Amended Rule 37(e)

Thomas Y. Allman[1]

Rule 34 of the Federal Rules of Civil Procedure ("Federal Rules" or the "Rules") has long provided for the discovery of information in the electronic form, especially since the 2006 amendments. The scope of permissible discovery, including that of "electronically stored information" ("ESI"), is the subject of Rule 26(b)(1), whose modifications in 2015 are particularly important in framing obligations dealing with the preservation and production of ESI.

Rule 37 provides measures to address failures to make discovery. Amended Rule 37(e), which became effective on December 1, 2015, fills an important gap in that Rule by providing comprehensive measures to deal with the failures to preserve ESI for use in federal litigation, displacing the need for courts to rely on their inherent authority to do so.

The amended Rule has had a dramatic and transformative effect.[2] This reflects the fact that it has successfully resolved the longstanding tensions that emerged as electronic discovery assumed its current dominant role while maintaining ample judicial discretion to deal with prejudice resulting loss of ESI.

Background

The contours of the duty to preserve – which are not provided by the Federal Rules – have evolved in order to deal the loss, alteration or destruction of relevant evidence which may be useful to an adversary in a judicial proceeding ("spoliation"). The authority of

[1] © 2018 Thomas Y. Allman. Tom Allman is a former General Counsel and Chair Emeritus of the Sedona Conference® Working Group 1 on Electronic Discovery.

[2] The Author has identified well over 230 decisions which have applied the amended Rule – and over 120 which have not but could have - when losses of ESI by parties were at issue. *See* Thomas Y. Allman, *Amended Rule 37(e): Case Summaries*, January 9, 2019(copy available from Author).

courts to sanction a party which fail to satisfy their obligations arises "from a court's inherent power to control the judicial process and litigation."[3]

The Supreme Court in *Chambers v. NASCO* explained that this is "necessary to redress conduct which "abuses the judicial process."[4] Federal Courts apply federal principles in dealing with spoliation.[5] Allegations of spoliation do not provide a basisfor a claim in damages nor a defense to claims by others.[6]

It was not until the late 1990s that the duty to preserve ESI became a matter of heightened concern to parties, seeking to accommodate management practices with the risk that perfectly appropriate business conduct would be seen, in hindsight as inappropriate.[7] The cause was the dramatic increase in ubiquity and volume as well as the ephemeral nature of ESI and the costs and burdens associated with demands for its retention in future litigation.

In 2006, the Supreme Court promulgated (then) Rule 37(f), which barred use of certain *rule-based* sanctions[8] in the absence of "exceptional circumstances." The Rule did not address limitations on sanctions issued under inherent authority.[9] In that context, some Circuits concluded that merely negligent conduct sufficed to justify use of an adverse inference jury instruction when information, including ESI, was not available because of breach of a duty to preserve.[10]

Other Circuits disagreed.[11]

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[3] Silvestri v. General Motors, 271 F.3d 583, 590 (2001).
[4] 501 U.S. 32, 45-46 (1991).
[5] Atkins v. Wolever, 554 (F.3d 650, 652 (6th Cir. 2009)(courts apply their own evidentiary rules in both federal question and diversity matters).
[6] To the extent that a substantive claim for damages in tort exists under state law for spoliation, it may be heard in federal court sitting in diversity. *See also* Cummerlander v. Patriot Preparatory, 2013 WL 5969727, at *2 (S.D. Ohio 2013)(there is no federal "free-standing tort claim for spoliation under federal common law").
[7] Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206 (2001)(advocating rulemaking to alleviate risk that perfectly appropriate business actions involving reasonable steps would later be deemed inappropriate).
[8] The limits to sanctions "under these rules" was added out of concern that the Committee was approaching the outer limits of its Rules Enabling Act authority. Comments by Hon. Lee Rosenthal to Standing Committee, Minutes, *supra*, Standing Committee, January 6-7, 2011, at page 19.
[9] The initial proposal, released in 2004, provided that sanctions for losses of ESI were not available if a party "took reasonable steps to preserve information after it knew or should have known the information" was discoverable. That provision was omitted from the final version adopted in 2006 and only resurfaced when it was incorporated into amended Rule 37(e) prior to its adoption by the Rules Committee in 2014. *Compare* Thomas Y. Allman, *Defining Culpability: The Search for a Limited Safe Harbor in Electronic Discovery*, 2 FED. CTS. L. REV. 65, 74 (2007)(reproducing 2004 proposal) *with* Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 SEDONA CONF. J. 1, 33 (2015)(noting its "last minute" inclusion in the final verson).
[10] *See, e.g.*, Residential Funding Corp. v. DeGeorge Financial Corp., 306 F. 3d 99 (2nd Cir. 2002).
[11] Aramburu v. Boeing, 112 F.3d 1398, 1407 (10th Cir. 1997)("[m]ere negligence . . .is not enough because it does not support an inference of consciousness of a weak case").

This lack of uniformity exacerbated the impression that it was necessary to undertake excessive preservation measures to avoid the risk of severe sanctions "if the court found they did not do enough."[12] It was also grossly unfair, given that it penalized objectively reasonable conduct undertaken in good faith. Ultimately, the Advisory Committee concluded "that the 2006 version of Rule 37(e) had not adequately addressed emerging issues about failure to preserve electronically stored information."[13]

Renewed Rulemaking

The 2010 Duke Litigation Conference was instrumental in focusing attention on the need for an amended Rule. The E-Discovery Panel famously concluded that a new "rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules."[14]

In response, the Rules Committee evaluated alternative proposals, including whether to articulate the duty to preserve in a rule. It ultimately concluded, however, that it was not feasible to draft a rule which adequately defined the trigger and scope of the duty to preserve.[15] Instead, it resolved to rely on the common law for the duty to preserve while providing an amended Rule with sufficiently comprehensive measures for its breach to would obviate the need for courts to rely on their inherent authority.[16]

In April, 2014, the Rules Committee, with the concurrence of the Standing Committee, adopted a pithy amended rule which provides for measures to failures to take reasonable steps to preserve ESI.[17] The proposal adopted by the Supreme Court and forwarded to Congress in April, 2015. After passage of the requisite statutory period for their consideration (no changes were made), amended Rule 37(e) came into effect on December 1, 2015.

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[12] Committee Note ("[varying circuit standards] have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough"). *See also* Bozic v. City of Washington, (W.D. Pa. Dec. 5, 2012)("individual litigants may be faced with costly spoliation/sanctions battles that they simply do not have the economic resources to fight").

[13] *See* Wright and Miller, 8B FED. PRAC. & PROC. CIV. § 2284.2 (3ed.).

[14] John G. Koeltl [Chair of the Conference], *Progress in the Spirit of Rule 1*, 60 DUKE L. J, 537, 542-44 (2010).

[15] Minutes, Rules Committee, April 14-15, 2005, at pps. 39-40 ("the Committee has concluded that the difficulties of drafting a good rule would be so great that there is no occasion to even consider the question whether a preservation rule would be an authorized or wise exercise of Enabling Act authority"); *see also* Tadler and Kelston, *What You Need To Know About The New Rule 37(e)*, 52-JAN TRIAL 20, at n. 4 (2016)("[a] more comprehensive Rule 37(e) – to the extent it would have included pre-litigation preservation – would have exceeded the [Enabling]Act's parameters"). *See, e.g.*, 28 U.S.C. § 2072(a)(federal rules may not "abridge, enlarge, or modify substantive rights") *and* A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court,* 79 FORDHAM L. REV. 2005, 2031-2033 (2015).

[16] As Justice Scalia emphasized in Shady Grove Orthopedic v. Allstate, 559 U.S. 393, 407 (2010), a rule is valid if it governs "the manner and the means" by which the litigants rights are "enforced," as compared to altering the rules of decision by which they are adjudicated.

[17] A particularly influential suggestion was to permit a court to impose a remedy no more severe than that necessary to cure any prejudice unless the court finds that the party that failed to preserve acted in bad faith. *See* Comment, January 10, 2014, at 6 (Hon. James Francis).

Rule 37(e)

Rules 37(e) measures are available only when "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery."

If the threshold conditions are met, curative measures are available to deal with "prejudice to another party from the loss of the information." However, they must be "no greater than necessary to cure the prejudice." It is not necessary to address the culpability of the conduct leading to the failure and courts have wide discretion in the selection of appropriate remedial measures.

However, severe measures, including adverse inference jury instructions, dismissals and default judgments are available "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation."

Most – but by no means all - courts have utilized the amended Rule to address losses of ESI that should have been preserved, given that the Rule is intended to "foreclose" reliance on inherent authority.[18] A surprising number have ignore it under circumstances where it was intended to apply, especially those involving videotapes and the like.[19] When losses of both ESI and documents have occurred in the same litigation, courts typically apply two distinct standards.[20] When only documents or tangible property are lost, the pre-existing Circuit standards apply.[21]

Duty to Preserve

The duty to preserve at issue under Rule 37(e) is that of the common law, "it does not attempt to create a new duty to preserve."[22] It may arise prior to the commencement of litigation and it continues throughout the litigation, often blending seamlessly into discovery issues when a failure to preserve results into an inability to produce ESI sought in discovery.

Applying the duty involves two related inquiries: *when* the duty to preserve arises (is "triggered") and *what* evidence must be preserved.[23]

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[18] The Committee Note provides that the Rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used." *See* discussion at Inherent Power, *infra.*
[19] Courts typically offer no explanation. *See* Ballard v. Wal-Mart, 2018 WL 496 4361 (S.D. West Va. October 15, 2018).
[20] Best Payphones v. City of New York, 2016 WL 792396, at *4 (E. D.N.Y. Feb. 26, 2016).
[21] Aidoo v. Cela, 2018 WL 6435650, at *7 (D. Conn. Dec. 7, 2018)(dealing with spoliation of automobile under Residential Funding, 306 F.3d 99, 107 (2nd Cir. 2002), while acknowledging it was "superseded in part by [FRCP] 37(e)(2015)(concerning [ESI])").
[22] Committee Note.
[23] Marten Transport v. Plattform Advertising, 2016 WL 492743, at *5 (D. Kan. Feb. 8, 2016).

Trigger

In order to meet threshold requirements under Rule 37(e), a moving party must first establish that discoverable ESI was "lost" at a time when a duty to preserve existed (was "triggered"). A duty to preserve typically arises when litigation is commenced or is "reasonably foreseeable." If the focus is on the ripening of an ongoing dispute, a finding of a duty to presreve must be "predicated on something more than an equivocal statement of discontent."[24]

In *Fishman v. Tiger Natural Gas*, for example, a reasonable person in the position of the defendant would have foreseen litigation in the future regarding misleading telemarketing calls.[25] Some courts require, however, that the filing be "imminent" to justify onset of the duty.[26]

Explicit pre-litigation demands made by a potential litigant can also trigger the duty to preserve.[27] Or not. As one District Judge noted, "it [was] not at all clear [that the demand] was a "reasonable, proportionate request" when it was made.[28] In *Trainer v. Continental Carbonic*, the court found that since a former employee had not yet made up its mind to sue at the time it deleted its text messages, there was no duty to preserve.

