

# Spoliation of ESI Today

Thomas Y. Allman<sup>1</sup>

Introduction	1
Amended Rule 37(e)	2
Duty to Preserve	4
Reasonable Steps	7
Restore or Replace	11
Remedial Measures ((e)(1))	13
Sanctions ((e)(2))	19
Intent to Deprive	23
Inherent Authority	25
Appendix (Circuit Use of Rule)	30

This Paper describes the key issues arising from the implementation of amended Federal Rule 37(e)(2015) (“Rule 37(e)”) dealing with spoliation of electronically stored information (“ESI”).<sup>2</sup>

Rule 37(e) was adopted by the Civil Rules Advisory Committee in April, 2014 and included in the 2015 Amendment Package forwarded to Congress.<sup>3</sup> After the passage of time to allow Congress to decide if it wished to intervene (it did not), the Rule went into effect on December 1, 2015. Since that time, approximately 300 written opinions have appeared which did – or should have – applied the Rule.<sup>4</sup>

## Introduction

Spoliation involves a failure to preserve - or affirmative acts designed to alter or destroy - relevant evidence which may be useful to an adversary in a judicial proceeding. The common law duty to preserve evolved from that doctrine and is typically understood as attaching once litigation is reasonably anticipated or has commenced. While spoliation allegations may well have been a relatively rare before e-discovery, that is no longer the case, particularly in regard to pre-litigation conduct.

---

<sup>1</sup> © 2018 Thomas Y. Allman. Tom Allman is a former General Counsel and Chair Emeritus of the Sedona Conference® Working Group 1 on Electronic Discovery and serves as an Adjunct Professor at the University of Cincinnati College Of Law, where he teaches a class on E-Discovery.

<sup>2</sup> An earlier version of this Memorandum 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](https://law.duke.edu/sites/default/files/centers/judicialstudies/judicature/may2017_rule37.pdf).

<sup>3</sup> The Rules and Committee Notes are found at 305 F.R.D. 437, 567-578 (2015).

<sup>4</sup> As of this writing, almost 200 reported Opinions have cited and applied the Rule and over 100 could or should have done so, but did not. See *Acceptance by Courts, infra*.

Federal Courts historically addressed the breach of a duty to preserve under their inherent powers, whether it occurred before or after litigation was commenced.<sup>5</sup> However, the Federal Circuits famously disagreed on the degree of culpability required for measures such as serious sanctions.

In the Second Circuit, for example, mere negligence sufficed to justify adverse inference jury instructions<sup>6</sup> and any loss of ESI was deemed negligent.<sup>7</sup> Other Circuits disagreed.<sup>8</sup> This lack of uniformity, however, had an unfortunate practical impact on preservation planning and was regarded as unfair.<sup>9</sup> The initial version of Rule 37(e) enacted in 2006 did not adequately address this issue and many courts continued to impose harsh measures despite a lack of culpable intent.

As a result, the E-Discovery Panel at the 2010 Duke Litigation Conference strongly recommended and the Rules Committee ultimately accepted that a new Rule 37(e) providing for a uniform treatment of preservation was needed.<sup>10</sup>

## **Amended Rule 37(e)**

Amended Rule 37(e) provides remedies for the loss of ESI which should have been preserved, including those that result from pre-litigation conduct.<sup>11</sup> However, because this is a “back-end” or “sanctions-only” approach<sup>12</sup> dealing with the impact of spoliation, not providing rules governing primary conduct, it satisfies Rules Enabling Act limitations.<sup>13</sup>

---

<sup>5</sup> Iain D. Johnston, *Federal Courts Authority To Impose Sanctions for Pre-litigation or Pre-Order Spoliation of Evidence*, 156 F.R.D. 313 (1994).

<sup>6</sup> *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2<sup>nd</sup> Cir. 2002).

<sup>7</sup> *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent”).

<sup>8</sup> *See, e.g., Aramburu v. Boeing*, 112 F.3d 1398, 1407 (10<sup>th</sup> Cir. 1997) (“[m]ere negligence . . . is not enough because it does not support an inference of consciousness of a weak case”); *accord McCormick*, EVIDENCE § 273 at 660-61 (1972).

<sup>9</sup> Committee Note, Rule 37(e)(2015)(hereinafter “Committee Note”) (“[t]hese developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough”).

<sup>10</sup> The E-Discovery Panel at the Duke Conference recommended enactment of a comprehensive version of Rule 37(e) which spelled out the consequences of a failure to preserve. The Author served on the Panel, along with several jurists, a future member of the Rules Committee and two experienced outside counsel.

<sup>11</sup> Amended Rule 37(e) provides that “[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.”

<sup>12</sup> Discovery Comm. Notes, Nov. 23, 2011, March 2012 Agenda Book, Rules Committee, 289.

<sup>13</sup> A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2033 (2011)(rules are appropriate if they merely address the “manner and means” by which litigants rights are adjudicated).

The amended Rule “rejects cases such as *Residential Funding v. DeGeorge Financial Corp.*, 306 F.3d 99 (2<sup>nd</sup> Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.”<sup>14</sup> It authorizes sanctions only “only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation.” It also acknowledges, however, the authority of trial courts to act to cure any prejudice from losses of ESI by employing remedial measures without a showing of culpability.

The Rule is inapplicable to tangible property losses, including documents. If both ESI and documents are lost in the same case, a court applies separate standards of culpability, if needed,<sup>15</sup> despite arguments by the Author that the same standard should be applied if the loss arises from the same conduct.<sup>16</sup>

However, the uniform approach championed by Rule 37(e) has been influential in contests other than loss of ESI context.<sup>17</sup>

## Acceptance by Courts

A substantial number of decisions, hopefully declining in volume over time, do not apply Rule 37(e) in contexts where it clearly should have been. As of this writing, the Author has identified over 100 such opinions in which courts could or should have done so, but did not.

This includes a substantial number of cases in which courts have failed to acknowledge that ESI is involved in the use and storage of surveillance videos and digital cameras.<sup>18</sup> As recently as May 29, 2018, a court resolved allegations of the loss of portions of videos and of the metadata for digital photographs without applying Rule 37(e)

---

<sup>14</sup> Committee Note.

<sup>15</sup> *Best Payphones v. City of New York*, 2016 WL 792396, at \*4 (E. D.N.Y. Feb. 26, 2016); *but cf* *Mid-Atlantic Framing v. AVA Realty*, 2018 WL 1605567 (N.D.N.Y. March 29, 2018)(ignoring Rule where both ESI and documents lost).

<sup>16</sup> *EPAC Technologies v. HarperCollins*, 2018 WL 1542040, at \*14 (M.D. Tenn. March 29, 2018)(rejecting Author’s argument to that effect, but conceding, in n. 7 that it would be “a more difficult question” if the hard copies and electronic copies of the same data are destroyed”).

<sup>17</sup> *See e.g.*, *EEOC v. Jetstream*, 878 F.3d 960, 965-66 (10<sup>th</sup> Cir. Dec. 28, 2017)(Rule 37(e) Committee Note provides a common sense explanation for requiring high standard of intent for adverse inference in a case involving loss of hard copy notes); *see also* *Emerald Point v. Hawkins*, 294 Va. 544, 808 S.E.2d 384, 392 (Va. Dec. 28, 2017)(“the resolution of a spoliation issue . . . should be guided by the same standard”); *accord*, *Brookshire Bros. v. Aldridge*, 438 S.W. 3d 9, 24 (Tex. 2014); *Cooper Tire & Rubber v. Koch*, 812 S.E.2d 256, at n. 6 (S.C. Ga. March 15, 2018)(endorsing test of loss intentionally to deprive the other party of its use of the evidence in litigation in tire defect case).

<sup>18</sup> Exhibit B, Thomas Y. Allman, *Amended Rule 37(e): Case Summaries*, May 27, 2018 (current copy available from Author (separately listing the decisions of courts that failed to apply Rule 37(e) under conditions calling for its use). An earlier version of Exhibit B is available at <https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/judicature/2017rule37etodaycasesummaries.pdf>.

standards. Had the requisite finding required by the Rule been made, it is possible that the allegations would have been dismissed out of hand.<sup>19</sup>

## Foreclosure

The intent of the Rule, as explained in the Committee Note,<sup>20</sup> is to limit the need for courts to rely on the use of inherent authority, given the specific rejection of *Residential Funding*. Not all courts have accepted this limitation on use of inherent authority, a topic examined in more detail *infra* at “Inherent Authority.”

## Duty to Preserve

The common law obligation to preserve ESI requires a party or potential party to litigation to undertake reasonable and good faith efforts to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation which is under its custody and control.<sup>21</sup> A failure to demonstrate that relevant evidence has not been preserved is fatal to recovery, whether the loss is of tangible property or documents or ESI.<sup>22</sup>

Amended Rule 37(e) builds on these predicate conditions; “[the Rule] does not attempt to create a new duty to preserve.”<sup>23</sup> It applies only when “electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.”

However, the authority conferred by Rule 37(e) to enforce a duty to preserve is limited to a breach of the duty by parties to the litigation. While non-parties served with subpoenas may be under a duty to preserve, they are not subject to the Rule<sup>24</sup> and it is not uncommon in cases challenging prison misconduct for those in control of decisions to retain or delete prisoner video surveillance tapes not be joined.<sup>25</sup>

---

<sup>19</sup> *Wooten v. BNSF*, 2018 WL 24117858 (D. Mont. May 29, 2018)(imposing measures without findings of culpability or prejudice and reserving the opportunity to later impose an adverse inference if warranted at trial).

<sup>20</sup> Committee Note (“New Rule 37(e) replaces the 2006 rule [and] authorizes and specifies measures a court may employ. . . it therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used.”).

<sup>21</sup> The Sedona Principles, Third Edition, Principle 5, 19 SEDONA CONF.J. 1, 93 (2018)(hereinafter “The Sedona Principles”).

<sup>22</sup> *World Trade Centers Assn. v. Port Authority*, 2018 WL 1989616] (S.D.N.Y. April 2, 2018); *report and recommendation adopted*, 2018 WL 1989556 (S.D.N.Y. April 25, 2018)(denying spoliation sanctions in the absence of proof of loss of relevant documents or ESI).

<sup>23</sup> Committee Note, 305 F.R.D. 457, 570 (2015).

<sup>24</sup> *In Re Broiler Chicken Antitrust Litigation*, 2017 WL 1682572, at\*3 (N.D. Ill. April 21, 2017)(refusing permission to serve document preservation subpoenas on massive numbers of customers on proportionality grounds); *but see* *Caston v. Hoaglin*, 2009 WL 1687927 (S.D. Ohio. 2009)(permitting service of preservation subpoenas as to nine former employees in form which does not require a response).

<sup>25</sup> *Void v. T.D. Large*, 2018 WL 1474550 (W.D. Va. March 26, 2018)(no measures available because tape not lost because a “party” failed to take reasonable steps to preserve it).

## Triggering the Duty

The Committee Note observes that the “rule does not apply when information is lost before a duty to preserve arises.”

It explains that “[m]any court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable.” It suggests that courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant.

A duty to preserve based on possible litigation must be “predicated on something more than an equivocal statement of discontent.”<sup>26</sup> The institution of governmental investigations or widely reported industry activity can also supply sufficient notice of potential litigation to “trigger” the duty in subsequent litigation even if the cited activity did not involve the party.<sup>27</sup> Hiring counsel to help file an EEOC claim may be sufficient, however.<sup>28</sup>

Governmental record-keeping obligations such as those imposed by the EEOC or the SEC may also be an independent source of a duty to preserve even if litigation is not reasonably foreseeable.<sup>29</sup> The test is whether the party is within the class of parties sought to be advantaged by the regulation.<sup>30</sup>

## Scope of the Duty

The scope of the duty to preserve extends to unique, relevant evidence that might be useful to the adversary and is discoverable under amended Rule 26(b)(1).<sup>31</sup> However, since “the duty to preserve is coextensive with the party’s discovery obligations,” it is logical to apply proportionality by analogy to the scope of the pre-litigation duty to preserve.<sup>32</sup>

---

<sup>26</sup> *Cache La Poudre Feeds v. Land O’Lakes*, 244 F.R.D. 614, 623 (D. Colo. March 2, 2007).

