Amended Rule 37(e): Case Summaries

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This Memorandum summarizes the holdings of decisions which did or could have applied Rule 37(e) as of May, 2017. The Rule, enacted as part of the 2015 Amendments to the Federal Rules of Civil Procedure, has been referred to or applied in over one hundred appellate and district court opinions since it became effective on December 1, 2015.[2]

Appendix A. Appendix A lists the decisions, including those of appellate courts,[3] which have applied or mentioned Rule 37(e). In the main, the results are unchanged from those which might have been expected without application of the Rule, which merely provides a framework for the analysis. However, because the Rule rejects the *Residential Funding* authority to cite negligence or gross negligence as a basis for use of certain potentially case dispositive measures, such as adverse inferences, there has been a change in some outcomes.

As of this writing, twenty-two requests for relief in the form of adverse inferences were denied because of failure to demonstrate adherence to the "intent to deprive" standard of the amended rule. Based on the findings and comments contained in the body of the reported decisions themselves, it appears that a substantial number of those requests would have been granted absent Rule 37(e).

Appendix B. In over seventy opinions, including those of several appellate courts,[4] court have not referenced the Rule in factual contexts where it could or should have been applied. In a few cases, courts found it not to be just and practicable to apply it to pending proceedings.[5] In most others cases, however, the reason was unclear. In fifteen decisions imposing adverse inference jury instructions, it appears that at least twelve of those requests would have been denied if Rule 37(e) had been applied.[6]

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[1] © 2017 Thomas Y. Allman.
[2] *See* 2015 US Order 0017; Proposed Rules, 305 F.R.D. 457, 460 (April 29, 2015)("[the Rules] shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending").
[3] Helget v. City of Hays, 2017 WL 33525, n. 7 (10th Cir. Jan. 4, 2017); Applebaum v. Target, 831 F.3d 740 (6th Cir. Aug. 2, 2016); Mazzei v. The Money Store, 656 Fed. Appx. 558 (2nd Cir. July 15, 2016) and Roadrunner Transp. v. Tarwater, 692 Fed. Appx. 759 (9th Cir. March 18, 2016).
[4] Alston v. Park Pleasant, 2017 WL 627381 (3rd. Cir. Feb. 15, 2017)(sale of ESI storage devices without retention of ESI); Champion Pro Consulting v. Impact Sports, 845 F.3d 104 (4th Cir. Dec. 22, 2016)(lost or deleted text messages; NFL Mgt. Council v. NFL Players Association [820 F.3d 527] (2nd Cir. April 25, 2016)(deletion of text messages).
[5] *See* 2015 US Order 0017; Distefano v. Law Offices, 2017 WL 1968278, at *3-4 (E.D. N.Y. May 11, 2017)(collecting cases).
[6] *See also* Distefano v. Law Offices, 2017 WL 1968278, at *27 (E.D. N.Y. May 11, 2017)(insufficient culpability or prejudice for adverse inference instruction but movant nonetheless allowed to "explore" the issue at trial).

A substantial number of decisions ignoring the Rule have involved losses of video or audio footage. In *Oppenheimer v. City of La Habra*,[7] for example, the court stated that "Rules 37 does not directly address destruction of video equipment or video footage." This echoed a pre-enactment decision where the court noted that "[a]lthough this case concerns deletion of a digital video file, it does not concern ESI in the sense addressed in the [then] proposed amendment, which is concerned more with the operation of modern ESI systems and the ease with which information can be added to and lost by such systems."[8]

APPENDIX A
Cases explicitly citing Rule 37(e)

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

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

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

4. **Air Products v. Wiesemann** [2017 WL 758417] (D. Del. Feb. 27, 2017). A District Judge refused to sanction Air Products for the wiping of laptops belonging to former employees which came to light only after initial disclosures because the moving party named only one of

[7] 2017 WL 1807596, at *7(C.D. Cal. Feb. 17, 2017).
[8] *Cf*. Hsueh v. N.Y., 2017 WL 1194706, at *4 (S.D.N.Y. March 31, 2017)("no reason" why digital recording "would not be ESI").

them as a subject of search terms until after being notified that the wiping had occurred. The court also refused to sanction for lost emails which were available from another source, citing CAT3 v. Black Lineage. According to the court "[p]ure speculation is not enough" to find that relevant ESI was destroyed. The court noted that the party had "not met the threshold requirement under Fed. R. Civ. P. 37(e) of showing that ESI [on a server] was actually lost." The court cited to Rule 37(e) and noted that sanctions are determined under "two different rubrics" depending on the type of evidence.

5. **Alabama Aircraft Industries v. Boeing** [2017 WL 930597] (March 9, 2017). A former subcontractor of Boeing in a dispute over failure of joint bidding arrangement convinced a court that ESI of an unknown nature was "intentionally destroyed by an affirmative act with has not been credibly explained." (*15). Accordingly, without evidence of the missing contents and rejecting the possibility that it was available from other sources, the court stated that if the case goes to trial, the jury will be instructed that it may presume that the lost information was unfavorable to Boeing. The court applied **Rule 37(e)(2)** and concluded that the "type of unexplained, blatantly irresponsible behavior leads the court to conclude that Boeing acted with the intent to deprive" the moving party of "the use" of the ESI in connection with the claims. The court also awarded reasonable attorney's fees and costs to the movant in prosecuting the motion against Boeing, but not its counsel, without citing the authority for doing so.