The Committee Note admonishes that individuals may be "less familiar with preservation obligations than those that have considerable experience" with it[29] but social medial postings are not exempt because of that fact.[30]

External events not directly involving the party in question can also provide sufficient notice to "trigger" a duty a duty to preserve. In an extreme example, the court in *Phillip M. Adams v. Dell*, found that events over five years earlier had "sensitized" an entire industry such that the party "should have been preserving evidence" related to the issue.[31] However, other courts find the "industry-wide" theory to be "highly problematic."[32]

Similarly, regulations governing record-keeping obligations may be deemed to impose a duty to preserve even when litigation is not reasonably foreseeable. The test is whether the party seeking to invoke the duty is within the class of parties sought to be

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[24] Cache La Poudre Feeds v. Land O'Lakes, 244 F.R.D. 614, 623 (D. Colo. March 2, 2007).
[25] 2018 WL 6068295, at *3 (N.D. Cal. Nov. 20, 2018).
[26] Russell v. Nebo School D. District, 2018 WL 4627699, at *2 (D. Utah Sept. 26, 2018)(no duty to retain text messages without a showing that the plaintiff "knew, or should have known, that litigation was imminent").
[27] Daniel Small v. UMC, 2018 WL 3795238, at *59 (D. Nev. Aug. 9, 2018)(party was "on notice of and had a legal duty to preserve" as of date plaintiffs' counsel sent preservation letter to its CEO).
[28] Alex Ang v. Bimbo Bakeries, 2018 WL 4181896, at *18, n.12 (N.D. Cal. Aug. 31, 2018).
[29] 2018 WL 3014124, at *4 (D. Minn. June 15, 2018).
[30] Bell v. Pension Committee, 2018 U.S. Dist. LEXIS, at *12 (S.D. Ind. June 14, 2018).
[31] 621 F. Supp.2d. 1173, 1191 (D. Utah March 30, 2009)(actual and threatened class actions). *See also* Point Blank Solutions v. Toyobo America, 2011 WL 1456029, at *24-27 (S.D. Fla. April 5, 2011)(discussing the "shifting duty" to preserve which is triggered by third party investigation).
[32] In re Abilify (Aripiprazole) Products Liability Products Liability Litigation, 2018 WL 4856767 (N.D. Fla. Oct. 5, 2018)(collecting cases)

advantaged by the regulation.[33] This may also be true when a party is in receipt of a governmental subpoena.[34]

Preservation orders issued by courts – including *ex parte* orders[35] – can also impose obligations to preserve. Courts typically balance the danger of destruction of the information absent an order and whether irreparable harm is likely to result against the burden of preserving the evidence.[36]

Scope

The determination of what particular evidence must be preserved may be "uncertain" when viewed at the outset of a dispute, since the triggering events may "provide only limited information about [the] prospective litigation."[37] Historically, a party was said to have a duty to "what it knows, or reasonably should know, is relevant to the action" as well as 'reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."[38]

However, the obligation to preserve, like the obligation to produced, is governed in part by Rule 34 and Rule 45, which extends only to information in the responding party's "possession, custody, or control." This may include information found on all forms of electronic storage, including iPhone, laptops, iPad and in the cloud. In *Lester v. Allied Concrete*, it included sixteen photographs posted on Facebook[39] and has included self-destructing messages such as Wickr.[40]

However, whether the duty to preserve extends to information on the devices of current or former employees often depends on whether the party has the practical ability to obtain "either the ESI or the device or both."[41] The cases are not in full accord.[42] A family or personal relationship with a non-party may also include a practical ability sufficient to justify imposing an obligation.[43]

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[33] Byrnie v. Town of Cromwell, 243 F. 3d 93, 108-109 (2nd Cir. 2001).
[34] The Sedona Conference *Principles and Commentary of Defensible Disposition* (August 2018 Public comment Version), at 6 ("preservation obligations can differ [in government investigations], because they are often governed by different statutes, court procedural rules, and case law").
[35] Henry Schein v. Cook, 2016 WL 3212457 (N.D. Cal. June 10, 2016).
[36] Toussie v. Allstate Insurance Co., 2018 WL 2766140, at *7 (E.D.N.Y. June 8, 2018).
[37] Committee Note ("[i]t is important not to be blindsided to this reality by hindsight arising from familiarity with an action as it is actually filed").
[38] Wm. T. Thompson v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984).
[39] 736 S.E. 2d 699, 703 (Va. 2013).
[40] Agnieszka McPeak, *Disappearing Data,* 2018 Wis. L. Rev. 17, 59 (2018). *See, e.g.,* Waymo v. Uber, 2018 WL 646701, at *21 (N.D. Cal. Jan. 30, 2018. The Committee Note alerts counsel to the need to become familiar with the use of "social media" by clients in the case at hand.
[41] The Sedona Conference *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* 17 SEDONA CONF. J. 467, 511 (2016); *see also,* The Sedona Conference *Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations,* 19 SEDONA CONF. J 495, 529 (2018)(the duty to preserve BYOD devices).
[42] *See, e.g.,* Stinson v. City of New York, 2016 WL 54684, at n. 4 (S.D.N.Y. Jan. 2, 2016)(refusing to determine if preservation obligations extended to "NYPD officers' personal devices" since the failure to preserve ESO on department issued devices was sufficient for its purposes).
[43] Joseph, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE, § 53(E)("Spoliation by Third Party).

In *Zubulake v. UBS Warburg ("Zubulake* IV")[44] the court held that the duty extended to all relevant documents (but not multiple copies) in existence at the time the duty to preserve attached. This included material created by and for "key players" who are likely to have unique, relevant evidence.[45]

However, the effort needed to preserve must be reasonable and proportional to the needs of the case.[46] As the Committee Note observes, "aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts)."

If the ESI in question is unlikely to be the subject of future discovery, there is no duty to preserve absent explicit notice. In *Columbia Pictures v. Bunnell,* for example, the court held that there was no duty to preserve otherwise relevant data which was retained briefly in RAM until an order was issued to do so.[47] In *Marten Transport v. Plattform Advertising*, there was no duty to preserve internet browsing history when the party had no reason to believe it would be required at the time it was deleted pursuant to company policy.[48]

Examples include (1) deleted, slack, fragmented, or unallocated data; (2) random access memory ("RAM"); (3) on-line data such as temporary internet files, history, cache, cookies, etc.; (4) metadata fields updated automatically; (5) backup data substantially duplicative of date more accessible elsewhere; and (6) forms of ESI whose preservation requires extraordinary affirmative measures.[49]

Rule 26(b)(2)(B)

Rule 26(b)(2)(B),[50] added to the Rules in 2006, presumptively exempts inaccessible ESI from initial *production* but authorizes a court to order its production for "good cause." According to the 2006 Committee Note, however, this "does not relieve the party of its

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[44] 220 F.R.D. 212 (S.D.N.Y. Oct. 22, 2003).
[45] *Id.*, at 217.
[46] Wright and Miller, 8B FED. PRAC. & PROC. CIV. § 2284.2 (3ed.)(2018)(once it is established that a duty to preserver is triggered, the inquiry turns on "reasonableness" which turns on whether what was done was proportional to that case and consistent with clearly established applicable standards).
[47] 245 F.R.D. 443, 448 (C.D. Cal. Aug. 24, 2007)(ordering preservation and production after issuing an order based on an evaluation of the burdens involving and in light of its relevance and the lack of other available means to obtain it). *See also* cases collected and discussed in Kenneth J. Withers, *"Ephemeral Data" and Duty to Preserve,* 37 U. BALT. L. REV. 349, 352-375 (2008).
[48] 2016 WL 492743, *supra*, at *7 (D. Kan. Feb. 8, 2016); accord Comment 8.a., Principle 8, 19 SEDONA CONF. J. 1, 137 (3rd Ed. 2018)(the source may contain duplicative or redundant information, and others may contain ephemeral data or massive and disproportionate volumes clearly not relevant to the claims or defenses in the case).
[49] SEVENTH CIRCUIT E-DISCOVERY GUIDELINES, Principle 2.04(d)(1)-(6) (Scope of Preservation)(2010), copy at http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf.; Sedona Principle 9 and Commentary, 19 SEDONA CONF. J. 1, 144 (3rd Ed. 2018)("deleted, shadowed, fragmented, or residual [ESI]").
[50] Rule 26(b)(2)(B) provides a presumptive exemption from the necessity to *produce* ESI found on inaccessible sources, provided that the party has identified them in a timely fashion so that the requesting party can determine if it chooses to challenge the inaccessibility classification.

common-law or statutory duties to preserve evidence."[51] It may be required to preserve an inaccessible source that it is the only source "of some proportional and relevant ESI."[52]

The Sedona Conference has argued that there is no duty to preserve an inaccessible source "[i]f the burdens and costs of preservation are disproportionate to the potential value of the data. For example, "an employee's local drive may not warrant forensic imagining in a straightforward commercial dispute, whereas it could be crucial to (and thus need to be preserved) in a trade secret case."[53]

Early Discussions/Scheduling Orders

The 2006 amendments to Rules 26(f) introduced the requirement that preservation issues be discussed at a conference prior to the scheduling conference with the court.[54] The expectation was that this would encourage early agreements and avoid subsequent motion practice.

Unfortunately, there were practical barriers. Many preservation issues were neither ripe for discussion at the time of the conference nor were all counsel prepared or willing to deal with them at that time. According one survey by the Federal Judicial Center, the topic of "retention" was discussed in only about 17% of the cases surveyed.[55]

The 2015 Amendments, therefore, amended Rules 16 and 26(f) so that open preservation issues would be included in the discovery plan furnished the Court and authorized the Scheduling order, if appropriate, to include provisions deal with the issue.

Local initiatives have supported the effort. The Northern District of California provides a "checklist" for Rule 26(f) conferences which encourages discussion of systems that will be preserved, policies regarding deletion of ESI, and the identification of data which, due to proportionality factors, is not discoverable and need not be preserved and including data under Rule 26(b)(2)(B) that will not be reviewed but will be preserved.[56]

Nonetheless, potential producing parties, in the absence of agreement, must often undertake unilateral preservation decisions, guided by its best judgment. The ultimate test under Rule 37(e), however, is whether the party has taken "reasonable steps" to preserve the information.

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[51] Committee Note to Rule 26(b)(2006), 234 F.R.D. 219, 337 (2006).
[52] The Sedona Principles, Third Edition, 19 SEDONA CONF. J. 1, 139 (2018).
[53] The Sedona Conference Commentary *on Preservation, Management and Identification of Sources of Information that Are Not Reasonably Accessible ("Preservation of Inaccessible Sources"),* 10 SEDONA CONF. J. 281, 291- 292 (2009).
[54] Committee Note, Rule 26(f)(2006)(the rule "directs" the parties to discuss any issues regarding the preservation of discoverable information, especially ESI, since the ordinary operation of computers involves both the automatic creation and deletion or overwriting of information). 234 F.R.D. 219, 235 (2006).
[55] FJC National, Case-Based Civil Rules Survey (2009).
[56] U.S. District Court N.D. Cal. Checklist, file:///C:/Users/PC/Downloads/ESI_Checklist-12-1-2015%20(2).pdf

Reasonable Steps

Rule 37(e) essentially functions as a decision tree. A threshold requirement is a showing that discovery ESI once existed but was not preserved "due to a party's negligent failure to take reasonable steps to preserve it."[57] Negligent conduct is "broadly speaking," conduct that falls "below the standard of what a reasonably prudent person would do under similar circumstances,"[58] and is the traditional approach courts have used to assess the duty to preserve.[59]

The "reasonable steps" requirement is an "objective" test and subjective states of mind are not relevant to this "threshold" determination.[60]

However, conduct is not "unreasonable" simply because information is lost.[61] Perfection is not required.[62] As a Rules Committee Member expressed it during original consideration of the 2006 version of the rule, "[r]easonable steps do not always preserve everything. Things slip through."[63]

For parties that act reasonably, the requirement provides a "safe harbor" when "reasonable steps" have been taken.[64] The purpose of amended Rule 37(e) was, in part, to "address the excessive effort and money being spent on ESI preservation" and the Committee expressly instructed that "reasonable steps" suffice. As the Supreme Court observed in another context, there is an "obvious unfairness" in imposing liability for "engaging in conduct that was objectively reasonable when it occurred."[65]

In assessing compliance, courts should be "sensitive" to the party's sophistication with regard to litigation, and take into account that some entities "may have limited staff and resources to devote to these efforts." Other factors are important in assessing reasonability.[66]

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[57] Rule 37(e) measures are available for lost ESI which cannot be restored or replaced only when it is shown that the "party failed to take reasonable steps to preserve it."