<sup>27</sup> *See, e.g., Point Blank Solutions v. Toyobo America*, 2011 WL 1456029, at \*24-27 (S.D. Fla. April 5, 2011)(“shifting duty” to preserve triggered by third party investigation) *and Phillip Adams v. Winbond Elec.*, 2010 WL 3767318 at \*3-4 (D. Utah Sept. 16, 2010)(duty triggered by access to “industry-wide” knowledge of claims of violations).

<sup>28</sup> *Fox v. Steepwater*, 2018 WL 2208308, at \*3 (D. Utah May 14, 2018)

<sup>29</sup> *See, e.g., EEOC v. JetStream*, 878 F.3d 960 (10<sup>th</sup> Cir. Dec. 28, 2017)(dealing with violation of 29 CFR 1602.14 as basis for breach of duty to preserve).

<sup>30</sup> *Byrnie v. Town of Cromwell*, 243 F. 3d 93, 108-109 (2<sup>nd</sup> Cir. 2001).

<sup>31</sup> The 2015 Amendments limited the scope of discovery in Rule 26(b)(1) to non-privileged material which is both relevant to claims or defenses and proportional to the needs of the case. The formulation that a party is obligated to preserve what is reasonably calculated to lead to the discovery of admissible evidence is outdated. *Cf. William T. Thompson v. General Nutrition Corp.*, 593 F. Supp. 1443, 1445 (C.D. Cal. 1984) *in light of* *In re Bard IVC Filters*, 2016 WL 4943393 (D. Ariz. 16, 2016).

<sup>32</sup> Hon. Paul W. Grimm, Michael D. Berman, Conor R. Crowley and Leslie Wharton, *Proportionality in the Post-Hoc analysis of Pre-Litigation Preservation Decisions*, 37 BAL. L. REV. 381, 404-405, 410 (Spring 2008).

Similarly, in *Pippins v. KPMG* the court observed that “[p]reservation and production are necessarily interrelated.”<sup>33</sup> Ephemeral or transitory ESI which is not routinely produced in discovery need not be preserved in the absence of affirmative notice of its potential relevance to the case.<sup>34</sup> The seminal *Columbia Pictures v. Bunnell* decision clarified that there was no duty to preserve relevant data retained briefly in RAM until an order was issued to do so.<sup>35</sup>

The Seventh Circuit Guidelines for E-discovery provides practical examples<sup>36</sup> of types of ESI that need not be preserved absent appropriate notice, basically on proportionality grounds. Sources of ESI which are inaccessible under Rule 26(b)(2)(B) also may not need to be preserved if a party reasonably believes that ESI will continue to be available from other reasonably accessible sources.<sup>37</sup>

However, a degree of prudence and caution is advisable when making pre-litigation decisions based on proportionality grounds. There remains the risk, in the absence of agreement or a court order, that if challenged later on spoliation grounds, the decision may be second guessed.<sup>38</sup> The Committee Note to Rule 37(e) observes that courts should use care in that regard.<sup>39</sup>

## Relevance

The burden of proof in demonstrating discovery relevance is on the moving party, but some courts “presume” that the missing ESI would support a claim or defense<sup>40</sup> when there is a high degree of culpable conduct.<sup>41</sup> In *GN Netcom v. Plantronics*, for example,

---

<sup>33</sup> 279 F.R.D. 245, 255 (S.D.N.Y. Feb. 3, 2012)(refusing to excuse preservation of hard drives of potential opt-in parties without further information of possible benefits of retention).

<sup>34</sup> Principle 9, The Sedona Principles (3<sup>rd</sup> Ed. 2018).

<sup>35</sup> 245 F.R.D. 443, 448 (C.D. Cal. Aug. 24, 2007)(data in RAM is not too ephemeral to be discoverable but absent notice there is no duty to preserve).

<sup>36</sup> Seventh Circuit E-Discovery Guidelines, at Principle 2.04(d)(1)-(6) (Scope of Preservation)(2010), copy at [http://www.discoverypilot.com/sites/default/files/Principles8\\_10.pdf](http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf). This includes (1) deleted, slack, fragmented, or unallocated data (2) random access memory (“RAM”); (3) on-line data such as temporary internet files, history, cache, cookies, etc.; (4) metadata fields updated automatically; (5) backup data substantially duplicative of data more accessible elsewhere; and (6) other forms of ESI whose preservation requires extraordinary affirmative measures.

<sup>37</sup> Rule 37(f) Committee Note (2006), 234 F.R.D. 219, 374 (2006)(a factor in deciding whether a party must intervene to stop automatic deletion is whether the party reasonably believes the ESI “is likely to be discoverable and not available from reasonably accessible sources”).

<sup>38</sup> The Sedona Conference *Commentary on Proportionality in Electronic Discovery*, Comment 1.a., 18 SEDONA CONF. J. 141, 15051 (2017).

<sup>39</sup> Committee Note (“[i]t is important not to be blinded . . . by hindsight arising from familiarity with an action as it is actually filed”).

<sup>40</sup> *Mastr Adjustable Rate v. UBS Real Estate*, 295 F.R.D. 77, 85-86 (S.D.N.Y. 2013) explaining the Second Circuit requirement that a court must determine if the missing evidence “would have been favorable to the moving party” so as to support its claims or defenses as required by Residential Funding).

<sup>41</sup> In *Ottoson v. SMBC Leasing*, 2017 WL 2992726, at \*9 (S.D.N.Y. July 13, 2017)(inferring relevance and prejudice from grossly negligent conduct).

a court placed the burden on the non-moving party to show that the lost ESI was not relevant.<sup>42</sup>

Rules 16 and 26 were amended in 2015 to encourage parties to discuss and resolve issues about preservation as early as possible. Rule 26(f) now requires that any “discovery plan” furnished to the court should lay out any open issues dealing with preservation disputes for discussion with the court. Rule 16(b) now authorize scheduling orders are authorized to deal with resolution of open preservation issues.<sup>43</sup>

## Reasonable Steps

Rule 37(e) measures are available only if ESI which should have been preserved is “lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.” If a party has taken reasonable steps, the inquiry ends at that point.<sup>44</sup>

The “reasonable steps” requirement of Rule 37(e) is akin to a negligence standard, since “negligence, broadly speaking, is conduct that falls below the standard of what a reasonably prudent person would do under similar circumstances.”<sup>45</sup> It is the traditional method by which the duty to preserve has been assessed,<sup>46</sup> perfection is not required<sup>47</sup> and sanctions “are not automatic” simply because ESI is “lost.”<sup>48</sup>

One method of achieving compliance is through implementation of a litigation hold process, as famously articulated in *Zubulake v. UBS Warburg* (“Zubulake IV”).<sup>49</sup> Its usefulness was noted in the Committee Note to the original version of Rule 37(e) and in the draft Committee Note to the amended Rule.<sup>50</sup> The Sedona Conference *Commentary on*

---

<sup>42</sup> 2016 WL 3792833 (D. Del. July 12, 2016).

<sup>43</sup> Guidelines in one District require counsel to discuss scope, sources and types of ESI that have been and will be preserved in light of the claims and defenses in the case and other proportionality factors. Hon. Craig B. Shaffer, Deconstructing “Discovery About Discovery,” 19 SEDONA CONF. J. 215, 263-264 (2018).

<sup>44</sup> A.O.A. v. Rennert, 2018 WL 11251827, at \*3 (E.D. Miss. March 12, 2018) (“nothing . . . indicates [that the conduct resulting in the loss] was unreasonable”).

<sup>45</sup> Leidig v. Buzzfeed, 2017 WL 651253, at \*10 (S.D.N.Y. Dec. 19, 2017) (“amateurish collection” leading to loss of perhaps critical ESI reflects the fact that the party did not take “reasonable steps” as required).

<sup>46</sup> Ariana Tadler and Henry Kelston, *What you Need to Know About the New Rule 37(e)*, 52-JAN TRIAL 20, 22 (2016) (“reasonableness is the standard against which efforts to preserve are judged; perfect preservation is neither expected nor required”).

<sup>47</sup> Committee Note (“perfection in preserving all relevant [ESI] is often impossible”); *accord* Winfield v. City of New York, 2017 WL 5664852, at \*9 (S.D.N.Y. Nov. 27, 2017) (“perfection in ESI discovery is not required” [citing Rule 37(e)]).

<sup>48</sup> *Konica Minolta v. Lowery*, 2016 WL 4537847, at \*6 (E.D. Mich. Aug. 31, 2016).

<sup>49</sup> 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure preservation of relevant documents”).

<sup>50</sup> Ronald J. Hedges, *What Might Be Reasonable Steps to Avoid Loss of Electronically Stored Information*, 18 DDEE 143 (March 1, 2018), copy at <https://www.corporateeddiscovery.com/what-might-be-reasonable-steps-to-avoid-loss-of-electronically-stored-information/> (a “party’s issuance of a litigation hold is often important [to establish reasonability] [b]ut it is only one consideration, and no specific features – for example, a written rather than an oral hold notice – is dispositive”). The final version of the Committee

*Legal Holds*<sup>51</sup> and related commentaries emphasize that compliance with procedural steps of that nature can be persuasive evidence of “reasonable steps.”<sup>52</sup>

The Second Circuit explained in *Chin v. Port Auth. Of New York & New Jersey* that the failure to adopt good preservation practices is only one factor in determining if sanctions should issue when there is a failure to preserve.<sup>53</sup> Mere “imperfections” do not suffice.<sup>54</sup> In *Bouchard v. U.S. Tennis Association*, for example, a failure to issue a legal hold was not dispositive under Rule 37(e) because the party had “fully complied” by taking other steps.<sup>55</sup>

In *Johnson v. Brenna*, it was not decisive that a key player did not return a signed “Litigation Hold Notice.”<sup>56</sup> On the other hand, a grossly negligent failure to determine the proper scope of and to adequately follow up on implementation of a litigation hold was not taking reasonable steps.<sup>57</sup>

A party may be found to have failed to take reasonable steps without having done so with an “intent to deprive.” In *Coward v. Forestar Realty*<sup>58</sup> a party that forgot a password to a hard drive did not take reasonable steps, but did not act “in bad faith or with intent to deprive.”

However, a party that acts with an “intent” to deprive the other party of the use of ESI is unlikely to be able to demonstrate that it took reasonable steps to preserve. That was the case in *GN Netcom v. Plantronics*, where the assessment of the party’s otherwise efficient conduct was clouded by the fact that the Court was not convinced that the party had done all it could once massive deletions by an executive were discovered.<sup>59</sup>

---

Note simply observes that “the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation.”

<sup>51</sup> The Sedona Conference *Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265 (2010).

<sup>52</sup> Kurz and Mauler, *A Real Safe Harbor*, 62- AUG FED. LAW. 62 (2015)(Guidelines 8, 9 & 10 of the Sedona Commentary on Legal Holds can serve as the “reasonable steps” identified in Rule 37(e)).

<sup>53</sup> *Chin v. Port Auth. Of New York & New Jersey*, 658 F.3d 135, 162 (2<sup>nd</sup> Cir. 2012)(rejecting *per se* impact of failure to issue litigation hold in Pension Comm., 685 F. Supp. 2d 456, 464-65 (S.D.N.Y. 2010)). Chin emphasized that “a case-by-case approach to the failure to preserve relevant evidence at the discretion of the trial court is appropriate.” 658 F.3d. at 162.

<sup>54</sup> *New Mexico Oncology v. Presbyterian Healthcare*, 2017 WL 3535293, at \*5 (D. New Mexico Aug. 16, 2017)(criticizing failures to implement holds but refusing to find that they resulted in the spoliation of evidence).

<sup>55</sup> 2017 WL 3868801, at \*2 (S.D.N.Y. Sept. 5, 2017).

