prejudice of "ferreting out" the malfeasance and seeking relief. The measures were "no more severe than necessary" under **(e)(1)** to cure prejudice. While **Rule 37 (e)(2)** also applied because the party "acted with intent to deprive,"

drastic measures are not mandatory under **(e)(2)** or inherent powers. If Rule 37(e) had been inapplicable, the court could have imposed sanctions because of "bad faith" conduct pursuant to inherent power. The court also described the rule as more lenient with respect to sanctions and found it just and practicable to apply it.

36. **Christoffersen v. Malhi,** 2017 WL 2653055 (D. Ariz. June 20, 2017). The court, perhaps failing to understand that **Rule 37(e)** had been amended, applied Rule 37(e) in a case involving the destruction of documents relating to a trucking business after a duty to preserve attached by citing Judge Campbell's opinion in Surowiec v. Capital Title Agency, 790 F. Supp.2d 997, 1005 (D. Ariz. 2011). The cited pagination does not support the conclusion in Christoffersen that Rule 37(e) has been applied to all records, not jut electronic records. Surowiec is a much cited case for, among other holdings, its statement that the failure to implement a litigation hold is an important factor in determining culpability, "but not per evidence of culpable conduct giving rish to a presumption of relevance and prejudice." (noting disagreement with Pension Comm. v. Banc of Amer. Sec. , 685 F. Supp.2d 456, 465 (S.D. N.Y. 2010).

37. **Citibank v. Super Sayin' Publishing** [2017 WL 946348 (S.D.N.Y. March 1, 2017). A District Judge affirmed a prior ruling by the Magistrate Judge [2017 WL 462601] (S.D.N.Y. Jan. 17, 2017) under Rule 72(a) and held that it was just and practicable to apply **Rule 37(e)** in a case where the conduct relevant to the motion took place two years before the rule took effect, citing CAT3 v. Black Lineage, 164 F. Supp. 3d 488, 495-96 (S.D.N.Y. 2016). The Magistrate Judge refused to apply **Rule 37(e)** or exercise its inherent authority over a motion seeking 'monetary and evidentiary sanctions" on both procedural and "substantive" grounds, since the motion did not discuss prejudice and also failed to discuss or show the defendants acted with an "intent to deprive" and failed to establish Rule 37(e) prerequisites. The Magistrate Judge also noted that imposition of sanctions under a court's inherent powers requires a bad faith finding [citing to Wolters Kluwer Fin. Srev. V. Scivantage, 564 F.3d 110, 114 (2nd Cir. 2009)] and that the adverse inference standard announced in Residential Funding had been interpreted as overruled in several lower court opinions and that the Second Circuit in Mazzei v. The Money Store had stated that the principle had been "superseded in part."

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

39. **Cohn v. Guaranteed Rate** [2016 WL 7157358] (N.D. Ill. Dec. 8, 2016). In an action against former employees now in competition, the court described **Rule 37(e)** as describing "some" of the remedies available if ESI is destroyed, and noted that a court also has "broad, inherent power to imposed sanctions" which are "over and above the provisions of the Federal Rules." The court then proceeded to analyze and resolve the spoliation motion entirely relying on pre-rule decisions without again mentioning Rule 37(e). It did not analyze whether "reasonable

steps" and implies that it was irrelevant that the missing emails were recovered from other parties. The court found "bad faith" conduct intended to hide adverse information thus implying that the information would have been unfavorable but refused an adverse inference since additional discovery might obviate the need to do so.

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

41. [STATE Case] **Cooper Tire & Rubber v. Koch** [__S.E.2d __, 2018 WL 1323994] (S.Ct. Ga. March 15, 2018). The Supreme Court of Georgia affirmed by certiorari that the lower courts had appropriately applied a "reasonable forseeable" test for the duty to preserve, as measured by both actual and constructive knowledge that litigation was forthcoming. In passing, it noted that the loss of the auto and three of the four tires involved was of equal importance to both the plaintiff and the defendant, which "is why fact-finders should not readily presume that lost evidence was favorable to the opposing party absent a showing that the evidence lost intentionally to deprive the other party of its use in litigation." [citing the 2015 Committee Note to Rule 37(e)](ftn. 6). It also noted that in cases involving "extensive amounts of ESI" that the steps a party reasonably should take to preserve "may be difficult and disputed issues." (ftn. 5.)

42. **Core Laboratories v. Spectrum Tracer Services** [2016 WL 879324] (W.D. Okla. March 7, 2016). In action for damages from appropriation of trade secrets, the failure to preserve emails at the time of switching to a new email service was said to have caused "prejudice' under **Rule 37(e)(1)** because it deprived the party of all information about certain issues in those emails. However, the court ordered an adverse inference jury instruction that the lost email would have been unfavorable without also finding an "intent to deprive." The court selectively quoted from *Turner v. Public Service*, 563 F.3d 1136, 1149)(10th Cir. 2009) implying that a showing of prejudice is the only factor that is relevant to entitlement of "spoliation sanctions." The opinion is ambiguous as to whether or not reasonable steps were taken.

43. **Coyne v. Los Alamos National Security** [2017 U.S. Dist. LEXIS 65758] (D. N.M., May. 21, 2017). Dismissal of case affirmed after de novo review of Magistrate order under Rule 37(e)(2)(c) because the evidence showed that she "willfully" deleted text messages prior to turning an iphone over for forensic imaging. The plaintiff had agreed to the forensic examination, but after an examination of a forensic copy, the examiner found the iphone had been erased and reset shortly before shipment of the phone for examination. The plaintiff "vehemently" denied the assertion but the court found evidence calling into question the veracity of the arguments made.

44. **Coward v. Forestar Realty** [2017 WL 8948347] (N.D. Ga. Nov. 30, 2017). Court sanctioned a party which produced hard drive for storing images of flooded property without a password, claiming they had forgotten it. The court applied Rule 37€ and found that they had failed to take reasonable steps to preserve, that the loss was prejudicial because the non-moving party failed to prove that it was not, citing *Ala. Aircraft v. Boeing*, 319 F.R.D. 730, 742 (N.D. Ala. 2017) that the burden is on spoliator) (*8). It stated it would allow introduction of the spoliation and argument concerning the effect of the loss, but refused to find that the movant showed the party "acted in bad faith or with intent to deprive." (*9). The court ignored the duty to restore or replace, and in footnote 5 cited Rule 34(b) as requiring production in a usual form and also *D'Onofrio* for the proposing that the party had the duty to restore it to a useable form if software needed to be used.

45. **Creative Movement v. Pure Performan**ce [2017 WL 4998649] (N.D. Ga. July 24, 2017). In this classic application of Rule 37(e), a court refused to find that the errors of a forensic IT contractor in carrying out transfers of ESI constituted spoliation under the Rule because there was no showing that "either Defendants or their counsel acted" with an "intent to deprive" merely that there was "confusion and ineptitude" (*15). In addition, there was a failure to demonstrate anything other than "a minimal amount of prejudice, if any." Although the party may "never know" what information is missing, it failed to demonstrate how this would affect the remaining claims . (*16). The District Judge did a superb job of succinctly summarizing the text and Committee Notes (*13-15). In addition, the court refused to find that the moving had demonstrated by clear and convincing evidence that party and its counsel the acted in contempt of the scheduling order which required the production of digital devices and login information because, among other reasons, it would appear that they were produced. (*17). The court reviewed and refused to dismiss a count dealing with a CFAA claim based on damages ("loss") caused by access to a website by the former licensee which required restoring a server backup, ciging Brown Jordan, 846 F.3d 1167 (11th Cir. 2017). (*4).

46. **Crow v. Cosmo Specialty Fiber** [2017 WL 1128505] (W.D. Wash. March 24, 2017). In an action regarding injuries due to exposure from a release of hazardous fume or gas, a court refused to sanction the failure to produce an email under **Rule 37(e**) which was later produced after a more careful search indicated it had not been lost or destroyed. The court quoted that Committee Note to the effect that the rule applies only when the ESI is "lost." There was "meager prejudice" resulting from the delayed production. The moving party conducted depositions which inquired about the topic and there was no showing that the delayed receipt of the email barred questions or that the outcome of the motion would have been different given other evidence independent of the email. The court also denied the motion under its inherent authority "notwithstanding' that the Rule may "limit the court's otherwise broad authority to govern discovery." The court noted that "[r]ather than litigating discovery minutiae," the parties should submit fact issues to the trier of fact.

47. **CTB v. Hog Slat [2016 WL 1244998] (**E.D. N.C. March 23, 2016**).** In a trademark in infringement case by a manufacturer of poultry feeding machines claiming to apply the 2015 Amendments (n. 3) [but, in fact, not mentioning Rule 37(e) and referring only to case law based on Circuit authority], an adverse inference instruction was recommended solely because of a delayed use of a litigation hold in violation of an internal preservation policy prevented

the retention of data from use of Survey Monkey. The court held this was "willful" destruction because of the "manifest relevance of the evidence and the applicability of the duty to preserve." (*13-14). The court defined willful conduct as not requiring proof of bad faith, which requires proof of "destruction for the purpose of depriving the adversay of the evidence." (*9) The Magistrate Judge proposed that the trial judge instruct the jury that the CTB had deleted data that was "adverse" from its 2013 survey that was adverse to the stated conclusion that the trade dress had acquired distinctiveness and secondary meaning.

48. **DiStefano v. Law Offices** [2017 WL 1968278] (E.D. N.Y. May 11, 2017). Court refused to find that Rule 37(e) applied since the conduct involved and an evidentiary hearing on the matter preceded the effective date of the Rule, relying on CAT3 v. Black Lineage, 164 F. Supp. 488 ((SDNY 2016) and 2015 US Order 0017, 28 USC § 2074(a). Applying the "benchmark three-part test set forth in Byrnie v. Town of Cromwell, 243 F.3d 93, 107-112 (2nd Cir. 2001)," the court found insufficient culpability or prejudice to justify issuance of an adverse inference instruction but stated that it would nonetheless allow the movant to "explore" the issue at trial and awarded attorney's fees. (*27). The single-practitioner defendant had relied on printouts of key documents, and had produced large volumes of them, and the moving party did not establish the lack of ESI, some of which was available elsewhere, had prejudiced the ability to present the case. However, after concluding that the non-moving party "believed her actions were reasonable and not negligent at the time she undertook them," (*19), the court nonetheless concluded the actions to be somewhere between negligence and gross negligence, citing Pension Committee for the observation that the fact that she had acted in good faith did not mean the Second Circuit test of culpability was not satisfied. (*21). **Had Rule 37(e) been applied, as it could have been, no relief at all would have been warranted, given that (1) no case dispositive remedies were available under (e)(2); (2) no remedial remedies were available under (e)(1), given the lack of prejudice and (3) no attorney's fees were available under inherent authority (post Haeger) given the lack of a finding of bad faith.**

49. **Dotson v. Edmonson** [2018 WL 501511 (E.D. La. Jan. 22, 2018)]. A court found that Rule 37(e) was inapplicable because it had not been shown that there was a duty to preserve, but the moving party would be allowed to elicit testimony "regarding the [missing] cell phone records and text messages" and could question witnesses regard record preservation polices, "as such testimony is relevant and its relevance is not outweighed by the risk of undue prejudice."

50. **DVComm v. Hotwire Communications** [2016 WL 6246824] (E.D Pa. Feb. 3, 2016). In action by individual (Sizemore) and the proprietorship he owned to enforce an agreement relating to the defendant's entry into the Atlanta market (the facts relating to allegation are recited at 2015 WL 2381059)(E.D. Pa. Dec. 23, 2015)), the defendant was granted a permissive adverse inference jury instruction under **Rule 37(e)(2)** because there was circumstantial evidence that the destruction of an early draft of a proposed business plan was done with "intent to deprive." The court found that the party failed to take reasonable steps and the lost ESI could not be restored or replaced (although it was, in fact, supplied from the former employer of the individual) and may or may not have found prejudice to have existed. The court also asserted that its inherent power applied "without limitation" (¶55) and said it would consider "monetary sanctions" later. On February 16, the court ordered the individual owner and the plaintiff entity jointly and severally to pay $110K in fees and costs as "monetary sanctions"

under Circuit authority for "discovery misconduct," without reference to Rule 37(e) as well as under Rule 37(c)(1) for "reasonable expenses." (2016 WL 7018554, at ¶31-39, 46). In March, the court refused to vacate its earlier orders when the party found the missing business plan because "fulsome discovery" is not "amnesty for failing" to meet discovery obligations "after" findings under Rule 37." (2016 WL 7228629 (E.D. Pa. March 29, 2016)). In May, it acknowledged that an appeal of denial of a "new trial" motion was under way. (2016 WL 2858826 (E.D. Pa. May 13, 2016)). However, there is no indication that there was a trial on the merits in any of the opinions.

51. **Edelson v. Cheung** [2017 WL 150241] (D. N.J. Jan. 12, 2017). In determining if there had been "spoliation of electronic evidence" from deletion of emails, the court quoted Rule 37(e), acknowledging it to be a uniform standard, and applied pre-Circuit case law to determine whether to "impose spoliation sanctions under Rule 37." The court concluded that the conduct was intended to deprive the other party of the information in question but determined that there had not been sufficient prejudice to impose a default judgment. No reference was made to any of the threshold conditions of the Rule, but the court used the fact that the party could subpoena some of the missing emails to justify instructing the jury that "it may presume the information was unfavorable" citing Rule 37(b) rather than entering a default.

52. **Emerald Point v. Hawkins**, 294 Va. 544, 808 S.E.2d 384, 392 (Va. Dec. 28, 2017). In reversing an opinion on other grounds, the Supreme Court of Virginia explained that "the resolution of a spoliation issue . . . should be guided by the same standard and applicable to all forms of spoliation evidence." Accordingly, citing **Rule 37(e)** and Brookshire Bros. v. Aldridge, 438 S.W. 3d 9, 24 (Tex. 2014), the court applied Rule 37(e) logic to the loss of tangible property because the "intent to deprive" standard provides a common sense basis for determining if an adverse inference should lie.[13]

53. **EPAC Technologies v. HarperCollins** [2018 WL 1542040] (M.D. Tenn. March 29, 2018). In a lengthy Opinion blending the conclusions of a Special Master with the de novo review of a District Judge, the Court fashions targeted relief under **Rule 37(e)** and Sixth Circuit principles for the loss of ESI and physical evidence from the grossly negligent implementation of a litigation hold. The court does not find an "intent to deprive." The principal failures are attributable to an in-house counsel's failure to take an active and primary role, citing Zubulake V, but it is the party that failed to take reasonable steps and against whom the remedial measures and sanctions are levied. The Opinion make numerous subtle points about the assessment of trigger, the application of **Rule 37(e)** when both types of losses occur and about the subtle and creative nature of jury instructions for a future trial, as well as the role (and limits) of Special Master authority.

54. **Epicor Software v. Alternative Technology** [2015 WL 12734011] (C.D. Cal. Dec. 17, 2015). A District Judge applied **Rule 37(e)** to a pending motion since it would be just and practicable to do so, given that "[a]s a practical matter" it would lead to the same result if it had simply

[13] *Accord*, EEOC v. Jetstream, 878 F.3d 960 (10th Cir. Dec. 28, 2017)(noting that giving an inference when the violation was not in bad faith could tip the balance in ways the lost information never would have); *see also* Tipp v. Adeptus, 2018 WL 447256, at *5 (D. Ariz. Jan. 17, 2018)(Rule 37(e) provides "helpful rationale" in deciding a case involving shredding of hand-written notes); see also

been acting under its inherent authority before the rule became effective. It decided to permit the jury to decide if an intent to deprive existed with respect to destroyed ESI since a reasonable trier of fact could conclude it existed. It stated it would permit submittal of evidence of what evidence was destroyed, the notice of litigation and intent and, if there was sufficient evidence, would instruct the jury as suggested by the Committee Note.

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

56. **Eshelman v. Puma** [2017 WL 2483800, at *5](E.D. N.C. June 7, 2017). A Magistrate Judge to whom a motion for a jury instruction was assigned concluded the Rule 37(e)(2) did not justify imposition of an adverse inference under because of failure of the party to act to prevent the loss of internet browser information (ultimately overwritten by Google) immediately upon receipt of a demand related to the anticipation of litigation. The court concluded that the loss, "at most," resulted from negligent conduct. The party did not have a formal document retention or destruction policy and a litigation hold was not issued until later. The court went through the predicate requirements of Rule 37(e) and held that there was no showing that additional discovery could not provide the same information as the browser history, such as by depositions. Moreover, there had been no showing of prejudice within the meaning of subdivision (e)(1) since it was required to be shown some evidence regarding the particular nature of the missing ESI in order to evaluate the prejudice it was being requested to mitigate. The court noted that the moving party did not argue that the party had acted with an intent to deprive and relied only on case law that predated the 2015 revision to Rule 37(e).

57. **Estate of Vallina v. County of Teller Sherriff's Office** [2017 WL 1154032] (D. Colo. March 28, 2017). Motion for adverse inference, for failure to preserve prison video denied under Rule 37(e) and Turner v. Public Service, 563 F.3d 1136, 1149 because of a lack of showing of prejudice, citing Zbylski v. Douglas Cty. Sch. Dist, 154 F. Supp.3d 1146, 1171 ("the prejudice must be actual, rather than merely theoretical") and no showing of bad faith or intent to deprive under **Rule 37(e),** since the loss was, at most, the result of negligence when it was automatically overwritten.

58. **Feist v. Paxfire** [2016 WL 4540830] (S.D. N.Y. Aug. 29, 2016). In action seeking statutory and actual damages under the Wiretap Act, where the court purported to apply **Rule 37(e),** the court barred a party from asserting evidence in opposition to a summary judgment motion or

at trial. The court found it was not reasonable for a sophisticated plaintiff to utilize a "cleaner" after it filed suit, and while it "does not conclude that [the party] acted intentionally to deprive" she must "bear the risk" of running the cleaner and the court would "presume" that any missing cookies would have been "unfavorable." It also precluded the party from arguing "that statutory damages are to be awarded in this case" but did not rule on it.