[58] Leidig v. Buzzfeed, 2017 WL 651253, at *10 (S.D.N.Y. Dec. 19, 2017)("amateurish" efforts leading to loss of critical ESI reflect the fact the party did not take "reasonable steps")

[59] Tadler and Kelston, *What you Need to Know About the New Rule 37(e)*, 52-JAN Trial 20, 22 (2016).

[60] Joseph, *Sanctions: The Federal Law of Litigation Abuse* §53(H)(e)(5th Edition).

[61] Konica Minolta v. Lowery, 2016 WL 4537847, at *6 (E.D. Mich. Aug. 31, 2016)(sanctions "are not automatic" simply because ESI is "lost).

[62] Committee Note ("perfection in preserving all relevant [ESI] is often impossible"); *accord* Winfield v. City of New York, 2017 WL 5664852, at *9 (S.D.N.Y Nov. 27, 2017)("perfection in ESI discovery is not required").

[63] Minutes, Rules Committee Meeting of April 15-16, 2004 at lines 755, 756.

[64] Matthew Enterprise v. Chrysler, 2016 WL 2957133, at *1 (N.D. Cal. May 23, 2016)("Rule 37(e) now provides a genuine safe harbor for those parties that take "reasonable steps" to preserve their [ESI]").

[65] Crawford-El v. Britton, 513 U.S. 574, 1593 (1998)(articulating a rationale of fairness in connection with the qualified immunity doctrine).

[66] The routine, good-faith operation of an electronic information systems remains an important factor, as well as the need to intervene in such operations and the existence of factors beyond a parties control, as well as the proportionality of the effort and the costs involved. *See, e.g.*, Committee Note.

Litigation Holds

In *Zubulake v. UBS Warburg* ("Zubulake IV"), the court famously held that once a party reasonably anticipates litigation, it "must suspend its routine document retention/destruction policy and put in place a 'litigation hold.'"[67] *Zubulake V* held that it is not enough to merely issue such a hold; affirmative steps are also required to oversee and monitor compliance so that all sources of discoverable information are identified and searched.[68]

However, a litigation hold is but one factor in the determination of whether "reasonable steps" taken.[69] The Sedona Conference *Commentary on Legal Holds* (2018 Public Comment Version) explains that whether a party issued a "legal hold notice" is "not dispositive" in determining the reasonableness of the party's preservation efforts.[70]

In *Bouchard v. U.S. Tennis Association*, for example, a failure to issue a legal hold was not dispositive under Rule 37(e) because the party had "fully complied" by taking other steps.[71] The point was made that "a party is not required to hold on to information in perpetuity on the chance it becomes relevant."[72] The Committee Note explains that "[a]s under the current rule, the routine, good-faith operation" of an electronic information system is relevant factor in determining if reasonable steps were taken.

An automatic auto-delete function, for example, is a routine document retention feature,[73] albeit one which, when necessary, should be suspended when appropriate.[74] In *BankDirect Capital Finance v. Capital Premium*, the court was highly critical of a party which chose "not to take reasonable (and quite easy) steps to preserve" by failing to stop "automatic deletion" of emails.[75]

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[67] 220 F.R.D. 212 at 218 (S.D.N.Y. Oct. 22, 2003).
[68] Zubulake v. UBS Warburg, 229 FR.D. 422 (S.D.N.Y. July 20, 2004).
[69] *See, e.g.*, Chin v. Port Authority, 685 F.3d 135, 162 (2nd Cir. 2012)(abrogating Pension Comm. 685 F. Supp. 2d 456, 464-65 (S.D.N.Y. 2010) with respect to required use of written litigation holds and emphasizing use of a "case-by-case approach" at the discretion of the court).
[70] The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & The Process*, December 2018 Public Comment Version, at 4. *See also* Ronald J. Hedges, *What Might Be Reasonable Steps to Avoid Loss of Electronically Stored Information*, 18 DDEE 143 (March 1, 2018).
[71] 2017 WL 3868801, at *2 (S.D.N.Y. Sept. 5, 2017), *adopted in its entir*ety, 2017 WL 10180425 (S.D.N.Y. Aug. 10, 2017); *see also* New Mexico Oncology v. Presbyterian Healthcare, 2017 WL 3535293, at *5 (D. New Mex. Aug. 16, 2017)(accord).
[72] 2017 WL 10180425, at *6. One of the reasons that Rule 37(e) was amended was to deal with excessive effort and money spent to "avoid the risk of severe sanctions if a court finds they did not do enough.")
[73] In re Abilify (Aripiprazole) Products Liability Litigation, 2018 WL 4856767, at *8 (N.D. Fla. Oct. 5, 2018)(refusing to find that adopting such a policy was for purpose of depriving parties of information)
[74] Eshelman v. Puma Biotech, 2017 WL 2483800, at *5 (E.D.N.C. June 7, 2017)(failure to suspend not sanctioned); *cf.* Bush v. Lumileds, 2018 WL 4576676, at *6 (E.D. Mich. Sept. 25, 2018)(turning off auto-delete function for affected email accounts indicates good faith effort to preserve), *and see* Love v. Medical College of Wisconsin, __F. Supp. 3d ___, 2018 WL 6072265, at *4 (E.D. Wisc. Nov. 20, 2018)(the party "had notice and means to preserve [the witness's emails, and should have done so").
[75] 2018 WL 1616725, at *9 & *12 (N.D. Ill. April 4, 2018 (recommending that jury be allowed to determine if failure was with intent to deprive and the effect, "if any" on the merits of the claims).

Failures to preserve laptops or mobile phones which contain repositories of information such as texts or emails may under some circumstances may be deemed failures to take "reasonable steps." The same may be true of the overwriting of video surveillance footage.[76]

Counsel Responsibility

Zubulake V unequivocally places the duty to institute and monitor compliance with litigation holds on counsel regardless of client preferences.[77] This arguably over-states the common law requirements,[78] since the duty to preserve is that of the party,[79] and counsel inadequacies are typically attributed to it for purposes of assessing whether "reasonable steps" have been taken under Rule 37(e). As discussed *infra*, however, at least one court has accepted these standards as governing attorney malpractice actions.

A better view is that the duty of counsel is to competently advise its client and work to ensure, given the limitations involved, it is accomplished. This includes advice on the potential consequences for the client for failing to do so. The Committee Note to Rule 37(e) suggest, that counsel may need to become knowledgeable about client systems and use of ESI, including social media in providing advice about preservation.[80] "Collection and preservation of ESI is often an iterative process between the attorney and the client."[81]

This best practice has its roots in the ethical responsibilities of counsel, and in the teaching of cases like *Turner v. Hudson Transit Lines*[82] and *Bratka v. Anheuser-Busch*,[83] dealing with the need for outside counsel to exercise "some degree of oversight" to ensure that client employees are acting competently, diligently and ethically.[84] Counsel is in the superior position to understand the claims and defenses and to guide discussions.[85]

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[76] Sosa v. Carnival Corp., 2018 WL 6335178, *19 (S.D. Fla. Dec. 4, 2018)(employee did not act reasonably in failing to confirm that downloading of footage was successful to ensure its retention).
[77] 229 FR.D. 422, at 432, (S.D.N.Y. July 20, 2004)("[c]ounsel must oversee compliance with the litigation hold" and monitor the party's efforts to retain and produce the relevant documents)
[78] *Compare* Sun River Energy v. Nelson, 800 F.3d 1219, at text and n. 3 (10th Cir. Sept. 2, 2015)(upholding counsel sanction based on violation of duty of "oversight and inquiry").
[79] Centrifugal Force v. Softnet Comm., 783 F. Supp.2d 736 (S.D.N.Y. May 11, 2011)("[t]he Second Circuit, however, places the obligation to preserve evidence on the "party"); *accord*, In re Pfizer, 288 F.R.D. 297, 314 (S.D. N.Y. 2013).
[80] Wright and Miller, 8B FED. PRAC. & PROC. CIV. § 2284.2 (3ed.)(2018)("proportional preservation may be addressed during the parties' Rule 26(f) conference" and it is often important for counsel to "delve into these issues early" both to prepare for the Rule 26(f) conference "and to advise the client on preservation measures").
[81] Small v. University Medical, 2018 WL 3795238, at *60 (E.D. Pa. Aug. 2, 2018)(noting that counsel and the party delayed issuance of a litigation hold, provide little or no guidance, and did not adequately notify staff and follow up with key custodian or coordinate with adequately qualified IT staff).
[82] 142 F.R.D. 68, 73 (S.D. N.Y. Sept. 27, 1991)(also noting the duty of the party's corporate managers to convey the information to the relevant employees).
[83] 164 F.R.D. 448, 461 (S.D. Ohio Dec. 11, 1995).
[84] *See also* Metropolitan Opera v. Local 100, 212 F.R.D. 178, 222-23 (S.D.N.Y. Jan. 28, 2003)(conceding that counsel need not supervise "every" step, but noting failures leading to violations of Rule 26(g)).
[85] *Paula* Schaefer, *Attorney Negligence and Negligent Spoliation,* 51 AKRON L. REV. 607, 620, 625-27 (2017)(speculating that some lawyers are reluctant to raise tough issues with clients).

Rule 26(g) requirements provide a useful analogy.[86] Counsel must make a reasonable effort to ensure that the "client has provided all of the information and documents available to him that are responsive to the discovery demand." A "reasonable" inquiry can require identification of the appropriate personnel, formulating a plan to identify and collect responsive documents and ESI follow up on any perceived inadequacies.[87]

The current case law largely eschews counsel sanctions for non-intentional inadequacies relating to litigation holds. Under Rule 37(e) it is the party that must undertake "reasonable steps" and it is the party whose failure to do so prompts the availability of "measures" under the Rules, foreclosing the use of inherent authority where applicable.

In *EPAC Technologies v. Harper Collins*,[88] for example, the court criticized in-house counsel for failing to take an "active and primary role" in issuing a litigation hold, but it was the party that was sanctioned. A similar result occurred in *Franklin v. Howard Brown Health Center*, where the in-house counsel issued a litigation hold but did not check to be sure that preservation had occurred.[89]

Similarly, in *Shaffer v. Gaither*, the court did not sanction counsel when "plaintiff and her counsel" failed to take reasonable steps to preserve texts, such as printing them out, making electronic copies, cloning the phone or "even taking possession of the phone and instructing the client to simply get another one."[90]

It is noteworthy that the court in *Zubulake V* also did not sanction counsel despite holding that counsel "failed to properly oversee UBS in a number of important ways." Instead, it appropriately concluded that "at the end of the day, the duty to preserve and produce" rests on the party which, once on notice of its obligations, "acts at its own peril." As it noted, "UBS [employees] deleted the e-mails in defiance of explicit instructions not to."[91]

However, where bad faith conduct is involved, courts are prepared to utilize their inherent authority to sanction counsel for failure to provide an adequate degree of oversight

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[86] Professor Gensler suggests that under Rule 26(g) "lawyers are ultimately responsible for ensuring that their clients implement sound preservation, search and production processes." Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 566 (2009).