<sup>56</sup> 2017 WL 5672692 at \*8 (S.D. Tex. Nov. 27, 2017)(refusing to infer “wrongdoing” from a failure to return the form).

<sup>57</sup> *EPAC Technologies v. HarperCollins*, 2018 WL 1542040, at \*22 (M.D. Tenn. March 29, 2018).

<sup>58</sup> 2017 WL 8948347 (N.D. Ga. Nov. 30, 2017).

<sup>59</sup> 2016 WL 3792833, at \*6 (D. Del. July 121, 2016)(the court was “not convinced” that the party took all “the reasonable steps it could have taken”).

That was also the case in *Alabama Aircraft v. Boeing*, where “blatantly irresponsible behavior” led the court to conclude that the party acted with the intent to deprive.<sup>60</sup>

## Proportionality

The Committee Note to amended Rule 37(e) acknowledges that proportionality considerations play a role in determining if “reasonable steps” have been taken in implementing the duty to preserve.<sup>61</sup> Principle 5 of the *Sedona Principles* (3<sup>rd</sup> Ed. 2018) has been amended to state that it is unreasonable to require disproportionate steps to preserve.<sup>62</sup>

Perhaps the best articulation of the linkage between “reasonable steps” and proportionality was expressed in *Rimkus v. Camarata*, where the court explained that whether preservation conduct is acceptable in a case “depends on what is *reasonable*, and that in turn depends on whether what was done – or not done- was *proportional* to that case.” (emphasis in original).<sup>63</sup> The Seventh Circuit E-Discovery Principles also emphasize that preservation of certain types of ESI are presumptively not proportional.<sup>64</sup>

As noted in *Washington v. Wal-Mart*,<sup>65</sup> it would be unreasonable to demand the preservation of an uncertain amount of surveillance video footage over an uncertain area” based on a phone call and letter that did not reference or threaten litigation.<sup>66</sup> A party should be prepared to justify its pre-litigation preservation decisions made on proportionality grounds to avoid the impact of accusations of spoliation.<sup>67</sup>

## Role of Counsel

Rule 37(e) applies only to parties to litigation, not counsel, and is focused on whether “reasonable steps” were taken by or attributable to the party to comply with the duty to preserve ESI.<sup>68</sup>

---

<sup>60</sup> 319 F.R.D. 730, at \*11 and \*16 (N.D. Ala. March 9, 2017).

<sup>61</sup> Committee Note, Rule 37(e)(2015)(“[a]nother factor in evaluating the reasonableness of preservation efforts is proportionality”).

<sup>62</sup> 19 SEDONA CONF. J. 1, 93 (2018)(“[i]t is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant electronically stored information”).

<sup>63</sup> Similarly, in *Wooten v. BNSF*, 2018 WL 2417858, at \*10 (D. Montana May 29, 2018), the court cited the *Rimkus* analysis in considering an explanation of the factors a party used in deciding what to preserve, such as the likelihood that a video would contain relevant footage, the field of visions involved and the limitations on duration of automatic recording.

<sup>64</sup> Seventh Circuit Electronic Discovery Committee, *Principles* (Principle 2.04(d))(Scope of Preservation), SEVENTH CIR. PILOT PROGRAM, copy at <http://www.discoverypilot.com/>.

<sup>65</sup> 2018 WL 2292762, at \*4 (W.D. La. May 17, 2018).

<sup>66</sup> 688 F. Supp.2d 598, 613 (S.D. Tex. 2010)(Rosenthal, J.).

<sup>67</sup> Comment 1.a, *The Sedona Commentary on Proportionality*, 19 SEDONA CONF. J. 1, 93 (2018)(“[A]t the preservation stage parties should be wary of applying too narrow a definition of what constitutes relevant ESI”).

<sup>68</sup> The Committee Note observes that in preparation for discussions with opposing counsel on preservation requests, “it is important that counsel become familiar with their clients’ information systems and digital data – including social media – to address these issues.”

As noted in *Turner v. Hudson Transit*, however, counsel must be prepared to advise its client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction.<sup>69</sup> In *Zubulake v. UBS Warburg* (“Zubulake V”), the court expanded its earlier admonitions on the topic to require that “*counsel* must issue a ‘litigation hold’ at the outset of litigation or whenever litigation is reasonably anticipated”<sup>70</sup> and thereafter take “affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.” (emphasis added)<sup>71</sup>

The assertion that counsel is responsible for the execution of the preservation obligations of its client is questionable.<sup>72</sup> Most courts focus on party responsibility taking into account that parties are in the best position to determine the necessary steps to preserve data and documents in their own systems and capabilities.<sup>73</sup>

On balance, a good preservation practice<sup>74</sup> is that counsel, once retained, should advise clients of the duty to preserve and make reasonable inquiry as to a party’s efforts to execute its duty to preserve. The degree of direct involvement by counsel in the preservation effort itself will vary, given that many parties may not wish to assume the added costs involved by having outside counsel perform the tasks associated with preservation.<sup>75</sup>

---

<sup>69</sup> 142 F.R.D. 68, 73 (S.D.N.Y. 1991)(once on notice of the duty to preserve, the “obligation ran first to counsel, who had a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction”); see also Standard 10, ABA CIVIL DISCOVERY STANDARDS (1999, Rev. 2004)(“when a lawyer who has been retained to handle a matter learns that litigation is probably or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client’s custody or control and the possible consequences of failing to do so”).

<sup>70</sup> *Id.* at 433 (citing *Zubulake IV*, 220 F.R.D. at 218).

<sup>71</sup> *Id.* at 432. This requires counsel to become familiar with client policies and retention architecture and requires speaking with information technology personnel and key player in order to understand who they store information. *Id.*

<sup>72</sup> *Centrifugal Force v. Softnet Comm.*, 783 F. Supp.2d 736, 742(S.D.N.Y. 2011)(“[t]he Second Circuit. . . places the obligation to preserve evidence on the ‘party,’ not counsel”).

<sup>73</sup> See, e.g., *Cache La Poudre v. Land O’Lakes*, 244 F.R.D. 614, 628 (D. Colo. 2007)(refusing to interpret a suggestion in *Zubulake V* as establishing an “immutable ‘obligation’” and noting that Sedona Principle 6 provides that responding parties are best situated to evaluate the procedures “appropriate for preserving and producing” their own electronic data and documents).

<sup>74</sup> Rule 26(g), for example, requires counsel to make a “reasonable inquiry” as to the adequacy of the processes followed by a client in locating the content for discovery responses prior to signing discovery pleadings. The Committee Note (1983) states that the signature certifies that the lawyer has made a reasonable effort to assure that the “client has provided all of the information and documents available to him that are responsive to the discovery demand.” Cf. *Martinez v. City of New York*, 2018 WL 604019, at \*26-27 & n. 17 (S.D.N.Y. Jan. 24, 2018)(“Defendants and their counsel were required to conduct a reasonable inquiry at the beginning of this litigation into the information, documents and witnesses available to the defendants”).

<sup>75</sup> Steven S. Gensler, *Some Thoughts on the Lawyer’s E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 565-66 (2009)(noting that that “there is a real danger of interjecting the highest-cost providers – into aspects of the process where they might not always be needed” citing Thomas Y. Allman, *Deterring E-Discovery Misconduct with Counsel Sanctions: The Unintended Consequences of Qualcomm v. Broadcom*, 118 YALE L. J. POCKET PART 161 (2009); cf. *Danis v. USN Communications*, 2000 WL 1694325, at \*39

Courts which acknowledge counsel inadequacies typically hold the party responsible, as was done in *Zubulake V*.<sup>76</sup> In *EPAC Technologies v. Harper Collins*, for example, the court noted that in-house counsel failed to take an “active and primary role” in implementing a litigation hold, leading the court to the conclusion that the party had failed to take reasonable steps under Rule 37(e).<sup>77</sup> A similar result obtained in *Lokai Holdings v. Twin Tiger*.<sup>78</sup>

If sanctions or other measures under Rule 37(e) are imposed on a party because of counsel failures, courts may entertain requests for apportionment.<sup>79</sup> In cases involving egregious counsel misconduct, courts may impose sanctions on counsel through the exercise of inherent authority.<sup>80</sup> In addition, clients may, as was the case in *Industrial Quick Search v. Miller*, cite inadequate counsel behavior as the basis for allegations of attorney malpractice action.<sup>81</sup>

## Restore or Replace

Rule 37(e) does not apply to “lost” ESI which can “be restored or replaced through additional discovery.” This important qualification - a major change from the rule in some Circuits that restoration or replacement only mitigates the severity of the sanctions – and is an important restraint on reflexive imposition of spoliation findings, since it reserves them for ESI which is truly “lost.”

When the lost ESI is restored through additional discovery, the Rule 37(e)(1) analysis stops at that conclusion. In *Steves and Sons v. Jeld-Wen*, the court stressed that a party must show that it made “some good-faith attempt to explore” its alternatives to restore or replace before pursuing spoliation sanctions.<sup>82</sup>

The Committee Note explains that because ESI “often exists in multiple locations, loss from one source may often be harmless when substitute information can be found

---

(N.D. Ill. 2000)(recommending sanctions against CEO for not hiring outside counsel to execute preservation plan) .

<sup>76</sup> *Zubulake V* noted that “[a]t some point the client must bear responsibility for a failure to preserve” and did not impose sanctions on counsel.

<sup>77</sup> 2018 WL 1542040, at \*22 (M.D. Tenn. March 29, 2018)(describing minimal efforts which went “awry”).

<sup>78</sup> 2018 WL 1512055, at \*11 (S.D.N.Y. March 12, 2018).

<sup>79</sup> In *CAT3 v. Black Lineage*, 164 F. Supp.3d 488, at n. 7 (S.D.N.Y. Jan. 12, 2016), the court offered to “apportion” measures awarded under Rule 37(e) to former counsel if they “bear all or some” responsibility. Rule 26(g), however, applies to obligations of counsel and client in regard to discovery requests, objections and responses, not necessarily to pre-litigation preservation conduct.

<sup>80</sup> See *Amalong & Amalong, P.A. v. Denny’s, Inc.*, 500 F.3d 1230, 1252 (11<sup>th</sup> Cir. Sept. 17, 2007)(reversing counsel sanctions under Rule 26(g) because not traceable to specific discovery abuse and inherent authority not available since conduct not so egregious that it is tantamount to bad faith).

<sup>81</sup> 2018 WL 264111, at \*10 (S.D.N.Y. Jan. 2, 2018)( disputed factual allegations regarding counsel failure to issue a litigation hold or properly oversee compliance as articulated in *Zubulake V* are sufficient to bar summary judgment).

<sup>82</sup> 2018 WL 2023128, at \*9 (E.D. Va. May 1, 2018)(noting the party could have taken the obvious step of seeking a forensic examination of hard drives, which might have confirmed the impossibility of restoration of the deleted email).

elsewhere.” Rule 37(e)<sup>83</sup> rejects those decisions holding that replacement of ESI does not “change at all the fact that spoliation has occurred.”<sup>84</sup> It is not unfair since the party “cannot show prejudice.”<sup>85</sup>

Nonetheless, the replacement must be of an equivalent nature; in *Schmalz v. Village of North Riverside*, the court found that the prejudice caused by the loss of text messages could not be adequately replaced simply through cross-examination of the witnesses at trial.<sup>86</sup>

A failure to take readily available action to restore or replace, such as filing a motion to compel or to seek discovery from other potential sources, can bar availability of measures.<sup>87</sup> Courts may authorize additional discovery from sources that would ordinarily be considered inaccessible under Rule 26(b)(2)(B) and an allocation of expenses under amended Rule 26(c)(1)(B) may be useful in such instances.<sup>88</sup>

In *Marquette Transportation v. Chembulk*, it was immaterial that data from a voyage data recorder (VDR) initially believed to be missing was restored by acquisition of a downloaded copy. No measures were imposed.<sup>89</sup> Similarly, in *Living Color v. New Era Aquaculture*, measures were unavailable given that “the abundance of preserved information” was sufficient to meet the needs of the party.<sup>90</sup>

The burden of showing the absence of alternative sources is on the moving party if the issue is in doubt.<sup>91</sup> In *Fiteq v. Venture Corporation*, a party failed to present “persuasive evidence” that the ESI could not be restored or replaced.<sup>92</sup> In *GN Netcom v. Plantronics*, however, the “burden [was] shifted” to the producing entity to demonstrate that its efforts had been successful.<sup>93</sup>

However, substantial measures should not be used to restore or replace information that is only “marginally relevant or duplicative.” Efforts should be proportional to the

---

<sup>83</sup> *Konica Minolta v. Lowery Corporation*, 2016 WL 4537847, at \*3 (E.D. Mich. Aug. 31, 2016) (the requirement is not so burdensome that it is unjust and impracticable).