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

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

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

9. **Akinbo JS Hashim v. Ericksen** [2016 WL 6208532] (E.D. Wisc. Oct. 22, 2016). Prisoner motion for judgment based on failure to retain copy of menu of food served denied because

there was no evidence that any defendant destroyed it in bad faith, citing, *inter alia*, **Rule 37(e)(2**).

10. **Bagley v. Yale** [2016 WL 7407707 (D. Conn. Dec. 12, 2016). In a follow-up to its earlier decision [315 F.R.D. 131, 153] (D. Conn. June 14, 2016) ordering production of lists of individuals to whom litigation hold were delivered and from whom information was requested, the court ordered their production (and survey results from recipients) over objections based on attorney client privilege and an inadequate predicate showing of possible spoliation. The court noted that they were issued in batches and implied that the delays in doing so might be deemed culpable "or even negligent" and that a recent court opinion had implied that a sufficient indefensible failure to issue a litigation hold might justify an adverse inference in Stimson v. City of New York, 2016 WL 54684 (S.D.N.Y. Jan. 5, 2016). The court noted that amended **Rule 37(e)** does not apply to "old-fashioned documentary evidence" and that the Committee Note rejects Residential Funding.

11. **Barnett v. Deere & Company**, 2016 WL 4544052 (S.D. Miss. Aug. 31, 2016). In an initial spoliation decision in a product defects case involving lawn mower design, a court denied motion for sanctions because of lost documents and ESI because of destruction of electronic records was pursuant to retention policy as applicable under Circuit law and there was no showing that duty to preserve had attached at the time, since more than the mere possibility of litigation is required. The court did not apply **Rule 37(e)** because it was not timely raised by plaintiff and **because the Fifth Circuit "has not clarified" whether its prior spoliation jurisprudence has been abrogated or amended by the Rule.** The court noted that it would not have granted the motion even if **Rule 37(e)** had applied, but noted that at trial the party could cross-examine witnesses about the circumstances. Subsequently, the Court affirmed its position that the absence of a showing of bad faith barred sanctions where the destruction occurred "under a routine document retention policy," and also noted that the requested sanctions "were greater than necessary to cure the [purported] prejudice," **citing Rule 37(e)(1). [2016 WL 6694827, at *3]. It is possible that the court implied that Rule 37(e) might be held to be applicable, by analogy, to losses of tangible property (?).**

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

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

14. **Best Payphones v. City of New York** [2016 WL 792396] (E.D.N.Y., Feb. 26, 2016). In an action by provider of pay telephones challenging regulatory impact, the court refused to impose evidence preclusion or an adverse inference under Circuit law and **Rule 37(e**) for the negligent failure to retain and produce documents and emails. The court applied "separate legal analyses" but found that the failure to pursue the availability of evidence from third parties other sources negated any finding of prejudice and barred relief under both Circuit law and **Rule 37(e)**. **(at *6)** The court found that the party had not "acted unreasonably as is required" under **Rule 37(e)** given the flux in email preservation standards at the time. Attorney fees were awarded under Rule **37(a)(5)(A)** since material that should have been produced was furnished in response to a Rule 37 motion and the court appeared to also argue that it had inherent authority to award attorneys' fees and costs to punish and deter egregious conduct.

15. **Bird v. Wells Fargo Bank** [2017 WL 1213425, at *7 (March 3, 2017)] A court granted "leave to file a motion for sanctions under [Rule 37(e)]" to the extent the defendant was unable to restore or replace a terminated employee's email box. The court stepped in and ordered scope of discovery and timing after the parties had failed to do so despite active court guidance on the topic. In doing so, the Bank revealed that it had purged the plaintiff's email after her termination ("in accordance with its neutral practice") and could not say if the email files could be reconstructed.

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

17. **Blumenthal Distributing v. Herm**an Miller [2016 WL 6609208] (C.D. Cal. July 12, 2016). In a long and repetitive R&R, a Magistrate Judge recommended use of an adverse inference under Rule 37(b) and an award of monetary sanctions under **Rule 37(**e) and Rule 37(b). In assessing the deletion of emails, the court relied upon Residential Funding and Zubulake in recommending that the jury should be instructed to presume the missing emails were adverse because the party acted with a "conscious disregard" of its obligations, "but not necessarily deliberate intent." **It is not clear why the court ignored Rule 37(e) as to part, but not all, of its recommended sanctions**.[9]

18. **BMG Rights Management v. Cox Communications** [199 F.Supp. 3d 958] (E.D. Va. August 8, 2016). In a rare post trial opinion, the District Court applied Rule 37(e) in assessing the jury instruction it had utilized which gave what amounted to a permissive spoliation instruction and allowed the defendant to "identify" the spoliation issue in its opening stated. It held that the Magistrate Judge had made of finding of "spoliation" and of "intentionality" [apparently considering that equivalent to an "intent to deprive" under (e)(2)] but concluded that lesser remedies under (e)(1) sufficed "to redress the loss" citing the Committee Note as supporting

[9] For purposes of assessing the impact of Rule 37(e), the treatment of the adverse inference request in this case (granted without mention of "intent to deprive") is included as if rewritten in Appendix B.

permitting the party to present evidence and argument regarding the loss. The court gave an instruction alerting the jury to the "fact" of spoliation, identified the missing evidence and permitted the jury to consider the fact in their deliberations (*19), which served the [Silvestri list of] prophylactic, punitive, and remedial rationales underlying the spoliation doctrine. The District Court also held that the Magistrate Judge had properly rejected preclusion of evidence as the "equivalent of dismissal."