[87] N.T., by and through Nelson v. Children's Hospital, 2017 WL 5953118, at *7 (S.D. Ohio Sept. 27, 2017). The rule applies when preservation failures are intertwined with inadequate responses to discovery requests. In re Delta/Air Tran Baggage Fee Antitrust Litigation, 846 F. Supp.2d 1335, 1350-51 (N.D. Ga. Feb. 3, 2012)("Delta did not conduct a reasonable inquiry" as to "collected but unsearched hard drives").

[88] 2018 WL 1542040, *22 (M.D. Tenn. March 29, 2018)

[89] __F. Supp.3d ___, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018)(the Magistrate Judge found it "astounding and frankly unbelievable" that counsel never took control of the computer or checked up on it).

[90] 2016 WL 6594126, at *2 (W.N.C. Sept. 1, 2016).

[91] Zubulake V, 229 F.R.D. 422, at 435 ("Counsel's Failings") & 437.

of client employees[92] or under 28 U.S.C. §1927.[93] In *Swofford v. Eslinger*, counsel for a police department was sanctioned for failing to fulfill his duty to take affirmative steps to preserve after a finding of bad faith.[94]

Disciplinary Referrals

Counsel that fail to competently provide services in connection with preservation and production of ESI risk referrals by courts to State Bar authorities for disciplinary action.[95] This can become especially complicated given the ban on use of privileged communications with clients.[96] A California Ethics Opinion (2015-193)[97] has opined that the responsibility to promptly issue a litigation hold "falls on both the party and outside counsel working on the matter"[98] and that counsel must be able to perform a number of key skills, including the ability to "implement/cause to implement appropriate ESI preservation procedures."[99]

Malpractice Implications

There is always a risk that the failure to render competent legal service, including advice about preservation and discovery requirements may be deemed to be malpractice. In *Industrial Quick Search v. Miller*, allegations of a failure to provide adequate advice in regard to a litigation hold and as to production issues survived summary judgment because of issues of material fact as to whether counsel were negligent.[100]

The court held that an attorney's failure to institute a litigation hold "falls below the ordinary and reasonable skill possessed by members of the legal bar."[101] It also found that it not to be impermissibly speculative that but for such negligence conduct, a party

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[92] Brown v. Tellermate Holdings, 2015 WL 4742686, at *7 & *13-14 (S.D. Ohio Aug. 11, 2015)(citing Bratka v. Anheuser-Busch, *supra*, 164 F.R.D. 448, 461 (S.D. Ohio. 1995) and also awarding attorney fees under Rule 26(g). 37(a)(5) and 37(b)(2)).

[93] Six v. Dillon, 891 F.3d 508, (3rd Cir. May 21, 2018)(relying on Goodyear Tire & Rubber v. Haeger, __U.S. __, 137 S. Ct. 1178, 1186 (2017)(sanctioning counsel for suppressing the truth "to gain a tactical litigation advantage" in violation of duty of candor and in abuse of the litigation process).

[94] 671 F. Supp. 2d. 1274, at 1287-88 and n. 8 (M.D. Fla. Sept. 28, 2009)(also sanctioning the attorney in his capacity as "initial counsel" for all Defendants).

[95] Most states have adopted ethical standards modeled on the ABA Model Rules which prohibiting counsel from participating in or facilitating the spoliation of evidence and require counsel to acquire skills which are "reasonably necessary" to provide "competent" representation.

[96] In Qualcomm v. Broadcom, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), outside counsel were referred to The State Bar of California for possible "ethical violations" but, after substantial discovery free of ban on use of privileged information, the court concluded that discovery responses "were made after a reasonable, although flawed inquiry and no sanctions were appropriate because counsel had not acted in bad faith. 2010 WL 1336937, at *6 (S.D. Calif. April 2, 2010). Nothing was ever heard of the referrals thereafter.

[97] State Bar of California, Formal Opinion No. 2015-193 (June, 2015).

[98] *Id.*, footnote 6.

[99] It noted that a mere failure to act competently does "not trigger discipline,' rather it is the failure to do so in a manner that is "intentional, reckless or repeated" that results in a violation of the California ethical requirement of competent representation. *Id.* at 2.

[100] 2018 WL 264111, at *11 (S.D.N.Y. Jan. 2, 2018)

[101] *Id.* at *10 (citing Zubulake but noting that "[t]he court is mindful that plaintiffs point to no case law expressly hold that an attorney's failure to institute a litigation hold or monitor a client's compliance with that hold constitutes attorney negligence").

would not have incurred a dismissal for spoliation nor been compelled to settle their case for $2.5M, the amount sought in the malpractice action.[102]

Restore or Replace

Even when a party has not taken "reasonable steps" to preserve, no measures are available under Rule 37(e) if the information is "restored or replaced." One obvious example is when the missing ESI is replaced by an identical copy.[103] In *Marquette Transportation v. Chembulk*, data from a voyage data recorder (VDR) initially believed to be missing was restored by acquisition of a downloaded copy. No measures were imposed.[104] The result is not unfair since the party "cannot show prejudice."[105]

The tougher issue comes when oral testimony as a substitute. The cases are split.[106] In *Freidig v. Target*, the requirement was not satisfied by "comparable" evidence, since "that is not what Rule 37€ means by "restore and replace."[107] On the other hand, in *Eshelman v. Puma Biotech*, the court concluded that other avenues of discovery, such as depositions, are available.[108]

Moving parties must make reasonable efforts to restore or replace. The court in *Steves and Sons v. Jeld-Wen* stressed that while a party need not pursue "every possible avenue" it must show that it made "some good-faith attempt to explore" its alternatives before pursing spoliation sanctions. In *Steves*, the party failed to take an "obvious step" of seeking a court order for a forensic examination.[109]

In *GN Netcom v. Plantronics*, the "burden [was] shifted" to the producing entity to demonstrate that its restoration efforts had been successful.[110] However, substantial measures should not be used to restore or replace information that is only "marginally relevant or duplicative" since efforts should be proportional to the "apparent importance" of the lost ESI.

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[102] *Id*. at *16.
[103] The Committee Note explains that because ESI "often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere."
[104] 2016 WL 930946 (E.D. La. March 11, 2016).
[105] Barcroft Media v. Coed Media, 2017 WL 4334138, at *1 (S.D.N.Y. Sept. 28, 2017).
[106] Schmalz v. Village of North Riverside, 2018 WL 1704109 (N.D. Ill. March 23, 2018)(prejudice caused by the loss of text messages could not be adequately replaced through cross-examination at trial).
[107] 2018 WL 6681745, at *8 (W.D. Wisc. Dec. 19, 2018)("[the] provisions is referring to digital backups and the likelihood that electronic documents have multiple versions").
[108] 2017 WL 2483800, at *5 (E.D. N.C. June 7, 2017)(failure to establish that depositions of parties who prepared the materials at issue are likely to reveal the searches sought from the deleted internet browser history); accord Snider v. DanFoss, 2017 WL 2973464 (N.D. Ill. July 12, 2017)(although plaintiff's emails were deleted, she could obviously testify to their contents).
[109] 2018 WL 2023128, at *9 (E.D. Va. May 1, 2018)(the party had not pursued its request for a voluntary acquiescence in a forensic examination after was refused by the opposing party).
[110] 2016 WL 3792833, at *10 (D. Del. July 12, 2016). The court ultimately informed the jury that "some of the deleted emails were unrecoverable" but the experts had been unable to agree on the numbers. *See* 2017 WL 4417810, at *5 (D. Del. Oct. 5, 2017).

Prejudice

Imposing "curative" measures makes no sense if a showing is not first made that prejudice actually exist from the loss of ESI. [111] Only upon a finding of prejudice may a court order measures "no greater than necessary to cure the prejudice." In *Love v. Medical College of Wisconsin,* a court denied relief under the Rule since there was inadequate evidence of prejudice from the loss of third-party emails, some of which were retrieved from other custodians.[112]

However, if the loss of the ESI results from conduct motivated by an intent to deprive, that finding can also "support an inference that the opposing party was prejudiced by the loss of information that would have favored its position."[113] The Committee Note explains that "[s]ubdivision (e)(2) does not require any further finding of prejudice" for severe measures.[114]

Thus, an "incompetent spoliator" – one who intends, but does not, inflict prejudice by its actions – may, in theory, escape measures by rebutting the inference of prejudice, as seems to have been the intent of the Rules Committee.[115] The Sedona Conference, in its Comments to *Principle* 14 of the Sedona Principles (3rd ed. 2018), suggests use of a fine in such an instance.

Defining Prejudice

Courts typically require a showing of actual interference with the ability to go to trial or to reach a rightful decision[116] in order to justify a finding of prejudice. In *Living Color v. New Era Aquaculture,* measures were unavailable because "the abundance of preserved information" was sufficient to meet the needs of the party.[117]

The missing information must have "made a difference" at the trial for its loss to be prejudicial,[118] although the "economic" prejudice of filing a motion suffices for some courts when considering fee shifting for successful movants.[119]

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[111] *See, e.g.*, John K. Rabiej, *2014 Emerging Issues 7137, Revised Rule 37(E) Returns to 'Gotcha' Litigation*, April 3, 2014 (available on LEXIS ["Rabiej 2014 Emerging Issues"]).
[112] 2018 WL 6072265, at *5 (E.D. Wisc. Nov. 20, 2018)(noting that the moving party had access to an "abundance of preserved information" about the topics at issue and had not bothered to depose the author of the missing emails).
[113] Committee Note.
[114] US EEOC v. GMRI, 2017 WL 5068372, at *31 (S.D. Fla. Nov. 1, 2017)(adverse inference available "without also a finding of prejudice" under Rule 37(e) as long as the jury finds the party acted with intent to deprive).
[115] The Standing Committee deleted the comment that "~~there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice~~." Minutes, Standing Comm. Mtg., May 29-30, 2014 at n. 2.
[116] Leon v. IDX Systems, 464 F.3d 951, 959 (9th Cir. 2006).
[117] *Id.* *6. .
[118] Simon v. City of New York, 2017 WL 57860 (S.D.N.Y. Jan. 5, 2017)(quoting from Mazzei v. Money Store, 656 Fed. Appx. 558 (2nd Cir. July 15, 2016)).
[119] Moody v. CSX Transportation, 2017 WL 4173358, at *14 (S.D.N.Y. Sept. 21, 2017).

The Committee Note does not assign the burden of proof on the issue. It states that it can be "unfair" to force a party who did not lose information to show its contents but also observes that in other situations, the missing content "may be fairly evident," or appear to be "unimportant" or the abundance of preserved information "may appear to be sufficient."

