# Applying Amended Rule 37(e)

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"This proposal is a good rule. It can be adopted, and then tested in application. We will learn more from how it works." Hon. David Campbell, Chair, Civil Rules Advisory Committee[2]



Since December 1, 2015, amended Rule 37(e), has provided a comprehensive approach to deal with the loss of electronically stored information ("ESI") which should have been preserved.[3] It provides a safe harbor for reasonable preservation conduct and cabins use of case-determinative measures unless there is a showing of "intent to deprive." It also makes remedial measures available to address prejudice caused by a breach of a duty to preserve.

Given the substantial number of cases citing the rule, as well as those that should have, but did not, it is possible to reach some tentative conclusions about how well it is working. [4]

## Introduction

Under the common law spoliation doctrine, "the destruction or significant alteration of evidence or the failure to preserve [it] for another's use as evidence in pending or reasonably foreseeable litigation" has historically justified imposition of evidentiary or other measures.[5] As a derivative of that doctrine, courts acknowledge a duty to preserve – owed to the court - whose breach is addressed through the inherent authority to regulate litigation abuse or, if a court order exists, under Rule 37(b).

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[2] Minutes, Civil Rules Advisory Committee, April 10-11, 2014 (at lines 1047-1049).

[3] The text of amended Rule 37(e) and the Committee Note is available at 305 F.R.D. 457, 565-578 (2015).

[4] Appendix B lists the cases that could have, but did not, cite the Rule. It does *not* include spoliation decisions which unequivocally involve loss of tangible property or documents.

[5] West v. the Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2nd Cir. 1999).

A Panel at the 2010 Duke Litigation Conference (the "Duke Conference"), on which the author served, unanimously recommended that a new approach be adopted, under which the trigger and extent of the duty would be articulated in the Federal Rules. The then-current form of Rule 37(e), enacted in 2006 to provide a limited ESI safe harbor from rule-based sanctions, which did not do so, had been found to be ineffective.[6]

As a result of the Duke Conference, the Civil Rules Advisory Committee (the "Rules Committee") concluded that the 2006 amendment did not "adequately addressed [the] emerging issues"[7] and empowered its Discovery Subcommittee to develop viable alternatives. Ultimately, the Rules Committee decided to accept the duty to preserve as established and crafted a new Rule 37(e) that focused on the actions a court could take when ESI was lost which should have been preserved.

Rule 37(e) is intended to bring "consistency and coherence" to the adjudication of claims of failure to preserve ESI[8] and to help reduce over-preservation of ESI due to lack of uniformity among the Circuits.[9] It has been explained that "this approach would promote reasonable steps to preserve ESI, cure any prejudice, and deter intentional failure to preserve ESI."[10]

## Pending Cases

Rule 37(e) applies to all cases filed after December 1, 2015 and, "insofar as just and practicable," to then-pending proceedings. Only a few courts have refused to apply the rule as unjust in that situation[11] although it is possible that some of the numerous courts that inexplicitly ignore the rule may have done so for that reason.[12]

Courts applying the rule have found it equitable to do so because "[t]he new rule places no greater *substantive* obligation on the party preserving ESI")(emphasis added).[13]

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[6] John H. Beisner, *Discovery A Better Way: the Need for Effective Civil Litigation Reform*, 60 DUKE L. J. 547, 590 (2010)(the rule was "too vague to provide clear guidance as to a party's preservation obligations").

[7] Wright, Miller *et al*, 2015 Provision Regarding Failure to Preserve Electronically Stored Information, 8B FED. PRAC. & PROC. CIV. §2284.2 (3d ed)(2016).

[8] Hon. John G. Koeltl, *From the Bench: Rulemaking*, LITIGATION, Vol.41, No.3 (Spring 2015).

[9] CAT3 v. Black Lineage, 2016 WL 154116, at *4 (S.D. N.Y. Dec. 2015)(parties were incurring burden and expense as a result of overpreserving data because of varying Circuit standards applied under use of inherent authority).

[10] Interview of Hon. Paul W. Grimm, *The Path to New Discovery*, 52-JAN TRIAL 26 (2016).

[11] Learning Care Grp. V. Armetta, 315 F.R.D. 433 (D. Conn. June 17, 2016)(unfair to apply Rule 37(e) since spoliation issue was raised "prior to the application of the new rules"); McIntosh v. U.S., 2016 WL 1274585 (S.D. N.Y. March 31, 2016)(same); Stinson v. City of New York, 2016 WL 54684 (S.D. N.Y. Jan. 5, 2016)(same); Thomas v. Butkiewicus, 2016 WL 1718368 (D. Conn. April 29, 2016)(motion would have been resolved before effective date if not for substitution of counsel).

[12] *See* Appendix B.

[13] CAT3 v. Black Lineage, *supra*, 2016 WL 154116, at *5 (S.D. N.Y. Jan. 12, 2016); **see also** Marshall v. Dentfirst, 313 F.R.D. 691, at 695 (N.D. Ga. March 24, 2016)( the rule is "just and practicable" since it "does not create a new duty to preserve evidence").

# Rule 37(e)

Amended Rule 37(e) provides as follows:

> Failure to ~~Produce~~ Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.

## Scope of the Rule

Rule 37(e) applies only to losses of ESI, not to losses of other forms of discoverable information. Thus, losses of hard copy documents[14] or various forms of tangible property are excluded.[15] An initial proposal was extensively revised after public comment and before final adoption.[16]

The Committee understood that the rule would be problematic when both ESI and hard copy are lost due to the same conduct, a fairly common occurrence.[17] One court has dealt with the issue by applying "separate legal analyses" in assessing possible sanctions for failures to preserve.[18] Another simply ignored Rule 37(e).[19]

Courts could utilize Rule 37(e) as guidance where both ESI and documents are lost in the same case as occurred in *First American Title v. Norwest Title*.[20] Excluding losses

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[14] Puente Ariz. V. Arpaio, 2016 U.S. Dist. LEXIS 104883 (D. Ariz. Aug. 9, 2016)(refusing to apply rule to loss of notes taken during meetings).
[15] Whalen v. CSX Transportation, 2016 WL 4681217 (S.D.N.Y. Sept. 7, 2016)
[16] See *Advisory Committee Makes Unexpected Changes to 37(e), Approves Duke Pack* age, BNA EDISCOVERY RESOURCE CENTER, April 14, 2014, copy at http://www.bna.com/advisory-committee-makes-n17179889550/(reproducing text of over-night revision ultimately approved by Rules Committee).
[17] Jessica Jimenez v. Menzies Aviation, 2016 WL 3232793 (N.D. Cal. June 13, 2016)(paper and electronic records of same information); Star Envirotech v. Redline, 2015 WL 9093561 (C.D. Cal. Dec. 16, 2015)(same); *see also* Kristine Biggs Johnson v. Daniel Peay, 2016 WL 4186956 (D. Utah Aug. 8, 2016)(same); O'Berry v. Turner, 2016 WL 1700403 (M.D. Ga. April 27, 2016)(same); *cf* Karpenski v. Am. Gen., 2013 WL 12071666 (W.D. Wash. 2013)(electronic copy recovered).
[18] Best Payphones v. City of New York, 2016 WL 792396, at *3 (E.D. N.Y. Feb. 26, 2016)("there are separate legal analyses governing the spoliation of tangible evidence versus electronic evidence").
[19] Dubois v. Board of County Comm., 2016 WL 868276 (N.D. Okla. March 7, 2016).
[20] 2016 WL 4548398, at *5 (D. Utah Aug. 31, 2016)("the court analyzes spoliation of non-ESI documents under the same rubric of Rule 37").

of tangible property is understandable,[21] given the drafting complications caused by attempts to engraft a *Silvestri* exception.[22]

A definitional issue that needs resolution is whether video recordings are to be treated as physical property or as ESI.[23] Courts are badly split on the issue. In *Wichansky v. Zowine*,[24] a court did not apply Rule 37(e) to the loss of videotape in contrast to *Martinez v. City of Chicago*,[25] where the opposite conclusion was reached in regard to video content uploaded from police cars.

## Threshold Requirements

Rule 37(e) takes the onset and nature of the duty to preserve as established by the common law as its starting point; it does not create a new duty.[26] However, before a court is empowered to impose any of the measures available under subsections (e)(1) or (e)(2), it must first determine that:

- ESI which "should have been preserved" has been "lost;"
- *after* a duty to preserve attached;
- because a party failed to take "reasonable steps" to preserve; and it
- cannot be restored or replaced through additional discovery.

In *Konica Minolta Business Solutions v. Lowery Corp*, the court described these as "predicate elements" that must be met "before turning to the sub-elements of (e)(1) and (e)(2).[27] The party seeking relief must make the "threshold showing that the missing ESI was relevant under Rule 26(b)(1), and that the missing ESI was subject to a preservation obligation."[28]

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[21] June 2014 Committee Report, 305 F.R.D. 457, 512 at 527, (2015)("repeated efforts made clear that it is very difficult to craft a rule that deals with failure to preserve tangible things").

[22] *See* Silvestri v. GM, 271 F.3d 583, 593 (4th Cir. 2001)( imposing harsh sanctions without heightened culpability); *but see* Oil Equipment v. Modern Welding, __ Fed. Appx. __, 2016 WL 5417736 (11th Cir. Sept. 29, 2016).

[23] *Compare* Orologio v. The Swatch Group, __Fed. Appx. __, 2016 WL 3454211, at *2 & *8 (3rd Cir. June 16, 2016)(Rule 37(e) ignored in regard to spoliation of "hard-copy" video tapes) *with* Thomley v. Bennett, 2016 WL 498436 (S.D. Ga. Feb. 8, 2016)(applying Rule 37(e) to "loop-type" video recording) *and* Thomas v. Butkiewicus, 2016 WL 1718368 (D. Conn. April 29, 2016)(applying Rule to video surveillance tape).

[24] 2016 U.S. Dist. LEXIS 37065, *32-34 (D. Ariz. March 22, 2016)(Campbell, J.)("the parties do not contend that the lost information [photos and videotape] constitutes [ESI]").

[25] 2016 WL 3538823 (N.D. Ill. June 29, 2016)(Dow, J.).

[26] 2014 Rules Committee Report, 305 F.R.D. 457, 526 (2015)("the proposed Rule 37(e) does not purport to create a duty to preserve. The new rule takes the duty as it is established by case law, which uniformly holds that a duty to preserve arises when litigation is reasonably anticipated"); *accord* Bruner v. American Honda, 2016 WL 2757401 (May 12, 2016) (a duty to preserve exists if party "reasonably anticipates litigation" citing Rule 37(e)).

[27] 2016 WL 4537847 (E.D. Mich. Aug. 31, 2016).((a) the existence of ESI of a type that should have been preserved (b) which is lost (c) because of a failure to take reasonable steps and (d) which cannot be restored or replaced through additional discovery).

[28] Hon. Craig B. Shaffer, *The Burdens of Applying Proportionality* 16 SEDONA CONF. J. 55, 103 (2015)(which "will necessarily implicate proportionality factors").

## Triggering the Duty

The *onset* ("trigger") of the duty is largely determined by whether "litigation is reasonably forseeable," which involves the "extent to which a party was on notice that litigation [is] likely and that the information would be relevant."[29] The issue is intensely fact-specific given the great variety of factual contexts.[30] The Committee Note observes that "a variety of events may alert a party to the prospect of litigation," but cautions that they may provide only "limited information" about it.

In *Marten Transport v. Plattform Advertising*, Rule 37(e) was held to be inapplicable because the ESI at issue had already been overwritten by the time the duty attached.[31] The same result occurred in *Marshall v. Dentfirst*,[32] where there was no evidence that the missing ESI existed at the earliest time the duty attached. In *O'Berry v. Turner*, a duty to preserve arose when an injured party's counsel faxed a "spoliation letter" demanding preservation by the defendants.[33] In *Best Payphones v. City of New York*, it applied once the party decided to bring an action.[34]

A duty to preserve may also arise from statutory requirements, administrative regulations,[35] orders entered in the case or "a party's own information-retention protocols."[36] However, the mere fact that a party has "an independent obligation to preserve" does not mean that it had "such a duty with respect to the litigation."[37]

## Scope of the Duty

The *scope* of the duty to preserve presents a separate issue. Once the duty is triggered, a party is expected to take reasonable and good faith action ("reasonable steps") to preserve potentially relevant and discoverable ESI which may be under its custody and control. This may involve use of a litigation hold and undertaking other affirmative action as required involving key custodians or data repositories.

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[29] Committee Note ("[t]he rule does not apply when information is lost before a duty to preserve arises").
[30] *See, e.g.*, Pill and Larsen-Chaney, *Litigating Litigation Holds: A survey of Common Law Preservation Duty Triggers*, 17 J. TECH. L. & POL'Y 193, 209 (2012)( advocating use of "pragmatic" suggestions in the Sedona Conference Commentary on Legal Holds, 11 Sedona Conf. J. 265 (2010).
[31] Marten Transport v. Plattform Advertising, 2016 WL 492743, at *10 (D, Kan. Feb. 8, 2016)(the initial scope did not include browsing history of the computer that eventually became relevant subsequently); *accord* Jennifer Saller v. QVC, 2016 WL 4063411, at *5 (E.D. Pa. July 29, 2016)(it is "far from certain" that data had not been overwritten at the time the duty attached under Rule 37(e)).
[32] 313 F.R.D. 691(N.D. Ga. March 24, 2016).
[33] O'Berry v. Turner, 2016 WL 1700403, *3 (M.D. Ga. April 27, 2016).
[34] Best Payphones v. City of New York, 2016 WL 792396, at *4 (S.D. N.Y. Feb. 26, 2016).
[35] *Compare* Austrum v. Federal Cleaning Contractors, 149 F.Supp.3d 1343 (S.D. Fla. Jan. 8, 2016)(applying EEOC regulation requiring retention of "personnel records) *with* EEOC v. Office Concepts, 2015 WL 9308268 (N.D. Ind. Dec. 22, 2105)(violation of 29 CFR § 1602.14 does not automatically trigger entitlement to adverse inference).
[36] In CTB v. Hog Slat, 2016 WL 12444998, at *12 (E.D. N.C. March 23, 2016), the court assessed the loss of data against a records retention policy which covered both ESI and hard copy. In Coale v. Metro-North Railroad, 2016 WL 1441790, at *2 (S.D. N.Y. April 11, 2016), a court noted there was no automatic requirement that a party preserve evidence for purposes of litigation because of a self-imposed obligation.
[37] Committee Note.