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

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

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

22. **Cahill v. Dart** [2016 WL 7034139] (N.D. Ill. Dec. 2, 2016). The District Judge, acting in a de novo review of a Magistrate Judge's Report (2016 WL 7093434 [which ignored Rule 37(e)]) determined that the jury should make the decision as to whether prison officials had intentionally allowed a crucial party of a videotape segment to be overwritten in violation of **Rule 37(e)(2)** requirements (a "close call"), since it was also an element of a malicious prosecution claim. The Magistrate Judge had recommended, and the District Court agreed, that a witness that had observed the missing video segment could not testify as to its content. If the non-moving party argued for intentional destruction and the jury agreed, however, it would be instructed that it must presume that the lost evidence would have been unfavorable to the prison authorities in light of the prejudice involved. The court quoted (n.3) the Committee Note to **Rule 37(e)** as to how the jury should be instructed if permitted to make the finding of intent.

23. **CAT3 v. Black Lineage** [164 F.Supp.3d 488](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.

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

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

26. **Cohn v. Guaranteed Rate** [2016 WL 7157358] (N.D. Ill. Dec. 8, 2016). In an action against former employees now in competition, the court described **Rule 37(e)** as describing "some" of the remedies available if ESI is destroyed, and noted that a court also has "broad, inherent power to imposed sanctions" which are "over and above the provisions of the Federal Rules." The court then proceeded to analyze and resolve the spoliation motion entirely relying on pre-rule decisions without again mentioning Rule 37(e). It did not analyze whether "reasonable steps" and implies that it was irrelevant that the missing emails were recovered from other parties. The court found "bad faith" conduct intended to hide adverse information thus implying that the information would have been unfavorable but refused an adverse inference since additional discovery might obviate the need to do so.

27. [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."

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

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

30. **CTB v. Hog Slat [2016 WL 1244998] (**E.D. N.C. March 23, 2016**).** In a trademark in infringement case by a manufacturer of poultry feeding machines claiming to apply the 2015 Amendments (n. 3) [but, in fact, not mentioning Rule 37(e) and referring only to case law based on Circuit authority], an adverse inference instruction was recommended solely because of a delayed use of a litigation hold in violation of an internal preservation policy prevented the retention of data from use of Survey Monkey. The court held this was "willful" destruction because of the "manifest relevance of the evidence and the applicability of the duty to preserve." (*13-14). The court defined willful conduct as not requiring proof of bad faith, which requires proof of "destruction for the purpose of depriving the adversay of the evidence." (*9) The Magistrate Judge proposed that the trial judge instruct the jury that the CTB had deleted data that was "adverse" from its 2013 survey that was adverse to the stated conclusion that the trade dress had acquired distinctiveness and secondary meaning.

31. **Distefano v. Law Offices** [2017 WL 1968278] (E.D. N.Y. May 11, 2017). Court refused to find that Rule 37(e) applied since the conduct involved and an evidentiary hearing on the matter

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

32. **DVComm v. Hotwire Communications** [2016 WL 6246824] (E.D Pa. Feb. 3, 2016). In action by individual (Sizemore) and the proprietorship he owned to enforce an agreement relating to the defendant's entry into the Atlanta market (the facts relating to allegation are recited at 2015 WL 2381059), the defendant was granted a permissive adverse inference jury instruction under **Rule 37(e)(2)** because there was circumstantial evidence that the destruction of an early draft of a proposed business plan was done with "intent to deprive." The court found that the party failed to take reasonable steps and the lost ESI could not be restored or replaced (although it was, in fact, supplied from the former employer of the individual) and may or may not have found prejudice to have existed. The court also asserted that its inherent power applied "without limitation" (¶55) and said it would consider "monetary sanctions" later. On February 16, the court ordered the individual owner and the plaintiff entity jointly and severally to pay $110K in fees and costs as "monetary sanctions" under Circuit authority for "discovery misconduct," without reference to Rule 37(e) as well as under Rule 37(c)(1) for "reasonable expenses." (2016 WL 7018554, at ¶31-39, 46). In March, the court refused to vacate its earlier orders when the party found the missing business plan because "fulsome discovery" is not "amnesty for failing" to meet discovery obligations "after" findings under Rule 37." (2016 WL 7228629 (E.D. Pa. March 29, 2016)). In May, it acknowledged that an appeal of denial of a "new trial" motion was under way. (2016 WL 2858826 (E.D. Pa. May 13, 2016)). However, there is no indication that there was a trial on the merits in any of the opinions.

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

subpoena some of the missing emails to justify instructing the jury that "it may presume the information was unfavorable" citing Rule 37(e)(2)(B) rather than entering a default.

34. **Epicor Software v. Alternative Technology** [2015 WL 12734011] (C.D. Cal. Dec. 17, 2015). A District Judge applied **Rule 37(e)** to a pending motion since it would be just and practicable to do so, given that "[a]s a practical matter" it would lead to the same result if it had simply been acting under its inherent authority before the rule became effective. It decided to permit the jury to decide if an intent to deprive existed with respect to destroyed ESI since a reasonable trier of fact could conclude it existed. It stated it would permit submittal of evidence of what evidence was destroyed, the notice of litigation and intent and, if there was sufficient evidence, would instruct the jury as suggested by the Committee Note.