The court in *Sinclair v. Cambria County*[120] found a "plausible, good faith suggestion as to what the evidence might have been" to be sufficient evidence of the missing ESI. However, if missing ESI is only marginally relevant[121] or can be obtained from other sources, the requisite prejudice is not present.[122] In *Export-Import Bank of Korea v. ASI*, a court refused to impose sanctions because there was no "nonspeculative basis to find that any relevant, material evidence had been lost."[123]

In *HLV v. Page & Stewart*, however, where a cell phone was traded in for a new one after a duty to preserve attached, the court found that the missing records, while "sparse" should have been preserved and found that the moving party "did experience some measure of prejudice, despite securing production of texts and call logs from other sources" citing the Committee Note.[124]

Remedial Measures
(Subdivision (e)(1))

Rule 37(e)(1) authorizes courts to employ measures no greater than necessary to cure the prejudice, regardless of the intent of the party that lost the ESI, "[u]pon finding prejudice to another party from loss of the information."[125]

The range of measures is "quite broad" and, according to the Committee Note, "[m]uch is entrusted to the court's discretion."[126] However, "[c]are must be taken" to ensure that curative measures do not "have the effect of measures that are permitted" only on a finding of "intent to deprive." One example is an order "striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case."[127]

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[120] 2018 WL 4689111 and n. 6 (W.D. Pa. Sept. 28, 2018).
[121] Snider v. Danfoss, 2017 WL 2973464, at *4 (N.D. Ill. July 12, 2017)(noting the lack of prejudice from the loss of irrelevant ESI), *report and recommendation adopted*, 2017 WL 3268891 (N.D. Ill. 2017).
[122] Royal Park Inv. v. U.S. Bank, 2017 WL 4748054, at *4 (S.D.N.Y. Oct. 19, 2017)(collecting cases).
[123] 2018 WL 3203038, at *4 (C.D. Cal. June 28, 2018).
[124] Committee Note ("[the Rule] does not place a burden of proving or disproving prejudice on one party or the other"). 2018 WL 2197730, at *3-4 (W.D. Mich. March 2, 2018).
[125] 249 F.R.D. 111 (S.D.N.Y. 2008).
[126] This may include "serious measures" such as "forbidding the party that failed to preserve information from putting on certain evidence; permitting the parties to preserve evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument."
[127] *See, e.g.*, In re: Ethicon, 2016 WL 5869448 (S.D. West Va. Oct. 6, 2016)(refusing to strike statute of limitations and learned intermediary defenses).

Examples

1. Attorney's Fees and expenses

Courts routinely order parties to pay the reasonable costs and attorney's fees incurred by moving parties which have successfully pursued a Rule 37(e) motion despite the lack of rule-based authority in the Rule itself. Examples include *Alabama Aircraft Industries v. Boeing*,[128] *Bluementhal Distributing v. Herman Miller*,[129] *CAT3 v. Black Lineage*,[130] *CTB v. Hog Slat*[131] and *GN Netcom v. Plantronics*.[132] In some such cases, the conduct was, at most, negligent.[133]

It has been argued that "[t]his anomalous lack of authority for an attorney's fees in Rule 37(e) seems like an oversight, and may be corrected by the Advisory Committee or the courts over time.[134] More likely, however, appellate courts will find this to have been the intent of the Rule and that in so doing, in compliance with the American Rule.[135]

Awarding reasonable attorney's fees and costs under subdivision (e)(1) serves to alleviate the economic prejudice of bringing a challenge under the Rule, provided that it is no greater than necessary to cure that prejudice.[136] The Rules Committee treated it as such a commonplace curative remedy that the omission of explicit authority in the final version of the amended Rule[137] required no explanation.[138] This is also consistent with pre-enactment practice where there is a negligent failures to preserve.

In *GN Netcom v. Plantronics*, the court found that an award of fees and costs was an "appropriate component of relief for the prejudice" incurred by pursuing discovery of

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[128] 2017 WL 930597, at *16 (N.D. Ala. March 9, 2017).
[129] 2016 WL 6609208, at *26 (C.D. Cal. July 12, 2016).
[130] 164 F. Supp.3d 488, 501-02 (S.D.N.Y. Jan. 12, 2016).
[131] 2016 WL 1244998, at *13 (W.D. Wash. March 24, 2017)
[132] 2016 WL 3792833 (D. Del. July 12, 2016)
[133] See, e.g., Security Alarm v. Alarm Protection, 2016 WL 711591, at *6-7 (D. Alaska Dec. 6, 2016)(while the court cannot conclude the party acted with intent to deprive it is entitled to recover reasonable attorneys' fees).
[134] Steven Baicker-McKee, *Mountain or Molehill?*, 55 DUQ. L. REV. 307, 321 (2017).
[135] Baker Botts v. ASARCO, ___ U.S. ___, 135 S. Ct. 2158, 2164 (2015)(only Congress may authorize courts to shift the costs of adversarial litigation).
[136] Wright and Miller acknowledge attorney's fees may be awarded "even where evidence is lost or destroyed due to negligence so long as the party seeking sanctions can show it suffered prejudice." 8B FED. PRAC. & PROC. CIV. § 2284.2 (3d ed.).
[137] The proposed draft of amended Rule 37(e) stated that the court may "permit additional discovery, order curative measures or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure. The 2013 Draft is available at http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf.
[138] In analogous situations, silence lacks interpretive significance when there is no expectation that further explanation is required. *See* Sun River Energy v. Nelson, 800 F.3d 1219, 1227 (10th Cir. Sept. 2, 2015)("this is not some inexplicable gap in the rules" or one where an "explicit indication of such exceptional treatment would be expected").

spoliation.[139] Similarly, in *CAT3 v. Black Lineage*,[140] the court found such an award to be "consistent" with subdivision (e)(1) because it addressed the economic prejudice of having to file the motion. This is consistent with the approach of other provisions of Rule 37 which authorize use of fee shifting but do not fit the context. Rule 37(a), dealing with motions to compel is not applicable[141] nor is Rule 37(b), at least in the absence of a motion to compel or violation of a court order.

The Supreme Court in both *Chambers v. NASCO*[142] and *Goodyear Tire & Rubber*[143] has also made it clear that courts retain inherent authority to make compensatory awards of attorney's fees to address successful motions to sanction bad faith conduct.[144] In *Klipsch Group v. Epro E-Commerce*, for example, the Second Circuit affirmed an award of $2.7M in attorney's fees and costs on that basis.[145] It rejected the argument that the fee award was punitive in nature (and thus subject to due process protections akin to contempt), since it reimbursed the party only for legal bills which were caused by litigation abuse.

The extent to which, if at all, a court is foreclosed from exercising its inherent authority by the existence of remedies under Rule 37(e) was not explored in *Klipsch*. *See* Inherent Authority, *infra* (discussing limits on the exclusivity of Rule 37(e)).

2. Monetary Sanctions (& Fines)

Courts historically have imposed non-compensatory monetary sanctions (including fines payable to the court) for violations of the duty to preserve. The classic example is *United States v. Philip Morris*, where the court required a payment to the court registry of $2,750K because certain executives had failed to "print and retain" copies of emails.[146]

In *Cache La Poudre Feeds v. Land O'Lakes*, the court acknowledged *Phillip Morris* "fines" (and others) but noted that the inconsistency with the principle that payments which are not compensatory or avoidable are subject to certain procedural safeguards. Instead it ordered a payment of $5K to the moving party to "reimburse some of the legal fees and expenses" incurred in additional discovery.[147]

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[139] 2016 WL 3792833, at *13 (D. Del. July 12, 2016).
[140] 164 F. Supp.3d 488, 502 (S.D.N.Y. Jan. 12, 2016).
[141] Best Payphones v. New York City, 2018 WL.3613020, at *3 (E.D.N.Y. July 27, 2018)(rejecting Magistrate Judge conclusion that violations of Rule 37(e) are covered by the cost-shifting provisions of Rule 37(a)).
[142] 501 U.S. 32, 55 (1991).
[143] , __U.S. __. 137 S.Ct. 1178, 1186 (2017).
[144] Six v. Dillon, 891 F. 3d 508, 520-22 (4th Cir. May 31, 2018).
[145] 880 F.3d. 620 (2nd Cir. Jan. 25, 2018).
[146] 327 F.Supp.2d 21 (D. D.C. July 21, 2004). Another classic is the decision by a Magistrate Judge to require a company executive to pay a $10K fine, payable to the court, because the court felt he needed to be "impressed" with the importance of preservation obligations and to deter others from taking the obligations lighly. Danis v. USN Communications, 2000 WL 1694325, at *51 (Oct. 23, 2000)(citing Wright, Miller and Marcus, § 2284 (1994 Edition).
[147] 244 F.R.D. 614, 637 (D. Colo. March 2, 2007)

It has been observed by Greg Joseph that *Goodyear Tire, supra*, limits the discretion of the court to impose monetary sanctions that are "punitive" and therefore subject to the criminal procedural protections of criminal contempt. Indeed, since Goodyear, "courts are generally leery of imposing non-compensatory financial penalties as civil sanctions."[148]

The most prominent post-Rule 37(e) example of a punitive award is *GN Netcom v. Plantronics*[149] where the court initially imposed what it described as a "punitive" monetary sanction but, in a post-trial decision, simply alluded to it as a "financial" sanction.[150] The sanction would appear to be problematic.[151]

3. Relationship to Rule 37(b)

While compensatory measures dealing with remediation of prejudice resulting from breach of preservation orders are likely within Rule 37(e)(1) authority, they are more logically treated under Rule 37(b), which expressly contemplates that remedy, albeit without some textual concerns.[152]

In *Addison v. Monarch & Associates*, terminating sanctions and an order of class certification were imposed under Rule 37(b) because the ability to seek certification was rendered "impracticable" by spoliation of ESI. The court made no assessment of Rule 37(e) authority and the spoliation had prevented an assessment of whether bad faith was involved, which was not, in any event, a requirement under Rule 37(b).[153]

4. Direct Access/Forensic Examination

Under Rule 34, a party may seek to examine hard drives, cellphones and the like, although leave to do so over objection is not available as of right.[154] Typically a moving

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[148] Joseph, *Sanctions: The Federal Law Of Litigation Abuse* § 28(B)(1)(Fines)(5th Edition).
[149] 2016 WL 3792833, at *13 (D. Del. July 12, 2016)(bad faith intent merits a "punitive monetary sanction" in the amount of $3M payable to the moving party).
[150] 2018 WL 273649 (D. Del. Jan. 3, 2018).
[151] *Compare* Bradley v. Am. Household, 378 F.3d 373, 379 (4th Cir. Aug. 6, 2004)(reversing fines of $200K and $100K imposed "as a penalty" for discovery abuses since a Rule 37 fine is effectively a criminal contempt sanction, requiring notice of the criminal nature of the charges, prosecution by an independent prosecutor, and a finding of guilt beyond a reasonable doubt) *with* Jaen v. Coc-Cola Co., 157 F.R.D. 146, 151 (D. P.R. Sept. 16, 1994)(finding monetary sanctions payable to court imposed as a penalty "short of contempt" satisfied due process requirements because sanctioned persons received notice during conference call with court and had opportunities to argue the merits).
[152] Partricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CINN. L. REV. 1083, 1125 (2015)("there is a textual argument that the amendment to Rule 37(e) eliminates the possibility that a party could be held in contempt for intentionally disobeying a court order to preserve ESI," since Rule 37(b)(2) is arguably not available to an order to preserve, since it speaks only of failure to obey an order to provide or permit discovery.")(emphasis in original).
[153] 2017 WL 10562596, at *2 (C.D. Cal. May 8, 2017), *R& R adopted*, 2017 WL 10651148 (C.D. Cal. Aug. 24, 2017)("sanctions in the form of an individual judgment would effectively defeat this lawsuit"). Had the court proceeded under Rule 37(e), an intent to deprive finding would have been required.
[154] Wright and Miller, 8B FED. PRAC. & PROC. CIV. § 2218 (3d ed 2018)("charges that something was not produced need not automatically lead to authorization for such a search"). *See also* Committee Note

party must show inadequate attention to preservation or production obligations bordering on or constituting spoliation. It is ordered "to determine if relevant evidence currently exists or previously existed and was lost or destroyed."[155]