<sup>84</sup> *DuPont v. Kolon*, 803 F. Supp.2d 469, 506 (E.D. Va. 2011) (“from the perspective of the deleting [party’s] executives and employees, the deleted, but later recovered, electronically stored information was destroyed when it was deleted [since] they did not know that copies would be available in other custodians’ hard drives or email accounts”).

<sup>85</sup> *Barcroft Media v. Coed Media*, 2017 WL 4334138, at \*1 (S.D.N.Y. Sept. 28, 2017).

<sup>86</sup> *Schmalz v. Village of North Riverside*, 2018 WL 1704109 (N.D. Ill. March 23, 2018).

<sup>87</sup> *White v. U.S.*, 2018 WL 339414, at \*3 (E.D. Mo. Jan. 9, 2018).

<sup>88</sup> Committee Note (“[o]rders under Rule 26(b)(2)(B) regarding discovery . . . or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems”).

<sup>89</sup> 2016 WL 930946 (E.D. La. March 11, 2016).

<sup>90</sup> *Id.* \*6. The court also found that there was no direct evidence of an “intent to deprive” since use of an auto-delete feature on a cell phone is a “common practice” and there was “nothing nefarious” about it under the facts before the court.

<sup>91</sup> *Bird v. Wells Fargo Bank*, 2017 WL 1213425, at \*7 (E.D. Cal. March 3, 2017).

<sup>92</sup> 2016 WL 1701794, at \*3 (N.D. Cal. April 28, 2016).

<sup>93</sup> 2016 WL 3792833, at \*10 (D. Del. July 12, 2016). The court informed the jury that “some of the deleted emails were unrecoverable” but the experts had been unable to agree on the numbers. *See* 2017 WL 4417810, at \*5 (D. Del. Oct. 5, 2017).

“apparent importance” of the lost ESI.<sup>94</sup> In *Watkins v. New York Transit Authority*, no breach of Rule 37(e) existed because the moving party could have sought production from other employees or by subpoena of cell phone records.<sup>95</sup>

## **Remedial Measures** (Subdivision (e)(1))

Rule 37(e)(1) authorizes courts to employ remedial measures under the Rule only if the loss has actually resulted in prejudice.<sup>96</sup> Specifically, upon a satisfying the predicate requirements, the court “[u]pon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice.”

The Rule does not provide a catalog of the measures available under Subdivision (e)(1) although the Committee Note gives a few examples. “Much is entrusted to the court’s discretion.” Culpability is irrelevant; the focus is on curing prejudice, not the motivation behind the failure to preserve.

However, harsh measures such as those in (e)(2) are clearly beyond the scope of the subdivision. The District Judge in *Ethicon, Inc.* rejected (as had the Magistrate Judge prior to enactment of Rule 37(e)) a request to strike statute of limitations and learned intermediary defenses.<sup>97</sup> The Committee Note explains that “care must” be taken to avoid “inappropriate (e)(1) measure[s]” such as ‘an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case.’”

### Prejudice

Neither the Rule nor the Committee Note define “prejudice.” A traditional definition in the spoliation context requires a showing of interference with the ability to go to trial or to reach a rightful decision.<sup>98</sup> It also may require a showing that the missing evidence would have “made a difference” at the trial.<sup>99</sup> Speculation that the missing ESI may be prejudicial is not sufficient. One court, however, has held it sufficient that the

---

<sup>94</sup> *Id.*

<sup>95</sup> 2018 WL 895624, at \* \*10 (S.D.N.Y. Feb. 13, 2018)(noting the additional failure to show the plaintiff acted with a culpable state of mind)(citing *Best Payphones v. City of N.Y.*, 2016 WL 792396, at \*5 (E.D.N.Y. Feb. 26, 2016)).

<sup>96</sup> As originally proposed, the availability of “curative measures” did not require a predicate showing of prejudice, an illogical omission [how could one cure prejudice if it was not shown to exist?] which was forcefully pointed out by commentators. See, e.g., John K. Rabiej, *2014 Emerging Issues 7137, Revised Rule 37(E) Returns to ‘Gotcha’ Litigation*, April 3, 2014 (available on LEXIS [“Rabiej 2014 Emerging Issues”]).

<sup>97</sup> In re: *Ethicon*, 2016 WL 5869448 (S.D. West Va. Oct. 6, 2016).

<sup>98</sup> *Leon v. IDX Systems*, 464 F.3d 951, 959 (9<sup>th</sup> Cir. 2006).

<sup>99</sup> *Simon v. City of New York*, 2017 WL 57860 (S.D.N.Y. Jan. 5, 2017)(quoting from *Mazzei v. Money Store*, 656 Fed. Appx. 558 (2<sup>nd</sup> Cir. July 15, 2016)).

missing data “could” have contained relevant evidence.<sup>100</sup> Some courts find prejudice to exist when a party expends additional resources to resolve factual disputes dealing with spoliation.<sup>101</sup>

The degree of prejudice is correlated to the relevance of the missing ESI. If it is only marginally relevant<sup>102</sup> or when the ESI can be obtained from other sources, the requisite prejudice is not present.<sup>103</sup>

## Burden of Proof

The initial proposal required that the party seeking sanctions must show that it has been substantially prejudiced by the loss.<sup>104</sup> After criticism of this approach,<sup>105</sup> the final version of the Committee Note observes that it can be “unfair” to put the burden on the moving party in some cases although reasonable in others, especially when the information “may appear to be unimportant, or the abundance of preserved information may appear sufficient.”

Some courts place the burden of showing a lack of prejudice on the non-moving party when egregious conduct is involved.<sup>106</sup>

## Examples

### 1. Monetary Sanctions (in the form of Fees and costs)

Courts routinely award attorney’s fees and costs under Rule 37(e) despite the lack of explicit authority to do so.<sup>107</sup> The Committee may have regarded the matter as a “commonplace measure” which did not require specific authority, despite the American Rule requiring parties to bear their own attorneys’ fees.<sup>108</sup>

---

<sup>100</sup> *Yoe v. Crescent Sock*, 2017 WL 5479932, at \*11 - \*13 (E.D. Tenn. Nov. 14, 2017)(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”).

<sup>101</sup> *Moody v. CSX Transportation*, 2017 WL 4173358, at \*14 (S.D.N.Y. Sept. 21, 2017).

<sup>102</sup> *Snider v. Danfoss*, 2017 WL 2973464, at \*4 (N.D. Ill. July 12, 2017)(noting the lack of prejudice from the loss of irrelevant ESI).

<sup>103</sup> *Royal Park Investments v. U.S. Bank*, 2017 WL 4748054, at \*4 (S.D.N.Y. Oct. 19, 2017)(collecting cases).

<sup>104</sup> Committee Note, at discussion of Proposed Rule 37(e)(1)(B)(i), at 322 if 354. The 2013 Draft is available at <http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf>.

<sup>105</sup> Judge Shira A. Scheindlin, in *Sekisui American v. Hart*, 945 F. Supp.2d. 494, at n. 51 (S.D.N.Y. Aug. 15, 2013)(noting that “I do not agree that the burden to show prejudice from missing evidence lost as a result of wilful or intentional misconduct should fall on the innocent party”).

<sup>106</sup> *Coward v. Forestar Realty*, 2017 WL 8948347 (N.D. Ga. Nov. 30, 2017)(citing *Alabama Aircraft v. Boeing*, 319 F.R.D. 730, 742 (N.D. Ala. March 9, 2017)).

<sup>107</sup> *Cf. Snider v. Danfoss*, 2017 WL 2973464, at \*5 and n. 11 (N.D. Ill., July 12, 2017)(“every other provision [of Rule 37(e)] that addresses a violation provides for the imposition of attorneys’ fees”).

<sup>108</sup> Minutes, March 4, 2014 Subcommittee Meeting, copy at Rules Committee Meeting Appendix, April 10-11, 2014, at pg. 440 of 580.

One court has concluded that this deals with a form of “economic prejudice” and serves as a deterrent to future spoliation.<sup>109</sup>

Examples of such awards under subdivision (e)(1) include *Adcox v. UPS*,<sup>110</sup> *Alabama Aircraft Industries v. Boeing*,<sup>111</sup> *Blumenthal Distributing v. Herman Miller*,<sup>112</sup> *CAT3 v. Black Lineage*,<sup>113</sup> *CTB v. Hog Slat*,<sup>114</sup> *GN Netcom v. Plantronics*,<sup>115</sup> *Hsueh v. New York*,<sup>116</sup> *ILWU-PMA Welfare Plan v. Connecticut General*,<sup>117</sup> *Jenkins v. Woody*,<sup>118</sup> *Lokai Holdings v. Twin Tiger*,<sup>119</sup> *Security Alarm Financing v. Alarm Protection Technology*<sup>120</sup> and *Spencer v. Lunada Bay Boys*.<sup>121</sup>

Some courts rely on Rule 37(a)(5)(A)<sup>122</sup> despite the fact that the rule deals only with motions to compel.<sup>123</sup> In *Ottoson v. SMBC Leasing*, however, the court cited Rule 37(a) as applying when “a discovery motion is granted pursuant to to Rule 37.”<sup>124</sup> Other courts cite Rule 37(c)(1)<sup>125</sup> or Rule 37(b) or rely on their inherent authority.<sup>126</sup> One Commentator has noted that “[t]his anomalous lack of authority for an attorney’s fees in

---

<sup>109</sup> *CAT3 v. Black Lineage*, 164 F. Supp.3d 488,502(S.D.N.Y. Jan. 121, 2016)(finding it consistent with Rule 37(e)(1) and no more severe than necessary to cure prejudice); *accord Lokai Holdings v. Twin Tiger*, 2018 WL 1512055 at \*17 (S.D.N.Y. March 12, 2018).

<sup>110</sup> 2016 WL 6905707, at \*3 (D. Kan. Nov. 11, 2016).

<sup>111</sup> 319 F.R.D. 730, at \*16 (N.D. Ala. March 9, 2017)(attorney’s fees and costs prosecuting this motion”).

<sup>112</sup> 2016 WL 6609208, at \*26 (C.D. Cal. July 12, 2016)(“attorney’s fees and expenses” awarded since “no greater than necessary to cure the prejudice” resulting from failure to preserve); *findings adopted* by the District Judge at 2016 WL 6901696 (C.D. Cal. Sept. 2, 2016)).

<sup>113</sup> 164 F. Supp.3d 488, 501-02 (S.D.N.Y. Jan. 12, 2016)(awarding costs, including reasonable attorneys’ fees, incurred in establishing misconduct and securing relief); case subsequently dismissed and motion for sanctions withdrawn, each party to bear their own costs and attorney’s fees, 2016 WL 1584011 (S.D.N.Y. April 6, 2016).

<sup>114</sup> *CTB v. Hog Slat*, 2016 WL 1244998, at \*13 (W.D. Wash. March 24, 2017).

<sup>115</sup> 2016 WL 3792833 (D. Del. July 12, 2016).

<sup>116</sup> 2017 WL 1194706, at \*6 (S.D.N.Y. March 31, 2017)(relying on “either Rule 37(e) or the Court’s inherent authority”).

<sup>117</sup> 2017 WL 3459880, at \*6-7 (N.D. Cal. Jan. 24, 2017).