The rule is said to be applicable only when the lost ESI is "relevant." To date, courts have not focused on the subtle distinction between relevancy and discoverability after the 2015 Amendments. While amended Rule 26(b)(1)(2015) invokes proportionality factors in defining the scope of discovery,[38] proportionality is not typically acknowledged as reducing the scope of the initial duty to preserve relevant or potentially relevant ESI. The Committee Note ducks the issue.

Parties are well advised to undertake early discussion of preservation obligations, including potential disputes, and consider negotiation of case-specific protocols.[39] In *Martinelli v. Johnson & Johnson*, the parties agreed on the types of ESI within the scope of preservation, as spelled out in a Stipulated ESI and Hard Copy Protocol.[40] Courts will order preservation if a sufficient basis exists.[41] In *Leroy Bruner v. American Honda Motor Co.*,[42] the court required prospective use of a litigation hold and the court in *Shein v. Cook* granted an *ex parte* order compelling preservation.[43]

In *Marten Transport, supra*, the court noted that "the scope of information that should be preserved may be uncertain" and that it would not "use a 'perfection' standard or hindsight in determining the scope of the [party's] duty or preserve ESI." [44]

## "Reasonable Steps"

Rule 37(e) requires a showing that the loss of the ESI is due to a failure to take "reasonable steps" to meet the preservation obligation. This invokes the principle that parties need only take appropriate actions to preserve, as opposed to achieving perfection by adherence to *per se* precedent.[45]

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[38] Rule 26(b)(1)(Scope in General). Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery of any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering [factors]. Information within this scope of discover need not be admissible in evidence to be discoverable.

[39] *See, e.g.*, DEL. FED. CT. DEFAULT STANDARD (2011), Para. 1(b), copy at http://www.ded.uscourts.gov/ (listing ESI that need not be preserved absent a showing of good cause by the requesting party).

[40] 2016 WL 1458109 (E.D. Cal. April 13, 2016).

[41] *See, e.g.*, Swetlic Chiropractic v. Foot Levelers, 2016 WL 1657922 (S.D. Ohio April 27, 2016)(injunction granted where "real danger" of destruction existed ); *cf.* Micolo v. Fuller, 2016 WL 158591 (W.D. N.Y. Jan. 13, 2016).

[42] 2016 WL 2757401 (S.D. Ala. May 12, 2016).

[43] Schein v. Cook, 2016 WL 3212457, at *5 (N.D. Cal. June 10, 2016).

[44] 2016 WL 492743, at *10 (D. Kan. Feb. 8, 2016).

[45] Cooksey v. Digital, 2016 WL 5108199 (S.D.N.Y. Sept. 20, 2016)(Koeltl, J.)(it is frivolous to suggest that a party commits spoliation by removing an allegedly libelous article from a website while preserving a screenshot).

For preservation conduct that qualifies, the rule thus serves as a "safe harbor."[46] This permits courts to weed out ill-advised "gotcha" motions without excessive drain on judicial resources[47] while addressing over-preservation concerns of compliant parties.

However, some courts apply pre-amendment case law under which any loss of ESI is sanctionable.[48] Those courts ignore the fact that negligent or inadvertent conduct can constitute "reasonable steps" when all the circumstances, including proportionality factors, are considered.[49] In *Living Color v. New Era Acquastructure*, for example, the court determined that a failure to disable an auto-delete function did not constitute reasonable steps.[50] In *Virtual Studios v. Stanton Carpet*,[51] a party which "did little, if anything, to prevent the loss of the the e-mails" was held to have failed to take reasonable steps.

The Committee intended that "reasonable steps" reflect a "form of culpability.[52] In *Arrowhead Capital Finance v. Seven Arts*, the court compared it to "reckless" conduct.[53]

As was the case with the prior rule,[54] however, good faith adherence to routine policy may bar a finding of a failure to take reasonable steps. In *Marten Transport, supra*, a party successfully demonstrated that its company practices qualified as routine, good-faith" reliance on a business system.[55] A similar result existed in *Terral v. Ducote*, where the court held the moving party had not met the burden to show a failure to take reasonable steps where a retention policy was followed.[56]

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[46] Matthew Enterprise v. Chrysler Group, 2016 WL 2957133, at *1 (N.D. Cal. May 23, 2016); *see also* Kurtz and Mauler, *A Real Safe Harbor: The Long-Awaited Proposed FRCP Rule 37(e)*, 62-AUG FED. LAW. 62, 66 (2015)(citing guidance in the Sedona Commentary on Legal Holds: The Trigger and the Process (2010) as exemplars whose implementation evidence taking of reasonable steps).

[47] Montgomery v. Risen, 2016 WL 3919809, at *18 (D.D.C. July 15, 2016)(the resolution of spoliation issues is "labor intensive" and expressing hesitancy to "allocate additional judicial resources" to do so).

[48] *See* Lexpath Technologies v. Welch, *supra*, 2016 WL 4544344, at *2 (D. N.J. Aug. 30, 2016)(relying on Mosaid Technologies v. Samsung Electronics, 348 F. Supp.2d 332, 335 (D. N.J. 2004).

[49] Committee Note (a factor in "evaluating the reasonableness of preservation is proportionality"); *see also* Rimkus v. Cammarata, 688 F. Supp. 2d, 613 (S.D. Tex. Feb. 19, 2010)("[w]hether preservation or discovery 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).

[50] 2016 WL 1105297 (S.D. Fla. March 22, 2016).

[51] 2016 WL 5339601, at *10 & *11 (N.D. Ga. June 23, 2016)(noting it was "questionable" that a duty to preserve existed and finding "at most" that the party was "negligent or careless").

[52] Hon. Paul Grimm (Chair of Discovery Subcommittee), quoted in Minutes, Civil Rules Advisory Committee, April 10-11, 2014, at lns. 940-943 ("the revised proposal . . . is limited to circumstances in which a party failed to take reasonable steps to preserve information that should have been preserved, thus embracing a form of 'culpability'").

[53] 2016 WL 4991623, at *20 (S.D.N.Y. Sept. 16, 2016)(failure to move or copy ESI on serve "could be seen as reckless," citing Rule 37(e)).

[54] Rule 37(e)(2006): "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

[55] Marten Transport v. Plattform Advertising, 2016 WL 492743 (D. Kan. Feb. 8, 2016)(accepted business practices followed in replacing computers and not retaining browsing histories).

[56] 2016 WL 5017328, at *3 (W.D. La. Sept. 19, 2016)(failure to preserve was pursuant to routine video retention policy).

However, in *GN Netcom v. Plantronics*, deletions of massive amounts of email led the court to conclude that the preservation effort was "the opposite" of taking reasonable steps.[57] In *DVComm v. Hotwire*, a similar conclusion was reached where the party had "double deleted" crucial information.[58] In *CAT3 v. Black Lineage*," an unsuccessful attempt to falsify ESI was deemed inconsistent with taking "reasonable steps."[59] Similarly, in *Brown Jordan v. Carmicle*, egregious conduct by a party contributed to the conclusion that reasonable steps had not been taken.[60]

## Additional Discovery

A court must determine that the missing ESI "cannot be restored or replaced through additional discovery" before any measures are available. As the Committee Note puts it, Rule 37(e) directs that focus should be on that effort, since ESI "often exists in multiple locations."[61] If recoverable, the ESI is not "lost."[62] The Note explains that efforts should be proportional to the apparent importance of the lost information and substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.[63] The non-moving party should help identify such sources.[64]

In *Betsy Feist v. Paxfire*, the court concluded that "additional discovery [would] not rectify" the failure to preserve the missing ESI.[65] In some cases, courts have required the moving party to negate the ability to restore or replace the missing ESI. In *First American Title v. Northwest Title*, the court refused to make measures available under Rule under those circumstances.[66] In *Fiteq v. Venture Corporation*, the moving party did not demonstrate that any responsive documents ever existed other than the emails which were restored.[67]

In *GN Netcom v. Plantronics*,[68] however, the court held that because of the extent of the culpability involved, the non-moving party had the burden to establish that additional discovery was likely to replace the missing ESI. [69]

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[57] 2016 WL 3792833, at *6 (D. Del. July 12, 2016)(the conduct was not excused by his belief that IT personnel would continue to have access to the deleted email).
[58] 2016 U.S. Dist. LEXIS 13661 (E.D. Pa. Feb. 3, 2016).
[59] CAT3 LLC v. Black Lineage, 2016 WL 154116, at *9 (S.D. N.Y. Jan. 12, 2016)("manipulation of the email addresses is not consistent with taking 'reasonable steps' to preserve the evidence").
[60] 2016 WL 815827, at *37 (S.D. Fla. March 2, 2016)(the party acted with intent to deprive).
[61] Committee Note ("[b]ecause [ESI] often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere").
[62] *See, e.g.*, Erhart v. Bofl, 2016 WL 5110453, at *3 (S.D. Cal. Sept. 21, 2016)(reaching similar conclusion applying pre-amendment principles in case where Rule 37(e) should have been, but was not, applied).
[63] *Id.* (*See, e.g.*, In re Delta/AirTran Baggage Fee Antitrust Litigation, 770 F. Supp.2d 1299, 1311 (N.D. Ga. Feb. 22, 2011).
[64] Schaffer, *supra*, at 109 (arguing that "if necessary" the non-moving party should be required to show where or from whom the replacement ESI may be obtained or how the missing ESI should be restored).
[65] Betsy Feiset v. Paxfire, 2016 WL 4540830 (S.D. N.Y. Aug. 29, 2016).
[66] 2016 WL 4548398, at *3 (D. Utah Aug. 31, 2016 ("[the party has] fail[ed] to establish that the emails, or a significant portion of them, 'cannot be restored, or replaced through additional discovery'").
[67] Fiteq v. Venture Corporation, 2016 WL 1701794, at *3 (N.D. Cal. April 28, 2016).
[68] GN Netcom v. Plantronics, 2016 WL 3792833 (D. Del. July 12, 2016).
[69] *Id.*, at *9-10 (the burden of proof on prejudice shifted once bad faith was shown).

## Measures Available

Rule 37(e) specifies the measures available in two subdivisions. One is focused on remediation of prejudice and the other on the use of harsh measures. Both are premised on the existence of prejudice, but in the case of subdivision (e)(2), the moving party need not make an explicit showing, as it is necessarily inferred from the high degree of culpability involved. The subsections are not mutually exclusive; courts may award "lesser measures" under subsection (e)(1) in place of those under (e)(2) or even in addition to them, provided that prejudice exists.

According to the Committee Note, this "forecloses reliance on inherent authority or state law" to "determine when [the] measures should be used."[70] However, some courts appear reluctant to accept this limitation at face value, at least until it is clarified by Appellate Courts.[71] The Note is also silent on the impact of the Rule on use of other provisions of Rule 37. Both topics are discussed below in the "Exclusivity" section of this Memorandum.

## Subdivision (e)(1)

Subdivision (e)(1) of Rule 37(e) authorizes measures "no greater than necessary to cure" prejudice caused by the loss of ESI. No additional showing of culpability is required beyond that implicit in the finding that the ESI "should have been preserved."[72] Measures should be no greater than necessary to cure prejudice; but a court does not need to cure every prejudicial effect.[73] The Committee Note famously observes that "[m]uch is entrusted to the court's discretion."

The goal is to remediate – not punish – and the rule "does not require the court to adopt measures to cure every possible prejudicial effect."[74] Because of subdivision (e)(2), however, some measures are not available unless the court also makes a finding that the party acted with the requisite "intent to deprive." Care must also be taken to ensure that curative measures imposed under subdivision (e)(1) do not have the effect of measure that are permitted only on a finding of intent to deprive.

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[70] Committee Note, 305 F.R.D. 457, 569-570 (2015); *cf.* Hill v. Brass Eagle, 2016 WL 4505170, at *4 (N.D. Ill. Aug. 29, 2016)(parties agree that state law governs application of spoliation remedies in diversity case).

[71] *See, e.g.*, Barnett v. Deere & Company, 2016 WL 4544052, at n. 1 (S.D. Miss. Aug. 31, 2016)("[t]he Fifth Circuit has not clarified whether its prior spoliation jurisprudence has been abrogated or otherwise amended pursuant to the latest amendment of Rule 37(e)); *see also* Martinez v. City of Chicago, 2016 WL 3538823, at *24 (N.D. Ill. June 29, 2016)("the Committee [Note] is silent on how the amendment impacts presumptions based on document retention policies").

[72] Minutes, April 10-11, 2014 Rules Committee. *See also* Konica Minolta Business Solutions v. Lowery Corporation, 2016 WL 4537847, at *3 (E.D. Mich. Aug. 31, 2016)(explaining that traditionally a party must have shown that the lost ESI would support a claim or defense, which "is another way of saying the loss of ESI" could prejudice the party).

[73] Committee Note.

[74] *Id*.

## Prejudice

The Committee Note describes "prejudice" as involving a threat to the ability to present a claim or defense, taking into account the "information's importance in the litigation." The inquiry looks to "whether the [spoliating party's] actions impaired the non-spoliating party's ability to go to trial or threatened to interfere with the rightful decision of the case."[75] As noted in *First American Title v. Northwest Title*, not "every loss of ESI is *per se* prejudicial for purposes for purposes of spoliation sanctions."[76]

In *Marshall v. Dentfirst* the loss of the internet browsing history of a terminated employee was not prejudicial within the meaning of subsection (e)(1) because it had not been relied upon in making termination decisions."[77] Courts also failed to find sufficient prejudice to justify relief in *Best Payphones v. City of New York*,[78] *Fiteq v. Venture*[79] and *Matthew Enterprise v. Chrysler*.[80]

## Burden of Proof

The rule does not assign the burden to demonstrate prejudice to a specific party. The Committee Note observes that it may be fair to place it on the moving party when the content of the missing information is fairly evident or appears to be unimportant or if existing evidence is sufficient to meet the needs of the parties. However, if conduct is egregious enough, prejudice, like relevance, is likely to be established as a matter of law under some Circuit principles.[81]

## Evidence/Issue Preclusion

In *CAT3 v. Black Lineage*,[82] the court precluded reliance on certain emails whose authenticity was placed in doubt by the destruction of earlier versions.[83] In *Ericksen v. Kaplan*, use of certain disputed emails and documents was precluded in order to "cure the prejudice created" by the destruction of other information.[84] In *Betsy Feist v. Paxfire*,[85] a court which did not find an intent to deprive precluded a party from seeking statutory damages in light of the use of a "cleaner" which eliminated the existence of cookies and a browsing history.