However, the merely fact that a computer automatically deletes browsing histories is not sufficient to justify direct access where there is not showing that other means are not available. As the court in *Moser v. Health Insur*ance noted, there is "no routine right of direct access" (quoting the Committee Note) and in former times such an argument would not have permitted a party to enter an opposing party's office "to rummage through filing cabinets and desks."[156]

When the measure is authorized, courts typically require use of a protocol protecting privacy and confidentiality, with the costs imposed on the requesting party, the producing party, or shared.[157]

In *Estate of Shaw v. Marcus*, the court ordered that 70% of the costs of restoration and searching computer incurred by a party should be paid as a sanction by the non-moving party, apply *Zubulake* factors.[158] It also sought and was awarded, under Rule 37(a)(5)(A), its attorney's fees involving in compelling the inspection.[159]

In *TLS Mgt. and Mktg. Services v. Rodriquez-Toledo*, a court ordered a forensic examination to "ameliorate the prejudice caused by the spoliation of ESI."[160] However, in *Trainer v. Continental Carbonic Products*, the court refused to do so because only marginally relevant information was missing and "forensic imaging is not proportional to the needs of this case," given the availability of the missing texts from other sources.[161]

5. Orders Re Preservation

Some courts have cited Rule 37(e) as a justification for an order requiring a party to preserve ESI or other forms of information pending discovery.[162] In *John B. v. Goetz*, however, the Sixth Circuit reversed an order for forensic imaging of work and personal computers of party employees predominantly for preservation purposes.[163]

(2006)("The addition of testing and sampling to Rule 34(a) with regard to documents and [ESI] is not meant to create a routine right of direct access to a party's electronic information system [and] [c]ourts should guard against undue intrusiveness resulting from inspecting or testing such systems).

[155] Nacco Materials Handling v. Lilly Company, 278 F.R.D. 395, 406 (W.D. Tenn. Nov. 16, 2011)

[156] 2018 WL 6735710, at *6 and n. 1 (S.D. Cal. Dec. 21, 2018).

[157] Katherine Smith and Michael Holecek, *Guidelines for A Forensic Examination of ESI*, 39-SEP L.A. LAW15 (2016).

[158] 2017 WL 825317, at *6-7 (S.D.N.Y. March 1, 2017).

[159] *Id.* *3

[160] 2017 WL 115743 (D. P.R. March 27, 2017).

[161] 2018 WL 3014124, at *3 (D. Minn. June 15, 2018).

[162] Toussie v. Allstate Insurance, 2018 WL 2766140, at *4 (E.D.N.Y. June 8, 2018).

[163] 531 F.3d 448, 459-461 (6th Cir. 2008).

In *Nacco Materials v. Lilly Co*., a court ordered detailed certifications to the court, under oath, that automatic delete functions have been suspended and that backup tapes have been preserved to ensure that a duty to preserve "going forward" was being complied with. The declaration followed an order for a forensic examination and was to include a description of every step taken to preserve and collect since filing of the complaint.[164]

6. Preclusion of Evidence

According to the Committee Note, preclusion of evidence at trial is available under subdivision (e)(1) to offset prejudice from spoliation. In *US v. Regents of New Mexico State*, the court precluded an employer from introducing evidence of educational or other experience that was not produced in discovery because employee files were not retained despite a regulatory requirement to do so.[165]

In *Ericksen v. Kaplan*, use of an email was precluded because of the failure to preserve ESI which might have rebutted its authenticity.[166] In *Cahill v. Dart*, a party was prohibited from offering testimony about what it had seen on a deleted video.[167] In *Wali Muhammad v. Mathena*, jurors were instructed they should not assume that the lack of corroborating objective evidence undermined certain testimony.[168]

However, according to the Committee Note, a court may not prevent a party from offering evidence in support of the central or only claim or defense in the case without a showing of the specific intent required under subsection (e)(2).

7. Deeming Facts To Be Established

In *Freidig v. Target*, the court found the predicate elements of Rule 37(e) to exist when Target failed to preserve video from the period before a slip and fall and held that "as a form of relief under Rule 37(e)(1), it would determine that a reasonable jury could conclude that the puddle had been on the floor long enough to give Target constructive notice of its presence.[169] Accordingly, it denied the Target motion for summary judgment.

The court acknowledged that there was no evidence of intention conduct, and denied a request for an adverse inference at trial.[170] However, there is at least an argument that an "intent to deprive" is required. In *Barbera v. Pearson Education*, the Seventh Circuit found no abuse of discretion in deeming six facts as established to cure prejudice

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[164] 278 F.R.D. 395, 407 (W.D. Tenn. Nov.16, 2011). Some have suggested that Rule 26(a) should be amended to routinely require such disclosures. Paula Schaefer, *Attorney Negligence and Negligent Spoliation: The Need for New Tools to Prompt Attorney Competence in Preservation*, 51 AKRON L. REV. 607, 630-36 (2017)(suggesting Rule 26(a)(1) amendment).
[165] 2018 WL 3719240, at *4 (D. New Mex. August 3, 2018).
[166] 2016 WL 695789, at *2 (D. Md. Feb. 22, 2016).
[167] 2016 WL 7034139 (N.D. Ill. Dec. 2, 2016).
[168] 2017 WL 3955225 (W.D. Va. Jan. 27, 2017).
[169] 2018 WL 6681745 (W.D. Wisc. Dec. 19, 2018).
[170] *Id.* at *9.

under Rule 37(e)(1) when an employer destroyed emails because none of the facts was sufficient to prevent the District court from ordering summary judgment on the merits.[171]

In *Auer v. Minot*,[172] for example, the Eighth Circuit found it premature to grant summary judgment on the basis of a lack of a "genuine issue of material facts" before determining if there was, in fact, an adequate showing of "intent to deprive" sufficient to conclude that the facts did not exist.

8. Admission of Evidence and Argument Before the Jury

Courts historically admit evidence of spoliation - and permit arguments on its implications - as a "lesser sanction."[173] According to the Committee Note, this is also permissible under subdivision (e)(1) when "no greater than necessary to cure prejudice" and its likely relevance is shown.[174] It typically includes, as the court put it in *Shaffer v. Gaither*, on opportunity for the party "to explore in front of the jury the circumstances surround the destruction of [the ESI]."[175]

In *Waymo v. Uber Technologies*, the court observed that "at least some proof of the facts underlying the spoliation motion (to the extent admissible), and possibly additional evidence on point, will go before the jury."[176] In another case,[177] the court found authority to admit evidence about the absence of a surveillance video under FRE 607 (to address witness credibility).

In *Martinez v. Salazar*, the court decided to allow questioning about the lossof taser data and noted that it "may instruct the jurors that they are allowed to make any inference they believe appropriate" in light of its spoliation.[178]

In *Fishman v. Tiger Natural Gas*, the court outlined an elaborate series of steps it planned to ameliorate the prejudice from a failure to preserve recordings of telemarketing calls in a class action. First, it would inform the jury of the destruction of evidence either by evidence put on by counsel or via an instruction, and then permit the jury to decide if the sole remaining recorded call was "representative" of the sales pitches as a whole or not.

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[171] 906 F.3d. 621, 2018 WL 4939772, at *5 (7th Cir. Oct. 12, 2018),
[172] 896 F.3d. 854, 2018 WL 3470195, at *2 (8th Cir. July 19, 2018).
[173] *See, e.g.*, Dalcour v. City of Lakewood, 492 Fed. Appx. 924, 937 (10th Cir. 2012)(party is entitled to "question witnesses about the missing evidence" as a "lesser sanction").
[174] Committee Note (subdivision (e)(1) permits a court to give the jury "instructions to assist in its evaluation" of spoliation evidence which has been admitted, such as explaining to the jury that it may consider that evidence, along with all the other evidence in the case, in making its decisions." Similarly, subsection (e)(2) does not "prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision."
[175] 2016 WL 6594126, at *3 (W.D. North Carolina Sept. 1, 2016)(also reserving the right to consider a spoliation instruction if appropriate if there appears to be evidence that "there was an intentional destruction").
[176] Waymo v. Uber Technologies, 2018 WL 646701, at *18 (N.D. Cal. Jan. 30, 2018).
[177] Willis v. Cost Plus, 2018 WL 1319194, at *6 (W.D. La. March 12, 2018)(ignoring Rule 37(e)).
[178] 2017 WL 4271246 (D. New Mex. Jan. 16, 2017).

If it made that leap, it could then conclude that the same conduct occurred class-wide, which the court found to be reasonable. Second, it would permit the jury to infer that other sales calls, had they been preserved, would have been recorded without consent.[179]

In *Sosa v. Carnival*, involving a personal injury action where an employee had seen, but then lost, video footage, the court gave the moving party a choice of remedies. The court could allow all the evidence relating to the loss of video footage to come in – including what the defendant's employee saw before its loss (in which case the jury could also decide if an intent to deprive existed, opening up the possibility of subdivision (e)(2) measures). Alternative, the moving party could opt not to take that risk and settle for a statement by the court to the jury that the video once existed "but it is no longer available."[180]

In *Nuvasive v. Madsen Medical*, the court decided that it would allow the parties to present evidence to the jury[181] after a finding by the Magistrate Judge that a sufficient showing of prejudice had been made.[182] In *Barry v. Big M Transportation,* the court decided that it would "tell the jury that the ECM data was not preserved" and allow both parties to present evidence and argument at trial since it had resulted in prejudice to the ability to try the case.[183]

Obviously, some or all of these remedies necessarily risk prejudicing the jury in an excessive or unfair manner. However, courts have ample discretion under FRE 403 to limit such evidence or exclude it so as to prevent "unfair prejudice, confusing the issues [or] misleading the jury." In *Delta/AirTran Baggage Fee Antitrust Litigation*, for example, a court barred introduction of spoliation evidence because it would "transform what should be a trial about [an] alleged anti-trust conspiracy into one on discovery practices and abuses."[184]

9. Mali-type Instructions

In *Mali v. Federal Insurance,* the Second Circuit approved use of a permissive adverse inference jury instruction without making a predicate finding of culpability, since it was not a sanction for misconduct" but "simply explains to the jury, as an example of the reasoning process known in law as circumstantial evidence," their fact-finding powers.[185]

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[179] 2018 WL 6068295, at *5 (Nov. 20, 2018).
[180] 2018 WL 6335178, at *21 (S.D. Fla. Dec. 4, 2018)(the court left open the possibility that the trial judge could also give the jury instructions "to assist in its evaluation of such evidene or argument," quoting from the Committee Note to Rule 37(e).
[181] 2016 WL 305096, at *3 (S.D. Cal. 2016).
[182] 2015 WL 4479147, at *2 (S.D. Cal. 2015).
[183] 2017 WL 3980549, at *7-8 (N.D. Ala. Sept. 11, 2017).
[184] 2015 WL 4635729, at *14 (N.D. Ga. Aug. 3, 2015).
[185] 720 F.3d 387, 391- 393 (2nd Cir. June 13, 2013).