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

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

37. **Feist v. Paxfire** [2016 WL 4540830] (S.D. N.Y. Aug. 29, 2016). In action seeking statutory and actual damages under the Wiretap Act, where the court purported to apply **Rule 37(e),** the court barred a party from asserting evidence in opposition to a summary judgment motion or at trial. The court found it was not reasonable for a sophisticated plaintiff to utilize a "cleaner" after it filed suit, and while it "does not conclude that [the party] acted intentionally to deprive" she must "bear the risk" of running the cleaner and the court would "presume" that any missing cookies would have been "unfavorable." It also precluded the party from arguing "that statutory damages are to be awarded in this case" but did not rule on it.

38. **First American Title v. Northwest Title** [2016 WL 4548398] (D. Utah Aug. 31, 2016). In action against former employees who formed a competing business, hiring other former employees, the court methodically applied **Rule 37(e)** to several losses of ESI. Relief was

denied where it was not shown that the ESI could not be restored through additional discovery or where no prejudice was shown. In one case, the new enterprise failed to take reasonable steps to maintain documents and thumb drive brought over by an ex-employee (*5). As to those materials, the court permitted the introduction of evidence and argument under **(e)(1) before the jury,** but since there was no evidence of intent to deprive, denied evidence preclusion, an adverse inference, or monetary sanctions under subdivision **(e)(2)**. **In dicta, the court noted that while an oral litigation did not per se violate of Rule 37(e), it was problematic.**

39. **First Financial Security v. Freedom Equity Group** [2016 WL 5870218] (N.D. Cal. Oct. 7, 2016). In an opinion mixing **Rule 37(e)** measures with those under **Rule 26(b),** the court recommended a permissive adverse inference jury instruction against a newly formed entity of former employees for actions of its "agents" in deleting text messages under **Rule 37(e)** because it inferred a shared intent of the "agents" of the defendant to deprive the moving party of the use of the deleted text messages. The failure to produce a database in native format pursuant to a series of court orders was sanctioned by a permissive inference under **Rule 37(b)** by allowing a jury to infer particular facts needed in the claim on the merits, primarily on procedural grounds to punish delay and avoidance of orders, without finding bad faith. **The court does not acknowledge an earlier Minnesota decision involving the same parties and some of the same issues. *See also* First Financial Security v. Lee, 2016 WL 881003 (D. Minn. March 8, 2016)(granting adverse inference based on Rule 37(b) without citing Rule 37(e) after concluding that it could not find "bad faith" as required by use of inherent power in the Eighth Circuit (listed in Appendix B).**

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

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

42. **Friedman v. Phila. Parking Auth.** [2016 WL 6247470](E.D. Pa. March 10, 2016)(Opinion); see also 6246814 (Order). In action by taxi cab company against its local regulators, **Rule 37(e)** was not applied because there was (at least not yet) any showing that ESI was "lost"

(¶69) or that the party acted with an "intent to destroy" since negligence or gross negligence is insufficient (¶73) or that there had been any prejudice under subdivision (e)(1). After additional discovery, the party "may move for evidentiary rulings, short of an adverse inference, relating to the failure to preserve" since "absent prejudice," the court could not define the scope of the evidence to be admitted or argued to the jury. (¶85). However, while court had power to act ("without limitation") under its inherent authority to remedy litigation misconduct ((¶75), attorney's fees were awarded under **Rule 37(a)** as a more "tailored" remedy (¶76). The Court held that movants needed to establish by a preponderance of the evidence the "facts warranting findings under Rule 37(e)" and rejected the conclusion in CAT3 that a higher standard of proof was required for sanctions under Rule 37(e) since "non-monetary" sanctions do not involve fraud, the party sought only an adverse inference, the fact that an analysis of the state of mind did not require it and, applying a higher standard might allow a spoliator to benefit and the party was only seeking an adverse inference. (¶58-59).

43. **FTC v. DIRECTV, Inc**. [2016 WL 7386133] (N.D. Cal. Dec. 21, 2016). The court refused to sanction a party that had preserved screen shots, but not the fully interactive website. The FTC argued that the party had failed to take 'reasonable steps' and that it was entitled under subdivision (e)(1) of **Rule 37(e)** to an order precluding use of an expert report. The Court held that the FTC "should have been proactive in its efforts to obtain discovery." (*4). It also noted that the FTC had not shown it was "sufficiently prejudiced to warrant exclusion of the information," which was greater than what is necessary to cure the prejudice" identified, but ordered an additional deposition of the expert, noting that the case would be resolved by a bench trial, not a jury. It also noted that "after the 2015 amendments to Rule 26(b)(1), the FTC is only entitled" to discover information that is relevant and proportional to the needs of the case" and DIRECTTV could not be sanctioned under Rule 37(e) for failing to preserve ESI "solely because" the FTC asserts that "potentially relevant" other ESI may have existed (at *5).