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[75] Leon v. IDX Systems, 464 F.3d 951, 960 (9th Cir. 2006).
[76] 2016 WL 4548398, at *3 (D. Utah Aug. 31, 2016).
[77] 313 F.R.D. 691 (N.D. Ga. March 24, 2016)("no evidence to support that the allegedly spoliated documents were reviewed, relied upon or even available" at the relevant times).
[78] 2016 WL 792396, at *5-6 (E.D. N.Y. Feb. 26, 2016).
[79] 2016 WL 1701794 (N.D. Cal. Aril 28, 2016).
[80] 2016 WL 2957133, at *4 (N.D. Cal. May 23, 2016).
[81] *See, e.g.*, GN Netcom v. Plantronics, 2016 WL 3792833, at *9-*10 (D. Del. July 12, 2016).
[82] 2016 WL 154116 (S.D. N.Y. Jan. 12, 2016)[subsequently dismissed, 2016 WL 1584011 (April 6, 2026)].
[83] *Id*. at *10.
[84] Ericksen v. Kaplan Higher Education, 2016 WL 695789, at *2 (D. Md. Feb. 22, 2016).
[85] 2016 WL 4540830] (S.D. N.Y. Aug. 29, 2016).

However, the Committee Note cautions that it would be inappropriate to preclude a party from offering evidence in support of the "central or only claim or defense in the case" absent a finding of "intent to deprive."

## Admission of Evidence and Argument re Spoliation

According to the Committee Note, evidence of spoliation may be admitted under subdivision (e)(1) if necessary to address prejudice, together with arguments about its significance. The purpose of the admission is not to punish.[86] A court may instruct the jury that it "may consider that evidence along with all the other evidence in the case, in making its decision." However, courts may not instruct a jury that it must or may "infer from the loss of information that the information was in fact unfavorable to the party that lost it."

FRE 403[87] cautions against the admissibility of evidence when its probative value is outweighed by a danger of "undue prejudice," "confusing the issues" or "misleading the jury." In *Delta/AirTran Baggage Fee Antitrust Litigation*, the court barred such evidence because it would "transform what should be a trial about [an] alleged antitrust conspiracy into one on discovery practices and abuses."[88]

In *First American Title v. Northwest Title*, the parties would be "permitted to present evidence and argument to the jury" but the jury "will not be instructed regarding any presumption or inference" regarding the materials.[89] In *BMG Rights Management v. Cox Communications*,[90] the court allowed a party to argue about spoliation during opening arguments and gave an instruction alerting the jury to the fact of spoliation. The Court described this as a "lesser measure" than dismissal or evidence preclusion and consistent with the Rule 37(e) Committee Note.[91]

In *Virtual Studios v. Stanton Carpet*[92] the court decided to allow the party to introduce evidence concerning the loss of emails and argue to the jury about "the effect of the loss." The court did so while being vague about the trigger of the duty or the contents of the missing email, and ignored the requirement to find that they could not be restored or replaced. The court saw this as appropriate to punish conduct that was "at most" "negligent or careless," which may have pushed the envelope.

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[86] Hon. Shira A. Scheindlin and Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 FORDHAM L. REV. 1299, 1309 (2014)("the jury must not use evidence of spoliation to *punish* the spoliating party")(emphasis in original); Mali v. Federal Insurance, 720 F3d. 387, 393 (2nd Cir. June 13, 2013)("[s]uch an instruction is not a punishment. It is simply an explanation to the jury of its fact-finding powers").

[87] Decker v. GE Healthcare, 770 F.3d 378, 397-398 (6th Cir. 2014)(instruction declined that would have given a lot more importance to lost or discarded documents than appropriate).

[88] In re Delta/AirTran Baggage Fee t Litigation, 2015 WL 4635729, at *14 (N.D. Ga. Aug. 3, 2015).

[89] 2016 WL 458398, at *7 (D. Utah Aug. 31, 2016)(leaving it to trial judge to determine "the appropriate mechanism for permitting presentation of the evidence and argument at trial").

[90] 2016 WL 4224964 (E.D. Va. August 8, 2016).

[91] *Id*. at *19.

[92] 2016 WL 5339601 (N.D. Ga. June 23, 2016).

In *Shaffer v. Gaither*,[93] the court reserved a decision on spoliation instructions regarding missing text messages until after it heard the evidence and crafted an order "that cures the prejudice resulting from the loss." The moving party would be free to examine witnesses who read the texts and the jury will be "free to decide whether to believe that testimony."[94] In *Nuvasive v. Madsen Medical*, both sides would be permitted to submit evidence of spoliation and the jury would be permitted to consider the evidence along with other evidence in making its decisions.[95]

In *Accurso v. Infra-Red Services*[96] and *SEC v. CKB168 Holdings*,[97] courts planned to admit spoliation evidence at trial and noted that further relief under Rule 37(e) might follow if justified. In *Matthew Enterprise v. Chrysler*,[98] it was noted that evidence of spoliation would be admissible to counter certain testimony, if offered.

The Committee Note also states that the rule does not limit the discretion of courts to give a "traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial."[99]

## Monetary Sanctions, Fines & Attorney's Fees

There has been a virtually automatic award of attorney's fees and reimbursement of moving party expenses when the threshold requirements are met. Courts justify their action in a variety of ways. In *CAT3 v. Black Lineage*, for example, the court invoked subdivision (e)(1) by holding that an award of attorneys' fees "ameliorates the economic prejudice imposed on the defendants."[100]

Other courts have cited Rule 37(a)(5)(A),[101] where there has been additional production as a result of filing the spoliation motion.[102] This has been criticized as "inappropriate."[103] In *Friedman v. Phila. Parking Auth.*, the court explained that it

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[93] 2016 U.S. Dist. LEXIS 118225 (W.D. N.C. Sept. 1, 2016).
[94] *Id*. at *7-*8.
[95] Nuvasive v. Madsen Medical, 2016 WL 305096, at *3 (S.D. Cal. Jan. 26, 2016)(describing it as a "remedy or recourse" because of prejudice suffered by party not entitled to adverse inference).
[96] 2016 WL 930686 (E.D. Pa. March 11, 2016)
[97] 2016 U.S. Dist. LEXIS 16533 (E.D. N.Y. Feb. 2, 2016).
[98] 2016 WL 2957133 (N.D. Cal. May 23, 2016).
[99] *See, e.g.*, Applebaum v. Target, __F.3d ___, 2016 WL 4088740 (6th Cir. Aug. 2, 2016)( Sutton, J.)(approving the use of such an instruction while affirming refusal of trial judge to also award adverse inference for loss of a documents).
[100] 2016 WL 154116 (S.D. N.Y. Jan. 12, 2016).
[101] "Rule 37(a)(5)(A) If the motion is Granted or Disclosures or Discovery is Provided After Filing)." *See* Ericksen v. Kaplan, 2016 WL 695789 (D. Md. Feb. 22, 2016) and Marshall v. Dentfirst, 313 F.R.D. 691, at n. 9 (N.D. Ga. March 24, 2016)(refusing award because of "plaintiff's motion having been denied").
[102] Best Payphones v. City of New York, 2016 WL 792396, at *8 (E.D. N.Y. Feb. 26, 2016).
[103] John M. Barkett, *The First 100 Days (or So) of Case Law Under the 2015 Amendments to the Federal Rules*, 16 DDEE 178 (April 14, 2016), copy at http://www.bna.com/first-100-days-n57982069891/.

preferred to use Rule 37(a) rather than inherent power, since it had not found that the party acted in bad faith, a requisite under inherent authority.[104]

In *GN Netcom v. Plantronics*,[105] a court awarded fees and costs as "an appropriate component of relief for the prejudice."[106] It also imposed a $3M "punitive monetary sanction," payable to the moving party, without justifying it as alleviation of prejudice under subsection (e)(1). By making the sanction payable to the moving party, the court avoided the procedural requirements for punitive sanctions designed to vindicate a court's authority.[107]

### Counsel Sanctions

Rule 37(e) does not explicitly authorize measures to be imposed against counsel, only the party. In *Sun River Energy v. Nelson*,[108] the Tenth Circuit Court of Appeals refused to interpret Rule 37(c)(1), which also refers only to a party, to authorize counsel sanctions, a conclusion that should apply to Rule 37(e).[109] However, in *CAT v. Black Lineage, supra*, the only reason the court did not sanction counsel was that "there was no evidence of culpability on [their] part."[110]

## Subsection (e)(2)

Subdivision (e)(2) authorizes potentially case-dispositive measures when it is shown that the party acted "with intent to deprive another party of the information's use in the litigation."

The requirement of proof of an "intent to deprive" applies to the use of the following measures:

- presumptions that lost ESI was unfavorable when ruling on pretrial motions or presiding at a bench trial,
- instructions to a jury that they may or must conclude that lost ESI was unfavorable to the party, and
- dismissal of the action or entry of a default judgment.

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[104] Friedman v. Phila. Parking Auth., 2016 U.S. Dist. LEXIS 32009 (E.D. Pa. March 10, 2016)
[105] 2016 WL 3792833 (D. Del. July 12, 2016).
[106] *Id*. at *13.
[107] *See, e.g*. Haeger v. Goodyear Tire & Rubber, 813 F.3d 1233, 1252 (9th Cir. Feb. 16, 2016)( award of $2.7 M to moving party was compensatory because "[n]ot one dime was awarded to the government or the court").
[108] 800 F.3d 1219, 1226 (10th Cir. Sept. 2, 2015).
[109] Shira A. Scheindlin, *Electronic Discovery and Digital Evidence in a Nutshell (2nd Edition)*, 323 ("Rule 37(e) 'measures,' unlike the sanctions available under Rule 37(b), appear to be only against the party").
[110] 2016 WL 154116, at n. 7 (S.D. N.Y. Jan. 12, 2016). The court may have assumed that it retained inherent authority to sanction counsel, regardless of the limits of Rule 37(e).

Courts should consider the adequacy of lesser measures before turning to those available under subdivision (e)(2).[111] The Committee Note cautions that the "remedy should fit the wrong" and that "severe measures" should not be used when the information lost was "relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss."

The rule explicitly rejects *Residential Funding Corp. v. DeGeorge Financial Corp.*,[112] under which missing ESI may be presumed to be adverse if destruction occurred without a showing of bad faith.[113] Had it been in effect, it could well have barred use of such instructions in decisions such as *Zubulake V*,[114] *Pension Committee*[115] and *Sekisui v. Hart*.[116] As the Sixth Circuit recently noted in *Applebaum v. Target*, "a showing of negligence or even gross negligence will not do the trick [under the rule]."[117]

In selecting among the alternative measures authorized, some courts appropriate apply *additional* requirements for dismissals and default judgments.[118]

## Intent to Deprive: Generally

Assessments of "intent to deprive" are typically made by the court, although a jury may be called upon to do so. A court acting as the fact-finder under Rule 37(e) "is free to evaluate the credibility of, and assign weight to, all offered evidence."[119] In *CAT3 v. Black Lineage*, a court utilized a "clear and convincing" standard in reaching its conclusion given that state of mind was at issue.[120]

The "intent to deprive" standard bears a close relationship to the "bad faith" requirement already in use in some Circuits, but is "defined even more precisely."[121] In *Accurso v. Infra-Red Services*, for example, a court held that the rule did not substantially change the burden in the Third Circuit of showing that the ESI was destroyed in "bad

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[111] GN Netcom v. Plantronics, 2016 WL 3792833, at *14 (D. Del. July 12, 2016)(refusing to impose dispositive sanctions where adequate, alternative remedy available).
[112] 306 F.3d 99 (2nd Cir. 2002).
[113] In re Bridge Construction Services of Florida, 2016 WL 2755877, at ¶17 (S.D. N.Y. May 12, 2006)(Koeltl, J.).
[114] Zubulake v. UBS Warburg ("Zubulake V"), 229 F.R.D. 422, 439-440 (S.D. N.Y. July 20, 2004).
[115] Pension Committee v. Banc of America, 685 F. Supp. 2d 456, 496-497 (S.D. N.Y. May 28, 2010.
[116] Sekisui American v. Hart, 945 F.supp.2d 495, 509-510 (S.D. N.Y. Aug. 15, 2013).
[117] Applebaum v. Target, ___ F.3d ___, 2016 WL 4088740 (6th Cir. Aug. 2, 2016)(Sutton, J.).
[118] *See, e.g.*, Xyngular Corporation v. Schenkel, 2016 WL 4126462, at *21-22 (D. Utah Aug. 2, 2016)( dismissal requires proof by clear and convincing evident of compliance with 10th Circuit "Ehrenhaus" standards in case involving deletion of ESI and reformatting of computer (at *29) albeit without mentioning Rule 37(e)).
[119] U.S. v. Ind. Univ. Health, 2016 WL 4592210 (S.D. Ind. Sept. 2, 2016).
[120] 2016 WL 154116, at *8 (S.D. N.Y. Jan. 12, 2016)(noting alternative choices for standard of proof and relying on fact that dismissal was sought); *accord* Montgomery v. Risen, 2016 WL 3919809, at *18 (D.D.C. July 15, 2016)(citing to, *inter alia*, Shepherd v. ABC, 62 F.3d 1469, 1477 (D.C.Cir. 1995).
[121] June 2014 Report, Rules Advisory Committee, 305 F.R.D. 457, 512 at 528 ("The Committee views this definition as consistent with the historical rationale for adverse inference instructions").

faith."[122] In *Marshall v. Dentfirst*, the court noted that the considerations were "substantially similar" to Eleventh Circuit case law.[123]

A finding of "willful" conduct, however, is not sufficient; it must also involve an "intent to deprive another party of the information's use in the litigation."[124] In *Mazzei v. The Money Store*,[125] the Second Circuit affirmed a refusal to issue an adverse inference based on willful conduct because the lower court specifically found that defendants did *not* act with an intent to deprive.[126]