59. **First American Title v. Northwest Title** [2016 WL 4548398] (D. Utah Aug. 31, 2016). In action against former employees who formed a competing business, hiring other former employees, the court methodically applied **Rule 37(e)** to several losses of ESI. Relief was denied where it was not shown that the ESI could not be restored through additional discovery or where no prejudice was shown. In one case, the new enterprise failed to take reasonable steps to maintain documents and thumb drive brought over by an ex-employee (*5). As to those materials, the court permitted the introduction of evidence and argument under **(e)(1) before the jury,** but since there was no evidence of intent to deprive, denied evidence preclusion, an adverse inference, or monetary sanctions under subdivision **(e)(2)**. **In dicta, the court noted that while an oral litigation hold did not per se violate of Rule 37(e), it was problematic.**

60. **First Financial Security v. Freedom Equity Group** [2016 WL 5870218] (N.D. Cal. Oct. 7, 2016). In an opinion mixing **Rule 37(e)** measures with those under **Rule 26(b),** the court recommended a permissive adverse inference jury instruction against a newly formed entity of former employees for actions of its "agents" in deleting text messages under **Rule 37(e)** because it inferred a shared intent of the "agents" of the defendant to deprive the moving party of the use of the deleted text messages. The court held that the failure to preserve text messages occurred at a time when there was an obligation to preserve, that the party "took no reasonable steps to preserve" and that the messages cannot be restored or replaced through additional discovery, allowing an adverse inference instruction upon finding intent to deprive. (*3). The court rejected the argument that coincidentally the parties had been ignorant of the possibility of being sued and had a habit of routinely deleting text messages, thus finding that they acted with intent to deprive. The failure to produce a database in native format pursuant to a series of court orders was sanctioned by a permissive inference under **Rule 37(b)** by allowing a jury to infer particular facts needed in the claim on the merits, primarily on procedural grounds to punish delay and avoidance of orders, without finding bad faith. **The court does not acknowledge an earlier Minnesota decision involving the same parties and some of the same issues. *See also* First Financial Security v. Lee, 2016 WL 881003 (D. Minn. March 8, 2016)(granting adverse inference based on Rule 37(b) without citing Rule 37(e) after concluding that it could not find "bad faith" as required by use of inherent power in the Eighth Circuit (listed in Appendix B).**

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

62. **Fitzpatrick v**. Sgt. Verheyen [2017 WL 4792242] (E.D. Wisc. Oct. 23, 2017). The negligent, at most, failure to organize surveillance videos so that they could be promptly located was found not to "reflect an intent to deprive" a party of video evidence under Rule 37(e).

63. **Fleming v. Escort** [2015 WL 5611576] (D. Idaho Sept. 22, 2015). In a patent infringement action with a substantial history of discovery abuse by defendant, the court authorizing an adverse inference for failure to preserve **samples of products using challenged source codes** illustrating changes at issue in patent litigation. The court held it had the authority to admit evidence of spoliation and to permit a jury to draw an adverse inference without a finding of bad faith under Circuit authority. (*4) It acknowledged that **Rule 37(e)** (not then in effect) was drafted to deal with costly and burdensome efforts to preserve, but argued that the burden could have been avoided if the defendant had discussed it with the other party, instead of sending it on a fool's errand to try to try to buy copies of the product in the market. **Example of case in which either Rule 37(e) or Circuit rules could have been applied if the Rule had been in effect.**

64. **[Loss of Documents] Fox v. Steepwater** [2018 WL 2008308, at *3] (D. Utah May 14, 2018). the court noted the importance of placing a duty to preserve at the time counsel was hired to help an unsophisticated plaintiff file an EEOC charge, since otherwise "counsel would have a perverse incentive to tell clients not to preserve evidence upon filing an EEOC charge." **Although not a Rule 37(e) case, it makes the key point that counsel conduct is relevant to establishing the existence of a duty to preserve.**

65. **Friedman v. Phila. Parking Auth.** [2016 WL 6247470](E.D. Pa. March 10, 2016)(Opinion); see also 6246814 (Order). In action by taxi cab company against its local regulators, **Rule 37(e)** was not applied because there was (at least not yet) any showing that ESI was "lost" (¶69) or that the party acted with an "intent to destroy" since negligence or gross negligence is insufficient (¶73) or that there had been any prejudice under subdivision (e)(1). After additional discovery, the party "may move for evidentiary rulings, short of an adverse inference, relating to the failure to preserve" since "absent prejudice," the court could not define the scope of the evidence to be admitted or argued to the jury. (¶85). However, while court had power to act ("without limitation") under its inherent authority to remedy litigation misconduct ((¶75), attorney's fees were awarded under **Rule 37(a)** as a more "tailored" remedy (¶76). The Court held that movants needed to establish by a preponderance of the evidence the "facts warranting findings under Rule 37(e)" and rejected the conclusion in CAT3 that a higher standard of proof was required for sanctions under Rule 37(e) since "non-monetary" sanctions do not involve fraud, the party sought only an adverse inference, the fact that an analysis of the state of mind did not require it and, applying a higher standard might allow a spoliator to benefit and the party was only seeking an adverse inference. (¶58-59).

66. **FTC v. DIRECTV, Inc**. [2016 WL 7386133] (N.D. Cal. Dec. 21, 2016). The court refused to sanction a party that had preserved screen shots, but not the fully interactive website. The FTC argued that the party had failed to take 'reasonable steps' and that it was entitled under subdivision (e)(1) of **Rule 37(e)** to an order precluding use of an expert report. The Court held that the FTC should have been "more proactive in its efforts to obtain discovery." (*4).

It also noted that the FTC had not shown it was "sufficiently prejudiced to warrant exclusion of the information," which was greater than what is necessary to cure the prejudice" identified, but ordered an additional deposition of the expert, noting that the case would be resolved by a bench trial, not a jury. It also noted that "after the 2015 amendments to Rule 26(b)(1), the FTC is only entitled" to discover information that is relevant and proportional to the needs of the case" and DIRECTTV could not be sanctioned under Rule 37(e) for failing to preserve ESI "solely because" the FTC asserts that "potentially relevant" other ESI may have existed (at *5).

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

68. **GN Netcom v. Plantronics** [2016 WL 3792833] (D. Del. July 12, 2016). ***See also* 2017 WL 4417810 (D. Del. Oct. 5, 2017).** After concluding under **Rule 37(e)** that a senior executive of a party had failed to take reasonable steps to preserve emails which could not be restored or replaced, despite major corporate efforts to meet its obligations, the Court imposed monetary sanctions involving fees and expenses under subdivision **(e)(1)** to partially address prejudice, ordered payment to the moving party of a $3M **punitive monetary sanction** (three times the penalty imposed by the party on its executive who deleted the emails at issue). It also imposed a permissive adverse inference instruction and expressed a willingness to impose evidentiary sanctions if warranted as the case progressed to trial having found that the party had acted in bad faith and with the intent to deprive on the "totality of the record," citing the double deletion of the email. (*7-8, *12). The court found that substantial deletions by the executive were "the opposite of having taken reasonable steps" and that the entity could have done more. The conduct was attributable to the employer, and was "buttressed" by actions of counsel and the party in the initial refusal to acknowledge retention of an expert (Stroz) and permit them to complete an analysis of the missing email. (*7-8) The court applied Circuit law to shift the "heavy burden to show lack of prejudice" to the bad faith spoliator, which it did not meet. (*9-12) Subsequently, in October 2017, it issued a pretrial order setting for the "Stipulated Facts" which would read to the jury, as well as the pre-evidence instructions and post trial permissive adverse inference instructions, informing the jury of its duty to avoid having the missing ESI tilt the playing field. It also ruled on whether evidence of a possible Federal debarment proceeding was admissible (no, unless the party inaccurately presents evidence that it has not been the subject of a governmental investigation. 2017 WL 4417810 (D. Del. Oct. 5, 2017).

69. **Gonzalez-Bermudex v. Abbott**, 214 F. Supp.3d 130 (D. P.R. Oct. 9, 2016). In an Amended Opinion involving an employment claim, the court cited **Rule 37(e)** in provisionally denying an adverse inference for failure to preserve ESI lost because of a failure to interrupt an auto-

delete email system because there were not yet enough facts of record to make a finding of "intent to deprive." The court held that it would be "revisited" at trial after presentation of evidence. It replaced an initial opinion dated the same day (under which the court applied First Circuit case law in ordering mandatory inference jury instruction without finding a failure to take reasonable steps or intent to deprive. [2016 WL 5899147 (D. P.R. Oct. 9, 2016)].

70. **G.P.P v. Guardian Prot. Products** [2016 U.S. Dist. LEXIS 88926] (July 8, 2016] (E.D. Calif.) In a Memo regarding telephonic resolution of ongoing discovery disputes, the court noted that because a custodial mail box has been produced involving the sole recipient of emails at issue, a sanctions under **Rule 37(e)** were not available since the email not lost, since under **Rule 37(e)** it can be restored or replaced. Further discovery was ordered as to non-email ESI identified to determine if it is in fact lost, which would implicate Rule 37(e). The court also noted the relationship between relevance and the duty to preserve.

71. **Greer v. Mehiel** [2018 WL 1626345] (S.D.N.Y. March 29, 2018). The District Judge refused to sanction deletion of emails under **Rule 37(e)** because they were restored or replaced by copies and the court found no basis to conclude that any was missing, given that it was possible that the witness statement that she had seen one referred to one them. The court went on to say, however, that there was no evidence of "willfulness, bad faith, or any fault" to justify the severe sanction of summary or default judgment citing Guggenheim Capital, 722 F.3d 444, 450-51 (2nd Cir. 2013) *in addition* to **Rule 37(e)(2). This may imply that the court felt that taken as a whole (there were other allegations of misconduct) that there was no basis to exercise inherent powers to deal with the total misconduct or it may be simply a reinforcement of the Rule.**

72. **Hashim v. Ericksen** [2016 WL 6208532] (E.D. Wisc. Oct. 22, 2016). In a prisoner case where the court refused a dismissal because of the destruction of physical copies of menus pursuant to retention policy, the court held that there was no evidence that the staff destroyed the evidence "with an intent to deprive their use by plaintiff in this litigation.," citing Rule 37(e)(2) as well as Faas v. Sears, Roebuck & Col, 532 F.3d 633, 644 (7th Cir. 2008).

73. **Harper v. City of Dallas** [2017 WL 3674830] (N.D. Tex. Aug. 25, 2017). The court refused to grant any relief under Rule 37(e) where the moving party failed to demonstrate that ESI in the form of email and recordings of telephone conversations was lost because of a failure to take "reasonable steps." (at *16). The court indicated it would entertain the motion only if an appropriate, properly supported motion were submitted.

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

75. **HCC Insurance Holdings v. Valda Flowers** [2017 WL 393732] (N.D. Ga. Jan. 30, 2017). In a decision applying **Rule 37(e)** to a pending case because it incorporates the existing duty to preserve (n. 3), the court refused to find that "spoliation" had occurred after reviewing forensic findings by a neutral expert of examinations of personal and work computers and assessing the

explanations offered. The court distinguished cases where it was clear that relevant information existed on destroyed devices. Moreover, as to one defendant, there was no evidence that missing evidence was on personal laptop or "on a cloud-storage service in her control."

76. **Hefter Impact v. Sport Maska** [2017 WL 3317423] (D. Mass. Aug. 3, 2017). In a particularly well-written opinion, a court refused to sanction certain preservation failures under both Rule 37(e) and inherent powers (separately applied to missing ESI and to missing handwritten notes) after a thorough description of what appears to be a fair description of typical preservation effort undertaken in good faith. The court did not explicitly rules on whether "reasonable steps" had been taken, but essentially achieved a :safe harbor result for the party that had undertaken to preserve.

77. **Helget v. City of Hays** [844 F.3d 1216] (10th Cir. Jan. 4, 2017). In a decision finding that a party had waived the right to challenge the failure to resolve a spoliation motion, the court, in a footnote, acknowledged that **Rule 37(e)(1)** "instructs courts to 'order measures no greater than necessary to cure" prejudice but if a party acts with intent to deprive, a court may presume unfavorability, issue an adverse inference or dismiss or enter a default under Rule 37(e)(2)(A)-(C). However, in reviewing the appeal itself, the court spoke of reviewing a district court's ruling on a motion for spoliation sanctions in terms of the former Circuit principles, citing Turner v. Pub. Serv. Co. of Colo., 563 F.3d 1136 (10th Cir. 2009) and Silvestri v. GM, 271 F.3d 583 (4th Cir. 2001), while noting in a footnote that courts possess inherent power to manage their own affairs and that spoliation of evidence "is a matter of federal law," although the issue of state or federal law was not "dispositive here." An earlier ruling involved "internet-usage and email history" had resulted in an order for a forensic examination.

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

79. **Hernandez v. Tulare County** [2018 WL 784387] (E.D. Cal. Feb. 8, 2018). A Magistrate Judge applied **Rule 37(e)** to a correction center's failure to retain video footage of an incident resulting in prisoner injury resulting from non-compliance with procedures after a duty to preserve attached and acknowledging but not focusing on the "reasonable steps" requirement. However, because there was no prejudice and no intent to deprive, it denied all relief under the Rule. **This is a classic example of where a genuine safe harbor actually exists, but not because the party took "reasonable steps."**

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

settlement, which also vacated the sanctions [171 F. Supp.3d 1020, at n. 4 (S.D. Cal. March 15, 2016)].

81. **Horn v. Tuscola County** [2017 WL 1130095, at *4 (E.D. Mich. March 27, 2017] In an opinion overruling an earlier R&R to the contrary 2016 WL 6683570] (Nov. 8, 2016), the court analyzed the loss of a surveillance video under **Rule 37(e)** and quoted it as requiring an "intent to deprive" standard before presuming the contents of a video were unfavorable, but then applied a pre-enactment case to conclude that the rule was satisfied if the conduct was negligent. However, it refused to actually grant an adverse inference because the contents of the video were not relevant to the defendant's liability.

82. **Hsueh v. New York** [2017 WL 1194706] (S.D.N.Y. March 31, 2017). In granting an adverse inference for plaintiff's deletion of an audio tape, despite its subsequent recovery and production from a hard drive backup, the court held that **Rule 37(e)** did not apply "because she took specific action to delete it." The court cited CAT3, 164 F.Supp.3d 488, 495 for the proposition that Rule 37(e) was adopted to address over-preservation concerns which "are not applicable here." As the court put it: "It was not because Hsueh had improper systems in pace to prevent the loss of the recording," instead, "it was because she took specific action to delete it." *4). The court ultimately concluded that "under either" **Rule 37(e)** or the courts inherent authority, an adverse inference was the appropriate remedy because the party acted in bad faith "and with an intent to deprive" the defendant of its use, despite an obligation to preserve the highly relevant recording, which was not completely produced in the end. The court also awarded attorney fees and costs. (The court rejected the argument that the audio recording might not be ESI because it could "think of no reason why a digital audio recording would not be ESI" (also at *4).

83. **Hulett v. City of Syracuse** [2017 WL 2333712] (N.D.N.Y. May 30, 2017). A District Judge refused to apply the Amended Rule to the loss of surveillance video because the issue of spoliation was asserted before the effective date "at a time when [the moving party] could have obtained an adverse inference simply by demonstrating that defendants were negligent." Citing CAT3, the court held that the new rule governs unless its application would be unjust or impracticable.

84. **Hyatt v. Rock** [2016 WL 6820378] (N.D.N.Y. Nov. 18, 2016). In discussing the potential need to produce an image from a digital camera (not at that time), the court "highlights the requirement that steps be taken by the Defendants to preserve all electronically stored evidence for trial," citing Rule 37(e)).

85. **IBM v. Naganayagam** [2017 WL 5633165] (S.D.N.Y. Nov. 21, 2017). The court did not find it unjust to apply **Rule 37(e)** to a case filed prior to the effective date where the issue of spoliation was briefed and argued later. Moreover, while more lenient as to sanctions, the rule does not preclude a party from seeking "other avenues" of relief for negligent spoliation. The court refused to find prejudice existed because the contents were "fairly evident," and the moving party failed to demonstrate how their absence was prejudicial.

86. **ILWU-PMA Welfare Plan v. Connecticut General** [2017 WL 3459880 (N.D. Cal. Jan. 24, 2017). In a thoughtful opinion by a District Judge applying Rule 37(e) "framework" because it is "directly on point" (but reserving right to assert inherent authority) the court held that it could not, on the record before it, determine if additional sanctions were appropriate beyond additional discovery ordered, at defendants expense. The case involved an ERISA action by trustees against a service provider which failed to preserve ESI which was contained on servers it had sold to ADP and as to which it had contractual access. The court found that it was not "per se" unreasonable to have failed to make copies of the ESI and depend upon third parties, but that under the circumstances, the party had failed to take "reasonable steps to preserve relevant information for this reasonably forseeable litigation." It reopened discovery and ordered subpoenas to and depositions of ADP and stated that further sanctions, if any, would be considered under "either Rule 37(e) or inherent power" after the all available evidence is placed before the trier of fact at trial so that the importance of any remaining gaps can be assessed. **Clearly indicates that inherent power authority co-exists with Rule 37(e), which provides the "framework" but is not the only source of sanctioning authority in the Northern District of California**.

87. **In re Bridge Construction Services** [185 F.Supp.3d 459] (S.D. N.Y. May 12, 2016). **Rule 37(e)** is not applicable to loss of physical property, including, as in this case a "notebook or log book, and not ESI." It has "changed the rules" by "overruling" *Residential Funding* because no adverse inference is available for losses of ESI unless the party that destroyed the ESI acted with intent to deprive another party of the use in the litigation. Judge Koeltl also noted that sanctions could be imposed on the employer of an employee serving as an agent to the extent he was acting within the scope of his employment.

88. **In re Ethicon** [2016 WL 5869448] (S.D. W. Va. Oct. 6, 2016). In follow-up to earlier decision by the Magistrate Judge denying sanctions in an MDL based on allegations of spoliation decided prior to 2015 amendments [299 F.R. D. 502 (Eifer, M.J.)], the District Judge denied a motion by one plaintiff under **Rule 37(e)** for additional sanctions under either **(e)(1)** or **(e)(2)** because of the loss of a custodial file. The court held the rule applicable because the threshold requirements outlined in the rule were satisfied and the movant had demonstrated that not "all" of the emails and electronic documents were restored or recovered by other means. The finding of no prejudice to "her case as a whole' was made despite finding that the movant was burdened from having to piece together information from various sources. [Similar rulings were made as to the same custodial file in 2016 WL 5869449 and 5858996 involving motions by two other individual plaintiffs].

89. **Internmatch v. Nxbigthing** [2016 WL 491483] (N.D. Cal. Feb. 8, 2016), *vacated by order of Ninth Circuit*, 2017 WL 8944065 (N.D. Cal. Nov. 17, 2017). Plaintiffs seeking declaration that a party fraudulently obtained a trademark registration (and its cancellation) were granted an adverse inference and evidence preclusion where defendant consciously disregarded its preservation obligations regarding ESI which could have established the genuineness of use documents used in its defense. The party made bogus claims of power surges and other conduct in in bad faith and prevented the plaintiff from verifying the genuine of the evidence of certain use documents. (*13-14). It also awarded monetary sanctions in the form of attorney fees under its inherent powers as a result of the bad faith conduct, since the plaintiff had to

spend substantial resources in investigating the spoliation. In footnote 6, it stated that whether it must make the findings set forth in **Rule 37(e)** before exercising its inherent authority "has not been decided," but that it need not resolve that issue since it also concluded that defendants had acted with the requisite "intent to deprive" under **subdivision (e)(2).**

90. **Jackson v. Haynes & Haynes** [2017 WL 3173302] (N.D. Ala. July 26, 2017). A Distric Judge rendered a summary judgment against an individual pursuing an FSLA claim after barring use of summaries of data to create a genuine factual dispute about hours worked because she had failed to take "reasonable and prudent steps" as required under Rule 37(e) to preserve contemporaneous original notes relating to hours worked. The court found that this resulted in prejudice, but that this negligent and irresponsible conduct was not sufficient to show an intent to deprive. The court went through a litany of reasons, such as relying on a free version of an "Hours Tracker" on her cell phone (without paying for one that allowed export from a cell phone) and problems with use of Excel and Word spreadsheets that the Genius Desk at Apple could not resolve, compounded by her daughter's refuse to furnish the MacBook on which the information was stored. The court did not credit the veracity of the individual plaintiff and summarized the reasons in substantial detail in the text of the opinion and in footnotes.