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

45. **GN Netcom v. Plantronics** [2016 WL 3792833][2016 US LEXIS 93299] (D. Del. July 12, 2016). After concluding under **Rule 37(e)** that a senior executive of a party had failed to take reasonable steps to preserve emails which could not be restored or replaced, despite major corporate efforts to meet its obligations, the Court imposed monetary sanctions involving fees and expenses under subdivision **(e)(1)** to partially address prejudice, ordered payment to the moving party of a $3M **punitive monetary sanction** (three times the penalty imposed by the party on its executive who deleted the emails at issue). It also imposed a permissive adverse

inference instruction and expressed a willingness to impose evidentiary sanctions if warranted as the case progressed to trial having found that the party had acted in bad faith and with the intent to deprive on the "totality of the record," citing the double deletion of the email. (*7-8, *12). The court found that substantial deletions by the executive were "the opposite of having taken reasonable steps" and that the entity could have done more. The conduct was attributable to the employer, and was "buttressed" by actions of counsel and the party in the initial refusal to acknowledge retention of an expert (Stroz) and permit them to complete an analysis of the missing email. (*7-8) The court applied Circuit law to shift the "heavy burden to show lack of prejudice" to the bad faith spoliator, which it did not meet. (*9-12)

46. **Gonzalez-Bermudex v. Abbott**, 214 F. Supp.3d 130 (D. P.R. Oct. 9, 2016). In an Amended Opinion involving an employment claim, the court cited **Rule 37(e)** in provisionally denying an adverse inference for failure to preserve ESI lost because of a failure to interrupt an auto-delete email system because there were not yet enough facts of record to make a finding of "intent to deprive." The court held that it would be "revisited" at trial after presentation of evidence. It replaced an initial opinion dated the same day (under which the court applied First Circuit case law in ordering mandatory inference jury instruction without finding a failure to take reasonable steps or intent to deprive. [2016 WL 5899147 (D. P.R. Oct. 9, 2016)].

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

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

49. **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)

50. **HCC Insurance Holdings v. Valda Flowers** [2017 WL 393732] (N.D. Ga. Jan. 30, 2017). In a decision applying **Rule 37(e)** to a pending case because it incorporates the existing duty to preserve (n. 3), the court refused to find that "spoliation" had occurred after reviewing forensic findings by a neutral expert of examinations of personal and work computers and assessing the explanations offered. The court distinguished cases where it was clear that relevant information existed on destroyed devices. Moreover, as to one defendant, there was no evidence that missing evidence was on personal laptop or "on a cloud-storage service in her control."

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

52. **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."

53. **HM Electronics v. R.F. Technologies** [2015 WL 4714908, at *30] (S.D. Cal. Aug. 7, 2015). Pre-effective date recommendation that the District Court impose an adverse inference instruction and other sanctions under Rule 37(b) and inherent powers because the conduct was in breach of discovery orders. The court opined that the result would have been the same if **Rule 37(e)** had been applied. The recommendation was vacated as moot by virtue of settlement, which also vacated the sanctions [171 F. Supp.3d 1020, at n. 4 (S.D. Cal. March 15, 2016)].

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

55. **Hsueh v. New York** [2017 WL 1194706] (S.D.N.Y. March 31, 2017). In granting an adverse inference for plaintiff's deletion of an audio tape, despite its subsequent recovery and production from a hard drive backup, the court held that **Rule 37(e)** did not apply "because she took specific action to delete it." The court cited CAT3, 164 F.Supp.3d 488, 495 for the proposition that Rule 37(e) was adopted to address over-preservation concerns which "are not applicable here." As the court put it: "It was not because Hsueh had improper systems in pace to prevent the loss of the recording," instead, "it was because she took specific action to delete it." *4). The court ultimately concluded that "under either" **Rule 37(e)** or the courts inherent authority, an adverse inference was the appropriate remedy because the party acted in bad faith "and with an intent to deprive" the defendant of its use, despite an obligation to preserve the

highly relevant recording, which was not completely produced in the end. The court also awarded attorney fees and costs. (The court rejected the argument that the audio recording might not be ESI because it could "think of no reason why a digital audio recording would not be ESI" (also at *4).

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

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

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

59. **In re Ethicon** [2016 WL 5869448] (S.D. W. Va. Oct. 6, 2016). In follow-up to earlier decision in the MDL adverse to all plaintiffs prior to 2015 amendments, a court denied a motion by one plaintiff under **Rule 37(e)** for additional sanctions under either **(e)(1)**(no prejudiced shown) or **(e)(2)**(no intent to deprive) because of the loss of custodial file. The court held the rule applicable because the threshold requirements outlined in the rule were satisfied and the movant had demonstrated that not "all" of the emails and electronic documents were restored or recovered by other means. The finding of no prejudice to "her case as a whole' was made despite finding that the movant was burdened from having to piece together information from various sources. Similar decisions were reached as to the same custodial file in 2016 WL 5869449 and 5858996 involving two other individual plaintiffs on the same date.

60. **Internmatch v. Nxbigthing** [2016 WL 491483] (N.D. Cal. Feb. 8, 2016). Plaintiffs seeking declaration that a party fraudulently obtained a trademark registration (and its cancellation) were granted an adverse inference and evidence preclusion where defendant consciously disregarded its preservation obligations regarding ESI which could have established the genuineness of use documents used in its defense. The party made bogus claims of power surges and other conduct in in bad faith and prevented the plaintiff from verifying the genuine of the evidence of certain use documents. (*13-14). It also awarded monetary sanctions in the form of attorney fees under its inherent powers as a result of the bad faith conduct, since the plaintiff had to spend substantial resources in investigating the spoliation. In footnote 6, it stated that whether it must make the findings set forth in **Rule 37(e)** before exercising its inherent authority "has not been decided," but that it need not resolve that issue since it also concluded that defendants had acted with the requisite "intent to deprive" under **subdivision (e)(2).**