A surprising number of Courts seem to be unaware of the "intent to deprive" standard. In *Nelda Ayala v. Your Favorite Auto Repair*, for example, a court held that is "not clear" exactly "what state of mind a spoliator must have when destroying evidence" and cited *Residential Funding* and *Pension Committee* to authorize sanctions because it deemed the preservation conduct to be "unacceptable."[127]

## Examples of "Intent to Deprive"

In *Global Material Technologies v. DazhengMetal Firbre Co*. the court concluded that when the parties "discarded one source of electronic evidence and failed to preserve others, they did so deliberately and in order to prevent [the moving party] from obtaining that evidence and using it" in the ligation.[128] Because of the egregious conduct involved, the court imposed a default judgment.[129]

In *Brown Jordan v. Camicle*,[130] a court found the requisite "intent to deprive" when an individual with substantial IT experience deleted substantial amounts of information without credible explanation, and imposed an adverse inference.[131] A similar conclusion was reached in *GN Netcom v. Plantronics*, where the court concluded that a top executive

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[122] 2016 WL 930686 (E.D. Pa. March 11, 2016).
[123] 313 F.R.D. 691,695,699 (M.D. Ga. March 24, 2016)(finding that party failed to show non-moving party had "acted in bad faith or with intent to deprive [the moving party] of the use of the information in this litigation").
[124] Roadrunner Transportation v. Tarwater, 642 Fed. Appx. 759, at n. 1 (9th Cir. March 18, 2016)(affirming finding of entitlement based on "willful" conduct since, under the facts of the case, the court could have also found an "intent to deprive").
[125] Mazzei v. The Money Store,___ F.3d ___, 2016 WL 3902256] (2nd Cir. July 15, 2016)(finding that Byrnie v. Town of Cromwell was "superseded in part" by Rule 37(e)).
[126] 308 F.R.D. 92, 101 (S.D.N.Y. May 29, 2015)(although the party willfully failed to preserve, there was "no evidence of bad faith 'in the sense that the defendants were intentionally depriving the plaintiff of information for use in this litigation" [internal quotes omitted] ).
[127] Nelda Ayala v. Your Favorite Auto Repair, 2016 WL 5092588, *19 and n. 28 (E.D.N.Y. Sept. 19, 2016)(party took no steps to make a copy of contents of server or otherwise safeguard the electronic information stored in it).
[128] 2016 WL 4765689, at *9 (N.D. Ill. Sept. 13, 2016).
[129] Given the harshness of the sanction selected, the court also applied Seventh Circuit tests to determine the remedy was appropriate. *Id*. at *1 & *3. It found no lesser sanction to be adequate.
[130] 2016 WL 815827 (S.D. Fla. March 2, 2016).
[131] *Id*. at *36 ("Carmicle was familiar with the preservation of metadata and forensic copies of electronic data in light of his educational and professional background and [the] fact that he has at all relevant times been represented by counsel").

"acted in bad faith with an intent to deprive" because the court "[could] only conclude that at least part" of the motivation was to deprive the party of the discovery.[132] In *DVComm v. Hotwire*, the court found "substantial circumstantial evidence" that the "double deletion" of crucial information was done with an intent to deprive and ordered a narrowly tailored adverse inference.[133]

In *CAT3 v. Black Lineage*, while it was "more than reasonable to infer" that the intentional altering of emails was done in order to manipulate ESI for purposes of the litigation, the court concluded that preclusion of evidence was sufficient under subdivision (e)(1) to address the prejudice involved.[134]

An "intent to deprive" was also found in the case of *Internmatch v. Nxbigthing*[135] where a party "consciously" disregarded its obligations to preserve relevant evidence, resulting in an adverse inference to be determined at trial. In *O'Berry v. Turner*, the loss of the only copy of subsequently deleted ESI could "only" have resulted if defendants had "acted with the intent to deprive."[136] The court imposed a mandatory instruction that the jury must presume that the missing ESI was unfavorable to the non-moving party.[137] This result has been criticized as using "gross negligence" as an "end around" the rejection of the Second Circuit standards.[138]

## Refusal to Find "Intent to Deprive"

Courts have declined to find "intent to deprive" absent sufficient evidence of specific intent where negligent conduct has resulted in the loss of ESI. In *Best Payphones v. City of New York*,[139] for example, the court found that the failure to preserve "amounted to mere negligence," thus barring remedies under subdivision (e)(2). Other courts refusing to find the requisite intent to deprive under the facts of record include *Bry v. City of Frontenac,*[140] *Friedman v. Phila. Parking Auth.,*[141]*Matthew Enterprise v. Chrysler*[142] and *Thomley v. Bennett*.[143]

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[132] 2016 WL 3792833, *7 at (D. Del. July 12, 2016).
[133] DVComm. v. Hotwire, 2016 U.S. Dist. LEXIS 133661, at ¶¶37, 38, 52-62 (Feb. 3, 2016).
[134] CAT3 v. Black Lineage, 2016 WL 154116 at *8-9 (S.D.N.Y. Jan 12, 2016).
[135] 2016 WL 491483, at n. 6 (N.D. Cal. Feb. 8, 2016)("the Court determines both that [the conduct was] willful and in bad faith, and that defendants 'acted with the intent to deprive another arty of the information's use in the litigation")..
[136] O'Berry v. Turner, 2016 WL 1700403, *4 (M.D. Ga. April 27, 2016)("the loss of the at-issue ESI was beyond the result of mere negligence" and such "irresponsible and shiftless behavior can only lead to one [adverse] conclusion").
[137] *Id.*, *4.
[138] Skoczllas and Fortney, *Is the Road to Sanctions Paved with Specific Intentions? The Resurgence of Gross Negligence under New Rule 37(e)(2)*, National Law Rev., Aug. 31, 2016.
[139] 2016 WL 792396 (E.D. N.Y. Feb. 26, 2016).
[140] 2015 WL 9275661, at 7 (E.D Mo. Dec. 18, 2015).
[141] 2016 U.S. Dist. LEXIS 32009, at ¶73 ((E.D. Pa. March 10, 2016).
[142] 2016 WL 2957133 (N.D. Cal. May 23, 2016)(no "intentional spoliation").
[143] 2016 WL 498436, at n. 18 (S.D. Ga. Feb. 8, 2016).

A party that acted in good-faith was not found to have the requisite intent in *Marshall v. Dentfirst*,[144] where records were lost during an upgrade.[145] In *Betsy Feist v. Paxfire*,[146] a court did not find an intent to deprive in the use of a "cleaner" which eliminated the existence of cookies and a browsing history. In *Nuvasive v. Madsen Medical*, the mere deletion of text messages was not indicative of an intent to deprive.[147] A similar conclusion was reached in *SEC v. CKB168 Holdings*.[148] In *Orchestratehr v. Trombetta*, the court refused to find "intent to deprive" based on "equivocal evidence" about a party's state of mind.[149]

In *Accurso v. Infra-Red Services*, the court saw no basis for a finding of intent to deprive, but left the issue open for renewal at the trial.[150] Similarly, in *Shaffer v. Gaither*, the court did not find an intent to deprive when it crafted an interim order to reduce the prejudice by permitting testimony about the contents of missing text messages. It noted, however, that it had "not ruled out a spoliation or modified spoliation instruction" after it heard the evidence at trial.[151]

## A Note on Subsection (e)(2) Prejudice

Subdivision (e)(2) does not require a specific finding of prejudice[152] as, according to the Committee Note, it is presumed to exist when there is a finding of "intent to deprive."[153] However, the Standing Committee specifically rejected the argument that "reprehensible conduct" alone justified sanctions in the absence of prejudice.[154] As noted in *Konica Minolta Business Solutions v. Lowery Corporation*, "Rule 37(e)(2) sanctions are available to address the prejudicial effect of lost ESI only if the loss is shown" to have motivated by an intent to deprive.[155]

In *Global Material Technologies v. Dazheng Metal Fibre Co.*, the court imposed a default judgment without finding prejudice, citing the Committee Note to Rule 37(e)(2), in light of the egregious conduct involved which lesser sanctions could not adequately address.[156] There are indications in the Opinion, however, that material ESI was, in fact, lost.[157]

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[144] 313 F.R.D. 691 (N.D. Ga. March 24, 2016).
[145] *Id*. at 701.
[146] 2016 WL 4540830] (S.D. N.Y. Aug. 29, 2016).
[147] 2015 WL 4479147, at *2 (S.D. Cal. July 22, 2015).
[148] 2016 U.S. Dist. LEXIS 16533, at *14 (E.D. N.Y. Feb. 2, 2016)("the existing record is not sufficiently clear" but permitting SEC to renew its motion at trial based on evidence there adduced).
[149] 2016 WL 1555784, at *12 (N.D. Tex. April 18, 20116).
[150] 2016 WL 930686, at *4 (E.D. Pa. March 11, 2016).
[151] 2016 U.S. Dist. LEXIS 118225, at *8-*9 (W.D.N.C. Sept. 1, 2016).
[152] Minutes, Std. Comm. Meeting, May 29-30, 2014, at n. 2.
[153] Committee Note ("the finding of intent required . . . can support . . .an inference that the opposing party was prejudiced by the loss of information [and no further] finding of prejudice [is required]").
[154] The Standing Committee struck the provision that "~~there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice.~~" Minutes, Std. Comm. Meeting, May 29-30, 2014, at n. 2.
[155] 2016 WL 4537847, at *6 (E.D. Mich. Aug. 31, 2016).
[156] 2016 WL 4765689, at *10 (N.D. Ill. Sept. 13, 2016).
[157] *Id*., *4.

### A Note on the Use of the Jury

If a jury is called upon to determine if a party acted with "intent to deprive," there is a risk that it would invite a juror "to reason that someone who suppresses evidence is more likely to be the kind of person who would be wrong on the merits."[158] This could be particularly unfair if the evidence offered as to "intent to deprive" under subdivision (e)(2) would have otherwise been denied to it under subdivision (e)(1) in the absence of a specific showing of actual prejudice from the loss.[159]

The better approach would appear to be that of the Texas Supreme Court, which has recently concluded that a "judge, not jury, must determine whether a party has spoliated evidence and, if so, the appropriate remedy."[160]

## Exclusivity

Rule 37(e) is silent as to its impact on the use of inherent sanctioning authority to supplement or replace the rule as well as its exclusivity in regard to other subsections of Rule 37.

### Foreclosure of Inherent Authority

Amended Rule 37(e) does not apply only to sanctions issued "under these rules,"[161] as did the original version of the rule. Accordingly, the Committee Note states that under the amended rule courts are "foreclosed" from "relying" on inherent authority in choosing measures for ESI losses, such as use of measures which are barred by the rule.

As noted in *CAT3 v. Black Lineage*, courts have no authority "to dismiss a case as a sanction for merely negligent destruction of evidence, as would have been the case under *Residential Funding*."[162]

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[158] Dale A. Nance, *Adverse inferences about Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering by Parties to Litigation*, 90 B.U.L. REV. 1089, 1102 (2010).
[159] Ariana J. Tadler & Henry J. Kelston, *What You Need to Know About the New Rule 37(e)*, 52-JAN Trial 20, 23 (2016)("[r]egardless of whether the jury makes the inference, it will still have heard damaging evidence and arguments about the circumstances that caused the information loss").
[160] Brookshire Brothers v. Aldridge, 57 Tex. Sup. Ct. J. 947, 438 S.W. 3d 9, 2014 WL 2994435, at *29 (S.C. Tex. July 3, 2014); *see also* Norton, Woodward and Cleveland, *Fifty Shades of Sanctions*, 64 S.C.L. REV. 459 (Spring 2013); *and compare* Hon. Xavier Rodriquez, Brookshire Bros: Cleanup on Aisle 9: The Current Messy State of Spoliation, 46 St. Mary's L.J. 447, 480 (contrasting the Texas decision unfavorably with Rule 37(e)(1) Committee Note in regard to admission of evidence of negligent spoliation).
[161] Rule 37(e)(2006): "Absent exceptional circumstances, a court may not impose sanctions *under these rules* on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." (emphasis added) In Burkhart v. Kinsley, 804 F.2d 588, 589 (10th Cir, 1986).
[162] CAT3 v. Black Lineage, *supra*, 2016 WL 154116, at *6.

The Supreme Court has stated, however, that "where there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power." But "if, in the informed discretion of the court . . . the Rules are not up to the task, the court may safely rely on its inherent power.[163]

Thus, in *CAT3, supra*, *when* the authenticity of potential replacement for missing ESI was called into question, the court concluded that it *would* have had authority to act under its inherent authority if bad faith conduct had rendered Rule 37(e) measures unavailable. The court would have been "forced into an untenable position of condoning bad faith intentional conduct by parties successful in skirting the rule."[164]

In *Dietz v. Bouldin*, the Supreme Court acknowledged that the use of inherent authority is appropriate when it is not "contrary to any express grant of or limitation" on the district court's power contained in a rule or statute."[165] Thus, in *Global Material Technologies v. Dazheng Metal Fibre Co*, a court considered additional requirements (in addition to "intent to deprive") when selecting among options and imposing a default judgment.[166] Use of additional Circuit-based limitations does not reduce or interfere with the minimal requirements of subsection (e)(2).

Similarly, in *GN Netcom v. Plantronics*, a court may have imposed "punitive monetary sanctions" as a supplement to its authority exercised under Rule 37(e)(1) to remediate prejudice in a case where bad faith existed.[167]

Some courts erroneously profess to see no meaningful limitation on their authority to invoke inherent power because of Rule 37(e). In *Sell v. Country Life Insur. Co.*,[168] for example, the court used its inherent power to enter harsh measures for bad faith discovery conduct, which included a failure to preserve emails, citing the Ninth Circuit in *Haeger v. Goodyear*[169] to the effect that Rule 37 is "not the exclusive means" for addressing the adequacy of discovery conduct.