Judge Scheindlin has argued that this form of a permissive inference instruction is or should be available under Rule 37(e).[186] In *Leidig v. Bussfeed*, a court stated that it would utilize such an instruction since the "Second Circuit has made clear" that it "does not necessarily reflect a sanction" and does not require the same findings, citing *Mali, supra*.[187]

Severe Measures
(Subsection (e)(2))

Rule 37(e)(2) authorizes courts to "(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment" *only* upon a finding of an "intent to deprive another party of the information's use in the litigation."[188]

The "intent to deprive" formulation reflects a prescient suggestion by the Sedona Conference[189] and rejects "cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F. 3d 99 (2nd Cir. 2002), that authorize the giving of adverse inference instructions on a finding of negligence or gross negligence." As the Sixth Circuit explained in *Applebaum v. Target Corp.*, "a showing of negligence or even gross negligence will not do the trick."[190] Some courts have not gotten the message.[191]

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[186] Hon. Shira A. Scheindlin and Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-based Proposal*, 83 FORDHAM L. REV.1299, 1307 (2014).
[187] 2017 WL 6512353, at n. 12 (S.D.N.Y. Dec. 19, 2017).
[188] The "intent to deprive" standard of culpability replaces the initial proposal that sanctions and adverse inferences were only available for when conduct caused substantial prejudice in the litigation and were willful or in bad faith; or (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." Subsection (ii) was dropped when the scope of the Rule was limited to losses of ESI which should have been preserved, not losses of "discoverable information." The Draft is at http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf.
[189] Sedona suggested that the rule should provide that a party must have "acted with specific intent to deprive the opposing party" of material evidence relevant to the matter. Kenneth J. Withers, on behalf of Steering Committee of WG 1 of the Sedona Conference, November 26, 2013, at 13.
[190] 831 F.3d 740, 745 (6th Cir. 2016).
[191] Borgegarary v. County of Santa Barbara, 2016 WL 7260920 (C.D. Cal. Dec. 13, 2016); Brown v. Albertsons, 2017 WL 1957571 (D. Nev. May 11, 2017); Dallas Buyers Club v. Doughty, 2016 WL 1690090 (D. Ore. April 27, 2016, as amended 2016 WL 3085907); GoPro v. 360 Heroes, 2018 WL 1569727 (N.D. Cal. March 30, 2018); GM LLC Ignition Switch Litigation, 2017 WL 2493143 (S.D. NY. June 9, 2017); Kische v. Simsek, 2018 WL 620493 (W.D. Wash. Jan. 29, 2018); Nelda Ayala v. Your Favorite Auto Repair, 2016 WL 5092588 (E.D. N.Y. Sept. 19, 2016); Romain v. City of Grosse Point, 2016 WL 7664226 (E.D. Mich. Nov. 22, 2016); Stedeford v. Wal-Mart Stores, 2016 WL 3462132 (D. Nev. June 24, 2016); U.S. Commodity Futures Trad. Comm. v. Gramalegui, 2016 WL 4479316 (D. Colo. July 28, 2016); Van Buren v. Crawford Co., 2017 WL 168156 and 512767, 3479546 (E.D. Mich. 2017); Wilson v. Conair, 2016 WL 7742772 (E.D. Cal. June 3, 2016); Wooten v. BNSF, 2018 WL 2417858 (D. Mont. May 29, 2018).

In *Brice v. Auto-Owners*, for example, an adverse inference was given when text messages were lost when a party negligently exchanged cell phones at the expiration of her Verizon contract.[192]

"Intent to Deprive"

The Committee Note explains that adverse inference instructions were "developed on the premise" that intentional loss gives rise to a reasonable inference that the evidence was unfavorable. However, "[n]egligent or even grossly negligent behavior does not logically support that inference."[193] This is because "[i]nformation lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have."

It has been observed that "in the world of electronic information, it is simply not fair to assume that a loss of ESI necessarily equates to intent to destroy evidence."[194] Judge Grimm explained in *Victor Stanley v. Creative Pipe* that the more "logical explanation" of losses is that "the party was disorganized, or distracted, or technically challenged, or overextended, not that it failed to preserve evidence because of an awareness that it was harmful."[195]

In *Auer v. City of Minot*, the Eighth Circuit explained that because the allegations "would at most prove negligence," they do not show the "serious and specific sort of culpability" required.[196] The Eleventh Circuit noted in *Mt. Healthcare Services v. Publix Super Markets*, that there is no "intent to deprive" under Rule 37(e) when a party acts reasonably and in good faith in reaching its decisions as to the scope of preservation. [197]

Determining Intent

It is the "intent to deprive" the opposing party of use of the ESI in the litigation that is critically important, not the mere fact of intentional conduct.[198] As the Seventh Circuit famously explained in *Bracey v. Grondin*, "[t]he crucial element is not that evidence was

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[192] 2016 WL 1633025, at *6 (E.D. Tenn. April 21, 2016).
[193] Committee Note.
[194] Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J.L. & TECH. 9, at *34 (2007).
[195] Victor Stanley v. Creative Pipe, 269 F.R.D. 526, 526 (D. Md. Sept. 9, 2010)(an interference that a party negligently failed to preserve because it believed the missing ESI was harmful to its case "makes little logical sense;" the more "logical inference is that the party was disorganized, or distracted, or technically challenged, or overextended").
[196] 896 F.3d 854, 2018 WL 3470195, at *2 (8th Cir. July 19, 2018).
[197] 881 F.3d 1293, 1308-09 (11th Cir. Feb. 7, 2018).
[198] *Compare* Hendrix v. Pitsicalis et. al., 2018 WL 6191039, at *7, *9 (S.D.N.Y. Nov. 28, 2018)(an adverse inference instruction under Rule 37(e) requires only that party acted "intentionally"'). It seems apparent that the court simply misspoke. If found the requisite showing by focusing on the lack of "coherent" explanations for failures to preserve, which it calls a "willful and blatant violation" of the duty to preserve.

destroyed but rather the reason for the destruction."[199] In *Worldpay v. Haydon*, the court refused to find an "intent to deprive" since "even assuming that [the party] intended to delete the information permanently" this did not meant that she "did so for the purpose of hiding adverse information."[200]

While it is true that "[n]othing in Rule 37(e) nor the Advisory Committee Note sheds light on this issue [of determining intent],"[201] the district court has substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives of the witnesses in a particular case and other factors.[202]

In *Folino v. Michael Hines*,[203] where a forensic examination disclosed that ipads and a computer had been wiped of all data just prior to a court endorsed examination, the court dismissed the case because this "could not have occurred without intent."

Similarly, in *Moody v. CSX Transportation*, the court did so because of "stunningly derelict" conduct of a number of employees.[204] In *O'Berry v. Turner*, the errors and omissions by a variety of employees were could "lead to [but] one conclusion" – that the party had acted with intent to deprive the moving party of the use of the information at trial.[205]

Imputing Conduct

Misconduct of individual employees or agents is typically attributed to the party-employer when the employee is acting within the scope of their authority. In *GN Netcom v. Plantronics*, the wholesale destruction of emails by an executive was attributed to his employer because the "deletion activities were not undertaken for personal reasons."[206]

Prisoner cases are complicated in this regard when the employer is a governmental entity which is immune from suit and not a party to the lawsuit, leaving the court without an entity to whom inappropriate conduct can be attributed. In *Peters v. Cox*, a court refused to impute such actions by non-party officers to a party officer who was not in control of

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[199] Bracey v. Grodin, 712 F.3d 1012, 1019 (7th Cir. 2013)(bad-faith destruction occurs when a party destroys evidence "for the purpose of hiding adverse information").
[200] 2018 WL 5977926, at *5 (N.D. Ill. Nov. 14, 2018)(noting the similarity of Rule 37(e)(2) to the Seventh Circuit case law pre-dating the current version of Rule 37(e) and refusing to enter an inference that the destroyed information was unfavorable to the defendants).
[201] Charles Yablon, *Byte Marks: Making Sense of New F.R.C.P. 37(e)*, 69 FLA. L. REV. 571, 581 (2017).
[202] Martinez v. Triple S Properties, 2018 WL 4658700, at *2 (W.D. Mo. Sept. 27, 2018)(quoting from Greyhound Lines v. Wade, 485 F.3d. 1032, 1035 (8th Cir. 2007).
[203] 2018 WL 5982448 (W.D. Pa. Nov. 14, 2018)(also awarding attorney's fees and costs of the forensic examination).
[204] 271 F.Supp.3d 410, *11-*13 (W.D.N.Y. Sept. 21, 2017).
[205] 2016 WL 170043, at *4 (M.D. Ga. April 27, 2016)("irresponsible and shiftless" behavior).
[206] 2016 WL 3792833, at *7(D. Del. July 121, 2016). The executive was fined $1M by his employer and subsequently fired. *See* 2017 WL 4417810, at *5 (D. Del. Oct. 5, 2017).

decisions about surveillance tapes.[207] Other courts, however, have been willing to do so because of the availability of indemnification of such party officers by the governmental employer.[208]

Willful or Reckless Conduct

It is not enough to show that a party has acted "willfully," since it does not necessarily indicate that the party acted for the purpose of depriving a party of the ESI.[209]

Adverse Inference Instructions

The requirements of Rule 37(e)(2) applies to both permissive and mandatory[210] forms of jury instructions. Both can be difficult for a party to overcome since the instruction that the jury may or must infer that the missing evidence contained unfavorable information is delivered with the authority of the Court.

As one court explained, "[w]hen a jury is instructed that it may infer that the party who destroyed potentially relevant evidence did so out of a realization that the evidence was unfavorable, the party suffering this instruction will be hard-pressed to prevail on the merits."[211] Once the jury is informed that evidence has been destroyed, the "jury's perception of the spoliator may be unalterably changed."[212]

The contents of the instruction can vary greatly in specificity and tone. In *Hendrix v. Andrew Pitsicalis*, for example, the jury was to be told that it could draw an adverse inference that missing electronic devices contained "evidence of conduct in breach of their legal duties to plaintiffs in the connection with the sale and marketing of Jimi Hendrix-related materials."[213] In *Nutrition Distribution v. PEP Research*, however, the jury would be instructed only that the party "failed to preserve social media posts" after the duty to preserve arose, and it "may, but [is] not obligated to, infer that they were "favorable" to one party and "unfavorable" to the other.