61. **Jaffer v. Hirji** [2017 WL 1169665] (S.D. N.Y. March 28, 2017). In resolving a family dispute involving ownership of residential property, the court denied an adverse inference based on deletion of a recording of a conversation when the file was transferred from a cell phone to a computer. The court noted that the "standard" under Residential Funding that it was sufficient that the evidence was destroyed negligently has been "partially supplanted" by the Rule 37(e) which requires a finding of an intent to deprive. Litigants seeking an adverse inference for destruction of ESI "face a tougher climb than in years past." (*6). While the Second Circuit has "not yet published an opinion examining the impact" courts in the Second Circuit have recognized "that Rule 37(e) replaces the prior framework for spoliation claims," citing Citbank [2017 WL 462601] and In re Bridge Construction Services of Florida [185 F. Supp. 3d 459, 472-73]. Given that there was no showing of intent to deprive nor of prejudice, the court declined to draw an adverse inference or impose any other sanctions.

62. **Jenkins v. Woody** [2017 WL 362475] (E.D. Va. Jan. 21, 2017). In an action seeking redress from a prisoner's death, the court applied **Rule 37(e**), applying a clear and convincing standard of proof, and concluded that defendants had failed to take reasonable steps to preserve digital video of the prisoner which could not be restored or replaced through additional discovery. "No party" asserts the data "does not constitute ESI." It did not find that the failure to preserve was undertaken with an intent to deprive [noting that in the Fourth Circuit "the standard for proving intent under that rule is not settled"] and refused to impose an adverse inference. However, in view of the substantial prejudice its loss caused, it ordered that evidence of spoliation and argument would be available at trial, the court would preclude any evidence or argument that the contents of the video corroborated defendant's version of the events or that similar circumstances had existed in another death and awarded payment of fees and expenses. It found the measures necessary, but not greater than necessary, to cure the prejudice. The court also awarded monetary sanctions for late delivery of audio files under **Rule 37(b),** as a result of violating **Rule 37(d),** and as carefully limited to the "time and money" spent as a result.

63. **Keim v. ADF Midatlantic** [2016 WL 7048835] (S.D. Fla. Dec. 5, 2016). In a putative class action under the TCPA, the plaintiff was unable to produce text messages relevant to his claim and sanctions were sought under **Rule 37(e)(1).** The court famously noted that the rule "does

not set forth a standard for preservation and does not alter existing federal law as to whether evidence should have been preserved or when the duty to preserve attaches." The court ultimately refused to apply the rule because it could not be certain that the deletions at issue had not occurred prior to attachment of the duty. It noted, therefore, that the "better practice" would have been for the plaintiff's counsel to "sequester and copy the contents of a plaintiff's cell phone at the time that litigation is anticipated" so that a court can later determine which preserved portions must be produced," saving costly and time-consuming motions that use significant court and attorney resources (n.4).

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

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

66. **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.

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

substantial unfairness and will serve to deter if a party is seriously at fault. [While the court inexplicitly failure to utilize the threshold requirements, they would have been satisfied.]

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

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

70. **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).

71. **Marten Transport v. Plattform Advertising** [2016 WL 492743](D. Kan. Feb. 8, 2016) In a trademark and unfair competition action based on continued use of plaintiff's mark after termination of the agreement permitting it to do so, the court refused to find a breach of the duty to preserve under **Rule 37(e).** While it was clear that the ESI at issue was not preserved (internet browsing history) the party "did not know or have reason to know" that it would be relevant at the time. (*3). By the time it became clear that it was at issue, the employee had moved to a new work station and the browsing history had been recycled pursuant to standard procedures in effect at both parties. The court noted that the **Rule 37(e)** Committee Notes expressly instruct that reasonable steps suffice, the rule did not call for perfection and the "routine good faith operation of an electronic information system" is a relevant factor in determining if a party took reasonable steps. (*5) It refused to use a "perfection standard" or "hindsight" in determining the scope of the duty to preserve. (*10).

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

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

74. **Mazzei v. The Money Store** [656 Fed. Appx. 558] (**2d Cir.** July 15, 2016). The Second Circuit affirmed denial of an adverse inference noting that "under the current" **Rule 37(e)**, it could be granted only upon finding that the party acted with an intent to deprive and that the court "specifically found that defendants did not act with such intent." The Panel noted that *Byrnie v. Town of Cromwell* was "superseded in part by Fed. R. Civ. P. 37(e)(2015)." [The lower court (Koeltl, J.) had found that although the party willfully failed to preserve, there was "no evidence of bad faith 'in the sense that the defendants were intentionally depriving the plaintiff of information for use in this litigation." [internal quotes omitted]. 308 F.R.D. 92, 101 (S.D.N.Y. May 29, 2015).

75. **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).**

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

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

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

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

80. **Newman v. Gagan** [2016 U.S. Dist. LEXIS 120501] (N.D. Ind. Sept. 7, 2016). The District Court adopted, after a de novo review, the Report and Recommendations that the jury be

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

81. **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.

82. **Nunnally v. District of Columbia** [2017 WL 1080900] (D.D.C. March 22, 2017). In a lengthy opinion adopting after review a R&R dealing in an employment retaliation case, the court ordered an adverse inference instruction at trial for negligent failure to preserve potentially relevant email despite acknowledging (in note 10) the existence of **Rule 37(e)**. The court held that since Rule 37(b) did not apply in absence of a discovery order, the court may issue appropriate sanctions under its inherent power. The court also held that only "a very slight showing" of relevance was required since the burden on the party seeking the adverse inference is lower.