Others refused to conclude that the Committee Note "has it right." The court in *Internmatch v. Nxtbigthing*[170] argued that it "has not been decided" if Rule 37(e) barred it from exercising its inherent authority" to sanction. In *Friedman v. Phila. Parking Authority*,[171] the court asserted that it was "vested with broad discretion to fashion an

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[163] Chambers v. NASCO, 501 U.S. 32, at 50 (1991).
[164] Kristen L. Burge, *Addressing Altered Emails, Court Tests Limits of Amended Rule 37*, ABA LITIGATION NEWS, June 2, 2016.
[165] Dietz v. Bouldin,__ U.S. ___, 136 S. Ct. 1885, 1892 (2016).
[166] 2016 WL 4765689, *1 & *3 (N.D. Ill. Sept. 13, 2016; *see also* Xyngular Corportation v. Schenkel, 2016 WL 4126462, at *21-22 and *29-30 (D. Utah Aug. 2, 2016)(applying Tenth Circuit factors without mentioning Rule 37(e) in case involving dismissal for ESI spoliation).
[167] 2016 WL 3792833, at *7 (D. Del. July 12, 2016)(finding intent to deprive and bad faith).
[168] 2016 WL 3179461 (D. Ariz. June 1, 2016).
[169] 813 F.3d 1233, 1243 (9th Cir. 2016).
[170] 2016 WL 491483, at *4, n. 6 (N.D. Cal. Feb. 8, 2016).
[171] 2016 US Dist. LEXIS 32009, at ¶ 77 (E.D. Pa. March 10, 2016).

appropriate remedy under our inherent powers to stop litigation abuse."[172] In *Barnett v. Deere & Company*,[173] the court refused to apply Rule 37(e) because the Fifth Circuit "has not clarified" whether its prior spoliation jurisprudence has been abrogated or amended by the Rule.

One argument is that the permissive phrase "may"[174] indicates that courts are "not required to use [the] rule and have the ability to draw on the inherent power of the courts to address issues of spoliation."[175] However, there is nothing in the legislative history of the rule to indicate that is the case. The use of the phrase "may" was clearly intended to acknowledge that courts need not sanction or impose remedial measures in all cases where the threshold requirements exist.

## Preclusion of Rule 37(b) & (c)

Rule 37(b) authorizes sanctions for a failure to obey an order to "provide or permit discovery"[176] without a showing of fault.[177] Courts read the rule to apply to preservation orders. Not surprisingly, commentators suggest a strategy of seeking orders mandating preservation in order to provide a mechanism for courts to order sanctions "not otherwise available under Rule 37(e)."[178]

Neither the text of Rule 37(e) nor the Committee Note speak to the situation where a failure to preserve arguably breaches obligations under both rules. In *Matthew Enterprise v. Chrysler*, the court refused to consider a motion for sanctions under Rule 37(b) because the predominant issue was the failure to preserve, not breach of a discovery order entered after a motion to compel.[179] Some commentators this as appropriate.[180]

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[172] The Court had made the same comment earlier in DVComm v. Hotwire, 2016 U.S. Dist. LEXIS 13661 (E.D. Pa. Feb. 3, 2016)(declining to imposed non-monetary sanctions under inherent authority "as we find" a violation of Rule 37(e)(2)).

[173] 2016 WL 4544052, at n. 1 (S.D. Miss. Aug. 31, 2016).

[174] Rule 37(e) provides that if the threshold findings are made, a court upon finding prejudice "may" take remedial actions or, if intent to deprive exists, "may" impose harsh measures.

[175] Sonny S. Haynes, *Litigation Holds and Resolving Spoliation Motions*, 57 NO. 4 DRI FOR DEF. 30 (2015).

[176] Rule 37(b)(2)(A)("fails to obey an order to provide or permit discovery").

[177] *But compare* Bonilla v. Rexon Industrial Corp., 2015 WL 10792026, at n. 11 (S.D. Ind. Aug. 19. 2015)("Rule 37(b) sanctions require that there be "bad faith" on the party of the violating party" in the Seventh Circuit).

[178] Kristen L. Burge, ABA LITIGATION NEWS, 24 (noting advice of ABA Pretrial Practice & Discovery Committee that parties should seek an ESI order at an early stage to "leave open the possibility" for courts to sanction violations of such an order).

[179] 2016 WL 2957133, at n. 47 (N.D. Cal. May 23, 2016)("the issue with respect to these emails is spoliation and not compliance with the court's previous order on the motion to compel).

[180] Jablonski & Dahl, *The 2015 Amendments to the [FRCP]: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation*, 82 DEF. COUNSEL J. 411, 432(2015)(even if the duty to preserve arises from a court order under Rule 37(b), a court should apply the limitations under Rule 37(e) as a matter of guidance" since the "specific takes precedence over the general in such a case.").

A similar preference for Rule 37(e) was noted in *Ninoska Granados v. Traffic Bar*.[181] A decision by the Ninth Circuit can also be read that way. In *Roadrunner Transportation Services v. Tarwater*, the court affirmed entry of a default judgment and noted that it would have done so under Rule 37(e) despite the fact that the lower court had "explicitly ordered [the party] to preserve 'all data' on his electronic devices."[182]

Nonetheless, in *Prezio Health v. John Schenk & Spectrum Surgical Instruments*,[183] the court ignored Rule 37(e) in favor of Rule 37(b). A current member of the Rules Committee has noted that interpretation.[184] Similarly, in *First Financial Security v. Lee*, a court relied on Rule 37(b) to assess sanctions based on the loss of thousands of text messages[185] despite the fact that the non-moving party had asserted that the reason for the loss was accidental destruction.

Rule 37(c) raises similar issues. In *Marquette Transportation v. Chembulk*,[186] a court refused to apply Rule 37(c) and turned to Rule 37(e) for guidance where ESI had been missing but was subsequently restored.

## Assessment

Amended Rule 37(e) has successfully resolved the circuit split on the minimum culpability required for use of harsh spoliation measures. Contrary to predictions of some, this has not unfairly "insulated" spoliation which merits severe sanctions.[187] When "intent to deprive" is not shown, "serious sanctions," depending on the degree of prejudice involved, are available for losses of ESI.[188]

The identification of "reasonable steps" as a safe harbor has been less successful. To some courts, the rejection of *per se* standards is hard to accept. Reasonable conduct can include careless, inadvertent, or even negligent actions, especially when

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[181] 2015 WL 9582430, at n. 6 (S.D.N.Y. Dec. 30, 2015)(Francis, M.J.)("[t]o the extent that any of the material lost consists of [ESI], the provisions of recently-amended Rule 37(e) of the [FRCP] apply"); *accord*, Applebaum v. Target, 2016 WL 4088740 (6th Cir. Aug. 2, 2016).

[182] 642 Fed.Appx. 759 (9th Cir. March 18, 2016)(discussing Rule 37(e) if it had been applied).

[183] 2016 WL 111406 (D. Conn. Jan. 11, 2016).

[184] *See* Barkett, *supra*, 38 ("based on the facts there did not have to be [any mention of Rule 37(e)] given the violation of the court order requiring production"); *see also* In re Ajax Integrated, 2016 WL 1178350 (N.D. N.Y. March 223, 2016)(Rule 37(b) applied where deletion of files occurred after order issued for forensic examination).

[185] 2016 WL 88103, at *8 (March 8, 2016).

[186] 2016 WL 930946 (E.D. La. March 11, 2016)

[187] Richard Moriarty, *And Now For Something Completely Different: Are the Federal Civil Discovery Rules Moving Forward into a New Age or Shifting Backward Into A "Dark" Age?,* 39 AM. J. TRIAL ADVOC. 227, 264 (2015)("Moriarty").

[188] Gregory P. Joseph, Rule 37(e), *99* JUDICATURE 35, at 39-40 (2015) (the "serious sanctions" which may be imposed as "curative measures" under the subdivision include (1) directing that designated facts be taken as established; (2) prohibiting the party from supporting or opposing designated claims or defenses; (3) barring introduction of designated matters; (4) striking pleadings; (5) introducing evidence of failure to preserve; (6) allow argument on failure to preserve; and (7) giving jury instructions other than adverse inference instructions).

proportionality concerns are also considered. To permit juries to hear evidence and receive argument – rather than simply deny relief - may undue the benefits of the "reasonable steps" requirement and the limits on harsh measures under subdivision (e)(2).[189] Accordingly, it is not surprising that some have suggested that parties "may be well-advised to see how courts interpret new Rule 37(e) before going too far toward revamping existing preservation practices" to reduce over-preservation.[190]

In long run, however, Rule 37(e) should help temper unnecessary over-preservation resulting from the risk of severe sanctions "if a court finds [a party] did not do enough."[191] In the near term, however, the virtually automatic award of attorney fees may actually *increase* the incentives for filing "gotcha" spoliation motions lacking evidentiary support. Courts may and should be vigilant in identifying such instances which have no place in the courts.[192]

The sheer number of court decisions which ignore Rule 37(e) is troubling (see the list in Appendix B). As Judge Campbell, the former Committee Chair quoted at the outset of this paper, recently remarked: "[o]ld habits die hard."[193] It may be that simple. Or it may indicate that some courts feel it is unjust to apply the rule to pending cases but are unwilling to say so.[194]

More likely, it indicates that some courts and counsel are either unaware of the new rule or unsure that it actually "forecloses" use of existing Circuit law. Whatever the reason, the trend is not encouraging.

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[189] *See, e.g.* Virtual Studios v. Stanton Carpet, 2016 WL 5339601, at *11 (June 23, 2016). The willingness of courts to routinely permit juries to hear evidence of spoliation undermines the cabining of authority to sanction in subdivision (e)(2). Courts should also take FRE 403 to heart and refrain from asking the jury to assess the "intent to deprive" issue to minimize the risk of undue prejudice where no intent to deprive exists.

[190] H. Christopher Boehning and Daniel J. Toal, *New Rule 37(e) Overrules Second Circuit on Sanctions for Loss of ESI*, New York Law Journal, Volume 251, No. 105 (June 3, 2014).

[191] Committee Note (describing the excessive effort and money being spent on preservation in order to avoid the risk of severe sanctions).

[192] *See* Williams v. CVS Caremark, 2016 WL 4409190 (E.D. Pa. Aug. 18, 2016)(unreasonable allegation of spoliation of digital record of video surveillance earned counsel sanctions under 28 U.S.C. § 1927); Carin Miller v. Experian Information Services, 2016 WL 5242985, at *8 (S.D. Ohio Sept. 22, 2016)(applying Rule 11 sanctions to spoliation motions which lacked evidentiary support and "are consistent with an intent to drive up the costs of this lawsuit to extort a settlement").

[193] In re: Bard IVC Filters Products Liability Litigation, 2016 WL 4943393, at *2 & n. 1 (D. Ariz. Sept. 16, 2016)(the 2015 Amendments eliminated the "reasonably calculated" phrase as a definition for the scope of permissible discovery but in August, 2016 alone, at least 10 cases continued to relay on it).

[194] *Cf.* Learning Care v. Armetta, 315 F.R.D. 433, at *5 (D. Conn. June 17, 2016)(it would be unjust if the moving party were not entitled to the relief under pre-amendment case law, since they "raised the issue in September, 2015, prior to the application of the new rules.")

# APPENDIX A
# (Cases citing Rule 37(e))

1. **Accurso v. Infra-Red Services** [2016 WL 930686] (E.D. Pa., March 11, 2016)(Pratter, J). Adverse inference denied without prejudice under **Rule 37(e)** since there was no basis for a court to conclude that the party acted with intent to deprive the party of access to the information. The party may raise issue again at trial in light of what is received into evidence. The court noted that **Rule 37(e)** did not appear to substantially change the burden in Third Circuit of showing that the ESI was destroyed in "bad faith."

2. **Applebaum v. Target** [2016 WL 4088740] (**6th Cir**. Aug. 2, 2016). Sixth Circuit affirmed refusal of trial court to instruct a jury that the failure to produce any repair history records warranted an adverse inference. The court had instructed the jury that if it found that the defendant had disposed of the bike and had not shown a reasonable excuse for doing so, it could infer that the brakes had not been repaired. The Sixth Circuit (Sutton, J.) found no error in refusing to given an additional adverse inference instruction and noted that she had offered no evidence that some of the records even existed, much less that Target had control over them and destroyed them with a culpable state of mind. Moreover, **under amended Rule 37(e),** to the extent she sought an adverse inference for spoliation of electronic information, the rule required her to show an intent to deprive her of its use, since "a showing of negligence or even gross negligence will not do the trick," citing to the Committee Note.

3. **Arrowhead Capital Finance v. Seven Arts** [2016 WL 4991623, at *20 (S.D.N.Y. Sept. 16, 2016]. In assessing conduct involving a failure to move or copy ESI on serve, the court noted that it "could be seen as reckless," citing the Rule 37(e) requirement that a party take reasonable steps to preserve discoverable electronic information.

4. **Bagley v. Yale** [315 F.R.D. 131, 153] (D. Conn. June 14, 2016). Court reserved ruling on a spoliation motion under **Rule 37(e)** seeking sanctions for failure to take reasonable steps to preserve relevant documents and ESI. The court ordered production of information describing litigation holds or preservation notices along with lists of individuals from to the litigation hold was delivered and from whom information was requested.

5. **Barnett v. Deere & Company**, 2016 WL 4544052 (S.D. Miss. Aug. 31, 2016). In products liability case where documents and, apparently, ESI was not preserved because of application of records retention policy at a time when no duty attached, the court **refused to consider Rule 37(e)** because it was not timely raised and because the Fifth Circuit "has not clarified" whether its prior spoliation jurisprudence has been abrogated or amended by the Rule.

6. **Best Payphones v. City of New York** [2016 WL 792396] (S.D. N.Y., Feb. 26, 2016). The court barred relief under Circuit law and **Rule 37(e**) where party preclusion and

7. adverse inferences for failure to retain and produce documents and emails. The court acknowledged that "separate legal analyses" applied (and outlined key differences, at *4) but found that the failure to pursue the availability of evidence from third parties other sources negated any finding of prejudice and barred relief under Circuit law and **Rule 37(e)**. (*6-*7) The court found that the party had a duty to preserve and had acted negligently, but not willfully, had not "acted unreasonably as is required "under **Rule 37(e)** given the flux in email preservation standards at the time. Attorney fees were awarded under Rule **37(a)(5)(A)** since material that should have been produced was furnished in response to a Rule 37 motion.