91. **Jaffer v. Hirji** [2017 WL 1169665] (S.D. N.Y. March 28, 2017). In resolving a family dispute involving ownership of residential property, the court denied an adverse inference based on deletion of a recording of a conversation when the file was transferred from a cell phone to a computer. The court noted that the "standard" under Residential Funding that it was sufficient that the evidence was destroyed negligently has been "partially supplanted" by the Rule 37(e) which requires a finding of an intent to deprive. Litigants seeking an adverse inference for destruction of ESI "face a tougher climb than in years past." (*6). While the Second Circuit has "not yet published an opinion examining the impact" courts in the Second Circuit have recognized "that Rule 37(e) replaces the prior framework for spoliation claims," citing Citbank [2017 WL 462601] and In re Bridge Construction Services of Florida [185 F. Supp. 3d 459, 472-73]. Given that there was no showing of intent to deprive nor of prejudice, the court declined to draw an adverse inference or impose any other sanctions.
92. **Jenkins v. Woody** [2017 WL 362475] (E.D. Va. Jan. 21, 2017). In an action seeking redress from a prisoner's death, the court applied **Rule 37(e**), applying a clear and convincing standard of proof, and concluded that defendants had failed to take reasonable steps to preserve digital video of the prisoner which could not be restored or replaced through additional discovery. "No party" asserts the data "does not constitute ESI." It did not find that the failure to preserve was undertaken with an intent to deprive and refused to impose an adverse inference. However, in view of the substantial prejudice its loss caused, it ordered that evidence of spoliation and argument would be available at trial, the court would preclude any evidence or argument that the contents of the video corroborated defendant's version of the events or that similar circumstances had existed in another death and awarded payment of fees and expenses. It found the measures necessary, but not greater than necessary, to cure the prejudice. The court also awarded monetary sanctions for late delivery of audio files under **Rule 37(b),** as a result of violating **Rule 37(d),** and as carefully limited to the "time and money" spent as a result.

93. **Johnson v. Brennan** [2017 WL 5672692, at 8 (S.D. Tex. Nov. 27, 2017)]. The Senior District Judge refused to find Rule 37(e) remedies were avaialbe because of the late delivery of emails since the rule applies only if the ESI "*cannot be restored or replaced through additional discovery"* (emphasis in original)).

94. **Johnson v. City of Bastrop** [2017 WL 3381340, at n. 6 & 7] (W.D. La. Aug. 3, 2017). The court declined to grant pro se motions for contempt and sanctions)a case primarily involving allegations of violation of Rule 26(g), the court found that any relief under **Rule 37(e)** would be "duplicative and redundant" and, in any event, there was no evidence of prejudice or that the non-moving party had acted with an intent to deprive.

95. **Keim v. ADF Midatlantic** [2016 WL 7048835] (S.D. Fla. Dec. 5, 2016). In a putative class action under the TCPA, the plaintiff was unable to produce text messages relevant to his claim and sanctions were sought under **Rule 37(e)(1).** The court famously noted that the rule "does not set forth a standard for preservation and does not alter existing federal law as to whether evidence should have been preserved or when the duty to preserve attaches." The court ultimately refused to apply the rule because it could not be certain that the deletions at issue had not occurred prior to attachment of the duty. It noted, therefore, that the "better practice" would have been for the plaintiff's counsel to "sequester and copy the contents of a plaintiff's cell phone at the time that litigation is anticipated" so that a court can later determine which preserved portions must be produced," saving costly and time-consuming motions that use significant court and attorney resources (n.4).

96. **Klipsch Group v. Epro E-Commerce** [880 F.3d 620, 2018 WL 542338] (2nd Cir. Jan. 25, 2018). On an interlocutory appeal before trial, the Second Circuit affirmed a lower court findings of discovery misconduct due to "willful" spoliation of ESI without relying on Rule 37(e) and inferred prejudice from spoliation, resulting a permissive inference jury instruction (see footnote 5, referenced at *6) and a restraint on ePRO's assets. It affirmed the restrain as a form of injunctive relieve giving it jurisdiction and ruled on other issues "inextricably bound up" with the validity of the injunction. Thus, it also affirmed the imposition of $2.7M in counsel fees under its inherent authority, noting that the costs were carefully limited to those incurred in direct response to the party's misconduct (*8). It refused to consider if **Rule 37(e)** applied, explaining in footnote 6 that since the District Court had found the "requisite bad faith" for purposes of inherent authority, "[a]ccordingly, we have no occasion to address the parties' arguments regarding whether the amendments to Rule 37 that took effect on December 1, 2015 apply to this case." In footnote 7, it rejected the argument that the monetary sanctions were punitive measure in violation of due process rights, because the court found the requisite "bad faith" and since it reimbursed the party only for legal bills which litigation abuse occasioned., citing Goodyear Tire v. Haeger, 137 S.Ct. 1178 (2017). It also rejected the argument that the award improperly awarded the party for excessive discovery when it should have known that is was not proportional to this "small value" case. The court determined that a "compensatory discovery sanction" is decided independent of the ultimate recovery on the merits. (*10), although it would be "regrettable" if true in light of Rule 1 and amended Rule 26(b) (*112).

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

98. **Learning Care v. Armetta** [315 F.R.D. 433] (D. Conn. June 17, 2016). In a contract dispute where a former employees' laptop was destroyed "in the ordinary course of business" after the duty to preserve attached the Court declined to apply **Rule 37(e)** because it would be "unfair" to do so since the issue had been raised in September, 2015 at a time when Second Circuit authority would not have barred an adverse inference for negligence. (437) The negligent wiping of hard drive of laptop was sanctioned by an award of reasonable attorney's fees to deter the party from "doing it again" which was deemed proportionate to the prejudice involved, which resulted from "careless," but not grossly so. The court applied the *Residential Funding* "relevance" requirement of specifying "the type and substance of the destroyed evidence and that the evidence was favorable to his position," but held there was enough evidence to satisfy it. (438-439) It also rejected the argument that prejudice could have been reduced by third party discovery since that goes to the type of sanctions the court imposes. (439)

99. **Legacy Data Access v. Mediquant** [2017 WL 6001637] (W.D.N.C. Dec. 4, 2017). In a post jury verdict decision discussing why the court had permitted the jury to consider evidence of spoliation of the contents of an SD card, the court applied its inherent power **without mentioning Rule 37(e)** because "[t]his case involves the destruction of ESI, not the loss of ESI. Therefore, **Rule 37(e)(2) is inapplicable**." (at n. 8).

100. **Leidig v. Buzzfeed** [2017 WL 6512353] (S.D.N.Y. Dec. 19, 2017). In an action brought against Buzzfeed for libel in asserting that it had broadcast fake news, a foreign entity and Leidig deleted two websites and did an "amateurish" collection job of emails. The court found that they had not taken reasonable steps to preserve, but did not conclude that it and they had acted with an intent to deprive although were "certainly negligent" (*12) since that is "roughly a negligence standard." (*10). Intent to deprive requires not merely an intent to perform an act but "rather the intent to actually deprive another party of evidence." (*11) The court noted in a footnote that it was irrelevant if they were grossly negligent, as "**Rule 37(e)(1)** provides no reason to distinguish between gross negligence and ordinary negligence. (n. 8). It also refused to find that securing screen shots were not sufficient to restore or replace. It decided to allow Buzzfeed to present evidence of destruction of metadata (so as to suggest alternative creation dates); disabling of websites ; and can use evidence from internet archive if it chooses to do so and plaintiffs will be precluded from arguing the evidence is inadmissible." (*14). From all indications, the Magistrate Judge regarded this as a final order, not an R&R.

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

102. **Lexpath Techs. Holdings v. Brian R. Welch** [2016 WL 4544344] (D. N.J. Aug. 30, 2016). In action by former employer against former employee now in competition, the court granted sanctions after finding that "spoliation" had occurred under Circuit law and ignored the requirement to show that the loss occurred because of a lack of "reasonable steps." It applied the **Rule 37(e)(2)** requirement that spoliation must have resulted from an "intent to deprive" in deciding, under the facts, to instruct the jury that it may presume that the missing information was unfavorable. In choosing among the options in the rule, it relied on *Schmid v. Milwaukee Elec. Tool*, 13 F3d76 (3rd Cir. 1994) that it should choose a lesser sanction where it will avoid substantial unfairness and will serve to deter if a party is seriously at fault. [While the court inexplicitly failure to utilize the threshold requirements, they would have been satisfied.]

103. **Linior v. Polson** [2017 WL 7310076, at *2 (E.D. Va. Dec. 6, 2017)]. A Magistrate Judge recommended that the court deny a motion for dispositive sanctions under Rule 37(e) because, *inter alia*, the individual defendant had no power to have compelled its former employer to take "reasonable steps" to compel his TSA employer to preserve video recordings of the incident involving excessive force at the security screening. The court also noted the lack of prejudice or evidence of intent to deprive, since even if the agency had such an intent, that does not support a finding of intent by the defendant.

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

105. **Lokai Holdings v. Twin Tiger** [2018 WL 1512055] (S.D.N.Y. March 12, 2018). A Magistrate Judge sanctioned an entity sued for trade dress copying of a bracelet as a result of the loss of emails under confusing circumstances sufficient, in the courts view, to justify remedial measures under Rule 37(e)(1) but not under (e)(2) given a lack of intent to deprive (*15-*16) and a failure to show selective deletion (*16). The attorney for the non-moving party came in for criticism for failure to follow Zubulake standards of overseeing compliance with a litigation hold and not becoming familiar with policies and architecture. (*11). While the court found that prejudice existed, it was clear that it had been able to obtain discovery sufficient to support its claims. It exercised its discretion to order reimbursement for attorney's fees and costs to ameliorate "economic prejudice" citing CAT3 and was precluded from using unpreserved emails unless duplicate copies obtained an any testimony suggesting such emails

would support defenses or counterclaims. It left open the door for renewed requests prior to trial if material gaps are shown for an instruction that a jury may make 'reasonable extrapolations or interpolations" from existing sales data. (*17)

106. **Love v. City of Chicago** [2017 WL 5152345, at *5] (N.D. Ill. Nov. 7, 2017). The court, applying former version of **Rule 37(e) because the current version** is not retroactive held that there was no duty to preserve audio recordings overwritten in the regular course of business absent notice of the duty (citing In re Pradaxa, 2013 WL 5377164 at *3 (S.D. Ill. 2013).

107. **Manufacturing Automation v. Hughes** [2018 WL 2059839] (C.D. Cal. April 30, 2018). A District Judge refused to hear a spoliation motion for default judgment because of the alleged deletion of emails because it was procedurally premature, since the aggrieved party had not sought to obtain them by a motion to compel and, if that had failed, to subpoena the missing emails from alternative sources. [citing Anheuser-Busch, 69 F3d 337 as requiring those steps before bringing a motion for terminating sanctions] (ftn. 6). The court had earlier held that a court entertaining a request under Rule 37(e)(2)(C) must consider five factors, including the availability of "less drastic sanctions." (*4).

108. **Marquette Transportation v. Chembulk** [2016 WL 930946] (E.D. La. March 11, 2016). In an action alleging negligent operation of a vessel near New Orleans, allegedly causing a moored boat to capsize, **Rule 37(e)** was not applicable even if reasonable steps had not been taken to initially preserve because certain key audio and radar data, which had been deleted, was acquired after a DVE/CD-ROM to which it had been downloaded had been found by the captain of the vessel. The court also refused a request under **Rule 37(c)** for costs of expenditures for expert during period before the full data set was recovered because "the matter involves VDR data, which is electronically stored information ("ESI")."

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

110. **Marten Transport v. Plattform Advertising** [2016 WL 492743](D. Kan. Feb. 8, 2016) In a trademark and unfair competition action based on continued use of plaintiff's mark after termination of the agreement permitting it to do so, the court refused to find a breach of the duty to preserve under **Rule 37(e).** While it was clear that the ESI at issue was not preserved (internet browsing history) the party "did not know or have reason to know" that it would be relevant at the time. (*3). By the time it became clear that it was at issue, the employee had moved to a new work station and the browsing history had been recycled pursuant to standard

procedures in effect at both parties. The court noted that the **Rule 37(e)** Committee Notes expressly instruct that reasonable steps suffice, the rule did not call for perfection and the "routine good faith operation of an electronic information system" is a relevant factor in determining if a party took reasonable steps. (*5) It refused to use a "perfection standard" or "hindsight" in determining the scope of the duty to preserve. (*10).

111. **Martinez v. City of Chicago** [2016 WL 3538823] (N.D. Ill. June 29, 2016)(Dow, J.) In ruling on motions in limine filed prior to a trial arising out claims against police after arrests, the court apparently applied existing Circuit Principles to refuse to permit use of a dash cam video to the extent it captures references by an officer to "another" lawsuit involving one of the suspects (it would open the door to irrelevant information with the capacity of unfairly prejudicing both sides, citing FRE 401 & 403)(*16) and refused to instruct the jury that they should draw an adverse inference from a failure to produce other "videos from the cameras" in the squad cars (*23- 24). The court noted that **Rule 37(e)** negated use of gross negligence as a basis for adverse inferences, but since no evidentiary showing of bad faith existed, it was not necessary to rule on the interaction between **Rule 37(e)** and Seventh Circuit rulings on adverse inferences where the Circuit had not yet "addressed how, if at all, the Rule 37 impacts its rulings on adverse inferences." ["the Committee [Note] is silent on how the amendment impacts presumptions based on document retention policies."(*24).] The Court also noted since plaintiff only sought an adverse inference, it had "no occasion" to determine if a less severe remedy might be available. [n.11].

112. **Matthew Enterprise v. Chrysler** [2016 WL 2957133] (N.D. Cal. May 23, 2016). In action by car dealership challenging failure to adjust sales incentive thresholds, a "lackadaisical" preservation effort was made by dealer after it threatened to sue Chrysler. No effort was made by plaintiff to have outside vendor retain communications (which were deleted after 2 years) and email was not retained when switching email providers. These efforts did not qualify for the "**genuine safe harbor**" available under **Rule 37(e)** for parties that take "reasonable steps." Prejudice existed because lost customer communications "could" have contained information whose loss denied Chrysler the ability to undercut statistical evidence by anecdotal evidence of customer communications. As a remedy, Chrysler would be allowed to use evidence of communications post-price discrimination period, to support arguments as to reasons for choosing dealership and present evidence and argument about spoliation of communication lost if Plaintiff offers testimony. Moreover, "if the presiding judge deems it necessary," it can provide instructions to assist the jury in evaluation. In n. 55, **Rule 37(e)(2)** measures such as instructing the jury to presume the information unfavorable were inapplicable because of the absence of "intentional spoliation." The court refused to assess the deletion of emails under **Rule 37(b)** because the issue "is spoliation and not compliance with" the court's order on motion to compel" their production. (n. 37 & 47).

113. **Mazzei v. The Money Store** [656 Fed. Appx. 558] (**2d Cir.** July 15, 2016). The Second Circuit affirmed denial of an adverse inference noting that "under the current" **Rule 37(e)**, it could be granted only upon finding that the party acted with an intent to deprive and that the court "specifically found that defendants did not act with such intent." The Panel noted that *Byrnie v. Town of Cromwell* was "superseded in part by Fed. R. Civ. P. 37(e)(2015)." [The lower court (Koeltl, J.) had found that although the party willfully failed to preserve, there was

"no evidence of bad faith 'in the sense that the defendants were intentionally depriving the plaintiff of information for use in this litigation." [internal quotes omitted]. 308 F.R.D. 92, 101 (S.D.N.Y. May 29, 2015).

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

115. **McGowan v. Schuck** [2016 WL 4611249] (W.D.N.Y. Sept. 6, 2016). The Chief Judge of the District Court noted in a footnote that Rule 37(e)(2)(C) was one of two federal rules (the other being Rule 37(b)(2)(A)(vi) which "allows a court to enter default judgment against a party for "particularly egregious discovery violations."

116. **McIntosh v. US** [2016 WL 1274585] (S.D.N.Y. March 31, 2016). Court refused to apply **Rule 37(e)** to deletion of video surveillance tape because it would make no sense to apply it to a case briefed before the new rules came into effect. The court acknowledged that the movant is on "shakier legal footing" in seeking adverse inferences if the new Rule were to be applied, and while reluctant to reward the "capriciously aggressive tactics" in submitting the request after the rule went into effect, it would apply the "familiar law" of Residential Funding since the plaintiff is proceeding pro se. In footnote 34, it noted that courts differed as to whether Rule 37(e) applied to "videotape."

117. **McQueen v. Aramark Corporation** [2016 WL 6988820] (D. Utah Nov. 29, 2016). In a case involving loss of ESI and documents involving work orders relating to a work-related death, a court found that reasonable steps had not been taken to preserve due to a delay in use of a litigation hold and the information could not be restored or replaced through additional discovery, citing **Rule 37(e).** It found that prejudice existed because it "may well have an effect on Plaintiffs' ability to pursue their claims." It did not find that the party acted with "intent to deprive" under (e)(2) because it could not find that the "actions were intentional or that its conduct establishes bad faith." As a "lesser sanction," it ordered that the parties be permitted to present evidence of spoliation of the work orders and ESI and "argue any inferences they want the jury to draw." It added that the jury "will not, however, be specifically instructed regarding any presumption or inference regarding the destruction of those materials." The court also awarded reasonable expenses for bringing the motion under Rule 37(a), interpreting it to apply to all motions "seeking discovery" because the "failure to preserve records was not substantially justified" and court intervention was necessitated.

118. **ML Healthcare Services v. Publix Super Markets** [881 F.3d 1293] (11th Cir. Feb. 7, 2018). The Eleventh Circuit affirmed the rejection of a spoliation motion for retention of a limited amount of video in a slip and fall case under federal law, citing both its previous rulings based on *Flury*, where it had found Georgia spoliation law consistent with federal principles, and under Rule 37(e), while declining to determine if the *Flury* principles still applied since the court did not abuse it discretion under either. Specifically, it found that the failure to retain more video "did not constitute bad faith or demonstrate and intent to deprive" since it had immediately saved the most relevant part of the video – the hour during which the fall occurred.

The court ruled that despite later requests for broader preservation, "it might reasonably, and in good faith, have concluded that it did not have to comply with such a broad and far-reaching request." (*10). The court also noted the lack of evidence of bad faith, since it acted consistent with its normal video-retention policies and while plaintiff might have hoped to show other aspects of causation, it narrow narrowed its request nor is that any reason to believe the video would have actually shown conflicting testimony, inconsistent statements or observations from others. Similarly, since the court found there was no prejudice, any additional benefit was purely speculative since the resolution was not clear enough to see any liquids, even if videos were available. Under "either *Flury* or Rule 37(e)," it was no abuse of discretion for the court to deny requests for exclusion. Ron Hedges, in his article on reasonable steps describes this as showing how proportionality fits into a Rule 37(e) analysis.[14]

119. **Moody v. CSX Transportation** [271 F.Supp.3d 410] (W.D.N.Y. Sept. 21, 2017). In a personal injury action crucial data in an event recorder "black box" on the railroad engine was unavailable because of human error in failing to accurate transfer it electronically to a "vault," which was compounded, over the years, by the loss of the laptop from to which it had been downloaded and from which it had been transmitted. The Court methodically applied Rule 37(e) and after a lengthy analysis, came to the conclusion that the party had not taken reasonable steps. Ultimately, the court inferred that the party had acted with the intent to deprive, because the repeated failure over a period of years to confirm that the data had been preserved, particularly before discarding the laptop, was so "stunningly derelict as to evince intentionality." As a measure under Rule 37(e)(2), the Magistrate Judge refused to strike the answer, but ordered an adverse inference to "address" the "evidentiary gap caused by the loss of material evidence, with the wording to be decided by the Court at time of trial. (at *15).