<sup>118</sup> 2017 WL 362475, at \*18 (E.D. Va. Jan. 21, 2017)(to cure “immense” prejudice due to loss of video of prisoner prior to death).

<sup>119</sup> 2018 WL 2018 at \*17 (S.D.N.Y. March 12, 2018).

<sup>120</sup> 2016 WL 7115911, at \*7 (D. Alaska Dec. 6, 2016)(awarding “reasonable attorney’s fees in bringing this motion” in light of the prejudice from failure to preserve).

<sup>121</sup> 2018 WL 839862 (C.D. Cal. Feb. 12, 2018).

<sup>122</sup> *Best Payphones v. City of New York*, 2016 WL 792396, at \*8 (E.D. N.Y. Feb. 26, 2016) and *Ericksen v. Kaplan*, 2016 WL 695789 (D. Md. Feb. 22, 2016). *Cf. Wal-Mart Stores v. Cuker Interactive*, 2017 WL 239341, at \*2 (W.D. Ark. Jan. 19, 2017)(relief under Rule 37(a) not available for spoliation motions).

<sup>123</sup> *Marshall v. Dentfirst*, 313 F.R.D. 691, n. 9 (N.D. Ga. March 24, 2016).

<sup>124</sup> 268 F. Supp.3d 570 (S.D.N.Y. July 27, 2017)(also contenting that it has the inherent authority to award attorneys’ fees and costs to punish and deter, citing *Best Payphones*, *supra*).

<sup>125</sup> *DVComm v. Hotwire Communications*, 2016 WL 7018554, at ¶ 25 & ¶ 34 (E.D. Pa. Feb. 16, 2016)(imposing fees and costs involved in dealing with deletion of ESI and forensic examinations).

<sup>126</sup> *See, e.g. New Mexico Oncology v. Presbyterian Healthcare Services*, 2018 WL 1010284 (D. New Mex. Feb. 21, 2018)(awarding attorney fees under its inherent powers because it would “serve the interest of justice,” citing to *In re Rains*, 946 F.2d 731, 733 (10<sup>th</sup> Cir. 1991)).

Rule 37(e) seems like an oversight, and may be corrected by the Advisory Committee or the courts over time.<sup>127</sup>

## 2. Punitive Sanctions

A finding of civil contempt would presumably not lie under subdivision (e)(1), since it is punitive in nature and not designed to address prejudice.<sup>128</sup> The Supreme Court emphasized in *Goodyear Tire* that if the primary intent of a monetary sanction is to punish, a court must apply the requisite due process.<sup>129</sup> Remedial monetary sanctions differ from those which are intended to punish and deter; the latter cannot be imposed without procedural protections of a jury trial.<sup>130</sup>

In *GN Netcom v. Plantronics*,<sup>131</sup> a court imposed what it initially described as a “punitive” monetary sanction in addition to awarding fees and costs under the Rule. However, this is most likely to have been an exercise of inherent power designed to address bad faith conduct to vindicate the integrity of the judicial process in a manner not foreclosed by Rule 37(e). This seems evident from the fact that in a post-trial decision denying a new trial, the court simply referred to having imposed “financial” sanctions.<sup>132</sup>

In *Klipsch Group v. Epro E-Commerece*, the Second Circuit upheld an award of \$2.7 monetary sanction which it did not describe as punitive.<sup>133</sup>

## 3. Forensic Examination

The court in *TLS Mgt. and Mktg. Services v. Rodriquez-Toledo* ordered a forensic examination to “ameliorate the prejudice caused by the spoliation of ESI.”<sup>134</sup> However, courts are typically reluctant to impose such an intrusive remedy absent a clear failure to meet discovery obligations. The Supreme Court in *Riley v. California*<sup>135</sup> has eloquently highlighted the privacy issues involved in discovery of cell phones because of the mixture of personal and other information.

In *Borum v. Smith*, however, a court ordered inspection of medical records on a hospital’s computer without showing a breach of a production obligation or a failure to preserve.<sup>136</sup>

---

<sup>127</sup> Steven Baicker-McKee, *Mountain or Molehill?*, 55 DUQ. L. REV. 307, 321 (2017).

<sup>128</sup> *Hugler v. Jasper Contractors*, 2017 WL 8186737, at \*10, \*13 & \*16 (N.D. Ga. June 8, 2017)(recommending finding of contempt which can be lifted upon showing that violations have been cured and \$1K daily fine, with a maximum of \$39K).

<sup>129</sup> *Goodyear Tire v. Haeger*, 137 S. Ct. 1178, at 1186 (2017).

<sup>130</sup> *GWG MCA Capital v. Nulook Capital*, 2018 U.S. Dist. LEXIS 13328 (E.D.N.Y. Jan. 25, 2018).

<sup>131</sup> 2016 WL 3792833 (D. Del. July 12, 2016).

<sup>132</sup> 2018 WL 273649 (D. Del. Jan. 3, 2018).

<sup>133</sup> 880 F.3d. 620, 2018 WL 542338 (2<sup>nd</sup> Cir. Jan. 25, 2018).

<sup>134</sup> 2017 WL 115743 (D. P.R. March 27, 2017).

<sup>135</sup> 134 S.Ct. 2473 (June 25, 2014).

<sup>136</sup> 2017 WL 3014487 (W.D. Ky. July 14, 2017).

#### 4. Preclusion of Evidence

According to the Committee Note, the preclusion of evidence at trial is available under subdivision (e)(1) to offset prejudice from spoliation.

In *Ericksen v. Kaplan*, introduction of an email was precluded because of the failure to preserve ESI which might have rebutted its authenticity.<sup>137</sup> In *Cahill v. Dart*, a party was prohibited from offering testimony about what it had seen on a missing video.<sup>138</sup> In *Wali Muhammad v. Mathena*, jurors were instructed they should not assume that the lack of corroborating objective evidence undermined certain testimony.<sup>139</sup> Another court permitted a party to offer evidence from a website archive and barred the party that had deleted it from arguing that the evidence was inadmissible.<sup>140</sup>

However, a court may not prevent a party from offering evidence in support of the central or only claim or defense in the case without a showing of the specific intent required under subsection (e)(2).<sup>141</sup> In *EPAC Technologies v. HarperCollins*,<sup>142</sup> where no “intent to deprive” was found to exist, however, the court concluded that a recommended preclusion of evidence had crossed the line between what is permissible without a finding of intent to deprive.<sup>143</sup>

#### 5. Establishing Facts

A mandatory presumption that certain facts at the core of claim or defense must be taken as established in a trial should not be given or undertaken unless there is a finding of intent to deprive.<sup>144</sup> In *GN Netcom v. Plantronics*, after finding that the non-moving party had acted in bad faith and with an intent to deprive,<sup>145</sup> the court prepared and read to the jury at the outset of the trial a series of core factual findings relating to the alleged spoliation<sup>146</sup> and permitted evidence and argument during the six day trial that ensued on its impact.<sup>147</sup>

In order to establish or prevent a finding of material facts which sustain or bar a summary judgment also requires a finding of intent under subdivision (e)(2). Cases of this type are discussed *infra* in regard to Sanctions.

---

<sup>137</sup> 2016 WL 695789, at \*2 (D. Md. Feb. 22, 2016).

<sup>138</sup> 2016 WL 7034139 (N.D. Ill. Dec. 2, 2016).

<sup>139</sup> 2017 WL 3955225 (W.D. Va. Jan. 27, 2017).

<sup>140</sup> *Leidig v. Buzzfeed*, 2017 WL 6512353, at \*14 (S.D.N.Y. Dec. 19, 2017).

<sup>141</sup> Committee Note.

<sup>142</sup> 2018 WL 1542040 (M.D. Tenn. March 29, 2018).

<sup>143</sup> *Id.* at \*26.

<sup>144</sup> *Morrison v. Veale, M.D.*, 2017 WL 372980 (M.D. Ala. Jan. 25, 2017)(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”).

<sup>145</sup> 2016 WL 3792833 (D. Del. July 12, 2016).

<sup>146</sup> 2017 WL 4417810 (D. Del. Oct. 5, 2017).

<sup>147</sup> 2018 WL 273649 (D. Del. Jan. 3, 2018).

## 6. Evidence of Spoliation and Argument to the Jury

Courts have historically admitted evidence of spoliation – and permitted arguments to the jury on its implications – as a “lesser sanction.”<sup>148</sup> This is often authorized when a court is unable to find the requisite degree of culpability to impose harsh measures, but a court permits the jury to learn of the spoliation and to permit argument about any prejudice which may have resulted.<sup>149</sup>

According to the Committee Note, this is permissible under subdivision (e)(1) if “no greater than necessary to cure prejudice.”<sup>150</sup> In *BankDirect Capital Finance v. Capital Premium Financing*, a Magistrate Judge, constrained from finding “intent to deprive,” recommended that evidence of the spoliation be presented to the jury and that the jury determines its impact.<sup>151</sup> In contrast, the District Judge in *Nuvasive v. Madsen Medical*, decided that it would allow the parties to present evidence to the jury<sup>152</sup> only after a finding by the Magistrate Judge that a sufficient showing of prejudice had been made.<sup>153</sup>

There are obvious risks involved in allowing spoliation evidence without a finding of intent to deprive, since the “jury’s perception of the spoliator may be unalterably changed.”<sup>154</sup> However, courts have considerable discretion. FRE 403 authorizes courts to limit such evidence and argument in order to prevent “unfair prejudice, confusing the issues [or] misleading the jury.” In *Delta/AirTran Baggage Fee Antitrust Litigation*, for example, a court barred spoliation evidence because it would “transform what should be a trial about [an] alleged anti-trust conspiracy into one on discovery practices and abuses.”<sup>155</sup>

---

<sup>148</sup> See, e.g., *Dalcour v. City of Lakewood*, 492 Fed. Appx. 924, 937 (10<sup>th</sup> Cir. 2012)(absent bad faith, a party is not entitled to an adverse inference but is entitled to “question witnesses about the missing evidence” as a “lesser sanction”).

<sup>149</sup> *Titus v. Ameriwood Industries*, 2016 WL 11214709 (W.D. La. June 16, 2016)(no evidence of intentional motive or inference of bad faith in destructive testing of ladder without notice to opposing but allowing evidence and argument about ramifications and prejudice caused to go to jury).

<sup>150</sup> Committee Note ( subdivision (e)(1) permits a court to give the jury “instructions to assist in its evaluation” of spoliation evidence which has been admitted, such as explaining to the jury that it may consider that evidence, along with all the other evidence in the case, in making its decisions.” Similarly, subsection (e)(2) does not “prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice.

<sup>151</sup> 2018 WL 1616725, at \*12 (N.D. Ill. April 4, 2018)(also recommending that the jury determine the reasons for the loss and the impact on the merits of the claims).

<sup>152</sup> 2016 WL 305096, at \*3 (S.D. Cal. 2016).

<sup>153</sup> 2015 WL 4479147, at \*2 (S.D. Cal. 2015).

<sup>154</sup> *Gorelick et al, Destruction of Evidence § 2.4 (2014)*(“DSTEVID s. 2.4”)(once a jury is informed that evidence has been destroyed the “jury’s perception of the spoliator may be unalterably changed” regardless of the intent of the court).

<sup>155</sup> 2015 WL 4635729, at \*14 (N.D. Ga. Aug. 3, 2015). In Texas evidence which is “unrelated to the merits and served principally to highlight” the culpability of the party, as compared to non-speculative testimony on the subject, is inadmissible. *Brookshire Brothers v. Aldridge* 438 S.W. 3d 9, 28-29 (July 3, 2014).

In *Barry v. Big M Transportation*, the court decided that it would “tell the jury that the ECM data was not preserved” and allow both parties to present evidence and argument at trial about it after finding it had resulted in prejudice to the ability to try the case.<sup>156</sup> In *Storey v. Effingham County*,<sup>157</sup> the jury was to be told that “the video was not preserved” and spoliation evidence would be admitted. The court emphasized that there would be no adverse inference instruction that the destroyed evidence was “unfavorable” to the defendants.<sup>158</sup>

Spoliation evidence may be admitted without reference to a Rule 37(e) breach. In *Waymo v. Uber Technologies*, the District Court observed that “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.”<sup>159</sup> In another case,<sup>160</sup> the court found authority to admit evidence about the absence of a surveillance video under FRE 607 (witness credibility).