83. **Nuvasive v. Madsen Medical** [2016 WL 305096] (S.D. Cal. Jan. 26, 2016) Chief District Judge vacated his earlier decision to impose a permissive jury instruction [2015 WL 4479147] at an upcoming trial because **Rule 37(e)** applied and there was no finding that the party had "intentionally" failed to preserve text messages so they could not be used in the litigation. The Court decided, however, to allow both parties to "present evidence regarding the loss" to the jury and will instruct is that it may consider such evidence "along with all the other evidence in the case in making its decision" to serve as a "remedy or recourse (*3).

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

85. **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).

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

87. **Orchestratehr v. Trombetta** [178 F.Supp.3d 476] (N.D. Tex. April 18, 2016). In diversity action against former employee regarding non-compete, an adverse inferences was not available under **Rule 37(e)** where former employee deleted emails before resigning since only "equivocal evidence about this state of mind at the time he deleted the emails" (493). The court was unable to find that the destruction was in bad faith or with the requisite intent to deprive Plaintiffs of their use in the litigation based on the totality of the circumstances involved. Measures also imposed under Rule 37(b) for violations of temporary injunctive orders.

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

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

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

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

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

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

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

95. **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.

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

permission to do so." The District Judge upheld the recommendation in all respects. [2016 U.S.Dist. LEXIS 136922 (Sept. 28, 2016)].

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

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

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

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

101. [State Case] Sarach v. M&T Bank [2016 WL 3353835] (N.Y. App. Div 4th Dept. June 17, 2016). In a case involving spoliation of surveillance video tape "footage" where the majority applied a state law relating to obedience to orders, a thoughtful dissent to to granting an adverse inference based on mere negligence noted 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."

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

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

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

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

106. **Thurman v. Bowman** [199 F. Supp.3d 686] (W.D.N.Y. August 10, 2016). The District Court applied Circuit case law in affirming that the movement of Facebook posts to "private" was not sanctionable because the contents remained available. A failure to institute a litigation hold did not alone establish the relevance of any missing ESI as a matter of law, since it occurs

only "in the most egregious cases," which this case was not. In a footnote, it noted that the Magistrate Judge applied current law because "neither party advocated for retroactive application" of Rule 37(e). **The Magistrate had commented [2016 WL 1295957 (March 31, 2016)] that the outcome would have been the same since the deletion did not cause prejudice nor was it done with an intent to deprive**.

107. **TLS Management and Marketing Services v. Ricky Rodriguez-Toledo** [2017 WL 115743] (D. Puerto Rico March 27, 201). The court ordered an adverse inference and forensic examination of a hard drive because the non-moving party acted with an intent to deprive when it discarded a laptop after it malfunctioned, rejecting the argument that the existence of copies in the cloud and on flash drive negated allegations of prejudice in violation of Rule 37(e). *Id*. at 2 ("Defendants have not . . . proffered clear and convincing evidence that all information that might have been stored . . .including metadata – is discoverable from the information transferred to the cloud computing service and the USB flash drive"). This was sufficient to satisfy the **Rule 37(e)(2)** intent to deprive requirement, since the party "willfully discarded or deleted" ESI from a laptop and external hard drive.

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

109. **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."

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

111. **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.

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

the party was "negligent or careless" at most. Instead, the "appropriate sanction" is to allow the moving party to "introduce evidence concerning the loss of emails and to make an argument to the jury about the effect of the loss of the emails." (*11).

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

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

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

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

117. **Zamora v. Stellar Mgt**. [2017 WL 1372688] (W.D. Mo. April 11, 2017). A district court in the Eighth Circuit applying **Rule 37(e)** must make a finding of "prejudice to the opposing party" and of "intentional destruction indicating a desire to suppress the truth" before an

adverse inference is warranted. The court refused to find that prejudice existed "when at least some" of the absent material "is available through other discovery," and because a finding of prejudice was premature, it ordered further discovery of cell phones, with a special master determining which communications are relevant, at a cost to be split. The court acknowledged that it was somewhat sympathetic to a lay witness in contrast to a corporation subject to a formal litigation hold."

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

APPENDIX B
Cases Ignoring Rule 37(e)

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

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

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

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

5. 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.**

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

7. Browder v. City of Albuquerque [209 F.Supp.3d 1236] (D. N.M. July 20, 2016)("electronic data"); [187 F.Supp.3d 1288] (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 different.**

8. Buren [Sometimes referred to as "Van Buren"] v. Crawford County [2017 WL 168156] (E.D. Mich. Jan. 17, 2017) and [2017 WL 512767] (E.D. Mich. Feb. 8, 2017). District Court hearing an excessive force case involving killing of a resident in his apartment resolved two related spoliation claims involving handling of audio recordings **without mention of Rule 37(e).** After an evidentiary hearing the Court denied summary judgments to defendants and stated that it would instruct the jury using a rebuttable presumption that the missing ESI was unfavorable to the officers version of what happened in the apartment. The court concluded that the "actions exceed mere negligence" and at best were "remarkably reckless" which was the result of "grossly incompetent recordkeeping or purposeful obfuscation." (*16-17). **Rule 37(e) should have been applied; result would have been different**.