120. **Morrison v. Veale, M.D**. [2017 WL 372980] (M.D. Ala. Jan. 25, 2017). In FLSA action by former employee who accessed and deleted emails from a gmail account, the court acknowledged **Rule 37(e)** but held it was not binding because it became effective after the filing of the case. It applied Eleventh Circuit case-law and conducted an evidentiary hearing after which it found the non-moving party's explanatory testimony not to be credible. It concluded that since the party "deliberately" logged on to its former employers email in bad faith, "the fact-finder must accept as true the time cards/timesheets" plaintiff had created (a "mandatory evidentiary presumption"). **Given the credibility findings made, applying Rule 37(e)'s "intent to deprive" standard would not have made a difference, although it should have been applied. The court did acknowledge that it found the Rule material "persuasive" but not binding, and quoted from the Committee Note at length.**

121. **MPLA v. Gateway Community College** [__ Fed. Appx. __, 2018 WL 1659671] (2nd Cir. April 6, 2018). The Circuit court affirmed, without discussion, the refusal of the district court to reopen the judgment in a Section 1983 case based on the failure to preserve surveillance video of the library from which he was banned. The court held that Rule 60(b) did not apply and, moreover, he did not demonstrate that he was prejudiced by the alleged failure, citing Rule 37(e).

[14] Ronald J. Hedges, What Might Be "Reasonable Steps" to Avoid Loss of Electronically stored Information," 18 DDEE 143, March 1, 2018.

122. **Mt. Healthcare Services v. Publix Super Markets** [881 F.3d (11th Cir. Feb. 7, 2018)]. The Court of Appeals held that amended Rule 37(e) applies to "spoliation of electronically stored video like the video at issue here" (1307) but did not find it necessary to determine if the multi-factor test of *Flury* "is still applicable" since under either Rule 37(e) or the bad faith test in *Flury,* the district court did not abuse its discretion. The lower court did not abuse its discretion in ruling that the failure to retain more video "did not constitute bad faith or demonstrate an intent to deprive Plaintiff of evidence necessary to her case" since there was "no indication" that it had destroyed the evidence in a manner inconsistent with its normal video-retention policies. Moreover, "[d]defendant might reasonably, and in good faith, have concluded that it did not have to comply with" a broad and far-reaching preservation demand. Also, preclusion of evidence was not available because "[u]nder either *Flur*y or Rule 37(e)," a showing of prejudice was required, and the lower court held that any additional benefit from the undisclosed video was purely speculative and conjecture.

123. **Mueller v. Taylor Swift** [2017 WL 3058027] (D. Colo. July 19, 2017). In a thoughtful opinion in a case against Taylor Swift (and others), whose may or may not have been inappropriately touched at a meet and greet preceding a concert, the plaintiff on-air radio personality accused of doing so, subsequently fired by his employer, was found to have spoliated an audio tape of his firing under either or both inherent authority or Rule 37(e) at a time that litigation was anticipated. The court refused to issue an adverse inference under Circuit authority or Rule 37(e)(2) in editing and (destroying) part of the tape, since he was "unjustifiably careless" and nonchalant" about his failure to preserve the devices on which it was recorded in full. . (The court, in footnote 8, argued that the missing audio "was not the type of 'large-volume' [ESI] which motivated the adoption of Rule 37(e) and that "neither party made any argument based on this Rule.") The Court decided to allow the jury itself to decide if it wished to draw an adverse inference and whether or not there was any prejudice by allowing cross-examination of the Plaintiff in front of the jury "*regarding the record of his spoliation of evidence, as described*" in the opinion (emphasis in original) (*5-*7). It also noted that counsel could not discuss the contents of the Order or the court's imposition of sanctions in front of the Jury.

124. **Newman v. Gagan** [2016 U.S. Dist. LEXIS 120501] (N.D. Ind. Sept. 7, 2016). The District Court adopted, after a de novo review, the Report and Recommendations that the jury be instructed that they may infer that deleted ESI would have supported claims of the defendants the information was taken and used without authorization in an employment action based on wrongful discharge. It apparently relied upon its inherent authority under Seventh Circuit principles. The Report refused to apply **Rule 37(e)** to loss of files on a hard drive because the motion was filed before December 1, 2015. [2016 U.S. Dist. LEXIS 123168]. The District Judge also barred any defense based on a claim that the devices which were wiped or from which records were deleted had any of Defendant documents. The District Judge agreed with the recommendations that default judgment was not warranted and with the recommendation that it should refuse to award attorney's fees as well. The Magistrate Judge had noted that if **Rule 37(e)** had applied, it "does not specifically list attorney's fees as an available sanction."

125. **New Mexico Oncology v. Presbyterian Healthcare Services** [2018 WL 1010284 (D. New Mex. Feb. 21, 2018)]. The District Judge, after a devo review, adopting in full the findings of Magistrate Judge at 2017 WL 3535293, at *13 (D. New Mex. Aug. 16, 2017) which denied adverse inference and default judgment under Rule 37(e) but awarded attorney fees under its inherent powers citing *dicta* in Browder v. City of Albuquerque, 209 F. Supp. 3d 1236, 1295-1296 (2016) because it would "serve the interest of justice," citing In re Rains, 946 F.2d 731, 733 (10th Cir. 1991)).

126. **New Mexico Oncology v. Presbyterian Healthcare** [2017 WL 3535293] (D. New Mexico Aug. 16, 2017). In a comprehensive opinion dealing with best practices in litigation hold implementation and collection of ESI, the court criticized the timing and selection of key custodians and the failure of the IT Department to implement the holds, but refused to find that "these imperfections were a result of bad faith or that they resulted in the spoliation of evidence." The court refused to find that the discretion afforded employees to apply the litigation hold warranted a finding of prejudice. The court conceded the "theoretical possibility" that an employee could have deleted a relevant email, but found it pure speculation given the likelihood that the email would have been preserved by another employee. (*5). It found numerous deficiencies in the collection of data but ultimately concluded that the party did not act in bad faith and that harsh sanctions of default judgment or an adverse inference were not warranted. (*12). The court cited **Rule 37(e)** as giving it authority to impose adverse inferences or defaults only if the party acted with intent to deprive (*2-3), although it relied on its inherent authority when imposing cost-reimbursement of 75% of the motion for sanctions, including fees for witnesses to prepare reports and testify at the motion hearing.(*12-13).

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

128. **Nunnally v. District of Columbia** [243 F. Supp. 3d 55] (D.D.C. March 22, 2017). In a lengthy opinion adopting after review a R&R dealing in an employment retaliation case, the court ordered an adverse inference instruction at trial for negligent failure to preserve potentially relevant email despite acknowledging (in note 10) the existence of **Rule 37(e)**. The court held that since Rule 37(b) did not apply in absence of a discovery order, the court may issue appropriate sanctions under its inherent power. The court also held that only "a very slight showing" of relevance was required since the burden on the party seeking the adverse inference is lower.

129. **Nuvasive v. Madsen Medical** [2016 WL 305096] (S.D. Cal. Jan. 26, 2016) Chief District Judge vacated his earlier decision to impose a permissive jury instruction [2015 WL 4479147] at an upcoming trial because **Rule 37(e)** applied and there was no finding that the party had "intentionally" failed to preserve text messages so they could not be used in the litigation. The Court decided, however, to allow both parties to "present evidence regarding the loss" to the

jury and will instruct is that it may consider such evidence "along with all the other evidence in the case in making its decision" to serve as a "remedy or recourse (*3).

130. **O'Berry v. Turner** [2016 WL 1700403](M.D. Ga. April 27, 2016) A mandatory adverse inference was imposed under **Rule 37(e)** because it was "beyond the result of mere negligence" to make a single hard copy of downloaded ESI without taking further steps to preserve. The copy was placed in a file folder, ultimately moved to a new building and not reviewed until much later, when it was found missing. The court concluded that all the facts "when considered together" lead the court to but "one conclusion – that [defendants] acted with the intent to deprive Plaintiff of the use of this information at trial." The "minimal" effort undertaken to preserve was a failure to take "reasonable steps." There no discussion of the "prejudice" caused by loss of the data, which was apparently presumed to have occurred.

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

132. **Omnigen Research v. Wang** [321 F.R.D. 367] (D. Ore. May 23, 2017). The court granted a terminating sanction against parties involved in a Chinese-American venture under Rules 37(b), **37(e)** and inherent authority after finding that "all the required elements for spoliation are met under the required preponderance of evidence standard." The court found that the spoliation of ESI at issue had undermined the courts ability to render a judgment on the evidence and threatened the orderly administration of justice, and that the destruction was intentional, and the required preponderance of evidence standard was satisfied. It also refused to find that some of the destroyed evidence was not relevant, citing Leon, 464 F.3d 951, 959 (9th Cir. 2006) for the proposition that the responsible party may not assert a presumption of irrelevance.

133. **Oppenheimer v. City of La Habra** [2017 WL 1807596, at *7] (C.D. Cal. Feb. 17, 2017). In a prisoner suicide case, a court **applied Rule 37(e)** to the loss of text messages and emails after the event since litigation was reasonably anticipated and found subsection (e)(1) to be applicable since the party was prejudiced by loss of "potentially relevant information." It found an intent to deprive and awarded a permissive adverse inference citing First Financial Security, 2016 WL 5870218, at *4 (N.D. Cal. 2016) for the propositions that there was presumption that the evidence was adverse and the police gave no explanation for why they did not preserve them other than an existing policy. (*12-*13). **The court refused to apply Rule 37(e) to the loss of video footage of the cell because "Rule 37 does not directly address destruction of video equipment or video footage."** (*7). No case dispositive remedy was applied because there was no showing of 'willfulness, bad faith, or fault." (*10). However, the Plaintiff was "free to argue to the jury the fact that the recording system was destroyed" and were "free to question what the destroyed system might have shown." (*11).

134. **Orchestratehr v. Trombetta** [178 F.Supp.3d 476] (N.D. Tex. April 18, 2016). In diversity action against former employee regarding non-compete, an adverse inferences was not available under **Rule 37(e)** where former employee deleted emails before resigning since

only "equivocal evidence about this state of mind at the time he deleted the emails" despite evasive answers during a deposition(493). The court was unable to find that the destruction was in bad faith or with the requisite intent to deprive Plaintiffs of their use in the litigation based on the totality of the circumstances involved. Measures were also imposed under Rule 37(b) for violations of temporary injunctive orders.

135. **Ottoson v. SMBC Leasing** [268 F. Supp.3d 570] (S.D. N.Y. July 13, 2017). The court imposed an adverse inference under its inherent authority because it exists "in addition" to authority to act under Rule 37(e). It acted because the party had acted "willfully or in bad faith," relying on *Residential Funding* and *Pension Committee*. (*11) The court also found that the party had failed to take reasonable steps to preserve and had either deleted the emails or still had them without producing them, which was sufficient evidence to meet the "requisite level of intent required" by **Rule 37(e).** It collected a series of recent cases finding a lack of "**reasonable steps**" **(Arrowhead Capital, 2016 WL 4991623, at *20; CAT3, 164 F. Supp.3d 488, 501; First Fin., 2016 WL 5870218, at *3-4; GN Netcom, 2016 WL 3792833, at *6; O'Berry, 2016 WL 1700403, at *3-4; Brown Jordan, 2016 WL 815827, at *37; and Internmatch, 2016 WL 491483, at *4-5, *12-14 [Note*: *vacated* **Nov. 17, 2017, 2017 WL 8944065].)** The court also stated it would award fees and costs under Rule 37(a)(5)(A) on the theory that granting any discovery motion requires such payment band because it has inherent authority to do "outside the context of a Rule 37(e) dispute" so as to punish and deter, citing Best Payphones, 2016 WL 792396 (E.D. N.Y. 2016). At no point did the Court mention the Committee Note statement that Rule 37(e) foreclosed reliance on inherent authority to determine when certain measures should be used.

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

137. **Pettit v. Smith** [2014 WL 4425779] (D. Ariz. Sept. 9, 2014)(Campbell, J.). In a pre-effective date opinion written by the then Chair of the Rules Committee, a digital video recording in a prison case was deleted without deliberate attempt to make them unavailable in the lawsuit. The court planned to allow the parties to present evidence and argument and would instruct the jury that the there was a duty to preserve and that they may infer that the lost evidence would have been favorable. In ftn. 6 the court stated that although the case involved "deletion of a digital video file, **it does not concern ESI in the sense addressed in the proposed amendment [ie, Rule 37(e)],** which is concerned more with the operation of modern ESI systems and ease with which information can be added to and lost by such systems."

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

139. **RealPage v. Enterprise Risk Control** [2017 WL 3313729](E.D. Tex. Aug. 3, 2017)(the court drew a presumption that a third party's acts of massive deletion may be "imputed to the

employer" when foreseeable considering the employees duties. the party regularly consulted with the employee and decisions relevant to the enterprise and the court found sufficient evidence to establish a prima facie case that the individual was acting within the scope of his employment. Citing **Rule 37(e),** the court drew a presumption that the missing information was sufficiently unfavorable to the party's case that it had made out a prima facie showing of misappropriation of trade secrets. *Id.* at *11-12.

140. **Regeneron Pharmaceuticals v. Merus** [864 F.3d 1343, 2017 WL 3184400] (Fed. Cir. July 27, 2017). The Federal Circuit, in dicta (the case involved discovery misconduct but not a failure to preserve), while applying Second Circuit authority, including Residential Funding, noted in footnote 7 that "Residential Funding may have been superseded in part by the 2015 Amendment to [FRCP] Rule 37(e)" quoting from the Committee Note as to rejection as to adverse inferences based on findings of negligence or gross negligence. The Court noted that for sanctions based on other discovery misconduct, Residential Funding remains good law in the Second Circuit.

141. **Richard v. Inland Dredging** [2016 WL 5477750] (W.D. La. Sept. 29, 2106). In personal injury action relating to a barge, post-accident photos alleged stored on a hard drive were lost when the barge sank. The Court refused a request for adverse presumption or inference under **Rule 37(e)(2)** because there was no showing that digital copies of the photographs existed which could have been lost or should have been preserved. In addition, even if the Rule applied, there was no showing that the party intentionally sunk the barge in order to hide or destroy the evidence from the plaintiff.

142. **Rivera v. Mathena** [2017 WL 3485012] (W.D. Va. Aug. 14, 2017). In a prisoner video case, the court concluded that no prejudice had resulted from missing video, and refused to sanction the failure to preserve under Rule 37(e) while also granting a motion for summary judgment on one of the claims because it could find no basis to believe that the unavailable video footage would change the outcome" of a summary judgment.

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

144. **Robertson v. USAA** [2016 WL 5864431] (S.D. Fla., Sept. 22, 2016). **Rule 37(e)** measures were not available regarding failure to preserve computer notes because there was no evidence of intent by defendants to deprive the moving party of the information or that the party had otherwise acted in bad faith, such as where a party purposefully "tamper[s] with evidence." (citing Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997).

145. **Robinson v. Renown Regional Medical Center** [2017 WL 2294085] (D. Nev. May 24, 2017). Court refused to impose sanctions under **Rule 37(e)** because it accepted the defendant's IT affidavit that the server containing the telephone call logs and attendant data had "failed"

prior to the events at issue. The plaintiff had argued that the failure to preserve them connotes and "intent to deprive" the party of access to them.

146. **Rhoda v. Rhoda** [2017 WL 4712419] (Oct. 3, 2017). The court acknowledged Rule 37(e) but refused to apply it under the Supreme Court Order because it would be unjust to apply a rule rejecting Residential Funding because the issue was raised before the Rule became effective. However, since the party has not met the burden of showing that "the missing ESI would have contained relevant information *unfavorable* to" the non-moving party or "that [the moving party] is now prejudiced without" the emails, no adverse inference is appropriate. (emphasis in original). In dicta, the Court asserted that it had authority to impose sanctions for misconduct in discovery in addition to the authority under Rule 37(e)(2), without mentioning the Committee Note on Foreclosure.

147. **Ronnie Van Zant v. Pyle**, ___ F.3d ___, 2017 WL 3721777, at n. 16 (S.D.N.Y. Aug. 28, 2017). The District Judge, building off comments in *CAT3 v. Black Lineage*, citing CAT3 v. Black Lineage, 164 F. Supp.3d 488,497 (S.D.N.Y. 2016), *case dismissed and motion withdrawn*, 2016 WL 1584011 (S.D. N.Y. April 6, 2016)(Francis, M.J.), opined that while there was no need to do so in its case, since Rule 37(e) applied, courts retain implied powers to remedy spoliation. The court held that the failure to preserve text messages when a new phone was purchases breached Rule 37(e) duties and justified an adverse inference as "the kind of deliberate behavior that sanctions are intended to prevent" without explicitly finding an "intent to deprive." The court did find prejudice to exist.

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

149. **Scalpi v. Police Officer** [2018 WL 1606002] (S.D.N.Y. March 29, 2018). District Judge refuses to apply Rule 37(e) to alleged loss or alteration of video of altercation with driver arrested on bench warrant because no showing of what was missing or was altered. (*17). In the course of describing and applying Rule 37(e), the court in dicta remarked that "the Second Circuit has not yet published an opinion examining the impact of the new Rule 37(e) [sic]. In footnote 26 the court notes that neither party discussed whether or not the surveillance video at issue was ESI, citing cases under the former rule which imply it did not apply.

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

151. **Schmalz v. Village of North Riverside** [2018 WL 1704109] (N.D. Ill. March 23, 2018). A Magistrate Judge recommended sanctioning a party under **Rule 37(e)(1)** for grossly negligent failure to retain "highly relevant" text messages by allowing evidence of their destruction and likely relevance to be presented to the jury along with an instruction that it may be considered by the jury when making its decisions. The court also granted reasonable

attorneys fees under Rule 37(a). The court refused to find that a failure to take reasonable steps automatically demonstrated the requisite intent and bad faith, distinguishing other Rule 37(e) decisions and prior decisions from the Northern District such as Krumwiede, Wiginton and Bremen. While the party (an attorney) failed to take any measures to preserve the texts after receipt of a litigation hold letter, gross negligence does not rise to the level of "willfulness or bad faith required to find intent." (*6) (citing cases under the Rule).