If the court decides to allow the jury decide the issue of “intent to deprive”<sup>161</sup> evidence of spoliation and argument about its implications are necessarily before the jury. Under those circumstances, the Committee Note specifies the manner in which the instructions to the jury are to be framed.<sup>162</sup>

## **Sanctions** (Subsection (e)(2))

Rule 37(e)(2) authorizes courts to “(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment” only upon a finding of an “intent to deprive another party of the information’s use in the litigation.”

The cabining of harsh measures by “intent to deprive” is the signature achievement of the amended Rule 37(e). It has dramatically reduced the routine use of adverse inference instructions for merely negligent or grossly negligent conduct.

---

<sup>156</sup> 2017 WL 3980549, at \*7-8 (N.D. Ala. Sept. 11, 2017).

<sup>157</sup> 2017 WL 2623775< at \*4 (S.D. Ga. June 16, 2017).

<sup>158</sup> *Id.* at \*5 (also precluding evidence or argument that the contents of the video corroborated defendants version of the events at issue).

<sup>159</sup> *Waymo v. Uber Technologies*, 2018 WL 646701, at \*18 (N.D. Cal. Jan. 30, 2018).

<sup>160</sup> *Willis v. Cost Plus*, 2018 WL 1319194, at \*6 (W.D. La. March 12, 2018)(ignoring Rule 37(e)).

<sup>161</sup> *See, e.g., Shaffer v. Gaither*, 2016 WL 6594126 (W.D.N.C. Sept. 1, 2016) and 2016 WL 7331561 (Dec. 12, 2016)(reserving right to give a spoliation instruction at trial); accord, *Gaddy v. Blitz*, 2010 WL 11527376, at \*11 (Sept. 13, 2010)(“after hearing the evidence” the trial court may a more “severe spoliation instruction and adverse inference instruction” may be appropriate).

<sup>162</sup> 305 F.R.D. 457, 577-78 (2015)(“If a court were to conclude that the intent finding should be made by a jury, the court’s instruction should make it clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive”).

## Adverse Inference Instruction

The intent to deprive requirement of (e)(2) applies to both “permissive” and “mandatory” jury instructions, although the former outnumber the latter in practice.<sup>163</sup> However, the impact of even a permissive jury instruction can be difficult for a party to overcome<sup>164</sup> since it carries the extra weight of being delivered by authority of the Court.<sup>165</sup> Most courts permit the non-moving party faced with a permissive inference instruction to enter competing evidence and argue in rebuttal to the need for such inferences.<sup>166</sup>

In *GN Netcom v. Plantronics*,<sup>167</sup> *supra*, the jury was informed that its duty was to determine if the “spoliation tilted the playing field against” the other party,” and that it could infer that the missing information was harmful – or not.<sup>168</sup> After a six day trial, the jury delivered a verdict for the non-moving party despite having received extensive evidence and argument about spoliation. When challenged in a post-trial motion for failing to have entered a default judgment, the court explained that by empowering the jury to assess what impact, if any, the spoliation had on the party’s ability to prove its case, it had appropriately kept the focus on the merits of the case.<sup>169</sup>

Subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.<sup>170</sup>

## Mali

In *Mali v. Federal Insurance*, a decision rendered prior to adoption of the amended Rule, the Second Circuit approved use of a permissive adverse inference jury instruction without finding of a breach of the duty to preserve.<sup>171</sup> A prominent commentator has

---

<sup>163</sup> One such example is *O’Berry v. ADM*, 2016 WL 1700403 (M.D. Ga. 2016 (“[t]he court will instruct the jury that it *must* presume that the lost information was unfavorable to [the non-moving party])(emphasis in the original).

<sup>164</sup> *See, e.g., Zubulake IV*, 220 F.R.D. 212, at 219-20, *as quoted* in *DeCastro v. Kavadia*, 309 F.R.D. 167, 82 (S.D.N.Y. 205) (“[w]hen a jury is instructed that it may infer that the party who destroyed potentially relevant evidence did so out of a realization that the evidence was unfavorable, the party suffering this instruction will be hard-pressed to prevail on the merits”).

<sup>165</sup> *Arch Insur. V. Broan-Nutone*, 509 Fed. Appx. 453, 459 (6<sup>th</sup> Cir. 2012)(limiting comments in *West v. Tyson Foods*).

<sup>166</sup> *Corboda v. Pulido*, 2018 WL 500185, \*2 (N.D. Cal. Jan. 21, 2018)(permitting spolating party to explain to jury why file was discarded since the purpose of a permissive adverse inference is to permit the jury to determine if it should infer that the file contained information unfavorable to the party).

<sup>167</sup> 2016 WL 3792833 (D. Del. July 12, 2016).

<sup>168</sup> *Id.* at \*5.

<sup>169</sup> 2018 WL 273649, at n. 3 (D. Del Jan. 3, 2018).

<sup>170</sup> Committee Note.

<sup>171</sup> *Mali v. Federal Insurance*, 720 F.3d 387, 391 (2<sup>nd</sup> Cir. June 13, 2013)(the jury may “infer, though you are not required do so, that if the photograph had been produced in court, it would have been unfavorable” to the party that failed to produce it”).

argued that this same result obtain under Rule 37(e)<sup>172</sup> since a permissive instruction is “simply a formalization of what the jurors would be entitled to do even in the absence of a specific instruction.”<sup>173</sup>

In *Leidig v. Bussfeed*, where the court did not find an intent to deprive, it stated that it would permit evidence of spoliation to be introduced at trial and that it might also utilize a permissive jury instruction since the “Second Circuit has made clear” that the it “does not necessarily reflect a sanction” and does not require the same findings, citing *Mali, supra*.<sup>174</sup>

## Dismissals or Default Judgments

Only upon a showing of “intent to deprive” may a court “dismiss the action or enter a default judgment” as a sanction for the loss of ESI covered by Rule 37(e). This includes measures which have the same functionally equivalent effect, such as a summary judgment or an order striking pleadings related to “the central or only claim or defense in the case.”<sup>175</sup>

Most courts prefer to resolve cases on their merits, especially if lesser sanctions than dismissal or default can address the potential prejudice.<sup>176</sup> For example, in *Universal North American Insurance v. Blue Rhino*, it was not enough that the non-moving party had destroyed the charcoal grill at the heart of a product defect case to justify issuance of a summary judgment on the merits.<sup>177</sup>

In *Mid-Atlantic Framing v. AVA Realty*, a court refused to enter a summary judgment based on inferences that facts existed because of spoliation. It noted that lesser sanctions, such as an instruction to the jury to the jury that they can draw their own inferences, would be available at trial.<sup>178</sup> Similarly, in *Washington v. Wal-Mart*,<sup>179</sup> the court refused to bar a summary judgment by inferring that a material factual dispute existed because of spoliation.<sup>180</sup>

---

<sup>172</sup> Hon. Shira A. Scheindlin and Natalie M. Orr, 83 FORDHAM L. REV. 1299, 1307 (2014) (the Committee Note can be read as permitting a “*Mali*-type instruction to guide the jury’s consideration of spoliation evidence without requiring “intent to deprive.”). See also at 1315.

<sup>173</sup> *West v. Tyson Foods*, 374 Fed. Appx. 624, 635 (6<sup>th</sup> Cir. 2010).

<sup>174</sup> 2017 WL 6512353, at n. 12 (S.D.N.Y. Dec. 19, 2017).

<sup>175</sup> Committee Note (“[c]are must be taken . . . to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only a finding of intent to deprive another party of the lost information’s use in the litigation.”)

<sup>176</sup> *Internmatch v. Nxtbigthing*, 2016 WL 491483, at \*13-14 (N.D. Cal. Feb. 8, 2016) (refusing dismissal but imposing an adverse inference instruction and precluding evidence that the destroyed evidence supported the claims), *vacated* 2017 WL 8944065 (N.D. Cal. Dec. 17, 2017).

<sup>177</sup> 2018 WL 2220870, at \*3 (D. New Jersey Feb. 23, 2018) (“[l]esser sanctions will enable the case to proceed; the harsh sanction of dismissal is inappropriate).

<sup>178</sup> 2018 WL 1605567 (N.D.N.Y. March 29, 2018).

<sup>179</sup> 2018 WL 2292762, at \*5 (W.D. La. May 17, 2018).

<sup>180</sup> *Id.* at \*5 (the existence of bad faith [the court applied Circuit case law, not Rule 37(e)] sufficient to justify that inference of knowledge cannot be inferred 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)).

In *Global Material Tech. v. Dazheng Metal Fibre*, a default judgment was imposed where the requisite intent existed because an adverse inference would not be sufficient to punish the party for their dishonesty.<sup>181</sup> In *Sell v. Country Life Insur.*, where the court did not rely on Rule 37(e) (but should have), a court struck an answer and entered a default judgment after finding serious discovery misconduct, including a failure to preserve e-mail.<sup>182</sup>

The Ninth Circuit has affirmed a dismissal based on findings indicating that the “intent to deprive” of Rule 37(e) had been satisfied.<sup>183</sup> In *Organik Kimya v. ITC*, the Federal Circuit approved entry of a default judgment so that measures would be available to “deter those who might be tempted” to act with an intent to deprive in the absence of such a deterrent.<sup>184</sup>

## A Note on Prejudice

Rule 37(e)(2) does not contain a requirement that the moving party make a formal showing of prejudice as is the case with remedial measures under (e)(1)). However, prejudice is, in fact, assumed; since, according to the Committee Note, prejudice may be inferred from a finding of “intent to deprive.”<sup>185</sup> This is consistent with existing Circuit case law.

The Standing Committee modified the Committee Note to delete a statement that seemed to justify, in rare cases, the imposition of harsh measures based only on reprehensible intent in the absence of prejudice.<sup>186</sup> Since prejudice is fairly presumed when intent to deprive exists, it is inaccurate to posit that intent alone is sufficient. If, for some reason, there is, in fact, no basis to infer prejudice, there is ample authority suggesting that courts may exercise their inherent powers to sanction “even where bad-faith conduct does not disrupt the litigation.”<sup>187</sup>

Moreover, the *degree* of prejudice caused by the loss of ESI is important in considering which remedy should be selected. For example, “severe measures” such as a

---

<sup>181</sup> 2016 WL 4765689, at \*9 (N.D. Ill. Sept. 13, 2016).

<sup>182</sup> 189 F. Supp.2d 925, 944 (D. Ariz. June 1, 2016)(although not applying Rule 37(e), making findings equivalent to those required under subsection (e)(2) by relying on *Leon v. IDX Systems*, 464 F.3d 951, 958 (9<sup>th</sup> Cir. 2006).

<sup>183</sup> *Roadrunner Transportation v. Tarwater*, 642 F. Appx. 759 (9<sup>th</sup> Cir. March 18, 2016).

<sup>184</sup> 848 F.3d. 994, at \*6-7 (Fed. Cir. Feb. 15, 2017)(citing *Nat’l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976).

<sup>185</sup> Committee Note, Subdivision (e)(2)(“the finding of intent required by the subdivision” can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it but also an “inference that the opposing party was prejudiced by the loss of information that would have favored its position”).

<sup>186</sup> The Standing Committee deleted the statement in the Committee Note that “~~there may be rare cases where a court concludes that a party’s conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice.~~” Minutes, Standing Comm. Mtg., May 29-30, 2014 at n. 2.