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

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

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

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

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

14. Creighton v. The City of New York [2017 WL 636415] (S.D.N.Y. Feb. 14, 2017). Issues of potential spoliation of the contents of a surveillance video were resolved **without any reference to Rule 37(e) despite** explicit discussions of digital considerations and metadata. **Had the rule been applied, it is unlikely to have changed the result.**

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

16. Dallas Buyers Club v. Huszar [2017 WL 481469] (D. Ore. Feb. 6, 2017). Court permitted an adverse inference despite credible testimony by the alleged spoliator that it undertook the conduct at issue in an attempt to repair them **without applying Rule 37(e)**. **If applied, it would have led to a different result**.

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

18. Davis v. Crescent Electric [2016 WL 1637309] (D. S.Dak. April 21, 2016). In an employment dispute where the plaintiff sought sanctions for production of what it deemed to be a fabricated email, the court, **without reference to Rule 37(e), refused sanctions because it could not determine by clear and convincing evidence that a violation of Rule 26(g) had occurred (*4-5),** but allowed her to testify as to not sending it and left it for the jury to determine its

authenticity, but urged the parties to consider an alternative to avoid delaying the trial on an issue peripheral to the issues in the case, given FRE 403. **Rule 37(e) should have been applied but would not have changed the outcome.**

19. 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.**

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

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

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

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

24. First Financial Security v. Lee [2016 WL 881003] (D. Minn. March 8, 2016). The District Judge agreed, after a de novo review, to instruct a jury as recommended by a Magistrate Judge in a R&R found at 2016 WL 7971666 (D. Minn. Jan. 19, 2016). The instruction would tell the jury that the non-moving party did not fully respond to discovery of ESI as ordered by the

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

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

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

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

28. Garcia v. City of Santa Clara [2017 WL 1398263] (N.D. Cal. April 19, 2017). Judge Illston refused to impose an adverse inference or monetary damages for a negligent failure to place a "more robust litigation hold" with respect to email or maintenance of police reports and video files because the court was not convinced that "anything highly probative was lost or destroyed such that it will damage" the parties right to proceed. The court did not mention **Rule 37(e).** It did allow the jury to hear about a missing report and draw "whatever inferences it chooses." The Court cited to Goodyear v. Haeger, 581 U.S. __, 2017 WL 1377379, at *5 as authorizing a compensatory award of legal fees to redress the party and requires a "but for" causal link

between misbehavior and legal fees. It did not find sufficient culpability to award fees under its inherent authority (citing the Leon culpability formulation (bad faith, vexatiously, wantonly, or for oppressive reasons") but made a minor award under Rule 37(b).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

44. McCabe v. Wal-Mart Stores [2016 WL 706191] (D. Nev. Feb. 22, 2016). A court refused to impose an adverse inference regarding missing surveillance video because it did not result from a conscious disregard of preservation obligation. **Rule 37(e) should have been applied but the result would likely to have been the same.**

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

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

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

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

49. Nelda Ayala v. Your Favorite Auto Repair, 2016 WL 5092588, *19 and n. 28 (E.D.N.Y. Sept. 19, 2016). In an employee wage and hour bench trial, the court precluded use of use of paper records after ESI records of same content were destroyed after an order to preserve. The parties took no steps to make a copy of contents of server or otherwise safeguard the electronic information stored in it. The court **did not mention Rule 37(e)** and stated that it is not clear what state of mind was required, although the "bottom line" was whether the conduct is

acceptable or unacceptable under *Pension Committee*. **Rule 37(e) should have been applied and it is not clear whether the court would have found an "intent to deprive."**

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

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

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

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

54. Patrick v. Tractor Supply [2017 WL 396301] (E.D. La. Jan. 30, 2017). **Without reference to Rule 37(e)**, a court found that the fact of a missing video was sufficient to deny motion for summary judgment and that because it was not destroyed in bad faith, no sanctions would lie under First Circuit case law. It also stated that it would allow "the parties to admit evidence of these issues during trial." **Rule 37(e) should have been applied but court probably would have reached the same result as to admissibility after making the threshold findings since it seems to equate relevance with a showing of prejudice.**

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

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

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

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

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

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

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

62. Romain v. City of Grosse Point [2016 WL 7664226 (E.D. Mich. Nov. 22, 2016)], *adopted* [2017 WL 67518] (E.D. Mich. Jan. 6, 2017). A Plaintiff was sanctioned because its private investigator failed to retain copies of a downloaded Google search of images used in interviewing a witness, which may have been viewed on an electronic device. The court did not cite **Rule 37(e)** nor find bad faith or substantial prejudice. The plaintiff was barred from using the witness testimony and ordered to make payment of expenses and fees. In an April, 2017 clarification, the court pointed out that the preclusion was limited to referring to the images, not to trial testimony about the individual he saw. 2017 WL 1420455, at n. 1 (E.D. Mich. April 21, 2017). **Had Rule 37(e) been applied, there would have been no basis for any sanctions, given the lack of prejudice and lack of intent to deprive.**

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

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

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

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

67. Stedeford v. Wal-Mart Stores [2016 WL 3462132] (D. Nev. June 24, 2016). In a slip and fall case, the court authorized preclusion of evidence and an adverse inference **without citing Rule 37(e**) under its inherent authority because the court was convinced, based in party on other Wal-Mart cases before it, that Wal-Mart acted with conscious disregard of its duty to preserve but noted that there was no evidence it had "intentionally destroyed" evidence. (*13) In passing, the court noted that dismissal is only warranted when there is clear and convincing evidence of both bad-faith spoliation and prejudice to the opposing party, citing Micron Technologies. **Rule 37(e) should have been applied and likely would have led to different result.**

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

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

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

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

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