8. **Betsy Feist v. Paxfire** [2016 WL 4540830] (S.D. N.Y. Aug. 29, 2016). In action seeking statutory and actual damages under the Wiretap Act, the court found it was not reasonable for a sophisticated plaintiff to utilize a "cleaner" after it filed suit, given the relevance of the existence of cookies and browsing history. It did not find intent to deprive, but found prejudice under Rule 37(e). It assumed it could dismiss the Count, but did not do so ("disproportionate to the alleged wrongdoing") but precluded the party from arguing "that statutory damages are to be awarded in this case."

9. **BMG Rights Management v. Cox Communications** [2016 WL 4224964] (E.D. Va. August 8, 2016). District Court accepted recommendation of Magistrate Judge for a permissive spoliation instruction rather than dismissal or preclusion as contemplated by the Advisory Committee note to **Rule 37(e).** While a finding of intentionality was made, lesser measures were sufficient in light of all the evidence.

10. **Brown Jordan v. Carmicle** [2016 WL 815827](S.D. Fla., March 2, 2016). The court found that the party had failed to take "reasonable steps" under **Rule 37(e)** to preserve ESI by engaging in egregious conduct and that the ESI could not be restored. The court also found that the party acted with "intent to deprive," thus permitting the court to presume the missing ESI was unfavorable in a bench trial.

11. **Bry v. City of Frontenac** [2015 WL 9275661] (E.D. Miss. Dec. 18, 2015). A failure to retain dash camera data was not santionable because of qualified police immunity. The court also stated that remedies under **Rule 37(e)** were not available because there was also no evidence of intent to deprive.

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

13. **CAT3 v. Black Lineage** [2016 WL 154116](S.D. N.Y. Jan. 12, 2016)(Francis, M.J.)[Case dismissed & Motion withdrawn, 2016 WL 1584011]. Given the failure to take reasonable steps and the inability to restore challenged ESI, Plaintiffs were precluded **under Rule 37(e)(1)** from relying on their altered version of lost email which caused legal prejudice by "obfuscate[ing]" the record by placing authenticity of both

original and subsequently produced email at issue. Attorneys' fees were also awarded because of the economic prejudice of "ferreting out" the malfeasance and seeking relief. The measures were "no more severe than necessary" under **(e)(1)** to cure prejudice. While **Rule 37 (e)(2)** also applied because the party "acted with intent to deprive," drastic measures are not mandatory under **(e)(2)** or inherent powers. If Rule 37(e) had been inapplicable, the court could have imposed sanctions because of "bad faith" conduct pursuant to inherent power. The court also described the rule as more lenient with respect to sanctions and found it just and practicable to apply it.

14. **Coale v. Metro-North Railroad** [2016 WL 1441790] (D. Conn. April 11, 2016). Noting **Rule 37(e)** but finding it expressly cabined only ESI the court applied *Residential Funding* in a case involving loss of substances. Contains a useful description of the relationship between a self-imposed duty to preserve under an investigations Manual and the triggering of the duty to preserve for litigation.

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

16. **Core Laboratories v. Spectrum Tracer Services** [2016 WL 879324] (W.D. Okla. March 7, 2016). A failure to preserve emails at the time of switching to a new email service caused "prejudice' under **Rule 37(e)(1)** because it deprived the party of all information about certain issues in those emails. However, the court ordered an adverse inference jury instruction that the lost email would have been unfavorable without also finding an "intent to deprive." The court selectively quoted from *Turner v. Public Service*, 563 F.3d 1136, 1149)(10th Cir. 2009) implying that a showing of prejudice is the only factor that is relevant to entitlement of "spoliation sanctions."

17. **CTB v. Hog Slat [2016 WL 1244998] (E.D. N.C. March 23, 2016).** Adverse inference instruction was recommended because of "willful" destruction of underlying data from Survey Monkey (*13-14). Although **Rule 37(e) not mentioned,** nor was "intent to deprive" found, a footnote stated that the amended rules applied because "none of the changes in the amendments" affect the resolution of the motions. The finding of willfulness was because of "the manifest relevance of this evidence." **[NOTE: Case also included in Appendix B due to ambiguity].**

18. **DVComm v. Hotwire Communications** [2016 U.S. Dist. LEXIS 13661] (E.D Pa. Feb. 3, 2016). Permissive adverse inference jury instruction awarded under **Rule 37(e)(2)** because the destruction of emails was done with "intent to deprive," applying five additional factors as part of assessment, despite a lack of bad faith. Party failed to take reasonable steps and the lost ESI could not be restored or replaced. Since Rule

37(e)(2) applied, it did not need to examine its ability to impose additional non-monetary sanctions based on its inherent power, which "without limitation" also applies. (¶55).

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

20. **Emmanuel Palmer v. Ryan Allen** [2016 WL 5402961] (E.D. Mich. Sept. 28, 2016). Rule 37(e) applied to alleged destruction of video in prisoner case (it was found), noting that *Applebaum* (6th Cir.) and *Konica Minolta* applied the new rule to cases initiated before the rule became effective.

21. **Fiteq. v. Venture Corp.**[2016 WL 1701794] (N.D. Cal. April 28, 2016) Measures under **Rule 37(e)** were not applied because missed email was "restored or replaced" once the employees former computer was located. The moving party failed to prove that other responsive documents ever existed. Moreover, there was no prejudice under **Rule 37(e)(1)** in the interim, since duplicates were produced by other parties to whom they had been sent. The Court acknowledged that it was foreclosed from use of inherent authority.

22. **First American Title v. Northwest Title** [2016 WL 4548398] (D. Utah Aug. 31, 2016). In action against former employees and new business, the court methodically refused to apply **Rule 37(e)** where it was not established that the ESI could not be restored through additional discovery or where no prejudice was shown, but did hold that the new enterprise failed to take reasonable steps to maintain documents and thumb drive brought by ex-employee. As to those materials, the court permitted evidence and argument under **(e)(1),** but since no evidence of intent to deprive, denied evidence preclusion, an adverse inference, or monetary sanctions under subdivision **(e)(2)**.

23. **Fleming v. Escort** [2015 WL 5611576] (D. Idaho Sept. 22, 2015). In authorizing an adverse inference for failure to preserve samples of products using challenged source codes illustrating changes at issue in patent litigation, the court acknowledged that **Rule 37(e)** was drafted to deal with costly and burdensome efforts to preserve, but questioned unilateral decisions not to preserve on that basis, which it sanctioned, applying pre-enactment Ninth Circuit authority finding spoliation merely because of failure to preserve, without a requirement of culpability.

24. **Friedman v. Phila. Parking Auth.** [2016 U.S. Dist. LEXIS 32009](E.D. Pa. March 10, 2016). **Rule 37(e)** was not applicable for delay in production of ESI since there was no showing that ESI was "lost" (¶69) nor that the party acted with an "intent to destroy" since negligence or gross negligence is insufficient (¶73). However, while court had power to act under inherent authority to remedy litigation misconduct ((¶75), attorney's fees were awarded under **Rule 37(a)** as a more "tailored" remedy (¶76). After additional discovery, the party "may move for evidentiary rulings, short of an adverse inference, relating to the failure to preserve" for a specified period. "Absent prejudice," the court could not define the scope of the evidence to be admitted or argued to the jury. (¶85).

25. **G.P.P v. Guardian Prot. Products** [2016 U.S. Dist. LEXIS Aug. 8, 2016] (E.D. Calif.) Sanctions denied as to email not lost, since under **Rule 37(e)** it can be restored or replaced, but further discovery ordered as to non-email ESI identified so as to determine if it is in fact lost, which would implicate Rule 37(e).

26. **Global Material Technologies v. Dazheng Metal Fibre** [2016 WL 4765689, at *9] (N.D. Ill. Sept. 13, 2016). Court entered a default judgment under **Rule 37(e)** because the court concluded that when the parties "discarded one source of electronic evidence and failed to preserve others, they did so deliberately and in order to prevent [the moving party] from obtaining that evidence and using it" in the ligation. The court did not find it necessary to make a finding of prejudice because it was not required under **Rule 37(e)(2) (*10)** and default was appropriate because lesser sanctions were not adequate to reflect the seriousness of the egregious conduct, applying Seventh Circuit tests.

27. **GN Netcom v. Plantronics** [2016 WL 3792833] (D. Del. July 12, 2016). After concluding under **Rule 37(e)** that a party had failed to take reasonable steps to preserve emails which could not be restored or replaced, the Court imposed monetary sanctions involving fees and expenses under subdivision **(e)(1)** to partially address prejudice, ordered payment to the moving party of a $3M **punitive monetary sanction** (three times the penalty imposed by the party on its executive who deleted the emails at issue), use of a permissive adverse inference instruction under **Rule 37(e)(2)** and expressed a willingness to impose evidentiary sanctions if warranted as the case progressed to trial. The court found that substantial deletions by the executive were "the opposite of having taken reasonable steps" and that the entity could have done more. It was done in "bad faith" and with an "intent to deprive" which was attributable to the employer, and was "buttressed" by actions of counsel and the party in the initial refusal to acknowledge retention of an expert (Stroz) and permit them to complete an analysis of the missing email. (*7-8) The court applied Circuit law to shift the "heavy burden to show lack of prejudice" to the bad faith spoliator, which it did not meet. (*9-12)

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

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

30. **HM Electronics v. R.F. Technologies** [2015 WL 4714908, at *30] (S.D. Cal. Aug. 7, 2015). Pre-effective date recommendation that the District Court impose an adverse inference instruction and other sanctions under Rule 37(b) and inherent powers because the conduct was in breach of discovery orders. The court opined that the result would have been the same if **Rule 37(e)** had been applied. The recommendation was terminated as moot by virtue of settlement, which also vacated the sanctions [ 2016 WL 1267385, n. 4 (S.D. Cal. March 15, 2016)].

31. **In re Bridge Construction Services** [2016 WL 2755877] (S.D. N.Y. May 12, 2016). **Rule 37(e)** is not applicable to loss of physical property. It has "changed the rules" and no adverse inference is available for losses of ESI unless the party that destroyed the ESI acted with intent to deprive another party of the use in the litigation.

32. **Internmatch v. Nxbigthing** [2016 WL 491483] (N.D. Cal. Feb. 8, 2016). Declining to find allegations of a power surge credible, a court ordered adverse inference instruction under its inherent authority for willful failure to preserve ESI. In footnote 6, it stated that whether it must make findings under **Rule 37(e)** before exercising its inherent authority "has not been decided," but nonetheless also found that the party "acted with the intent to deprive."

33. **Jennifer Saller v. QVC** [2016 WL 4063411] (E.D. Pa. July 29, 2016). Relief denied where moving counsel did not "even allude" to **Rule 37(e)** since it was "far from certain" that the documents (or ESI from which the documents were generated) were lost because of Defendant's failure to take reasonable steps.

34. **Konica Minolta Business Solutions v. Lowery Corporation** [2016 WL 4537847] (E.D. Mich. Aug. 31, 2016). In an action against former employees who apparently formed a competitive company, the court explained the "four predicate elements" to use of **Rule 37(e)** with insightful comments in the course of deciding that it was just and practicable to apply the new Rule. It held that although deletions occurred, including use of "CCleaner," absence evidence that reasonable steps were not taken, the Rule would not be applied since "[s]anctions are not automatic." The court ordered more discovery to determine if that had occurred and whether there was an ability to restore or replace the lost information.

35. **Learning Care v. Armetta** [315 F.R.D. 433] (D. Conn. June 17, 2016). Court declined to apply **Rule 37(e)** because the issue had been raised in September, 2015 at a time when Second Circuit authority would not have barred an adverse inference for negligence. The negligent wiping of hard drive of laptop was sanctioned by an award

of reasonable attorney's fees to deter the party from "doing it again" which was deemed proportionate to the prejudice involved.

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

37. **Lexpath Techs. Holdings v. Brian R. Welch** [2016 WL 4544344] (D. N.J. Aug. 30, 2016). Court found that spoliation existed from deletion of large numbers of ESI files from a company-furnished laptop after a cease and desist letter received applying Third Circuit case law and without making any threshold findings under Rule 37(e). As a lesser sanction under Rule 37(e), the court expressed an intention to let the jury presume that the missing information was unfavorable. Citing *Accurso v. Infra-Red, supra,* the court equated an "intent to deprive" with bad faith and inferred existence of both, particularly because of the timing of the deletion. It also found that the missing information was relevant because it "could have been" relevant and because of the lack of credibility of the defendant. It did not discuss prejudice, but seemed to assume it was part of the relevance issue.

38. **Living Color v. New Era Aquaculture** [2016 WL 1105297](S.D. Fla. March 22, 2016). While negligent failure to prevent auto-delete of some text messages meant that reasonable steps were not taken and thus some ESI was not, in fact, restored or replaced, no remedies were available under either **Rule 37(e)(1)** or **(2)** as to the remaining text messages not restored since prejudice was minimal and there was no direct evidence of an intent to deprive. It was not a nefarious practice to delete text messages as soon as received or thereafter. There was no prejudice since no nexus between missing messages and allegations of complaint, and the non-moving party's description of content as unimportant was credible and abundance of preserved information was sufficient to meet the needs of the moving party, citing **Committee Note to Rule 37(e)** (at *5).

39. **Marquette Transportation v. Chembulk** [2016 WL 930946] (E.D. La. March 11, 2016). **Rule 37(e)** was not applicable since missing data was ultimately produced because it had been downloaded onto a DVE/CD-ROM which was later secured. However, **Rule 37(e)** barred a request for costs of expenditures for expert during period before the full data set was recovered because of the failure to disclose in initial disclosures under Rule 26(a) or to supplement under Rule 37(c). The court held that **Rule 37(c)** was inapplicable "since the matter involves VDR data, which is electronically stored information ("ESI"), FRCP 37(e) applies."

40. **Marshall v. Dentfirst** [313 F.R.D. 691](N.D. Ga. March 24, 2016). No measures were available under **Rule 37(e) (or if the Rule did not apply, under Eleventh Circuit standards, which are "substantially similar")** for failure to retain browsing history or emails of terminated employee since there was no evidence that they existed when the duty to preserve attached after filing of an EEOC charge. Even if they had existed when the computer was wiped and recycled there was no evidence that the party

acted in "bad faith" or with "intent to deprive" under **Rule 37(e)(2).** Moreover, there was no prejudice from their loss since there was no evidence it was relied upon in the termination process and the party can depose them on the topic. **Rule 37(a)(5)(A)** did not allow award of attorney fees and expenses since the motion was not granted (n.9).