152. **SEC v. CKB168 Holdings** [2016 U.S. Dist. LEXIS 16533](E.D. N.Y. Feb. 2, 2016). In an action challenging a "multi-national pyramid scheme revolving around a series of related entities" [2016 U.S. Dist. LEXIS 18624 (E.D.N.Y. Feb. 12, 2016)] a Magistrate Judge withdrew its earlier recommendation for an adverse inference in light of **Rule 37(e)** since the deficiency could not be said to the result of an "intent to deprive" under the record before the court. However, if the case goes to trial and the SEC makes the requisite showing of intent associated with the loss of ESI, the SEC was authorized to renew its motion under the Rule. The court also noted (n. 7) that it had not recommended that "certain facts be deemed established" but that a "forceful closing argument by counsel for the SEC could well persuade the jury to draw such a conclusion without a jury charge from the Court giving it express permission to do so." The District Judge upheld the recommendation in all respects. [2016 U.S.Dist. LEXIS 136922 (Sept. 28, 2016)].

153. **Security Alarm Financing v. Alarm Protection Technology** [2016 WL 7115911, at *7] (D. Alaska Dec. 6, 2016) and [2017 WL 506237 (D. Alaska Feb. 7, 2017). In the initial (December) decisions resolving motion for sanctions, a court found that the loss of customer recordings was the result of a failure to take reasonable steps and could not be replaced under **Rule 37(e).** When the court could not conclude that the party had acted with intent to deprive, it determined to admit evidence of the spoliation so that the jury could assess it, and indicated it would instruct the jury that the party had failed to preserve. In the second decision (February, 2017), the court cited the spoliation as sufficient to infer facts needed to avoid summary judgment as to liability, but not as to damages, thus permitting the granting of summary judgment on the claim. (at. *3).

154. **Shaffer v. Gaither I & II[**2016 WL 6594126][2016 US Dist. LEXIS 118225]("Shaffer I") (W.D. N.C. Sept. 1, 2016) and [2016 WL 7331561 (Dec. 12, 2016)("Shaffer II"). In an employment action by a former ADA, the Court twice denied, on proportionality grounds, motions to dismiss. The first opinion dealt with the destruction of the cell phone (and messages) containing text messages. The court did not find an "intent to deprive" under Rule 37(e)(2) but decided under (e)(1) to cure the prejudice involved by allowing the defendant to cross-examine witnesses who read the texts in front of jury, which will be "free to decide whether to believe that testimony." It found that party and her counsel failed to take reasonable steps to preserve under Rule 37(e) because they had not printed out the texts, made an electronic copy or sequestered the phone. In the second opinion, dismissal was sought because of alteration of the name of the defendant in the cell phone and a misstatement in "a relevant filing to the court." The court refused to dismiss because the alteration did not "rise to the level" necessitating action under the inherent authority of the court under Sun Trust Mortgage, 508 Fed. App'x 243 (4th Cir. 2013), which it quoted at length. Rule 37(e)(2)'s intent requirement was not cited, raising the possibility that inherent authority was seen as available

despite the inapplicability of harsh measures under that rule. In both opinions, the court did not rule out giving a spoliation or modified spoliation instruction at trial and allowed the moving party to "explore" in front of the jury circumstances surrounding the destructions of the texts.

155. **Simon v. City of New York** [2017 WL 57860] (S.D.N.Y. Jan. 5, 2017). Court refused to impose measures under **Rule 37(e)(1)** for failure of plaintiff to retain cell phone video of assembly of group near at time of arrest in context of civil actions for false arrest. The court held that there was no allegation of an attempt to deprive defendants of the video footage and that there was no showing of prejudice under (e)(1) because it was "pure speculation" as to the contents of the video or whether it would be helpful to the defense. Moreover, even if it showed location of a weapon, it would be "largely irrelevant" to the issue of probably cause, quoting from Mazzei v. Money Store [656 Fed. Appx. 558 (2nd Cir. July 15, 2016)] to the effect that no measures are available if the ESI would "not have made any difference" at the trial. The court applied **Rule 37(e)** because it was neither 'infeasible nor [would it] work injustice" to do so.

156. **Simon v. Northwestern University** [2017 WL 467677] (N.D. Ill. Feb. 3, 2017). A Magistrate Judge in an action by an individual complaining he had been falsely accused by an investigative journalism class, the court refused to compel production of certain ESI in light of the party's willingness to produce relevant information and its obligation to "retain electronic records for the duration of this litigation (thus making them available for later, more focused discovery requests)" citing to **Rule 37(e)** as "describing repercussions for failing to preserve electronically stored information."

157. **Snider v. Danfoss** [2017 WL 2973464] (N.D. Ill. July 12, 2017). A Magistrate Judge recommended that no sanctions be imposed under either Rule 37(e) or inherent authority for the failure to interrupt the automatic deletion of emails after a party was placed on notice of impending litigation. The court was able to determine that their loss was not prejudicial and there was no showing of intent to deprive. The Magistrate Judge found that all the perquisites for use of **Rule 37(e)** were satisfied, and that inherent authority was foreclosed because the purpose of the rule was to address differing standards and to allow otherwise would be to impair the "goals of uniformity and standardization." (n. 8). The court noted that Rule 37(e) was not restricted on its face to the loss of "relevant" ESI, which could have been done, but stated its assumption that "should have been preserved" encompasses both "the concept of relevance and duty to preserve." (n. 9). It also noted that "**limiting sanctions to the failure to preserve relevant ESI makes complete sense on many levels, including the lack of prejudice in the loss of irrelevant ESI and the lack of a need to even produce irrelevant ESI, let alone preserve it."** (at *4)The court also implied that Rule 37(e)'s failure to expressly authorize awards of attorney's fees barred their use but gave no recommendation for or against their imposition (*5).

158. **Spencer v. Lunada Bay Boys** [2018 WL 839862 (C.D. Cal. Feb. 12, 2018)]. The court adopted a recommendation that it award monetary damages in the form of attorney's fees as a sanction for the failure for violation of Rule 37(e). In doing so, the court rejected the argument that the silence as to remedies available under Subdivision (e)(1) necessarily implied that that

inherent authority must supply the basis for measures. The court held that the Committee Note "expressly contradicts" the argument because it provides that the rule "forecloses reliance on inherent authority."

159. **Steves and Sons v. Jeld-Wen** [2018 WL 2023128] (E.D. Va. May 1, 2018). In a well-written, thorough opinion, a Senior District Judge first found that no measures were available under Rule 37(e) because, despite having taken no reasonable steps to preserve, the moving party failed to demonstrate compliance with its duty to show that the lost ESI cannot be restored or replaced. (*9). Moreover, the court would not have found remedies available because of a failure to establish that the lost evidence would have caused prejudice ("would have significantly improved" the movants ability to prove trade secret misappropriation) since much of the information was obtained by other parties to the communications. Also, because the connecti0n between an expresses intent to delete and an intent to harm in future litigation was "hard to draw," there would be no basis for an adverse inference. (*10). The court reached the same conclusion as to the loss of any tangible evidence under its inherent authority; moreover, it was speculation to assume any had existed. (*11). In a footnote, the court expressed the view that the "foreclosure" of inherent authority is an open question, citing CAT 3, 164 F. Supp.3d 488 at 497.

160. **Stinson v. City of New York** [2016 WL 54684] (S.D.N.Y. Jan. 5, 2016). The court refused to apply **Rule 37(e)** because motion was fully submitted prior to effective date of new Rule. The court granted a permissive adverse inference based on gross negligence without finding any prejudicial impact under existing Residential Funding standards. In Note 5, the court acknowledged that "new standards" in Rule 37(e) were in effect but found that it was not just and practicable to apply them since the motion for sanctions had been briefed before the effective date. It also noted that the amended rule presented a "thorny" issue of application where a party fails to preserve both ESI and hard-copy evidence.

161. **Storey v. Effingham County** [2017 WL 2623775] (S.D. Ga. June 16, 2017). A court concluded that a failure to preserve videotapes which might have shown the tasering and roughing up of a prisoner occurred at a time when there was a duty to preserve under Rule 37. (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"). The court held that the "multi-step: process to determine if sanctions or curative measures are appropriate was satisfied. However, given that the "negligence – even recklessness – in allowing the normal video destruction policy to patter away unimpeded does not rise to the stringent 'intent' requirement set forth in the **amended Rule 37(e)**, it denied an adverse inference. However, because some prejudice had occurred, the court expressed the intent to tell the jury that "the video was not preserved" and would allow the parties to present evidence and argument at trial" about the destruction or failure to preserve the videos. In n. 5, the court made it clear there will not be any adverse inference instruction "that the destroyed evidence is *unfavorable* to the defendants." (emphasis in the original). The court inexplicitly (presumably in error) quoted the original (2006) rule as if it were still part of Rule 37(e), but it played no role in the decision.

162. **Tchatat v. O'Hara** 249 F.Supp.3d 701 at n.2 (S.D.N.Y. April 14, 2017). In a case involving alleged spoliation of videotape and digital photographs, the court did not "consider"

Rule 37(e) because "[n]either party has argued that Rule 37(e) applies here." The court also said that its ruling would have been the same even if the rule applied.

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

164. **Thomas v. Butkiewicus** [2016 WL 1718368] (D. Conn. April 29, 2016). Court refused to apply **Rule 37(e)** to loss of video surveillance tape since the issue would likely have been resolved before the effective date if new counsel had not been substituted. The court described Rule 37(e) as "procedural" and noted that it "overrules" Second Circuit precedent on state of mind required for an adverse inference.

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

166. **Thurman v. Bowman** [199 F. Supp.3d 686] (W.D.N.Y. August 10, 2016). The District Court applied Circuit case law in affirming that the movement of Facebook posts to "private" was not sanctionable because the contents remained available. A failure to institute a litigation hold did not alone establish the relevance of any missing ESI as a matter of law, since it occurs only "in the most egregious cases," which this case was not. In a footnote 5, the District Judge noted that the Magistrate Judge applied current law because "neither party advocated for retroactive application" of Rule 37(e). **The Magistrate had commented [2016 WL 1295957 (March 31, 2016)] that the outcome would have been the same since the deletion did not cause prejudice nor was it done with an intent to deprive**.

167. **Tipp v. Adeptus** [2018 WL 447256, at *5 (D. Ariz. Jan. 17, 2018)]. The court held that **Rule 37(e)** provides "helpful rationale" in deciding a case involving shredding of hand-written notes); see also Emerald Point v. Lindsay Hawkins, 808 S.E.2d 384 (Va. 2017) and EEOC v. Jetstream, 878 F3d 960 (10th Cir. 2017).

168. **Title Capital Mgt. v. Progress Residential** [2017 WL 5953428, at *4 (S.D. Fla. Sept. 29, 2017)]. A court applying **Rule 37(e)** found the onset of the duty did not have to include the exact type of litigation which ultimately ensued, since reading such a requirement "into the Rule" would allow misbehaving parties to escape through "the careful splitting of hairs." It rejected as "disingenuous" the argument that the actual litigation commenced must be reasonably foreseeable. However, the court did not apply any remedy under either subsection as it could not find that prejudice had resulted or that the "draconian sanction of dismissal" because the "intent" issue was "a close call and one that will be better made after completion of all discovery." (*6)

169. **TLS Management and Marketing Services v. Ricky Rodriguez-Toledo** [2017 WL 115743] (D. Puerto Rico March 27, 2017)]. The court ordered an adverse inference and forensic examination of a hard drive because the non-moving party acted with an intent to deprive when it discarded a laptop after it malfunctioned, rejecting the argument that the existence of copies in the cloud and on flash drive negated allegations of prejudice in violation of **Rule 37(e).** *Id*. at 2 ("Defendants have not . . . proffered clear and convincing evidence that all information that might have been stored . . .including metadata – is discoverable from the information transferred to the cloud computing service and the USB flash drive"). This was sufficient to satisfy the **Rule 37(e)(2)** intent to deprive requirement, since the party "willfully discarded or deleted" ESI from a laptop and external hard drive.

170. **US v. Capitol Supply** [2017 WL 1422364] (D.D.C. April 19 2017)], the court held that "by its express terms, **Rule 37(e)** does not govern the instant spoliation motions" because "'the data was not overwritten "in the anticipation or conduct of litigation' but rather . . .in violation of the defendant's regulatory and contractual obligations." (*10) The defendant did not argue that it was "overwritten unknowingly or accidentally" but because of a practice or for many years in violation of clear regulatory and contractual obligations to retain the information for specific periods. (*10) Applying Circuit law, the court held that the plaintiff was entitled to an adverse inference instruction because the violation of a record retention regulation creates a presumption that the missing evidence contained evidence adverse to the spoliator [citing, among other cases, Hicks v. Gates Rubber, 833 F.2d 1406, 1418-19 (10th Cir. 1987)].

171. **U.S. EEOC v. GMRI** [2017 WL 5068372] (S.D. Fla. Nov. 1, 2017)]. In a rambling, unfocused opinion in which a party was sanctioned under inherent power for spoliation of documents and under, apparently, under **Rule 37(e**) for loss of emails, the court equated the delivery of an EEOC charge with anticipation of litigation and imposed a bewildering and inconsistent series of presumptions and inferences, including a open ended invitation to argue about spoliation and inferences before the jury, while also holding that the jury could, if it found bad faith, also find intent to deprive and impose yet even harsher presumptions. (*31). The court spent considerable time dealing with the definition of implications of the omission of certain language from the Circuit definition of "spoliation" for unclear purposes, while implying that neither Rule 37(e) nor a finding of bad faith is required for some types of sanctions for failures to "retain" emails in the Eleventh Circuit. (*21). All of this was undertaken without determining (or even mentioning) the predicate requirements of a trigger of a duty to preserve; and despite finding a lack of prejudice from the missing information, which it steadfastly maintained needed not to be proven.

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

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

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

175. **Virtual Studios v. Stanton Carpet** [2016 WL 5339601] (N.D. Ga. June 23, 2016). In a breach of contract case, the court applied **Rule 37(e)** because reasonable steps were not taken to preserve emails (although does not explicitly find that they could not be restored) whose loss was "certainly prejudicial" since it would have been helpful in evaluating the merits of the case. The court declined to draw an adverse inference (it was requested for use at the summary judgment stage) or authorize an adverse inference jury instruction under **Rule 37(e)(2)** since the party was "negligent or careless" at most. Instead, the "appropriate sanction" is to allow the moving party to "introduce evidence concerning the loss of emails and to make an argument to the jury about the effect of the loss of the emails." (*11).

176. **Void v. Large** [2018 WL 1474550] (W.D. Va. March 26, 2018). Court applying **Rule 37(e)** refused to find any measures available because surveillance tape was not lost because a "party" failed to take reasonable steps to preserve it in case challenging prison misconduct. Those in control of decisions to retain or delete prisoner video surveillance tapes were not joined as parties.

177. **Wadelton v. Department of State** [2016 WL 5326402, at *4 (Sept. 22, 2016)]. The duty to preserve in anticipation of litigation under **Rule 37(e)**'s trigger provisions are inapplicable in regard to FOIA requests since there is no statutory requirement to preserve ESI or documents prior to receipt of a FOIA request.

178. **Wali Muhammad v. Mathena** [2017 WL 417122 (Order) and 2017 WL 395225 (Memorandum Opinion)] (W.D. Va. Jan. 27, 2017)]. In a Memorandum Opinion adopting a R&R [2016 WL 8116155 (W.D. Va. Dec. 12, 2016)] utilizing **Rule 37(e),** the court denied an adverse inference because there was no basis to find the loss was intentional but permitted evidence of spoliation of a video to be presented to the jury with an instruction that the prisoner requested the video be preserved but it was lost through no fault of his own and jurors should not assume that the lack of "corroborating objective evidence undermines" the prisoners version of events. In n. 7 of the Magistrate's R&R, it noted that under **Rule 37(e) the threshold issue** of whether spoliation occurred requires only a finding of negligent conduct. The District Judge referred to the conduct at issue as "negligent spoliation of the footage."

179. **Wal-Mart Stores v. Cuker Interactive** [2017 WL 239341] (W.D. Ark. Jan. 19, 2017)]. A District Judge refused to impose either a dismissal or an adverse inference under **Rule 37(e)** when the moving party did not demonstrate it suffered prejudice from the routine deletion of a former employee's laptop shortly prior to Wal-Mart's instituted litigation against it. It was of "central importance" that the moving party declined the opportunity to review, at its expense, backup tapes containing the former employee's emails. The court denied Wal-Mart's request for its expenses in responding to the Motion under **Rule 37(a)(5)(B)** because the rule did not apply and because it would be "unjust" to do so because it was "a very poor practice" for a sophisticated company to have wiped the laptop with litigation looming. The court did not reach intent, since prejudice was not shown, but whether the wiping was "the result of bad intent or a simple oversight," it would not "reward" Walmart for such conduct. **Indicates**

that prejudice is required under Rule 37(e) for any measures; consistent with Eighth Circuit rulings. Although not stated, it reflects Rule 37(e) requirement that the moving party negate the possibility of "restore and replace" as perquisite.

180. **Washington v. Rounds** [2017 WL 5668216, at *5 (D. Md. Nov. 27, 2017)(Grimm, J.)] The court ordered discovery be taken in a prisoner surveillance video case as to whether spoliation was committed by defendants or their supervisors and pointedly noted that "the appropriate authority to govern this dispute is not the court's inherent authority, as [the moving party] argues, but [Rule 37(e)]."

181. **Watkins v. New York Transit Authority**, 2018 WL 895624, at *10 (S.D.N.Y. Feb. 13, 2018). The District Court, in denying a motion for sanctions without prejudice to renewal before trial addressing the elements of **Rule 37(e),** held that while the plaintiff had a duty to preserve a cell phone, the motion would be denied because the moving party had not established either that the ESI could not be restored or replaced through additional discovery or that the party acted with a culpable state of mind. Citing Best Payphones v. City of N.Y., 2016 WL 792396, at *5 (E.D.N.Y. 2016), the court noted that the party could have questioned or requested production from other employees or "sought to subpoena Plaintiff's cell phone records." The court also noted that there was no proffer of evidence that the party acted with the requisite intent to deprive the moving party of relevant evidence, 'rather than negligence." The court cited to Rhoda v. Rhoda, 2017 WL 4712419 (S.D.N.Y. Oct. 3, 2017) for the proposition that the movants have the burden of proving intent to deprive under **Rule 37(e)(2).**

182. **Waymo v. Uber Technologies** [2018 WL 646701, at *18] (N.D. Cal. Jan. 30, 2018)]. The District Court delayed ruling on whether "intent to deprive" sufficient for measures under **Rule 37(e)(2)** existed until after the moving party presented its "case-in-chief" at trial, since "at least some proof of the facts underlying the spoliation motion (to the extent admissible), and possibly additional evidence on point, will go before the jury"). It also criticizing Waymo for failing to make an adequate offer of proof, apparently because it "seems unwilling or unable to prove its case at trial with qualified witnesses and evidence and seeks to have the Court fill in the gaps with adverse inferences instead."