<sup>187</sup> *Enmon v. Prospect Capital*, 675 F.3d 138, 145 (2<sup>nd</sup> Cir. 2012).

mandatory adverse inference are not justified when the information lost was relatively unimportant or lesser measures would be sufficient to redress the loss.<sup>188</sup>

## Intent to Deprive

The “intent to deprive” standard was adopted in response to criticism of the initial proposal which authorized “sanctions” or “an adverse-inference jury instruction” if a party’s actions caused “substantial prejudice” in the litigation *and* were “willful or in bad faith.”<sup>189</sup> Particularly influential was the prescient suggestion made by the Sedona Conference that a party should be shown to have “acted with specific intent to deprive the opposing party of material evidence relevant” to the matter.<sup>190</sup>

The revised standard, applicable only to losses of ESI, “rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2<sup>nd</sup> Cir. 2002), that authorize the giving of adverse inference instructions on a finding of negligence or gross negligence.”<sup>191</sup> It is akin to the definition of “bad faith” already applied by some Circuits.<sup>192</sup>

The Committee Note explains that “[i]nformation lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have.” This explanation has been widely cited and provides “a common sense explanation” for applying a higher standard than negligence or gross negligence, which has been persuasive in other contexts.<sup>193</sup>

---

<sup>188</sup> Committee Note.

<sup>189</sup> As noted earlier, the 2013 Draft is available at <http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf>. The proposal was intended to apply to all forms of discoverable information, including the loss of tangible property, such as automobiles after accidents. Accordingly, it authorized harsh sanctions if the loss “irreparably deprived” a party of any “meaningful” ability to present or defend against claims in the litigation. *See, e.g.*, *Silvestri v. GM*, 271 F.3d 583, 593 (4<sup>th</sup> Cir. 2001)(loss of damaged auto resulted in prejudice which substantially denied the ability of GM to defend the claim).

<sup>190</sup> Kenneth J. Withers, on behalf of Steering Comm., WG 1, November 26, 2013, at 13.

<sup>191</sup> Committee Note (explaining that “[t]he better rule for the negligent or grossly negligent loss” of ESI is to provide for a broad range of measures to cure prejudice but “limit the most severe measures to instances of intentional loss or destruction”).

<sup>192</sup> *See, e.g.*, *Bracey v. Grodin*, 712 F.3d 1012, 1019 (7<sup>th</sup> Cir. 2013)(“for the purpose of hiding adverse information”). *See also* *Aramburu v. Boeing*, 112 F.3d 1398, 1407 (10<sup>th</sup> Cir. 1997)(“[m]ere negligence . . . is not enough because it does not support an inference of consciousness of a weak case”); *accord* *McCormick*, EVIDENCE § 273 at 660-61 (1972).

<sup>193</sup> *EEOC v. Jetstream*, 878 F.3d 960, 965-66 (10<sup>th</sup> Cir. Dec. 28, 2017)(Rule 37(e) Committee Note provides a common sense explanation for requiring proof of a high standard of intent for adverse inference in a case involving loss of hard copy notes – ‘a virtually identical context’); *see also* *Cooper Tire & Rubber v. Koch*, 812 S.E. 256, n.6 (S.C. Ga. March 15, 2018)(quoting Committee Note to Rule 37(e) in tire defect case to justify required showing that evidence was lost intentionally to deprive the other of its use in litigation); *Emerald Point v. Hawkins*, 294 Va. 544, 808 S.E.2d 384, 392 (Va. Dec. 28, 2017)(“the resolution of a spoliation issue . . . should be guided by the same standard”); *accord*, *Brookshire Bros. v. Aldridge*, 438 S.W. 3d 9, 24 (Tex. 2014).

As the Sixth Circuit famously explained in *Applebaum v. Target Corp.*, “a showing of negligence or even gross negligence will not do the trick.”<sup>194</sup> In *EPAC Technologies v. HarperCollins*, the Court determined that “half-hearted” attempts to impose a litigation hold involved gross negligence but that the moving party did not show “directly or by inference” that the requisite intent existed.<sup>195</sup>

Similarly, in *Creative Movement v. Pure Performance*,<sup>196</sup> a court found that the party had acted in confusion and ineptitude,” but not “with the intent to deprive another party of the information’s use in the litigation.”

Nor is it enough to show that the party acted “willfully,” as was the case in *Zubulake v. UBS Warburg* (“Zubulake V”)<sup>197</sup> since that does not necessarily indicate that the party acted for the purpose of depriving a party of the ESI.<sup>198</sup>

### Assessing “Intent”

Assessing intent involves a subjective test, leading some courts to reserve the issue for jury consideration, subject to adequate jury instructions.<sup>199</sup> In *Cahill v. Dart*, the court did so because the issue was a “close one.”<sup>200</sup> The District Court in *Gipson v. MTC* indicated it would consider allowing the jury to decide the intent issue “assuming there is sufficient trial evidence supporting it,” noting that the Committee Note seemed to endorse such an approach.<sup>201</sup>

It has been pointed out that whether or not the jury decides that the requisite intent exists, “it will have still heard damaging evidence and (perhaps) arguments about the circumstances that caused the information loss.”<sup>202</sup> In *U.S. EEOC v. GMRI*, the court stated that it would permit the parties to present competing facts and theories about missing documents and ESI and infer the missing content would be adverse “if” the party was “shown to have destroyed the ESI in bad faith (as defined by the Rule).”<sup>203</sup>

In most cases, however, it is the court which determines whether or not the requisite intent is present. This often involves attributing the intent of individual employees or agents to a corporate entity which is the party to the case. In *GN Netcom v. Plantronics*, a wholesale destruction of emails by an executive was attributed to his employer in part

---

<sup>194</sup> 831 F.3d 740, 745 (6<sup>th</sup> Cir. 2016).

<sup>195</sup> 2018 WL 1542040, at \*18 & \*20 (M. D. Tenn. March 29, 2018)(“glaring incompetence in implementing a litigation hold . . . is gross negligence, but it is not intent”).

<sup>196</sup> 2017 WL 4998649] (N.D. Ga. July 24, 2017).

<sup>197</sup> 229 F.R.D. 422, 436 (S.D. N.Y. July 20, 2004)(applying Rule 11 standards in a Rule 26(g) decision).

<sup>198</sup> *CTB, Inc. v. Hog Slat, Inc.*, 2016 WL 1244998, at \*9 (E.D. N.C. March 23, 2016).

<sup>199</sup> *See, e.g., Epicor Software v. Alternative Technology*, 2015 WL 12734011 (C.D. Cal. Dec. 17, 2015).

<sup>200</sup> 2016 WL 7034139 (N.D. Ill. Dec. 2, 2016).

<sup>201</sup> 2018 WL 736265, at \*7 (S.D. Miss. Feb. 6, 2018).

<sup>202</sup> *Tadler and Kelston, supra*, 52-JAN TRIAL 20, 24. (2016).

<sup>203</sup> 2017 WL 5068372, at \*31 (S.D. Fla. Nov. 1, 2017).

because the “deletion activities were not undertaken for personal reasons.”<sup>204</sup> In *RealPage v. Enterprise Risk Control*, the court noted that destruction of ESI may be “imputed to the employer” when it was foreseeable considering the employees duties.<sup>205</sup> In *First Fin. Security v. Freedom Equity*, where text messages were lost, the court found a “shared” intent to deprive to exist among former employees bent on establishing a competing business.<sup>206</sup>

In *Alabama Aircraft Industries v. Boeing*, the court inferred that that party had acted with an intent to deprive based on “unexplained, blatantly irresponsible [preservation] behavior.”<sup>207</sup> In *Moody v. CSX Transportation*, the court reached the same conclusion because of “stunningly derelict” conduct. The court was particularly concerned about the inability to plausibly explain the recycling of the laptop containing the information at a time when its transmittal from the laptop to permanent repository had not been confirmed.<sup>208</sup>

In *O’Berry v. Turner*, the court concluded that the circumstances of loss under review could “lead to [but] one conclusion” – that the party had acted with intent to deprive the moving party of the use of the information at trial.<sup>209</sup>

## Inherent Authority

The initial version of Rule 37(e), as adopted in 2006, prohibited the use of certain rule-based sanctions when the loss resulted from the “routine, good-faith operation of an information system” but failed to restrict a court’s use of its inherent authority to sanction the same conduct.

Not surprisingly, courts often ignored Rule 37(e) and sanctioned parties under their inherent authority whether or not the rule, if applied, would have yielded a different result.<sup>210</sup> Accordingly, when drafting the amended version of the Rule, the Committee

---

<sup>204</sup> 2016 WL 3792833, at \*7(D. Del. July 121, 2016)(also finding that the entity made repeated “obfuscation and misrepresentations” relating to its investigation). The executive was fined \$1M and subsequently fired. See 2017 WL 4417810, at \*5 (D. Del. Oct. 5, 2017).

<sup>205</sup> 2017 WL 3313729, at 11-12 (E.D. Tex. Aug. 3, 2017). Cf. *Linior v. Polson* 2017 WL 7310076, at \*2 (E.D. Va. Dec. 6, 2017)(refusing to impute intent of non-party agent without power to compel the party to retain the video recording at issue).

<sup>206</sup> 2016 WL 5870218, at n. 1 (N.D. Cal. Oct. 7, 2016)(reporting that the instruction would provide that the parties failed to preserve their text messages and that the jury may, but need not, presume that they would have contained information that would have help prove that they intentionally encouraged [named employees] to leave the former employer and join the new company).

<sup>207</sup> 319 F.R.D. 730 (N.D. Ala. March 9, 2017).

<sup>208</sup> 271 F.Supp.3d 410, \*11-\*13 (W.D.N.Y. Sept. 21, 2017).

<sup>209</sup> 2016 WL 170043, at \*4 (M.D. Ga. April 27, 2016)( “irresponsible and shiftless” behavior).

<sup>210</sup> See, e.g., *Nucor v. Bell*, 251 F.R.D. 191, 197-98 (D. S.C. 2008)(Rule inapplicable “because it “is not applicable when the court sanctions a party pursuant to its inherent powers”).

acted to “discourage use of inherent authority [for ESI spoliation] by providing rules [which make] resort to inherent authority unnecessary.”<sup>211</sup>

The Committee Note thus observes that:

“New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used.”

By and large, lower courts have respected this admonition when faced with requests to apply their inherent powers to reach results different from those mandated by the amended Rule.

As one court put it, “[a]fter December 1, 2015, Rule 37(e) provides the specific – and sole – basis to sanction a party for failing to preserve [ESI]” since it would make a mockery of the rejection of *Residential Funding* logic by the Rule to do otherwise.<sup>212</sup> Some Commentators, however, see the foreclosure as evidence of a “distrust” towards federal judges in their use of a court’s inherent powers.”<sup>213</sup>

A number of courts have ignored Rule 37(e) under circumstances where the Rule might have made a difference. In *Brice v. Auto-Owners*, for example, a court decided to utilize an adverse inference at trial regarding losses of text messages when a party negligently exchanged cell phones at the expiration of her Verizon contract.<sup>214</sup> In most such cases, the court does not explain the reason for ignoring Rule 37(e).<sup>215</sup>

After two years of well-publicized use, this seems inexplicable. One court refused to consider a request for an adverse inference because the party “failed to address this

---

<sup>211</sup> Discovery Subcommittee Meeting, Feb. 28, 2014, Agenda Book, Rules Mtg. (April 2014), 431 of 580. *Cf.* *Galanix v. Szulik*, 841 F. Supp. 2d 456, 462 (D. Mass. 2011)(that Rule 11 did not bar use of inherent powers for the same conduct because “it [was not] intended to serve as a check on those powers”).

<sup>212</sup> *Snider v. Danfoss, LLC*, *supra*, 2017 WL 6512353 at n. 8 (“[i]f federal courts could simply fall back onto their inherent authority [to issue harsh measures for negligence], the goals of uniformity and standardization would be lost”); *accord* *Leidig v. BuzzFeed*, 2017 WL 6512353, at \*7, n. 5 (S.D.N.Y. Dec. 19, 2017).

<sup>213</sup> Richard Briles Moriarty, *Are the Federal Civil Discovery Rules Moving Forward Into a New Age or Shifting Backwards Into a “Dark Age,”* 39 AM. J. TRIAL ADVOC. 227, 257 (2015)(“Apparently, the Advisory Committee perceived dangers from the potentially arbitrary use of a court’s use of inherent powers’ – by judges appointed by the President to lifetime appointments and approved by the Senate – when ESI spoliation is involved”).