41. **Marten Transport v. Plattform Advertising** [2016 WL 492743](D. Kan. Feb. 8, 2016) No measures were available under **Rule 37(e)** because the duty to the browsing history of an employee's former computer upon movement of the employee to a new work station did not arise at the outset of the lawsuit. The party was not under notice at that time that that it would be at issue in the suit and the company practices followed in reassigning the computer and recycling were evidence of routine, good faith operations to be considered, per **Rule 37(e) Committee Notes**. (*9) The court noted that while the employee was a key player, the party had earlier taken reasonable steps to preserve her emails and other ESI prior to the time she moved to a new work station. It refused to use a "perfection standard" or "hindsight" in determining the scope of the duty to preserve. (*10).

42. **Martinez v. City of Chicago** [2016 WL 3538823] (N.D. Ill. June 29, 2016)(Dow, J.) Adverse inference instruction under existing Seventh Circuit principles denied because the plaintiff failed to meet the burden of showing police videos (which had been uploaded and later deleted) had been destroyed in "bad faith." The court noted but refused to rule on the interaction between Rule 37(e) and Seventh Circuit rulings on adverse inferences because the Circuit had not yet ruled [at *24] ("the Committee [Note] is silent on how the amendment impacts presumptions based on document retention policies"). It noted that it had authority to admit evidence concerning the loss and its likely relevance but since the party had only sought an adverse inference, it had "no occasion" to determine if a less severe remedy might be available. [n.11].

43. **Matthew Enterprise v. Chrysler** [2016 WL 2957133] (N.D. Cal. May 23, 2016). **Rule 37(e)(1)** measures were applied after a "lackadaisical" preservation effort where no effort was made by plaintiff to have outside vendor retain communications (which were deleted after 2 years) and previous email was not retained when switching email providers. These efforts did not qualify for the "genuine safe harbor" under the Rule for parties that take "reasonable steps." Prejudice existed because lost customer communications "could" have contained information whose loss denied Chrysler the ability to undercut statistical evidence by anecdotal evidence of customer communications. **Rule 37(e)(2)** measures were inapplicable because of the absence of "intentional spoliation." As a remedy, Chrysler would be allowed to use evidence of communications post-price discrimination period, to support arguments as to reasons for choosing dealership and present evidence and argument about spoliation of communication lost if Plaintiff offers testimony. Moreover, "if the presiding judge deems it necessary," it can provide instructions to assist the jury in evaluation. The court refused to assess the conduct under **Rule 37(b)** because the issue "is spoliation and not compliance with" the court's order on motion to compel.")(n. 37 & 47).

44. **Mazzei v. The Money Store** [2016 WL 3902256] (2d Cir. July 15, 2016). The Second Circuit affirmed denial of an adverse inference noting that "under the current" Rule 37(e), it could be granted only upon finding that the party acted with an intent to deprive and that the court "specifically found that defendants did not act with such intent." The Panel noted that *Byrnie v. Town of Cromwell* was "superseded in part by Fed. R. Civ. P. 37(e)(2015)." [the lower court (Koeltl, J.) found that although the party willfully failed to preserve, there was "no evidence of bad faith 'in the sense that the defendants were intentionally depriving the plaintiff of information for use in this litigation." [internal quotes omitted]. 308 F.R.D. 92, 101 (S.D.N.Y. May 29, 2015).

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

46. **McIntosh v. US** [2016 WL 1274585 (S.D.N.Y. March 31, 2016). Court refused to apply **Rule 37(e)** to deletion of video surveillance tape because it would make no sense to apply it to a case briefed before the new rules came into effect.

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

48. **Nuvasive v. Madsen Medical** [2016 WL 305096] (S.D. Cal. Jan. 26, 2016) Chief District Judge vacated his earlier decision to impose a permissive jury instruction [2015 WL 4479147] at an upcoming trial because **Rule 37(e)** applied and there was no finding that the party had "intentionally" failed to preserve text messages so they could not be used in the litigation. Court had already decided to allow both sides to present evidence regarding the other side's failure to preserve, presumably to address the prejudice from mutual failures to preserve. The court quoted the Committee Note to demonstrate that this was a "remedy or recourse" available under the Amended Rule. The court stated that it "will instruct the jury it can consider such evidence along with all other evidence in the case in making its decision."

49. **O'Berry v. Turner** [2016 WL 1700403](M.D. Ga. April 27, 2016) A mandatory adverse inference was imposed under **Rule 37(e)** because it was "beyond the result of mere negligence" to make a single hard copy of downloaded ESI without taking further steps to preserve. The copy was placed in a file folder, ultimately moved to a new building and not reviewed until much later, when it was found missing. The court concluded that all the facts "when considered together" lead the court to but "one conclusion – that [defendants] acted with the intent to deprive Plaintiff of the use of this information at trial." The "minimal" effort undertaken to preserve was a failure to

take "reasonable steps." There no discussion of the "prejudice," if any, caused by loss of the data.

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

51. **Orchestratehr v. Trombetta** [2016 WL 1555784] (N.D. Tex. April 18, 2016). No adverse inferences available under **Rule 37(e)** where former employee deleted emails before resigning since no evidence of destruction in bad faith or with the requisite intent to deprive Plaintiffs of their use in the litigation.

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

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

54. [State Case] Sarach v. M&T Bank [2016 WL 3353835] (N.Y. App. Div 4th Dept. June 17, 2016). In a thoughtful dissent to a New York case granting an adverse inference based on mere negligence, the Judge explained that "[o]ne of the reasons" that Federal **Rule 37(e)** was amended to bar use of negligent or even grossly negligent behavior involving loss of ESI was "to address business concerns about over-preservation of ESI."

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

56. **SEC v. CKB168 Holdings** [2016 U.S. Dist. LEXIS 16533](E.D. N.Y. Feb. 2, 2016). A court withdrew its earlier recommendation for an adverse inference in light of **Rule 37(e)** since the deficiency could not be said to the result of an "intent to deprive" under the record before the court. However, if the case goes to trial and the SEC makes the requisite showing of intent associated with the loss of ESI, the SEC was authorized to renew its motion under the Rule.

57. **Shaffer v. Gaither** [2016 U.S. Dist. LEXIS 118225] (W.D. N.C. Sept. 1, 2016). Request for dismissal for Plaintiff's failure to preserve text messages provisionally denied subject to renewal at trial after examination in front of jury, which will be "free to decide whether to believe that testimony." Court found that party had failed to take

reasonable steps to preserve **under Rule 37(e)** and since intent to deprive cannot (yet) be found, its responsibility was to craft an order that cures the prejudice, assuming that all alternative methods of replacement are foreclosed.

58. **Stinson v. City of New York** [2016 WL 54684] (S.D.N.Y. Jan. 5, 2016). Court refused to apply **Rule 37(e)** because motion was fully submitted prior to effective date of new Rule. The court granted a permissive adverse inference based on gross negligence without finding any prejudicial impact and noted that the amended rule set "new standards" for federal courts but raised a thorny issue of application where a party fails to preserve both ESI and hard-copy evidence.

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

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

61. **Thomley v. Bennett** [2016 WL 498436] (S.D. Ga. Feb. 8, 2016). Court refused to apply **Rule 37(e)** where loop-type video of prison incident was recorded over before there was demand for its production at a time when they had no reason to know it should be preserved. In n.18, the court also stated that there was no showing that the criteria of (e)(1) was met or that defendants had acted with an intent to deprive.

62. **Thurman v. Bowman** [2016 WL 4240050] (W.D.N.Y. August 10, 2016). The District Court applied Circuit case law in affirming that the movement of Facebook posts to "private" was not sanctionable because the contents remained available. A failure to institute a litigation hold did not alone establish the relevance of any missing ESI as a matter of law, since it occurs only "in the most egregious cases," which this case was not. In a footnote, it noted that the Magistrate Judge applied current law because "neither party advocated for retroactive application" of Rule 37(e). **The Magistrate's had commented [2016 WL 1295957 (March 31, 2016)] that the outcome would have been the same since the deletion did not cause prejudice nor was it done with an intent to deprive**.

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

64. **U.S. v. Safeco** [2016 WL 901608] (D. Idaho March 9, 2016). Court exercising inherent power refused to sanction loss of tangible property (notebook) because the court was

not persuaded conduct was "willful or done in bad faith." The court noted that **Rule 37(e)** requires a finding of "bad faith intent" but that it applies only to ESI, not missing tangible evidence.

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

66. **Virtual Studios v. Stanton Carpet** [2016 WL 5339601] (N.D. Ga. June 23, 2016). Court applied **Rule 37(e)(1)** but not (e)(2), to a case where reasonable steps were not taken but prejudice was found to exist by allowing the moving party to introduce evidence concerning the loss of emails and argue to the jury about "the effect of the loss." The court was vague about the trigger of the duty and the contents of the missing email, and ignored the requirement that it must negate the ability to restore or replace them.

67. **Wichansky v. Zowine** [2016 U.S. Dist. LEXIS 37065] (D. Ariz. March 22, 2016)(Campbell, J.). Court declined to apply **Rule 37(e)** in regard to motions for sanctions involving spoliation of audio and videotapes where little prejudice and marginal relevance. The court denied an adverse inference because the court did not wish to put its "thumb on the scale," but parties were allowed to present admissible evidence on the topic to overcome any prejudice suffered from loss.

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

# APPENDIX B
# Case Summaries (Cases Ignoring Rule 37(e))

1. Austrum v. Federal Cleaning [149 F. Supp.3d 1343] (S.D. Fla. Jan. 8, 2016). Court imposed rebuttable adverse inference because of loss of (hard copy) employment application despite concluding that the party had not "acted deliberately to hinder [plaintiff's] case." Discusses role of violation of Title VII recordkeeping regulation in triggering duty to preserve without showing anticipation of litigation. **Poster child for treating documents and ESI alike; case would have had different outcome had the ESI version of the application been lost.**

2. Benefield v. MStreet Entertainment [2016 WL 374568] (M.D. Tenn. Feb. 1, 2016). Court imposed "spoliation instruction" for failure to preserve text messages that "should have been preserve" **without mentioning Rule 37(e)** or making an finding of elevated culpability. **Rule 37(e) should have been applied; result would be different.**

3. Beyer v. Anchor Insulation [2016 WL 4547123] (D. Conn. Aug. 30, 2016). In case involving disposal of carpeting that was videotaped while being removed from home, the court found that the party acted intentionally and placed its good faith in question, applying *Residential Funding* and *Pension Committee* to authorize adverse inferences. **Rule 37(e) could have been applied as analogy; result would be different.**

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

5. Brice v. Auto-Owners Insur. [2016 WL 1633025] (E.D. Tenn. April 21, 2016). Adverse inference granted under Sixth Circuit authority for negligent deletion of email and text messages without mentioning Rule 37(e). **Rule 37(e) should have been applied; result would be different.**

6. Browder v. City of Albuquerque [2016 WL 3946801] (D. N.M. July 20, 2016)("electronic data"); [2016 WL 3397659, at *8 and n. 4] (D. N.M. May 9, 2016)(text messages on cell phone). In the July decision involving loss of "electronic data, such as the video footage here" by former police officer after accident, court sanctioned without mentioning Rule 37(e) because of "questionable information management" practices [citing Phillip Adams, 621 F. Supp. 2d 1173, 1193 (D. Utah 2009) and allowed the plaintiff to present evidence of the spoliation since lacking bad faith and only minimal prejudice. In the May ruling dealing with loss of cell phone lost after several years court allowed jury to "make any inference they believe appropriate" without mentioning Rule 37(e) because of failure to issue litigation hold

(discussing *Pension Committee* and *Chin*) because it had "reason to suspect" there was consciousness of a weak case. **Rule 37(e) should have been applied; result would likely to have been the same.**

7. Buren v. Crawford County [2016 WL 4124092] (E.D. Mich. Aug. 3, 2016). Assessment of loss of audio recordings from lapel microphone made without any mention of Rule 37(e). Court orders evidentiary hearing to clarify questions of fact, which it lists. **Rule 37(e) should have been applied; result would likely to have been the same.**

8. Carter v. Butts County [2016 WL 1274557] (M.D. Ga. March 31, 2016). Adverse inference granting rebuttable presumption and evidence preclusion awarded under Eleventh Circuit authority **without mentioning Rule 37(e)** for destruction of electronic copy of crime report and downloaded photos by police officer acting in bad faith. Attorney who signed responses sanctioned under **Rule 26(g). Rule 37(e) should have been applied; result would likely to have been the same.**

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

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

11. CTB v. Hog Slat [2016 WL 1244998] (E.D. N.C. March 23, 2016). Adverse inference instruction was recommended because of "willful" destruction of underlying data from Survey Monkey (*13-14). Although **Rule 37(e) not mentioned,** nor was "intent to deprive" found, a footnote stated that the amended rules applied because "none of the changes in the amendments" affect the resolution of the motions. The finding of willfulness was because of "the manifest relevance of this evidence." **[NOTE: Case also included in Appendix A because of ambiguity in footnote implying the rule had been applied].**

12. Dallas Buyers Club v. Doughty [2016 WL 1690090] (D. Ore. April 27, 2016, amended April 29, 2016 [as 2016 WL 3085907]). **Without citing to Rule 37(e),** court stated that jury will be permitted as an "evidence-weighing" matter to presume adverse information was contained on cell phone which was destroyed since spoliation in Ninth Circuit raises a presumption that missing information was adverse and party need not act in bad faith. **Rule 37(e) should have been applied; result likely different.**

13. Davis v. Crescent Electric [2016 WL 1637309] (D. S.Dak. April 21, 2016). In case where party sought sanctions for fabricating an email, the court, **without reference to Rule 37(e)** decided to leave it for the jury to determine, but urged the parties to consider an alternative to avoid delaying the trial on an issue peripheral to the issues in the case, given FRE 403. **Rule 37(e) should have been applied; unclear exact impact of Rule 37(e) had it been utilized.**

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

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

16. Erhart v. Bofl [2016 WL 5110453](S.D. Cal. Sept. 21, 2016). Pre-amendment principles applied without mention of Rule 37(e) in refusing to sanction "culpable" failures to preserve ESI on laptops because there moving party had not suffered any meaningful prejudice from loss of files which may be located elsewhere in systems. **While Rule 37(e) should have been applied, the result would have been the same.**

17. Estakhrian v. Obenstine, 2016 U.S. Dist. LEXIS 66143 (C.D. Cal. May 17, 2016). Court adopted awarding adverse inference instruction relating to delayed production of documents, including ESI, apparently under Rule 37(c). **No reason to mention Rule 37(e), which applies only if ESI is lost because of failure to preserve, not mere delay in production**.