183. **Wichansky v. Zowine** [2016 WL 6818945] (D. Ariz. March 22, 2016)(Campbell, J.)]. Court declined to apply sanctions in regard to motions involving missing audio and videotapes where little prejudice and marginal relevance. The court noted that there was no need to put its "thumb on the scale," but parties would be allowed to present admissible evidence on the contents to overcome any prejudice suffered from loss. The court noted that **Rule 37(e) did not apply because "the parties do not content that the lost information constitutes electronically stored information."**

184. **Willis v. Cost Plus** [2018 WL 1319194, at *6 (W.D. La. March 12, 2018)]. In a diversity action for personal injuries where challenges were made to the contention that video surveillance tapes of the shopping injury were at issue, the District Judge concluded that the Louisiana Supreme Court would likely permit an independent tort action for intentional spoliation [citing, *inter alia*. BASF v. Man Diesel, 2016 WL 5817159, *41 (M.D. La. 2016)] but that there was no evidence that the video was intentionally destroyed (*5). It also opined

that while Louisiana did not necessarily foreclose permit such an action for negligent spoliation that does not apply since evidentiary presumptions which permit an adverse inference are controlled by federal procedural law in diversity actions involving state substantive law and require a showing of bad faith, **ignoring the standards of Rule 37(e).** (*6). The court held that there was no showing that the surveillance video was destroyed for the purpose of hiding adverse evidence, citing Guzman v. Jones, 804 F.3d 707, 713 (5th Cir. 2015) and "indeed" has not shown such evidence ever existed. The court went on to say, however, that the party may question witnesses about the absence of video surveillance and any alleged failures to follow internal policies, citing Federal Rule of Evidence 607 (witness credibility) – and may argue for whatever inference she deems may be draw due to the absence of items of potential evidence. (*6).

185. **White v. United States** [2018 WL 2238592] (E.D. Mo. May 16, 2018). The court refused to given an adverse inference instruction under Rule 37(e) but permitted the moving party to "argue an inference – as opposed to a presumption – that missing parts" about a video that "skip" from shot to shot as downloaded to a DVD where the original footage on the server to which it had been uploaded had been deleted prior to the date the duty to preserve attached (*4).

186. **Winfield v. City of New York** [2017 WL 5664852, at *9 (S.D.N.Y Nov. 27, 2017)] The opinion, which involves challenges to the use of TAR relies on Sedona *Principle* 6 and cites other reasons to defer to party choices, including the statement that "perfection in ESI discovery is not required" citing to **Rule 37(e).**

187. **Wooten v. Barringer** [2017 WL 5140519, at *4 (N.D. Fla. Nov. 6, 2017)]. The court held that Rule 37(e) applied because "the [prisoner surveillance] video recordings (which presumably are digital) constitute ESI" to the exclusion of inherent authority, which was foreclosed by the Rule, which "significantly limits a court's discretion to impose sanctions for ESI spoliations." The court applied a "step-by-step" analysis of the Rule and found that even if there was a lack of reasonable steps taken, there was no prejudice and no intent to deprive since, at most the failure to preserve was negligent.

188. **World Trade Centers Assn. v. Port Authority** [2018 WL 1989616] (S.D.N.Y. April 2, 2018); report adopted, 2018 WL 1989556 (S.D.N.Y. April 25, 2018). Spoliation sanctions for loss of documents and ESI was denied in separate analysis. As to documents lost when a contractor executed oral instructions, the court noted that the instructions were adequate and while any loss is negligent [citing *Zubulake*, 220 FRD 212 at 220 (any destruction of documents is negligent)], it was not sufficiently egregious to support a finding of either gross negligence or bad faith nor was there evidence that relevant evidence was destroyed (*8-9). As to ESI, there is no evidence that ESI was actually destroyed and the actions challenged were "consistent with normal business practices and are not consistent with the intentional or even negligent destruction of electronic documents."(*10). Applying amended Rule 37(e), the court refused sanctions, and even if the older version were to be applied, same result would obtain given the lack of evidence from which a "reasonable inference can be made that relevant evidence was destroyed." (n. 12).

189. **Yoe v. Crescent Sock** [2017 WL 5479932] (E.D. Tenn. Nov. 14, 2017)]. In a long, convoluted decision, the court held that Rule 37(e) measures addressing prejudice were available, repeatedly stressing that culpability was not required (although it hinted at a finding of gross negligence), and seemingly held that there was no "intent to deprive." Its key rules was a finding that "in its discretion" (quoting the Committee Note) that sufficient prejudice existed to justify Rule 37(e)(1) measures because the missing ESI "would, and certainly could, be relevant to a claim or to a defense." (at *11 - *13).

190. **Zamora v. Stellar Mgt**. [2017 WL 1372688] (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" and of "intentional destruction indicating a desire to suppress the truth" before an adverse inference is warranted. The court found it premature to find that prejudice existed "when at least some" of the absent material "is available through other discovery" and ordered extensive further discovery of cell phones, with a special master determining which communications are relevant, at a cost to be split. Because it could not find prejudice, it need not determine intent, noting that the memory of the plaintiff cannot be relied upon and that the record "might permit a reasonable inference" that she was aware of the importance of preserving information when she reset her company phone and deleted a Facebook message. The court acknowledged that it was somewhat sympathetic to a lay witness in contrast to a corporation subject to a formal litigation hold."

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

APPENDIX B
Cases Ignoring Rule 37(e)

1. Alston v. Park Pleasant, ___Fed. App'x ___, 2017 WL 627381 (3rd Cir. Feb. 15, 2017). The Third Circuit Court of Appeals affirmed denial of motion for sanctions for failure to preserve ESI in storage devices sold prior to discovery. The party had retained information it thought might be relevant, but it turned out not to be sufficient. The non-moving party offered to make older storage devices available but never heard back from the requesting party. The Court of Appeals affirmed the denial under an abuse of discretion standard and concluded that the conduct of the non-preserving party did not qualify for a finding of bad faith, even if the ESI had existed and was relevant, under Third Circuit authority which required a showing of "actual suppression or withholding of evidence." The court noted that there was no actual suppression as withholding "requires intent." **Rule 37(e) should have been mentioned but the findings would have supported the same result.**

2. Alvarez v. King County [2017 WL 3189025] (July 27, 2017). The court resolved a motion in liminee excluding evidence of failure to preserve recordings of radio calls as to individual defendants because it was not just to attribute the negligence of the Prosecutors office to the Sheriff's personnel, given that they had no notice of the duty to preserve when they were routinely overwritten. Rule 37(e) should have been cited, and it would have given an additional reason to apply a safe harbor had individual culpability been assessed, namely, that the individuals did not have an "intent to deprive" when they failed to act.

3. Archer v. York City School District 710 Fed. Appx. 94 (3rd Cir. Sept. 27, 2017). Without expressly citing to **Rule 37(e),** but relying on Bull v. UPS, 665 F.3d 68, 73 (3d Cir. 2012), the court found no abuse of discretion in lower court decision concluding that there was no evidence that the deletion of former employees email account was intentional done to suppress or withhold evidence. (See Next Entry).

4. Archer v. York City School District [2016 WL 7451562] (M.D. Pa. Dec. 28, 2016). In granting summary judgment to School District which refused to renew a charter school authority to operate, the court refused to sanction deletion of email because there was no duty to preserve at the time and there was no evidence that the party acted with intent at the time (*16) which was one of four requirements of the Third Circuit test. **There was no mention of Rule 37(e).** The court explained in a footnote (20) that determining whether "spoliation" occurred was separate and distinct from the elements for selection of spoliation sanctions under Bull v. United Parcel, 665 F.3d 68 (3rd Cir. 2012). **No difference in result if Rule cited.**

5. Archer Daniels Midland v. Chemoil [2016 WL 9051173] (C.D. Ill. Oct. 19, 2016). A court refused to find that an eight month delay in instituting a litigation hold justified sanctions where where some of the "central participant" witness's emails were destroyed after he left the company but the company was able to restore them by getting copies from recipients. The court **did not cite Rule 37(e)** but held that there was no evidence of prejudice as a result of the delay and nothing to suggest the ADM acted with "willfulness, bad faith or fault." The court refused to order additional searches citing to **Rule 26(b)(2)(B)** and concluded that the company

had made "reasonable efforts to locate" the documents in its possession and the costs of an additional search would "outweigh the need for the discovery." **Rule 37(e) should have been applied, but would not have changed the result.**

6. Arkeyo v. Cummins Allison [2017 WL 2813224] (E.D. Pa. June 28, 2017). In a case involving the posting of software on the internet in a trade secrets dispute, a court denied a motion for a preliminary injunction. The court discussed, in footnote 10, whether the removal of URL to it and placing it in a ZIP file without making a forensic copy, constituted spoliation, finding that it did not because the action was not taken in bad faith. **No discussion of the impact of Rule 37(e) was included, but it would have made no difference since the court would not have found an intent to deprive.**

7. Benefield v. MStreet Entertainment [2016 WL 374568] (M.D. Tenn. Feb. 1, 2016). In an employment dispute where the text messages were not preserved, the court noted that it would give a "spoliation instruction to the jury" **without mentioning Rule 37(e**) or making a finding of elevated culpability. The court cited the text of Rule 37(c) as making appropriate sanctions available where a party has failed to provide information as provided by Rule 26(a) or (e). **Rule 37(e) should have been applied; the result could have been different; the court merely found that there was no justification given for the failure to preserve.**

8. Bordegarary v. County of Santa Barbara [2016 WL 7260920] (C.D. Cal. Dec. 13, 2016). Court resolved allegations of spoliation of Power Control Module ("PCM") data in police car and a diagram about the incident involving allegations of excessive force by applying Ninth Circuit case law without explaining why Rule 37(e) was not applicable. The Court stated it would give an adverse inference as to the missing contents to deter spoliation without examining the intent of the defendants since under Ninth Circuit case law based on Apple v. Samsung, 888 F.Supp.2d. 987, 993 (N.D. Cal. 2012) the fact that there was a "failure to preserve" constitutes spoliation**. Rule 37(e) should have been applied and would have made a difference.**

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

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

11. Browder v. City of Albuquerque [2016 WL 10538347] (D. N.M. April 15, 2016)(loss of cell phone); as amended (slightly) and reissued [187 F.Supp.3d 1288] (D. N.M. May 9, 2016)(text messages on cell phone); and [209 F.Supp.3d 1236] (D. N.M. July 20, 2016)("electronic data"). In the April and May decision, the court treated the loss of a cell phone as sanctionable without citing Rule 37(e) because of failure to issue litigation hold (discussing *Pension Committee* and *Chin*) and because it had "reason to suspect" there was consciousness of a weak

case. It determined that it would give a jury instruction that allows any inference as well as admitting the evidence of spoliation. In the July decision involving loss of "electronic data, such as the video footage here" by former police officer after accident, court sanctioned without mentioning Rule 37(e) because of "questionable information management" practices [citing Phillip Adams, 621 F. Supp. 2d 1173, 1193 (D. Utah 2009) and allowed the plaintiff to present evidence of the spoliation since lacking bad faith and only minimal prejudice. **Rule 37(e) should have been applied; result would likely to have been different.**

12. Brown v. Albertsons [2017 WL 1957571] (D. Nev. May 11, 2017). A failure to preserve surveillance video, copies of an incident report and email between a prior store manager at the time of slip and fall was sanctioned without reference to Rule 37(e). The court asserted authority under its inherent powers and "Rule 37" (mentioning (b) and (d), which did not require a finding of bad faith for non-dispositive sanctions, including adverse inferences. It allowed introduction of evidence of the loss of the video and emails, which was, at the most "negligent" and none of the evidence lost "threatens the rightful decision of the case on the merits." (*11). Albertson was permitted to introduce evidence of its explanations for the losses.

13. Brown v. Certain Underwriters [2017 WL 2536419] (E.D. Pa. June 12, 2017). A court allowed an adverse inference and introduction and argument about the loss of a cell phone at trial **without mentioning Rule 37(e).** Although a "close call," it declined to enter a dismissal given that an adverse inference would be likely sufficient to cure the prejudice. It decided it would instruct the jury that they may infer, had inspection of the cell phone been permitted before it was lost, that the evidence would have been unfavorable. In n. 4, the court concedes that information about the missing text messages are available from the cellular carrier and raised the possibility that none were sent or received around the key date in the case. Given the finding of bad faith, the court awarded fees and costs, including efforts to obtain records from the cellular carrier**. Rule 37(e) should have been applied, and it is likely that if it were, the same core relief would apply, but the award of fees would be justifiable only as an exercise of inherent powers.**

14. Brown v. Sam's West Inc. [2018 WL 576826] (D. Nev. Jan. 26, 2018). Court analyzes alleged spoliation of surveillance video without mentioning Rule 37(e), but while speaking of video recordings and that after installation of new recording equipment they video footage no longer exists.

15. Carroll v. ATA Retain Services [2016 WL 8417377] (N.D. Ga. Jan. 8, 2016). Without explanation, the court resolved a spoliation dispute over failure to preserve text messages and email without mentioning Rule 37(e). In n. 14, it conceded that federal law governs spoliation sanctions because they constitute an evidentiary matter, but following Flury, applied both federal and state law.

16. Carpenter v. Gregg Scott [2017 WL 4270624] (C.D. Ill. Sept. 26, 2017). (video of altercation). Court analyzed pro se request for sanctions for failure to preserve video surveillance within prison without citing to Rule 37(e), without out ruling on whether it was ESI.

17. Carter v. Butts County [2016 WL 1274557] (M.D. Ga. March 31, 2016). In case where police officer charged with unlawful arrest had destroyed or altered a police report and deleted photos on digital camera, an adverse inference granting rebuttable presumption and evidence preclusion was imposed under Eleventh Circuit authority **without mentioning Rule 37(e)** after finding the officer had acted in bad faith. Attorney who signed responses was sanctioned $500 under **Rule 26(g). Rule 37(e) should have been applied; result would likely to have been the same.**

18. Champion Pro Consulting v. Impact Sports, 845 F.3d 104 (4th Cir. Dec. 22, 2016). In appeal from summary judgment on a claim that competitive sports agents had violated North Carolina unfair and deceptive practices acts, the appellate court found that an appeal based on the failure to rule on a motion spoliation based on lost or deleted text messages was moot since summary judgment was properly granted **without mention of Rule 37(e).**

19. Charles v. City of New York [2017 WL 530460] (E.D.N.Y. Feb. 8, 2017). A District Judge refused to dismiss a case or issue an adverse inference as to the contents of a video on a cell phone which was negligently lost by a Plaintiff who had recorded her interaction with the police. It cited Zubulake, 229 FRD 422, 431 (S.D.N.Y. 2004) for the proposition that it could not be inferred from mere negligence that the recording would likely be favorable to the defendants. **Applying Rule 37(e) would have made no difference**.

20. U.S. Commodity Futures Trading Comm. v. Gramalegui, 2017 WL 2570022, at *3 (D. Colo. June 14, 2017). Without discussing the impact of **Rule 37(e),** a Magistrate Judge recommended a finding of presumption of authenticity of webistes retained by one party when the other had a duty to preserve them, but had not done so, despite the fact that the websites "'may' be relevant to pending or imminent litigation." The court then found bad faith based on observing conduct which indicated that the defendant has manipulated and obfuscated the discovery process to suit its ends**. Rule 37(e) should have been applied, but the court could have found an intent to deprive and the creative remedy would have been allowed under the amended Rule**.

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

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

23. Creighton v. The City of New York [2017 WL 636415] (S.D.N.Y. Feb. 14, 2017). Issues of potential spoliation of the contents of a surveillance video were resolved **without any**

reference to Rule 37(e) despite explicit discussions of digital considerations and metadata. **Had the rule been applied, it is unlikely to have changed the result.**

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

25. Dallas Buyers Club v. Huszar [2017 WL 481469] (D. Ore. Feb. 6, 2017). Court permitted an adverse inference despite credible testimony by the alleged spoliator that it undertook the conduct at issue in an attempt to repair them **without applying Rule 37(e)**. **If applied, it would have led to a different result** (See also 2016 WL 11187248 (D. Ore. Dec. 28, 2016)(earlier recommendation for sanctions for same conduct (?)).

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

27. Davis v. Crescent Electric [2016 WL 1637309] (D. S.Dak. April 21, 2016). In an employment dispute where the plaintiff sought sanctions for production of what it deemed to be a fabricated email, the court, **without reference to Rule 37(e), refused sanctions because it could not determine by clear and convincing evidence that a violation of Rule 26(g) had occurred (*4-5),** but allowed her to testify as to not sending it and left it for the jury to determine its authenticity, but urged the parties to consider an alternative to avoid delaying the trial on an issue peripheral to the issues in the case, given FRE 403. **Rule 37(e) should have been applied but would not have changed the outcome.**

28. Doe v. County of San Mateo [2017 WL 6731649] (N.D. Cal. Dec. 29, 2017). Judge Orrick evaluated allegations of spoliation of "camera recordings" from security cameras in a prison without mentioning Rule 37(e). **While ultimately concluding that none existed, it should have been - or, at the very least, could have been - mentioned**.

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

30. Edmundo Caltenco v. G.H. Food [2018 WL 1788147] (E.D.N.Y. March 7, 2018). In an FSLA case where a Brooklyn waiter claimed to have worked 72 hours, not the 62 his employer conceded, the court, **without mentioning Rule 37(e)** found that the employer had no duty to preserve the ordinal copies of the sheets upon which it had written the payments in case, and to which the employee had assented.(*3) The Court simply did not believe that the additional information from an accountant, apparently based on ESI, was on the sheets at the time.

Despite that ruling, the court also went on to determine that the culpability was not gross negligence and accepted the explanation that the originals had been negligently lost. It conceded that the party should have "taken greater care in moving the few documents relevant to this litigation when conducting the office move" but because it was merely negligent ["at most" (*7)] there was not prejudice inferred under Pension Committee nor was it sufficient not to have extrinsic evidence of relevance, as is required by Residential Funding. (*6). It concluded that there was no showing of prejudice sufficient to warrant relief and to do so would "convert a document management issue into an advere inference of doubtful accuracy at trial." (*8). However, in a footnote, the Magistrate Judge said the Plaintiff is not precluded from raising the issue of spoliation at trial if permitted, and a court could "consider the differing accounts as to the accuracy of the photocopies and the explanations for non-production of the original in deciding whether to credit the legitimacy of the records. (n. 2).