<sup>214</sup> 2016 WL 1633025, at \*6 (E.D. Tenn. April 21, 2016).

<sup>215</sup> A significant number of cases do not apply the rule to video surveillance cases. *See, e.g.*, *Henkle v. Cumberland Farms*, 2017 WL 563540 (S.D. Fla. June 15, 2017)(discussing “surveillance software” but ignoring Rule 37(e); *but cf.* *ML Healthcare Services v. Publix Super Markets*, 881 F.3d 1293, (11<sup>th</sup> Cir. Feb. 7, 2018)(amended Rule 37(e) applies to “spoliation of electronically stored information like the video at issue here”).

controlling law.”<sup>216</sup> In another, the court emphasized that “the appropriate authority” was not the court’s inherent authority, as the moving party argued, “but [Rule 37(e)].”<sup>217</sup>

### “Gaps” and “Interstices”

*Chambers v. NASCO* provides that courts retain inherent power to sanction a litigant for bad-faith conduct even when civil rules are available if the rule is “not up to the task.”<sup>218</sup> However, “when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, a court “ordinarily should rely on the Rules rather than the inherent power.”<sup>219</sup>

Courts are thus prepared “to fill in the interstices” of the Federal Rules,<sup>220</sup> such as where no single rule covers all the misconduct. As some courts have put it, when the rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power “fills the gap.”<sup>221</sup>

This appears to have been the case in *GN Netcom v. Plantronics*.<sup>222</sup> In a case involving massive failures to preserve, a court levied a substantial “punitive” monetary sanction under circumstances in which neither subdivision (e)(1) or (e)(2) appeared to apply.<sup>223</sup> In the post-trial proceedings, the monetary sanctions became “financial” sanctions,<sup>224</sup> thus obviating the due process protections subsequently highlighted by *Goodyear Tire v. Haeger*.<sup>225</sup>

In *Agility Public Whsg. v. DOD*, the court explained that the use of inherent authority is foreclosed “at least in factual situations to which the rule applies, i.e., where the information cannot be substituted from another source.”<sup>226</sup> In *Hsueh v. New York State*, a court concluded that Rule 37(e) was not applicable because the deletion of ESI was

---

<sup>216</sup> *Carpenter v. All American Games*, 2017 WL 4517081, at n. 4 (D. Ariz. Oct. 10, 2017)(Campbell, J.).

<sup>217</sup> *Washington v. Rounds*, 2017 WL 5668216, at \*5 (D. Md. Nov. 27, 2017)(Grimm, J.)

<sup>218</sup> 501 U.S. 32, 45-46 (1991).

<sup>219</sup> 501 U.S. 32, 50 (1991).

<sup>220</sup> 2017 WL 6614101, at \*2 (S.D. W. Va. Dec. 27, 2017).

<sup>221</sup> *See, e.g., Galanis v. Szulik*, 841 F. Supp. 2d 456, 461 (D. Mass. 2011)(collecting cases and quoting from *Shepherd v. Am Broad. Cos.*, 62 F. 3d 1469, 1474 (D.C. Cir. 1995).

<sup>222</sup> 2016 WL 3792833, at \*13 (D. Del. July 12, 2016).

<sup>223</sup> It was not intended to cure prejudice (since did so separately) under (e)(1) nor was the \$3M the functional equivalent of a case-dispositive measure under (e)(2) in the context of the case. *But see* Official Comm. of Unsecured Creditors, 2015 WL 5027899, at n. 25 (E.D.N.Y. Aug. 25, 2015)(raising issue of whether “punitive monetary sanctions” should also be levied in case whether “sufficient relief” already is provided by adverse inference).

<sup>224</sup> 2018 WL 273649, at \*# (D. Del. Jan. 3, 2018)(“[t]he Court also imposed financial sanctions”).

<sup>225</sup> In *Goodyear Tire v. Haeger*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1178 (2017), the Supreme Court remanded a substantial award of fees and costs imposed against a party and its counsel cautioning that a court utilizing civil procedures is limited to an amount which is compensatory, rather than punitive.

<sup>226</sup> 2017 WL 1214424 (D.D.C. March 30, 2017).

intentional and not the result of over-preservation.<sup>227</sup> In *Legacy Data Access v. Mediquant*, the court opined that the Rule did not apply because ESI was destroyed, not lost.<sup>228</sup>

In *US ex rel Scutellaro v. Capitol Supply*, Rule 37(e) did not apply the Rule because the breach of a duty to preserve was not in anticipation or conduct of litigation but because of violation of a regulation.<sup>229</sup>

*CAT3 v. Black Lineage*, *supra*, however, argues that even if Rule 37(e) does not apply by its terms, Federal Courts should not enter an adverse inference or dismiss a case as a sanction for “merely negligent destruction of [ESI],” and certainly not when the Rule is inapplicable solely because the missing ESI could not be restored through forensic examination.<sup>230</sup>

This reflects rejection of *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F. 3d 99 (2<sup>nd</sup> Cir. 2002), which authorized the giving of adverse inference instructions on a finding of negligence or gross negligence.<sup>231</sup> In *Dietz v. Bouldin*, the Supreme Court held that inherent powers should not be used when “contrary to any express grant of or limitation on the district court’s power contained in a rule or statute.”<sup>232</sup>

## Concurrent Application

Some courts, however, take the position that Rule 37(e) does not exclude use of inherent authority in dealing with losses of ESI and that courts may rely on either or both at their discretion.<sup>233</sup> In *Ottoson v. SMBC Leasing*, a court described its authority to act as existing “in addition” to authority to act under Rule 37(e),<sup>234</sup> and proceeded to find it sufficient that a party had acted “willfully” in order to impose an adverse inference.<sup>235</sup>

Indeed, somewhat ironically, the court in *CAT3 v. Black Lineage*, *supra*, also opined that harsh measures were available to it “either under Rule 37(e) or the court’s

---

<sup>227</sup> 2017 WL 1194706, at \*4 (S.D.N.Y. Mar. 31, 2017)(relying on *CAT3 v. Black Lineage*, 164 F. Supp. 3d 488, 495 (S.D.N.Y. 2016).

<sup>228</sup> 2017 WL 6001637, at n. 8 (W.D.N.C. Dec. 4, 2017).

<sup>229</sup> 2017 WL 1422364, at \*10 (D.D.C. April, 19, 2017)(Rule 37(e) inapplicable because not overwritten in anticipation or conduct of litigation).

<sup>230</sup> 164 F. Supp. 3d 488 (S.D.N.Y. Jan. 12, 2016)(Francis, M.J.). *See also* James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority*, 17 SEDONA CONF. J. 613, 662 (2016)(the limitation of sanctions resulting from specific intent to deprive “is not a gap” to be filled by the exercise of inherent of inherent authority).

<sup>231</sup> Committee Note.

<sup>232</sup> \_\_\_ U.S. \_\_\_, 136 S. Ct. 1885, 1892 (2016).

<sup>233</sup> A Special Master, in its May, 2017 Report in *Hugler v. Southwest Fuel Mgt.*, 2017 WL 8941163, at \*8 stated that it “disagreed” with the Committee Note because it is “irrefutable” that the Supreme Court’s authority “cannot be limited by a body such as the Advisory Committee.” It would be “poor public policy” to unnecessarily deprive courts of their broader powers by relying solely on the Rules, citing to *CAT3 v. Black Lineage*, 164 F. Supp.3d 488, 497-98 (S.D.N.Y. 2016).

<sup>234</sup> 268 F.Supp.3d 570 (S.D. N.Y. July 13, 2017).

<sup>235</sup> *Id.*, at \*13 (because the party had acted “willfully or in bad faith,” relying on *Residential Funding* and *Pension Committee* and other Second Circuit precedent.

inherent authority,<sup>236</sup> an observation that has proven influential to other courts, such as *Rhoda v. Rhoda*.<sup>237</sup> *CAT 3* also inspired the court in *Steves and Sons v. Jeld-Wen* to observe that the effect of the Committee Note on foreclosure is an “open question” since even if a court’s discretion is limited as to the sanctions noted in Rule 37(e)(2), the court “may well retain its full discretion to impose lesser sanctions even if a party cannot establish all the Rule 37 prerequisites.”<sup>238</sup>

There is also precedent for the argument that the authority to deal with spoliation of evidence “arises jointly under the [Federal Rules] and the court’s own inherent powers.”<sup>239</sup> Courts in cases like *DV Comm v. Hotwire* contend that their broad discretion to fashion an appropriate sanction” under inherent authority continues to exist “without limitation” and “regardless of whether any party suffered prejudice” as a result of the challenged activity.<sup>240</sup>

Similarly, In *Klipsch Group v. EPRO E-Commerce*, the Second Circuit affirmed a monetary award of \$2.7M in reasonable fees and costs for spoliation of ESI under its inherent authority under circumstances where it, somewhat cryptically, did not find it necessary to decide if Rule 37(e) applied because, relying on *Chambers*, the lower court had “acted with the requisite bad faith.”<sup>241</sup>

---

<sup>236</sup> 164 F. Supp.3d 488 (S.D.N.Y. 2016).

<sup>237</sup> *Rhoda v. Rhoda*, 2017 WL 4712419 (Oct. 3, 2017).

<sup>238</sup> 2018 WL 2023128, at n. 4 (E.D. Va. May 1, 2018)(noting the comment in *CAT3* that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct)..

<sup>239</sup> *DeCastro v. Kavadia*, 309 F.R.D. 167, at n. 15 (S.D.N.Y. 2015)(quoting *Zubulake IV*, 220 F.R.D. 212, 216).

<sup>240</sup> 2016 WL 6246824, at ¶50 (E.D. Pa. Feb. 3, 2016)(imposing permissive adverse inference as to contents of missing ESI under Rule 37(e)(2)).

<sup>241</sup> 880 F.3d. 620, at n. 6 (2<sup>nd</sup> Cir. Jan. 25, 2018).

## Appendix Circuit Acknowledgment of Rule 37(e)

<b>Circuit</b>	<b>Status</b>	<b>Citation</b>
1st	Unknown	
2nd	Yes	MPLA v. Gateway, 2018 WL 1659671 (2 <sup>nd</sup> Cir. 2018)(acknowledging Rule 37(e); Klipsch v. EPRO E-Commerce, 880 F.3d 620, (2 <sup>nd</sup> Cir. 2018)(ducking choice); Mazzei v. the Money Store, 656 Fed. Appx. 558 (2 <sup>nd</sup> Cir. 2016)(databases)(requiring intent to deprive to give adverse inference instruction).
3rd	Ignored	Archer v. York School District, 710 Fed. Appx. 94 (3 <sup>rd</sup> Cir. Sept. 27, 2017)(post-employment deletion of email account).
4th	Ignored	Integrated Direct Mktg. v. May, 690 Fed. Appx. 822 (4 <sup>th</sup> Cir. 2017)(deletion of files on hard drive).
5th	Ignored	Timms v. LZM, 657 Fed. Appx. 228 (5 <sup>th</sup> Cir. July 2016)(texts).
6th	Yes	Applebaum v. Target, 831 F.3d 740 (6 <sup>th</sup> Cir. 2016)(showing of negligence or gross negligence does not justify adverse inferences).
7th	Ignored	Lewis v. McLean, 864 F.3d 556 (7 <sup>th</sup> Cir. 2017)(surveillance video); <i>but see</i> 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 (9 <sup>th</sup> 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 (10 <sup>th</sup> Cir. 2017) ((Rule 37(e) provides “further” guidance); EEOC v. Jetstream, 878 F.3d 960 (10 <sup>th</sup> Cir. 2017).
11th	Yes	ML Healthcare Services v. Publix Super Markets, 881 F.3d 1293, (11 <sup>th</sup> Cir. 2018)(Rule 37(e) applies to spoliation of video but impact on <i>Flury</i> factors need not be decided).
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).