18. Evans v. Quintiles Transnational [2015 WL 9455580] (D.S.C. Dec. 23, 2015) The court concluded that it was "not in a position to make" credibility findings and was "inclined" to provide the jury with guidance so they could determine if the alleged computer files ever existed and, if so whether the requisite degree of culpability existed**. Rule 37(e) was not mentioned. Rule 37(e) should have been applied; result would likely to have been the same.**

19. First Financial Security v. Lee [2016 WL 881003] (D. Minn. March 8, 2016). Failure to produce text messages and emails in violation of discovery order, including text messages lost through "accidental destruction," assessed under **Rule 37(b) without mention of Rule 37(e).** Court was unimpressed with argument that copies were available from third parties. **Rule 37(e) should have been applied because of allegations of ESI destruction; Rule 37(b) could have been precluded.**

20. Gibson v. C. Rosati [2016 WL 5390344] (N.D.N.Y. Sept. 27, 2016). Issue involving spoliation of five seconds of recorded video thought to have been inadvertently lost (it turned out it was not) resolved without reference to Rule 37(e). **Would have made no difference if had been cited.**

21. Georgia Power v. Sure Flow Equipment [2016 WL 3870080] (N.D. Ga. Feb. 17, 2016). Sanctions not imposed for loss of strainer housings at power plant during conversion from coal to natural gas. No ESI involved. Confusing opinion based on state and federal case law. **Shows that Rule 37(e) could usefully apply tangible property to avoid confusion. Result would not have been different had Rule 37(e) been applied.**

22. Hernandez v. Vanveen [2016 WL 1248702] (D. Nev. March 28, 2016). Sanctions denied for failure to take drug test since it could not be determined if the missing information would have been relevant. **Shows that Rule 37(e) could usefully apply to tangible property which could easily have been recorded in ESI form. Result would not have been different had Rule 37(e) been applied.**

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

24. In re: Ajax Integrated [2016 WL 1178350] (N.D. N.Y. March 23, 2016). Court analyzed motion for sanctions under Rule 37(b) **without mentioning Rule 37(e)** for deletion of file prior to forensic examination. Court decided to hold a separate evidentiary hearing to consider if sanctions were warranted. **Rule 37(e) should have been applied; would probably make a difference.**

25. In re: General Motors Ignition Switch Litigation [2015 WL 9480315] (S.D. N.Y. Dec. 29, 2015). Court refused to sanction for failure to preserve automobile where plaintiff acted at most negligently and New GM suffered no prejudice, distinguishing Silvestri v. GM, 271 F.3d 583 (4th Cir. 2001) as a case where the destroyed evidence was the most critical evidence on the issue. Court placed severe restrictions on introduction of evidence of spoliation and argument because of risk of unfair prejudice and juror confusion, citing FRE 403. **Shows that Rule 37(e) could usefully apply to tangible property even in face of *Silvestri* allegations. Result would not have been different had Rule 37(e) been applied.**

26. Jessica Jimenez v. Menzies Aviation [2016 WL 3232793] (N.D. Cal. June 13, 2016). Court **ignored Rule 37(e)** in case where paper time records were destroyed for some employees but electronically records continued to exist. **Excellent example of why Rule 37(e) should apply to both hard copy documents and ESI where same context exists.**

27. Kristine Biggs Johnson v. Daniel Peay [2016 WL 4186956] (D. Utah Aug. 8, 2016). Loss of hard copy of missing electronic report not sanctioned sanction since not evidence of bad faith or actual prejudice, since the author's sworn statement is "a sufficient substitute for the document." **Excellent example of why Rule 37(e) should apply to both hard copy documents and ESI where same context exists.** Cf. *O'Berry v. Turner* [2016 WL 1700403] (M. D. Ga. April 27, 2016)(APPENDIX A).

28. LaFerrera v. Camping World RV Sales [2016 WL 1086082] (N.D. Ala. March 21, 2016). Adverse inference for loss of email denied in the absence of bad faith showing **without mention of Rule 37(e). Rule 37(e) should have been applied; result would likely to have been the same.**

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

30. Martin v. Stoops Buick [2016 WL 1623301] (S.D. Ind. April 25, 2016). Adverse inference denied under Seventh Circuit authority because deletion of emails and other ESI not shown, after evidentiary hearing, to have resulted from bad faith (destroyed for purpose of hiding adverse information). **Rule 37(e) should have been applied; result would likely to have been the same.**

31. Mayer Rosen Equities v. Lincoln National Life [2016 WL 889421] (S.D. N.Y. Feb. 11, 2016). No spoliation of ESI existed merely because paper copies were scanned since experts were able to determine authenticity of underlying documents by use of the scanned copies. **Rule 37(e) should have been applied; result would likely to have been the same.**

32. McCabe v. Wal-Mart Stores [2016 WL 706191] (D. Nev. Feb. 22, 2016). No adverse inference where failure to preserve or destroying video surveillance did not result from conscious disregard of preservation obligation. **Rule 37(e) should have been applied; result would likely to have been the same.**

33. McCarty v. Covol Fuels [644 Fed. Appx. 372](**Sixth Cir**. Feb. 16, 2016). Sixth Circuit Panel **ignored Rule 37(e)** in affirming summary judgment for defendant despite its destruction of ladder, documents, text messages and phone call records on destroyed cell phones. The Court of Appeals held the spoliation issue to be moot since the summary judgment was issued on an independent ground. Moreover, defendants did not act in bad faith and loss of evidence did not preclude putting on a case, distinguishing *Silvestri*. **Rule 37(e) should have been mentioned since ESI was involved; but would probably not have altered outcome given that summary judgment was granted independently. Also demonstrates that Rule 37(e) could accommodate loss of tangible property in same context as documents and ESI.**

34. Montgomery v. Risen [2016 WL 3919809] (D.D.C. July 15, 2016). In refusing to analyze spoliation motion in favor of granting summary judgment because the court "is hesitant to allocate judicial resources to this discovery dispute" the court applies circuit law to allegations of failure to preserve software **without mentioning Rule 37(e)**. Also mentions that dismissal as a punitive spoliation sanction requires proof by clear and convincing evidence. **Would have made no difference to outcome**.

35. Moulton v. Bane [2015 WL 7776892] (D. N.H. Dec. 2, 2015). Applying First Circuit case law **without mention of Rule 37(e),** , the court refused to sanction loss of text messages as they were recovered from the only party with whom they were exchanged and from a forensic examination of the cell phone. The court noted that this reduced the prejudice, and that the circumstances did not support use of a "punitive" sanction such an adverse credibility inference. **Rule 37(e) should have been applied; result would likely to have been the same.**

36. Nelda Ayala v. Your Favorite Auto Repair, 2016 WL 5092588, *19 and n. 28 (E.D.N.Y. Sept. 19, 2016). Spoliation sanctions imposed under *Residential Funding* and *Pension Committee* where after receiving preservation notice parties took no steps to make a copy of contents of server or otherwise safeguard the electronic information stored in it. The court **does not mention Rule 37(e)** and states that it is not clear what state of mind is required, although the "bottom line" is whether the conduct is acceptable or unacceptable. **Rule 37(e) should have been applied and it is not clear whether the court would have found an "intent to deprive." It apparently could have done so.**

37. NFL Management Council v. NFL Players Association [2016 WL 1619883] **(Second Cir.** April 25, 2016). NFL Commissioner was within his discretion to conclude player had deleted text messages since "the law permits a trier of fact to infer that a party who deliberately destroys relevant evidence . . . did so in order to conceal damaging information from the adjudicator." **Rule 37(e) should have been applied; result would likely to have been the same. Not clear why the Second Circuit failed to do so.**

38. Orologio of Short Hills v. The Swatch Group [2016 WL 3454211] (**Third Cir**. June 24, 2016). In affirming the District Court's refusal to sanction for destruction of "hard-copy" videotape contents, the Court of Appeals held that there was no abuse of discretion since "bad faith" was required, not mere negligence, under Bull v. United Parcel, 665 F.3d 68 at 79 (3d Cir. 2012). **Rule 37(e) should have been mentioned, at least; would not have changed the outcome. It is possible that the court treated the loss as one of tangible property given reference to "hard copy." Illustrates reason to treat tangible, documents and ESI alike.**

39. Pierre v. Air Serv Security [2016 WL 5136256] (E.D.N.Y. Sept. 21, 2016). Spoliation of camera and videotape evidence resolved without mentioning Rule 37(e) by finding moving party failed to meet burden of proof of elements of spoliation. **Arguably**

**based solely on failure to establish common law breach, and thus Rule 37(e) technically not (yet) involved.**

40. Prezio Health v. John Schenk & Spectrum Surgical Instruments [2016 WL 111406] (D. Conn. Jan. 11, 2016). After ordering production of metadata, only five of eight emails from home AOL account were recovered when email transferred to a new ipad. Permissive adverse inference granted along with attorney's fees (**both *Residential Funding* and *Mali* are cited**) because the conduct was "grossly deficient." Neither Rule 37(b) nor **Rule 37(e)** are mentioned. **Rule 37(e) should have been applied, likely would have led to different result.**

41. Robbin L. Lologo v. Wal-Mart [2016 WL 4084035] (D. Nev. July 29, 2016). Sanctions for failure to preserve substances related to slip and fall [applesauce], video footage, sweep logs and names of witnesses denied for lack of culpability without citation to **Rule 37(e).** Although not the basis for the ruling, the court also seems to credit statement that no footage existed, mentioning that no depositions were taken of persons "with knowledge of the surveillance system." **Rule 37(e) should have been applied; not clear if would have led to different result.**

42. Sell v. Country Life Insur. Co [2016 WL 3179461] (D. Ariz. June 1, 2016). Court used its inherent power to strike Answer and entered a Default Judgment after finding willful and bad faith conduct during discovery, including a failure to preserve emails citing statement in *Haeger v. Goodyear*, 813 F.3d 1233, 1243 (9th Cir. 2016) that Rule 37 is "not the exclusive means" for addressing the adequacy of discovery conduct as well as *Surowiec v. Capital Title* (Campbell, J.), 790 F.Supp.2d 997, 1010 (D. Ariz. 2011). **Raises difficult issue of whether Rule 37(e), which should have been applied in part, would have had a preclusive impact on use of inherent power regarding the other discovery breaches.** *Cf.* CAT3 v. Black Lineage [2016 WL 154116] (S.D. N.Y. Jan. 12, 2016).

43. Star Envirotech v. Redline [2015 WL 9093561] (C.D. Cal. Dec. 16, 2015). **Rule 37(e)** not mentioned in decision involving failure to preserve hard copy advertising documents while retaining electronic copies which provide exemplars. The court refused to find that spoliation had occurred by the destruction of the hard copies ("difficult to imagine what nefarious purposes would have been served by destroying . . .other than [the stated] purpose of ensuring that the [out of date] materials were no longer disseminated")(*7). **Shows why treating documents and ESI under same rule is important; if the electronic copies had been destroyed not the hard copies, Rule 37(e) would apply. However, the result would have been the same since the party took "reasonable steps" to preserve the content.**

44. Stedeford v. Wal-Mart Stores, [2016 WL 3462132] (D. Nev. June 24, 2016). Court authorized preclusion of evidence and adverse inference **without citing Rule 37(e**) where party allegedly failed to copy to electronic disk part of record of slip and fall that court concluded should have existed. In dicta, the court notes that dismissal is only warranted when there is clear and convincing evidence of both bad-faith spoliation and

prejudice to the opposing party. **Rule 37(e) should have been applied, likely would have led to different result.**

45. Terrell v. Central Washington Asphalt [2016 WL 973046] (D. Nev. March 7, 2016). Court to instruct jury that the loss of documents creates a rebuttable presumption that if they had been produced they would show information favorable to movant and unfavorable to other party. **No mention of Rule 37(e).** No finding equivalent to "intent to deprive." **Shows that documents should be treat the same as ESI.**

46. Transystems Corp. v. Hughes Assocs [2016 U.S. Dist. LEXIS 85548] (M.D. Pa. June 30, 2016). Citing *Zubulake* and distinguishing 28 U.S.C. § 1927, court imposed sanctions for negligent failure to preserve ESI by the wiping of hard drives **without mentioning Rule 37(e)**. **Rule 37(e) should have been applied, likely would have led to different result.**

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

48. Williams v. CVS Caremark [2016 WL 4409190] (E.D. Pa. Aug. 2016). In case where counsel pressed allegations of spoliation of digital recording of altercation in store to extent that he was sanctioned under 28 U.S. C. § 1927, **court never mentioned Rule 37(e**) despite discussing a motion for Rule 37 sanctions. **Although not necessary to case, it would have been useful to have cited the new Rule.**

49. Woodrow Flemming v. Matthew J. Kelsh [2016 WL 2757398] (N.D. N.Y. May 12, 2016). Rule 37(e) ignored in discussion of preservation of "video recordings" of incident based on video footage of corrections officer using handheld video camera. Court cites *Residential Funding* standards in holding no evidence of culpable state of mind. **Rule 37(e) should have been applied, unlikely it would have led to different result.**

50. Xyngular Corporation v. Schenkel [2016 WL 4126462, at *21-22] (D. Utah Aug. 2, 2016). Court noted that the 10th Circuit "Ehrenhaus" standards regarding dismissals in use of inherent sanction authority would apply in case involving deletion of ESI and reformatting of computer (at *29) but concluded that it had not been proven by clear and convincing evidence that deletions were permanent. Rule 37(e) was not mentioned. **Rule 37(e), had it been applied, would probably have led to the same result since the information was not "lost" since it was apparently restored and replaced. The case does suggest that additional requirements under Circuit case law may be applied if more demanding than Rule 37(e).**