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

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

33. Estakhrian v. Obenstine [2016 U.S. Dist. LEXIS 66143] (C.D. Cal. May 17, 2016). District Court adopted Special Master's recommendation for an adverse inference [under Rule 37(c)(1)] **without mention of Rule 37(e**) because it recommended sanctions for violation of Rules 26(a), (e) and 34, not the spoliation of evidence. (*17). [The Special Master's Report reflected a failure to disclose documents stored on a laptop (at *7 of Special Masters report]

34. Evans v. Quintiles Transnational [2015 WL 9455580] (D.S.C. Dec. 23, 2015). In an employment dispute involving an ex-employee who argued that her recycled company furnished laptop had contained a hidden file relevant to her retaliation claim, the court decided to let the jury hear and decide if the file existed and if the party had willfully lost or destroyed it (*5) which would determine if an adverse inference would be available. **Rule 37(e) was not mentioned.** The court concluded the disputed facts rested on credibility findings which it was "not in a position to make" at this time and decided to allow the party to introduce evidence and argument on the topic (*10). **Rule 37(e) should have been applied and it would likely have led the court to refuse to allow the jury to consider use of an adverse inference.**

35. First Financial Security v. Lee [2016 WL 881003] (D. Minn. March 8, 2016). The District Judge agreed, after a de novo review, to instruct a jury as recommended by a Magistrate Judge in a R&R found at 2016 WL 7971666 (D. Minn. Jan. 19, 2016). The instruction would tell the jury that the non-moving party did not fully respond to discovery of ESI as ordered by the court, and that it may infer a series of facts (*7) as to text messages not preserved after a February 2015 Discovery Order (per the District Judge interpretation – see footnotes 6 & 8). The Magistrate Judge did not find that the inherent authority to act existed as to texts and emails not preserved before that time because while the record supported an "inference" that the non-moving parties had "intentionally" failed to preserve the earlier texts, the record did not support a conclusion that they did so in "bad faith." (R&R, *11). The Magistrate Judge found the District Court agreed that "[the party and its counsel] willfully violated court orders compelling discovery" even though Rule 37(b) does not list an adverse inference as "one of the enumerated but inexhaustive options." (R&R). The District Court refused to strike certain affirmative defenses given that it was not clear that responsive documents had been withheld but stated that if at trial it is shown that "responsive documents existed and were not produced" and there is prejudice to counter affirmative defenses, the court will reconsider its ruling." (*6). **NOTE: A case involving the same Plaintiff (and similar allegations) in the N.D. Cal. subsequently applied Rule 37(e). [That case is summarized in Appendix A].**

36. Flemming v. Kelsh [2016 WL 27573980] (N.D. N.Y. May 12, 2016). Spoliation of "video footage" taken with "handheld video camera" of prison incident was resolved **without mention of Rule 37(e)**. The court utilized *Residential Funding* standards in holding that there was no evidence of culpable state of mind. **Rule 37(e) should have been applied, unlikely it would have led to different result.**

37. Florilli Transportation v. Western Express [2015 WL 12804273] (W.D. Miss. Dec. 29, 2015). In truck on truck collision case, operational data recording speed in the plaintiff's truck was lost because it was not requested until after the 6-12 month retention period. The Plaintiff's Safety Manager had reviewed it on a screen but did not print it out. The court refused to sanction the failure to preserve under its inherent authority **without mentioning Rule 37(e)** since while it may have been negligent to fail to preserve, it was not done "intentionally' with "a desire to suppress the truth." Moreover, there was no evidence of an attempt by the Defendant to secure the information directly. The court noted that the request for a spoliation sanction could be renewed at trial outside the hearing of the jury. **Rule 37(e) should have been cited, but given the similarity in culpability standards, it would likely have had no impact**.

38. Gibson v. C. Rosati [2016 WL 5390344] (N.D.N.Y. Sept. 27, 2016). Allegations of spoliation of a video which was inadvertently lost (it turned out it was actually available) were resolved **without reference to Rule 37(e)**. **It would have made no difference if the Rule had been cited.**

39. Garcia v. City of Santa Clara [2017 WL 1398263] (N.D. Cal. April 19, 2017). Judge Illston refused to impose an adverse inference or monetary damages for a negligent failure to place a "more robust litigation hold" with respect to email or maintenance of police reports and video files because the court was not convinced that "anything highly probative was lost or destroyed

such that it will damage" the parties right to proceed. The court did not mention **Rule 37(e).** It did allow the jury to hear about a missing report and draw "whatever inferences it chooses." The Court cited to Goodyear v. Haeger, 581 U.S. __, 2017 WL 1377379, at *5 as authorizing a compensatory award of legal fees to redress the party and requires a "but for" causal link between misbehavior and legal fees. It did not find sufficient culpability to award fees under its inherent authority (citing the Leon culpability formulation (bad faith, vexatiously, wantonly, or for oppressive reasons") but made a minor award under Rule 37(b).

40. GoPro v. 360Heroes [2018 WL 1569727 (N.D. Cal. March 30, 2018)]. A court acting without citation to Rule 37(e) court awarded a permissive adverse inference and reimbursement of the expenses incurred where a forensic examination determined that audio recordings transmitted by email had been intentionally altered.

41. Gordon v. Almanza [2018 WL 2085223] (March 5, 2018). Court denied motion for sanctions for failure to produce cell phone data and documents without mentioning Rule 37(e)

42. Griffiths v. Tucson, City of [2016 WL 7227553] (D. Ariz. Jan. 25, 2016). A court dealing with allegations of intentional deletion of text and voicemail messages from a cell phone applied Surowiec v. Capital Title, 790 F. Supp.2d 997, 1005 (D. Ariz. 2011), and took the issue of spoliation under advisement but allowed both parties to introduce evidence relevant to the issue and to argue inference from that evidence to the jury. **No mention was made of Rule 37(e).**

43. Harfouche v. Stars on Tour [2016 WL 54203] (D. Nev. Jan. 5, 2016). A court refused to find that spoliation by a party had occurred where former employee who was fired had "deleted" all of the information. The court refused to find there was a duty to preserve at the time since litigation must be more than a possibility. **No mention of Rule 37(e),** but it would not have made a difference.

44. Harmon v. United States [2017 WL 1115158] (D. Idaho March 24, 2017). In a complex case involving maintenance of canals and ditches for irrigation water, a court **ignored Rule 37(e)** in a case involving failure to enter data in databases and failure to keep logbooks. The court implied a duty to preserve from Federal Records Act regulations and ordered use of a permissive adverse inference instruction (citing Mali v. Fed. Insu., 720 F.3d 387, 393 (2nd Cir. 2013), which it described as least severe since "the jury is always at liberty to draw such inferences from circumstantial evidence." (*7). The court also found that the missing evidence was "likely" to have been relevant to a contested issue and proceeded to act upon finding the conduct "at least negligent" although there was no evidence the government engaged in intentional or bad faith spoliation because the plaintiff should not be asked "alone to shoulder the consequences of such a violation." (citing Chambers v. NASCO as giving it inherent authority to do so (*5)).

45. Heggen v. Maxim Heathcare [2018 WL 1992196] (N.D. Ind. April 27, 2018). Without mentioning Rule 37(e), the court orders, as a proportionate sanction for negligent deletion of recordings from cell phone, a factory reset, and then lost or deletion of the email transmitting the recordings to the EEOC during the pendency of a lawsuit, the award of reasonable expenses

incurred in filing the motion to compel. The court cited Rule 37(b)(2)(C) and found it premature to consider if a spoliation charge should be read to the jury if the case goes to trial.

46. Henkle v. Cumberland Farms [2017 WL 563540] (S.D. Fla. June 15, 2017). The court, in refusing to sanction because of a lack of bad faith, discussed the cause of the deletion as being due to overwriting due to "surveillance software" – but **ignored Rule 37(e).**

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

48. In re: Ajax Integrated [2016 WL 1178350] (N.D. N.Y. March 23, 2016). A court analyzed motion for sanctions under Rule 37(b) **without mentioning Rule 37(e)** for deletion of files prior to forensic examination. It noted that summary judgment can be precluded by spoliation, although it did not do so in this case. The Court decided to hold a separate evidentiary hearing to consider if sanctions were warranted. **Rule 37(e) should have been applied.**

49. In re: General Motors LLC Ignition Switch Litigation [2017 WL 2493143] (S.D.N.Y. June 9, 2017). 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 from an automobile in a bellweather trial because it would "plainly risk unfair prejudice" under FRE 403. The court indicated it would allow the jury to be told "in a neural manner" that does not suggest either party was responsible that the SDM data is unavailable. The court reserved the right to enter a permissive adverse inference at trial **without mentioning Rule 37(e). Rule 37(e) should have been mentioned since it clearly would preclude an adverse inference at trial on the facts presented in the opinion.**

50. Integrated Direct Marketing v. Drew May, 690 Fed. Appx. 822 (4th Cir. May 30, 2017). The Fourth Circuit did not find an abuse of discretion in refusing to find spoliation from the deletion of files from hard drive where the district court had conducted an evidentiary hearing and examined the non-moving party under oath before concluding that there was insufficient evidence to find spoliation and bar the issuance of summary judgment as a result of drawing an adverse inference of fact. **Rule 37(e) was not mentioned but given the sparse contents of the opinion on appeal, it is not possible to determine if it would have made a difference.**

51. Interjeet Basra v. Ecklund Logistics [2017 WL 1207482] (D. Neb. March 31, 2017). A failure of a trucking company to require its trucker to record Qualcomm/People Net server data in an accident was treated as mere negligence not sufficient to warrant an adverse inference.

52. Jutrowski v. Towship of Riverdale [2017 WL 1395484] (D. N.J. April 17, 2017). Court refused to deny a summary judgement as a sanction for failure to preserve dashcams video recording **without citing to Rule 37(e).** The court could not find that the video actually existed.

53. Kazan v. Walter Kennedy, 2016 WL 6084934 (W.D. Wash. Oct. 18, 2016). A court found refused to consider whether spoliation of the contents of a cell phone occurred when it fell out of a boat on a fishing trip moot while granting summary judgment in favor of party seeking sanctions for spoliation of the phone. **No mention was made of Rule 37(e), but it would have made no difference given the procedural posture of the case.**

54. Keathley v. Grange Insur. [2017 WL 1173767] (E.D. Mich. March 30, 2017). Inconclusive discussion of potential spoliation of digital photographs leading to order of further discovery **without mention of Rule 37(e).**

55. Kennedy v. Supreme Forest [2017 WL 2225557, at *2] (D. Conn. May 22, 2017). In case where original audio recording on a smartphone was destroyed in violation of duty to preserve, but copies and a transcript were offered in evidence, the court refused to issue an adverse inference without relying on **Rule 37(e)** because the court held that there was no showing that this occurred "with intent to impede its available for trial." **The failure to cite Rule 37(e) made no difference on the outcome.**

56. Khatabi v. Bonura [2017 WL 1434443] (S.D. N.Y. April 21, 2017). Sanctions were denied for loss of video tape, years after a conviction [which was overturned when a brother confessed] under Residential Funding **without mentioning Rule 37(e)** because there was no duty to preserve and because there was prejudice from its loss despite it having been grossly negligent to fail to preserve.

57. Kische v. Simsek [2018 WL 620493] (W.D. Wash. Jan. 29, 2018). The court analyzed a case deeply involving forensic examinations and allegations of spoliation **without relying on Rule 37(e)**, and applied per se rules gleaned from pre-Rule cases in the Ninth Circuit, ultimately applying the same jury instruction used in Apple v. Samsung, 888 F. Supp. 976, 995 (N.D. Cal. 2012).

58. LaFerrera v. Camping World RV Sales [2016 WL 1086082] (N.D. Ala. March 21, 2016). An adverse inference was denied where email was deleted in the absence of bad faith **without mention of Rule 37(e). Rule 37(e) should have been applied but the result would likely to have been the same.**

59. Legacy Data Access v. Mediquant [2017 WL 6001637] (W.D.N.C. Dec. 4, 2017). In a post jury verdict decision discussing why the court had permitted the jury to evidence of spoliation of the contents of an SD card, the court applied its inherent power without mentioning Rule 37(e) because "[t]his case involves the destruction of ESI, not the loss of ESI. Therefore, Rule 37(e)(2) is inapplicable." (at n. 8). This is an incorrect and unnecessarily restrictive reading of the Rule.

60. Lewis v. McLean, [864 F.3d 556, 2017 WL 3097864 (7th Cir. July 21, 2017)]. The Seventh Circuit raised the issue of an unexplained failure to preserve a portion of surveillance video which could have helped the plaintiff and suggested that upon remand the court should consider reopening discovery and asking recruited counsel to examine the state of mind of the defendants as well as explore why more video was not preserved. **Rule 37(e) was not but**

could have been referenced, clearing up the issue raised by Judge Dow in Martinenenz v. City of Chicago, 2016 WL 3538823 (N.D. Ill. 2016) when he noted that the Circuit had not yet addressed the impact of Rule 37(e).

61. Lologo v. Wal-Mart [2016 WL 4084035] (D. Nev. July 29, 2016). A court denied a request for (unspecified) sanctions for failure to preserve video footage without citation to **Rule 37(e) by holding that no "culpable state of mind" was shown under inherent authority of court to manage the case.** It also barred references implying that that video footage existed since that was not proven and could be prejudicial. The court also seems to credit statement that no footage existed, mentioning that no depositions were taken of persons "with knowledge of the surveillance system." **Rule 37(e) should have been applied but it would not have led to different result.**

62. Marla Moore v. Lowe's Home Centers [2016 WL 3458353] (W.D. Wash. June 24, 2016). A court refused to impose a default judgment because of the deletion of email which occurred prior to attachment of the duty to preserve. The court also held that the party did not act "willfully or in bad faith." **No mention of Rule 37(e). Rule 37(e) should have been applied; but the result would likely have been the same.**

63. Martin v. Stoops Buick [2016 WL 1623301] (S.D. Ind. April 25, 2016). An adverse inference was denied under Seventh Circuit authority because the deletion of emails and other ESI was not the result of bad faith (destroyed for purpose of hiding adverse information). **Rule 37(e) should have been applied but the result would likely to have been the same given the similarity of standards applied to the rule.**

64. Martinez v. Salazar [2017 WL 4271246] (D. New Mex. Jan. 16, 2017). Court analyzed request for sanctions for failure to search for or preserve taser use data and failure to implement a litigation hold without citing Rule 37(e), concluding that the conduct was grossly negligent, relying on Browder and Pension Committee. It inferred that prejudice existed merely because the loss of the "objective data" from the Taser as to its usage would have been relevant to determining the credibility of witnesses. (*6). "The court decided to allow questioning "limited in scope" to ensure that it did not detract from the main issues in the case, listing the topics that could be covered. It noted that it "may instruct jurors that they are allowed to make any inference they believe appropriate in light of the spoliation of the Taser data. **Rule 37(e) should have been applied, but it probably would have made no difference since the remedy is allowable under Rule 37(e)(1).**

65. Mayer Rosen Equities v. Lincoln National Life [2016 WL 889421] (S.D. N.Y. Feb. 11, 2016). The court refused to hold that spoliation of ESI existed merely because paper copies were scanned since experts were able to determine authenticity of underlying documents by use of the scanned copies. **Rule 37(e) should have been applied but the result would likely to have been the same.**

66. McCabe v. Wal-Mart Stores [2016 WL 706191] (D. Nev. Feb. 22, 2016). A court refused to impose an adverse inference regarding missing surveillance video because it did not result

from a conscious disregard of preservation obligation. **Rule 37(e) should have been applied but the result would likely to have been the same.**

67. McCarty v. Covol Fuels [644 Fed. Appx. 372](6th. Feb. 16, 2016). A Panel of the Sixth Circuit Court of Appeals **ignored Rule 37(e)** in affirming a summary judgment for defendant despite its destruction of ladder, documents, text messages and phone call records on destroyed cell phones. The Court of Appeals held the spoliation issue to be moot since the summary judgment was issued on an independent ground. Moreover, defendants did not act in bad faith and loss of evidence did not preclude putting on a case, distinguishing *Silvestri*. **Rule 37(e) should have been mentioned since ESI was involved; but it would have made no difference given the posture of the case.**

68. Mid-Atlantic Framing v. AVA Realty [2018 WL 1605567] (N.D.N.Y March 29, 2018). The District Judge refused to enter a summary judgment based against a party based in party on an inference that missing ESI and documents would have supported specific factual allegations key to the motion. Lacking evidence on that point, it refused to grand summary judgment. Without citing Rule 37(e), it noted that a dispositive motion "based on an adverse inference" is only available if bad faith and willfulness is demonstrated and there is no other remedy is available, citing Dahoda v. John Deere, 216 Fed. Appx. 124, 125 (2nd Cir. 2007). It noted that "questions existed" as to the motivation of the party and that lesser sanctions, such as an instruction to the jury to the jury that they can draw their own inference would be available. (*17). It cited **Residential Funding** for the requirements for an adverse inference.

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

70. Moore v. Philip Parker [2016 WL 6914884, at *2] (W.D. Ky. Nov. 22, 2016). A court dealt resolved allegations of spoliation due to the overriding of data in a digital surveillance system in a prisoner case **without citing Rule37(e). The rule should have been cited, but would not have made a difference.**

71. Moulton v. Bane [2015 WL 7776892] (D. N.H. Dec. 2, 2015). A court refused to sanction loss of text messages by use of a "punitive" sanction such an adverse credibility inference since they were recovered from the only party with whom they were exchanged and from a forensic examination of the cell phone. The court **did not cite to Rule 37(e)** and noted that the recovery reduced the prejudice. **Rule 37(e) should have been considered but the result would likely to have been the same since the rule would not have applied because ESI was restored.**

72. Nelda Ayala v. Your Favorite Auto Repair, 2016 WL 5092588, *19 and n. 28 (E.D.N.Y. Sept. 19, 2016). In an employee wage and hour bench trial, the court precluded use of use of paper records after ESI records of same content were destroyed after an order to preserve. The parties

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

73. NFL Management Council v. NFL Players Association [820 F.3d 527] (2nd Cir. April 25, 2016). The Second Circuit held that the NFL Commissioner was within his discretion to conclude that a player had deleted text messages since "the law permits a trier of fact to infer that a party who deliberately destroys relevant evidence . . . did so in order to conceal damaging information from the adjudicator." **Rule 37(e) should have been mentioned as an analogy although the court would likely have interpreted it as employing the same standard due to the intentionality involved.**

74. Nunes v. Rushton [2018 WL 2208301] (D. Utah May 14, 2018). Court resolves allegations of spoliation of social media accounts, including deletion of Google, Yahoo, Goodreads, Twitter and Bogspot accounts without ever mentioning Rule 37(e).

75. **Oppenheimer v. City of La Habra** [2017 WL 1807596, at *7] (C.D. Cal. Feb. 17, 2017). In a prisoner suicide case, a court **court refused to apply Rule 37(e) to the loss of video footage of the cell because "Rule 37 does not directly address destruction of video equipment or video footage."** (*7). No case dispositive remedy was applied to its loss because there was no showing of 'willfulness, bad faith, or fault." (*10). However, the Plaintiff was "free to argue to the jury the fact that the recording system was destroyed" and were "free to question what the destroyed system might have shown." (*11) **NOTE: The Rule was applied to losses of text messasges and email (see Appendix A).**

76. Organik Kimya v. ITC, 848 F.3d. 994, 2017 WL 604689, at *6-7 (Fed. Cir .Feb. 15, 2017), The Federal Circuit approved entry of a default judgment by the ITC under Rule 37(b) as appropriate "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted" to do so in the absence of such a deterrent. There had been significant destruction of electronic and hard copy files in bad faith causing high prejudice to the moving party. (*Id*., n. 4). The court ignored, without explanation, **Rule 37(e),** perhaps because prior orders had been violated and perhaps because of a restrictive reading of the ITC rules applied by the Commission. **Had Rule 37(e) been applied, it would not have made a difference.**

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

78. Patrick v. Tractor Supply [2017 WL 396301] (E.D. La. Jan. 30, 2017). **Without reference to Rule 37(e)**, a court found that the fact of a missing video was sufficient to deny motion for

summary judgment and that because it was not destroyed in bad faith, no sanctions would lie under First Circuit case law. It also stated that it would allow "the parties to admit evidence of these issues during trial." **Rule 37(e) should have been applied but court probably would have reached the same result as to admissibility after making the threshold findings since it seems to equate relevance with a showing of prejudice.**

79. Pierre v. Air Serv Security [2016 WL 5136256] (E.D.N.Y. Sept. 21, 2016). A court resolved allegations of spoliation of camera and videotape evidence **without mentioning Rule 37(e)** by finding moving party failed to meet burden of proof of elements of spoliation. **Since based solely on failure to establish common law breach, Rule 37(e) would not have applied.**

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

81. Presidee Barrett v. FedEx [2018 WL 1722385] (M. D. Ga. April 9, 2018). The Chief District Judge refused to determine that the failure to interrupt the automatic overriding of data about the length of work periods of a truck driver prejudiced a plaintiff that the truck driver had run off the road. The court relied on Flury factors, which arguably were not materially different, except that on reading the opinion one wonders why the court reached the decision that the practical importance of the missing ESI was low. Rule 37(e) was not mentioned**. If the Judge not found prejudice under Rule 37(e), there would have been no difference; one suspects that the opposite conclusion would have been drawn had the Rule been applied. The accident occurred after the effective date of the Rule.**

82. Prezio Health v. John Schenk [2016 WL 111406] (D. Conn. Jan. 11, 2016). After ordering production of email with metadata, only five of eight emails forwarded to the home AOL account were recovered because the wife of the defendant transferred family emails to a new ipad without going to an Apple store to help her do so. The metadata from the emails not recovered was irretrievably lost. The court recommended use of a type of permissive adverse inference similar to that in *Mali*, 720 F.3d 387, 391-94 (2nd Cir. 2013), because it was not "a punitive sanction, as in *Residential Funding*." **Neither Rule 37(b) nor Rule 37(e)** are mentioned, but **some commentators believe that Rule 37(b) was, in fact, applied.** If **Rule 37(e) were applied, it probably would have made no difference, even if no intent to deprive, given the treatment of Mali as consistent with (e)(1) measures.**

83. Reed v. Kindercare Learning Centers [2016 WL 6805336] (W.D. Wash. Nov. 17, 2016). In denying motion for an adverse inference based on failure to do a better job of preserving "electronically stored information," the court **did not mention Rule 37(e). It should have been applied, but would not have made a difference.**

84. Rega v. Armstrong, 2016 WL 10999995, at *2 (W.D. Pa. June 20, 2016). Court precluded offering of any evidence about surveillance video footage at trial in a prisoner case because it was not established that sanctionable spoliation had occurred, citing Bull v. UPS, 665 F.3d 68, 73 n.5 (3rd Cir. 2012)(distinguishing between finding that spoliation occurred and that

sanctions are warranted). There was no evidence that the defendant had seen or controlled the footage, and, if it did exist, there is no entitlement to an adverse inference because there was also no showing of bad faith, as defined in U.S. Nelson, 481 F. App'x 40, 42 (3rd Cir. 2012) to require a showing that the evidence was destroyed to prevent it being used by the adverse party. **Rule 37(e) was ignored but would not have made a difference on the culpability finding. This case seems to hold, in contrast to Willis v. Cost Plus, 2018 WL 1319194 (W.D. La. March 12, 2018), that speculative evidence of spoliation is not admissible at trial.**

85. Reyes v. Julia Place Condominium Homeowners Association [2016 WL 5871278, at n. 2] (E.D. La. Oct. 7, 2016). A court refused to use a spoliation inference drawn from the destruction of a hard drive to supply the missing evidence needed to bar summary judgment on merits, **without considering Rule 37(e)**. It noted a lack of authority for the position that an adverse inference may be used by a non-moving party to defeat a motion for summary judgment," citing a Handbook on Civil Procedure asserting that an adverse inference cannot "alone" make a sufficient showing. **Citing Rule 37(e) would not have made any difference in result.**

86. Richards v. Healthcare Resources Group [2016 WL 7494292] (C.D. Cal. Sept. 29, 2016). The court awarded evidentiary rulings and awarded monetary sanction because of intentional deletion in bad faith in a case where it also granted summary judgment for defendants.. Partial attorney's fees were also awarded for bad faith conduct under *Haeger v. Goodyear Tire & Rubber*, 793 F.3d 1122, 1135 (9th Cir. 2015**). No mention was made of Rule 37(e) but applying it would not have made a difference**.

87. Rife v. Okla. Dept. of Public Safety [846 F.3d 1119] (10th Cir. Jan. 23, 2017). The Tenth Circuit refused to consider allegations of intentional destruction of a video surveillance tape in a jail booking area **without mention of Rule 37(e)** in part because the aggrieved party failed to show "bad faith." **Had the rule been applied, the result would have been no different.**

88. Rockman Company v. Nong Shim Company [229 F. Supp.3d 1109](N.D. Cal. Jan. 19, 2017). The refused to sanction a party under Leon v. IDX, 464 F.3d 951 (9th Cir 2006) where a Korean parent in anticipation of a government investigation in Korea had destroyed documents and ESI based on US case law. The court treated the duty to preserve as uniquely enforceable in civil litigation as enforceable only by a specific party, not a "free-floating or shifting duty which other parties could latch onto," quoting from Point Blank Solutions v. Toyobo Am., Inc., 2011 WL 1456029, at *1 (S.D. Fla. Apr. 5, 2011), as well as In re Delat/Air Trans Baggage Fee, 770 F. Supp.2d 1299 (N.D. Ga. 2011) while distinguishing Phillip M. Adams v. Winbound, 2010 WL 3767318, at *3 (D. Utah. Sept. 16, 2010). **Rule 37(e) was not mentioned, but could have since the impact of ESI destruction was at issue, but it would have made no difference in the result.**

89. Romain v. City of Grosse Point [2016 WL 7664226 (E.D. Mich. Nov. 22, 2016)], *adopted* [2017 WL 67518] (E.D. Mich. Jan. 6, 2017). A Plaintiff was sanctioned because its private investigator failed to retain copies of a downloaded Google search of images used in interviewing a witness, which may have been viewed on an electronic device. The court did not cite **Rule 37(e)** nor find bad faith or substantial prejudice. The plaintiff was barred from

using the witness testimony and ordered to make payment of expenses and fees. In an April, 2017 clarification, the court pointed out that the preclusion was limited to referring to the images, not to trial testimony about the individual he saw. 2017 WL 1420455, at n. 1 (E.D. Mich. April 21, 2017). **Had Rule 37(e) been applied, there would have been no basis for any sanctions, given the lack of prejudice and lack of intent to deprive.**

90. Ruehl v. S.N.M. [2017 U.S. LEXIS 5399 (M.D. Pa. Jan. 12, 2017)]. In a Report and Recommendation in a wrongful death action, a Magistrate Judge recommended summary judgment for defendant on a punitive damages claim despite allegations of spoliation because the loss of video surveillance of a slip and fall because the party did not have a "culpable state of mind" as defined by Bull v. United Parcel Service, 665 Fed.3d 68, 79 (3rd Cir. 2012)(intentional conduct and desire to suppress the truth). The court held that the employees were "largely unaware of the capability of the hotel's video surveillance system" which is why they did not immediately preserve the video. **Rule 37(e) should have been applied but would not have changed the result.**

91. Sefket Redzepagic v. Hammer [2017 WL 780809] (S.D.N.Y. Feb/ 27. 2017). District Judge refused (in footnote 9) to consider sanctions of plaintiff for deletion of text messages after suit commenced because the moving party's employee retained copies of them and they were available to both parties. **Rule 37(e) was not cited but would not have made a difference.**

92. Sell v. Country Life Insur. Co [2016 WL 3179461] (D. Ariz. June 1, 2016). In an insurance claim by an individual seeking disability benefits, the court found that egregious discovery conduct by the party and its counsel in bad faith warranted striking of an Answer and entering a default judgment. The conduct included a failure to preserve emails through the misuse of an email "vault" which backup up an exchanger serverver. The court cited the statement in *Haeger v. Goodyear*, 813 F.3d 1233, 1243 (9th Cir. 2016) that Rule 37 is "not the exclusive means" for addressing the adequacy of discovery conduct as well as *Surowiec v. Capital Title* (Campbell, J.), 790 F.Supp.2d 997, 1010 (D. Ariz. 2011). **Raises difficult issue of whether Rule 37(e), which should have been applied in part, would have had a preclusive impact on use of inherent power regarding the other discovery breaches.** *Cf.* CAT3 v. Black Lineage [164 F.Supp.3d 488] (S.D. N.Y. Jan. 12, 2016).

93. Star Envirotech v. Redline Detection [2015 WL 90933461] (Dec. 16, 2015). The court found that the loss of advertising information, some in digital form and some in hard copy, was not "sanctions-worthy" spoliation since exemplars of the vast majority of the materials existed. The court was not persuaded that the party acted with a culpable state of mind in disposing of the documents, since it is "difficult to imagine what nefarious purpose would have been served" by the destruction. **Rule 37(e) should have been mentioned, but would have made no difference in the result.**

94. Stedeford v. Wal-Mart Stores [2016 WL 3462132] (D. Nev. June 24, 2016). In a slip and fall case, the court authorized preclusion of evidence and an adverse inference **without citing Rule 37(e**) under its inherent authority because the court was convinced, based in party on other Wal-Mart cases before it, that Wal-Mart acted with conscious disregard of its duty to preserve but noted that there was no evidence it had "intentionally destroyed" evidence. (*13) In

passing, the court noted that dismissal is only warranted when there is clear and convincing evidence of both bad-faith spoliation and prejudice to the opposing party, citing Micron Technologies. **Rule 37(e) should have been applied and likely would have led to different result.**

95. Sudre v. The Port of Seattle [2016 WL 7035062] (W.D. Wash. Dec. 2, 2016). In a slip and fall case where video surveillance "footage" was overwritten, the court found that it had been destroyed prior to the party receiving notice of the possibility of litigation and concluded that the party "did not have a duty to preserve evidence" at the time. **Rule 37(e) was not mentioned but would have not made a difference.**

96. Timms v. LZM [657 Fed. Appx. 228] (5th Cir. July 5, 2016). In affirming dismissal of a plaintiff's case and awarding fees as not an abuse of discretion, the Fifth Circuit noted that the District Court had not found the explanation "of why she did not produce" the text messages to be "credible" and cited the fact that in an attempt to replace them, only a partial production of hard copies from a cloud-based application was made. The Courts both treated the matter under Rule 37(b) as a violation of a discovery order despite testimony that the missing text messages resulted from the crashing of an iphone. **No mention was made of Rule 37(e), and had it been applied, it might have tempered the assessment that "intent to deprive" existed, barring a dismissal.**

97. Transystems Corp. v. Hughes Assocs [2016 WL 3551474] (M.D. Pa. June 30, 2016). Citing *Zubulake* and distinguishing 28 U.S.C. § 1927, court imposed nominal monetary sanctions ($1000) for negligent failure to preserve ESI by the wiping of hard drives **without mentioning Rule 37(e)**. **The rule should have been applied, but the measure could have been awarded as a result of a failure to take reasonable steps causing prejudice.**

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

99. Van Buren v. Crawford County [2017 WL 168156] (E.D. Mich. Jan. 17, 2017) and [2017 WL 512767] (E.D. Mich. Feb. 8, 2017), as well as [2017 WL 3479546, at *9-11] (E.D. Mich. Aug. 14, 2017). District Court hearing an excessive force case involving killing of a resident in his apartment resolved two related spoliation claims involving handling of audio recordings **without mention of Rule 37(e).** After an evidentiary hearing the Court denied summary judgments to defendants and stated that it would instruct the jury using a rebuttable presumption that the missing ESI was unfavorable to the officers version of what happened in the apartment. The court concluded that the "actions exceed mere negligence" and at best were "remarkably reckless" which was the result of "grossly incompetent recordkeeping or purposeful obfuscation." (*16-17). In August, 2017, however, a second motion sanctions was considered - without regard to the "restore or replace" language of Rule 37(e) - when the

defendants disclosed they had discovery the SD card which would have contained the audio recordings at issue. **Rule 37(e) should have been applied; result would have been different**.

100. Washington v. Wal-Mart [2018 WL 2292762 at *5] (W.D. La. May 17, 2018). In a slip and fall where the plaintiff alleged that there was a material issue as to the store management's knowledge of the hazard, the court refused to infer that spoliation of video segments supplied the necessary inference to bar summary judgment in the absence of adequate proof of the requisite culpability. The court used Circuit case law, **not Rule 37€**, and based on Russell v. Univ. of Texas, 234 F. App'x 195, 208 (5th Cir. 2007) found it insufficient to justify that inference of knowledge merely because Wal-Mart deleted the surveillance footage as part of its standard operating procedure); ***cf*. White v. United States, 2018 WL 2238592, at *4 (E.D. Mo. May 16, 2018)(permitting party to argue inferences at trial about missing parts of video despite finding no violation of Rule 37(e)).** The opinion is also noteworthy because it finds that the extent of a duty to preserve is "as in other discovery contexts, proportional to the facts of the case," citing Rimkus and Sedona Principle 2 (2007 Ed.).

101. Wiedeman v. Canal Insurance [2017 WL 2501753] (N.D. Ga. June 9, 2017). The court refused to sanction the loss of electronic information on the ECM of a truck which had been in an accident **without mentioning Rule 37(e).** The court agreed that the primary lessor was not responsible for any spoliaiton since the vehicle was not in its possession, custody or control at the time of the routine "reset." The court also found that in the absence of bad faith as to whether the party had knowledge of the "reset" of the data base, it would not award sanctions for spoliation against the principal party, since it was only speculation that they were aware the ECM data had been reset. **The application of the Rule would not have made a difference.**

102. Williams v. CVS Caremark [2016 WL 4409190] (E.D. Pa. Aug. 2016). Counsel was sanctioned under 28 U.S. C. § 1927 because no evidence of tampering of a surveillance video was presented at an evidentiary hearing after counsel had had the opportunity to conduct discovery of the alleged spoliation. **Although not necessary to case, it would have been useful to have cited the new Rule.**

103. Willis v. Cost Plus [2018 WL 1319194, at *6 (W.D. La. March 12, 2018)]. In a diversity action for personal injuries where challenges were made to the contention that video surveillance tapes of the shopping injury were at issue, the District Judge concluded that the Louisiana Supreme Court would likely permit an independent tort action for intentional spoliation [citing, *inter alia*. BASF v. Man Diesel, 2016 WL 5817159, *41 (M.D. La. 2016)] but that there was no evidence that the video was intentionally destroyed (*5). It also opined that while Louisiana did not necessarily foreclose permit such an action for negligent spoliation that does not apply since evidentiary presumptions which permit an adverse inference are controlled by federal procedural law in diversity actions involving state substantive law and require a showing of bad faith, ignoring the standards of **Rule 37(e).** (*6). The court held that there was no showing that the surveliance video was destroyed for the purpose of hiding adverse evidence, citing Guzman v. Jones, 804 F.3d 707, 713 (5th Cir. 2015) and "indeed" has not shown such evidence ever existed. The court went on to say, however, that the party may question witnesses about the absence of video surveillance and any alleged failures to follow

internal policies, citing Federal Rule of Evidence 607 (witness credibility) – and may argue for whatever inference she deems may be draw due to the absence of items of potential evidence. (*6). **Illustrates that the existing Circuit standard is roughly equivalent to Rule 37(e), thus making no difference in the final result, but citation to Rule 37(e) should have occurred and would have enhanced the value of the opinion.**

104. Wilson v. Conair [2016 WL 7742772, at *5] (E.D. Cal. June 3, 2016). Court postponed until trial consideration of sanctions for loss of text messages on cell phone when replaced by I-Phone despite request to preserve without mentioning Rule 37(e). **Citation to the Rule could have been different as to whether adverse inference would be available if the court had found no evidence of a failure to take reasonable steps.**

105. Wooten v. BNSF [2018 WL 2417858] (D. Mont. May 29, 2018). In an extremely well-written and thorough opinion on a wide variety of issues stemming from an alleged workplace injury by a railway conductor, the court resolved allegations of spoliation of videos of the vicinity of the alleged accident and of metadata of digital photos taken **without acknowledging Rule 37(e).** It asserted that if spoliation occurs "before litigation commences, the court may impose spoliation sanctions pursuant to its inherent authority." (*8). Ultimately, the court allowed the moving party to introduce evidence of its contentions to the jury, which will be allowed to draw "whatever reasonable inferences may follow from the evidence [about the video] presented." In addition, the court will have the opportunity to consider giving an adverse inference instruction if warranted. (*10). **The court did not find a failure to take reasonable steps - which it cited Rimkus as involving needed to be reasonable and proportional to the case - nor did it find any culpability - or even any prejudice. Had Rule 37(e) been applied, the court might have stalled its rulings until trial, but it would have been unjust to do so.**

106. Wright v. National Interstate [2017 WL 4011206, at *3 (E.D. La. Sept. 12, 2017)]. A court refused (**ignoring Rule 37(e)**) to find that a party had satisfied its "high burden" of showing that missing video footabe was the result of bad faith, but it did agree that a party could be questioned about its "whereabouts" as it goes to the party's credibility.

107. Xyngular Corporation v. Schenkel [200 F.Supp.3d 1273 at *21-22] (D. Utah Aug. 2, 2016). In litigation between corporation and shareholder in closely held corporation, the court refused to find that the corporation had committed spoliation by deleting electronic documents or reformatting a computer (at *29) **without citing Rule 37(e).** The court applied clear and convincing evidence standard in making its ruling (*30 & n.194 for std. of proof). **Rule 37 would probably have led to the same result since the information was not "lost" as it was apparently restored and replaced.**

Appendix C
Circuit Acknowledgments of Rule 37(e)

Circuit	Status	Citation
1st	Unknown	
2nd	Yes	MPLA v. Gateway, 2018 WL 1659671 (2nd Cir. 2018); Klipsch v. EPRO E-Commerce, 880 F.3d 620, (2nd. Cir. 2018)(ducking application); Mazzei v. the Money Store, 656 Fed. Appx. 558 (2nd Cir. 2016)(databases)(requires finding of intent to deprive to give adverse inference instruction)
3rd	Ignored	Archer v. York School District, 710 Fed. Appx. 94 (3rd Cir. Sept. 27, 2017)(post-employment deletion of email account).
4th	Ignored	Integrated Direct Mktg. v. May, 690 Fed. Appx. 822 (4th Cir. 2017)(deletion of files on hard drive)
5th	Ignored	Timms v. LZM, 657 Fed. Appx. 228 (5th Cir. July 2016)(texts).
6th	Yes	Applebaum v. Target, 831 F.3d 740 (6th Cir. 2016)(showing of negligence or gross negligence does not justify adverse inferences).
7th	Ignored	Lewis v. McLean, 864 F.3d 556 (7th Cir. 2017)(surveillance video); *but see* Martinenz v. City of Chicago, 2016 WL 3538823 (N.D. Ill. 2016)(Dow, J.) (impact of Rule 37(e) on Circuit law dealing with adverse inferences not yet been addressed).
8th	Unknown	
9th	Yes	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).
10th	Yes	Helget v. City of Hays, 844 F.3d 1216 (10th Cir. 2017) ((Rule 37(e) provides "further" guidance); EEOC v. Jetstream, 878 F.3d 960 (10th Cir. 2017).
11th	Yes	ML Healthcare Services v. Publix Super Markets, 881 F.3d 1293, (11th Cir. 2018)(Rule 37(e) applies to "spoliation of electronically stored video")
D.C	Unknown	
Fed.	Yes	Regenereon Pharm. v. Merus, 864 F.3d 1343 (2017), 2017 WL 3184400, at n.7 (Fed. Cir. 2017)(rule supersedes Residential Funding in part).