Most courts permit parties facing a permissive inference instruction to enter competing evidence and argue in rebuttal to the need for such inferences.[214] In *GN Netcom*

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[207] 2018 WL 3577242 (D. Nev. July 24, 2018); *see also* Wooden v. Barringer, 2017 WL 5140518 (N.D. Fla. Nov. 6, 2017)(imputation in employer- employee context applies only "where a non-party employee possesses the data, not a non-party employer).
[208] Cindy Davison v. Nicolou, 2018 WL 2843429, at *3 (S.D. Ga. June 11, 2018).
[209] CTB, Inc, v. Hog Slat, Inc., 2016 WL 1244998, at *9 (E.D. N.C. March 23, 2016).
[210] O'Berry v. ADM, 2016 WL 1700403 (M.D. Ga. 2016 ("[t]he court will instruct the jury that it *must* presume that the lost information was unfavorable to [the non-moving party])(emphasis in the original).
[211] *See, e.g.,* Zubulake v. UBS Warburg, 220 F.R.D. 212, at 219-20(S.D.N.Y. 2003
[212] Gorelick et al, Destruction of Evidence § 2.4 (2014)("DSTEVID s. 2.4").
[213] 2018 WL 6191039, at *10 (S.D. N.Y. Nov. 28, 2018).
[214] Corboda v. Pulido, 2018 WL 500185, *2 (N.D. Cal. Jan. 21, 2018)(permitting party to explain to jury why file was discarded).

v. Plantronics,[215] the jury was informed that its duty was to determine if the "spoliation tilted the playing field against" the other party," and that it could infer that the missing information was harmful – or not.[216]

Dismissals or Default Judgments

A showing of "intent to deprive" is also required before a court may "dismiss the action or enter a default judgment" as a sanction. Dismissals are rarely used in deference to measures such as adverse inference instructions which do not deny the party the chance to pursue or defend a claim.

In *Global Material Tech. v. Dazheng Metal Fibre*, however, where the requisite intent existed, the court dismissed the case because an adverse inference would not be sufficient to punish the party for their dishonesty.[217] The Ninth Circuit has affirmed a dismissal based on findings indicating that the "intent to deprive" requirement of Rule 37(e) had been satisfied.[218]

Juries

Some courts prefer to entrust the decision on the presence or absence of "intent to deprive" to a jury.[219] The Committee Note provides that "[i]f a court were to conclude that the intent finding should be made by a jury, the court's instruction should make it clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive"[220]

The District Court in *Gipson v. MTC* indicated it would allow the jury to decide the intent issue "assuming there is sufficient trial evidence supporting it," noting that the Committee Note seemed to endorse such an approach. [221]

However, assigning the task to the jury comes with a risk. Even if the jury ultimately decides that the requisite intent does *not* exist, "it will have still heard damaging evidence and (perhaps) arguments about the circumstances that caused the information loss."[222] It may well be preferable for the court to accept its role and make the initial determination. Some courts select a middle ground by deferring their decision on the topic until they (and the jury) have heard the evidence.

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[215] 2016 WL 3792833 (D. Del. July 12, 2016)(the court concluded its opinion by stating it was granting a . "Motion for Sanctions pursuant to Fed. R. Civ. P. 37(E)" but did not utilize the standards of the rule in the opinion).
[216] *Id.* at *5. *See also* 2018 WL 273649, at n. 3 (D. Del Jan. 3, 2018)(post jury trial justification for handling of the jury role).
[217] 2016 WL 4765689, at *9 (N.D. Ill. Sept. 13, 2016).
[218] Roadrunner Transportation v. Tarwater, 642 F. Appx. 759 (9th Cir. March 18, 2016).
[219] Cahill v. Dart, 2016 WL 7034139 (N.D. Ill. Dec. 2, 2016).
[220] 305 F.R.D. 457, 577-78 (2015).
[221] 2018 WL 736265, at *7 (S.D. Miss. Feb. 6, 2018).
[222] Tadler and Kelston, *supra,* 52-JAN TRIAL 20, 24. (2016).

Inherent Authority

As originally adopted in 2006, the predecessor to amended Rule 37(e) merely cabined the use of rule-based sanctions, absent exceptional circumstances, when a party had acted in good faith in respect to the routine operation of information systems.[223] It did not provide an independent source of authority for sanctions. Not surprisingly, it was possible for courts to ignore this limitation by simply relying on sanctions, such as adverse inference instructions, authorized under their inherent authority.[224]

As a member of the E-Discovery Panel at the 2010 Duke Litigation Conference, the Author suggested that it was time for the Rules Committee "revisit" the Rule and "shift away from reliance on inherent power" by enactment of an "extension" of Rule 37(e) to provide sanctioning authority for "preservation violations."[225]

Amended Rule 37(e)

When the Rules Committee accepted the challenge and recommendation of the Conference, it sought to "discourage use of inherent authority [for ESI spoliation] by providing rules [which make] resort to inherent authority unnecessary."[226] The Committee Note captured this intent as follows:

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

It is the comprehensive nature of the remedies available that justifies the conclusion that the Rule "supplants" inherent authority.[227] As the Ninth Circuit has explained "[t]he

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

[224] Because of the lack of uniformity in the Circuits, it was possible to bypass the intent of the Rule in thos Circuits which approached failures to preserve as per se sources of sanctions. *See, e.g.,* Nucor v. Bell, 251 F.R.D. 191, 197-98 (D. S.C. 2008).

[225] Thomas Y. Allman, *Preservation and Spoliation Revisited: Is it Time for Additional Rulemaking*?, 2010 LIT. REV. CONF. DUKE LAW SCHOOL, April 9, 2010, unpublished manuscript available at https://www.uscourts.gov/sites/default/files/thomas_allman_preservation_and_spoliation_revisited_0.pdf.

[226] Discovery Subcommittee Meeting, Feb. 28, 2014, Agenda Book, Rules Mtg. (April 2014), 431 of 580; *see also* Minutes Rules Committee Meeting, November 2, 2012 at 5. As Judge Posner had noted, "when a domain of judicial action is covered by an express rule, ... the judge will rarely have need or justification for invoking his inherent power." Fidelity Nat'l Title v. Intercounty Nat'l Title, 412 F.3d 745, 752 (7th Cir. 2005).

[227] Wright and Miller, 8B FED. PRAC. & PROC. CIV. § 2284.2 (3ed.)(2018)("the 2015 provision supplants inherent authority, which courts sometimes invoked to address preservation problems when rule provisions did not seem pertinent").

detailed language of Rule 37(e) '[t]herefore foreclosed[d] reliance on inherent authority to determine whether terminating sanctions were appropriate."[228]

Supreme Court Guidance

The Supreme Court has not ruled on the precise issue, but it is clear that its inherent authority "cannot be limited by a body such as the Advisory Committee."[229] In *Chambers v. NASCO*, the Supreme Court famously held that "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, a court "ordinarily should rely on the Rules rather than the inherent power."[230] The Third Circuit noted in *Clientron Corp. v. Devon IT*, that the "preferred" course of action is to rely on rule-based sanctions, including Rule 37(e).[231]

Nonetheless, *Chambers* also held that when civil rules are available but are "not up to the task, the court may safely rely on its inherent power.[232] In *Dietz v. Bouldin*, the Supreme Court also noted, however, that inherent powers should not be used when "contrary to any express grant of or limitation on the district court's power contained in a rule or statute."[233]

As of this writing, Panels of Circuit Courts in every Circuit except the District of Columbia Circuit have explicitly acknowledged the role of Rule 37(e), as noted in the Appendix which follows this section. With the exception of the Ninth Circuit opinion noted *supra*, however, no Circuit Court has endorsed the sweeping language of the Committee Note.[234]

Lower Court Practice

By and large, lower courts – whether in recommendations by Magistrate Judges or final rulings by District Judges - have respected the admonition in the Committee Note and resisted the temptation to impose adverse inferences or other harsh measures because of mere negligence or gross negligence when Rule 37(e) covers the context in which the loss of ESI occurs.

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[228] Newberry v. County of San Bernardino, __Fed. Appx.__, 2018 WL 4450831, at *2 (9th Cir. Sept. 18, 2018)
[229] Hugler v. Southwest Fuel Mgt., 2017 WL 8941163, at *8, citing to CAT3 v. Black Lineage., 164 F. Supp.3d 488, 497-98 (S.D.N.Y. 2016).
[230] 501 U.S. 32, 45-46 (1991).
[231] Clientron Corp. v. Devon IT, 894 F.3d 568, 2018 WL 3293212, at n. 5 (3rd Cir. July 5, 2018).
[232] 501 U.S. 32, 50 (19910(affirming sanctions because the conduct sanctionable under the Rules was intertwined with conduct that only the inherent power could address).
[233] __ U.S. __, 136 S. Ct. 1885, 1892 (2016).
[234] A comparable situation occurred when Rule 16(f) was amended to authorize sanctions for inadequate participation in scheduling conferences. The Committee Note stated that this change was made, in part, "to obviate dependence upon Rule 41(b) or the court's inherent power to regulate litigation." Committee Note, Rule 16(f), 97 F.R.D. 165, 213 (1983). The text of the Rule did not, itself, foreclose reliance on inherent authority.

The court in *CAT3 v. Black Lineage*, for example, noted that that harsh measures were available to it "either under Rule 37(e) or the court's inherent authority."[235] In *Worldpay v. Haydon*, the court refused to agree that the Rule was the "exclusive" means by which a court may exert its authority, but held that even if it could act under its inherent authority, it would not do so in the action before it.[236] Other courts simply assert the right to utilize inherent authority without mentioning the Committee Note."[237]

Inapplicability of the Rule

A more subtle issue arises if the Rule is, on its face, arguably inapplicable.[238] Courts clearly can and do appropriately utilize their inherent authority in such instances where for example, the loss is of tangible property or documents, not ESI. Another example is where the duty to preserve never attaches, because it is not triggered or if the scope is exceeded.[239] Courts clearly retain inherent power to "fill the gaps"[240] or "interstices"[241] when rules do not provide courts with sufficient authority to protect their integrity and to prevent abuses of the judicial process. In such cases, the use of inherent authority does not undermine the Rule.

This appears to have also been the logic behind the imposition of monetary damages in *GN Netcom v. Plantronics,* where the party did not take reasonable steps and was found to have acted in bad faith and with an intent to deprive, but the remedies were inadequate in the view of the court.[242]

In *Malone v. Weiss*, for example, the court found Rule 37(e) inapplicable and used its inherent authority to order dismissal of an action because its use was "more appropriate rubric to analyze this matter." The Rule was said to be inapplicable because the underlying misconduct was "more serious" than merely failing to take reasonable steps, as it involved manipulation and alteration of emails.[243] Similarly, in *Comlab v. Kal Tire*, the attempted

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[235] 164 F. Supp.3d 488 (S.D.N.Y. 2016).
[236] 2018 WL 5977926, at n.1 (N.D. Ill. Nov. 14, 2018)(noting that the argument that a court may take action under its inherent authority "is at odds with the Advisory Committee Notes to the 2015 amendment to Rule 37(e)").
[237] Internmatch v. Nxtbigthing, 2016 WL 491483, at *3 n. 6 (N.D. Cal. Feb. 8, 2016); Rhoda v. Rhoda, 2017 WL 4712419 (Oct. 3, 2017).
[238] It has to be plausible reason for not applying the rule. An implausible example is Legacy Data Access v. Mediquant, 2017 WL 6001637, at n. 8 (W.D. N.C. Dec. 4, 2017)(refusing to apply the Rule since it "involves the destruction of ESI, not the loss of ESI").
[239] *Cf.* US ex rel Scutellaro v. Capitol Supply, 2017 WL 1422364, at *10 (D.D.C. April 19, 2017).
[240] *See, e.g.*, Galanis v. Szulik, 841 F. Supp. 2d 456, 461 (D. Mass. 2011)(collecting cases and quoting from Shepherd v. Am Broad. Cos., 62 F. 3d 1469, 1474 (D.C. Cir. 1995).
[241] Johnson v. Ford Motor Company, 2017 WL 6614101, at *9(S.D. W. Va. Dec. 27, 2017)(citing Chambers, 501 U.S. 32 at 46 as authority to order award of fees and expenses to compensate for misrepresentations by Ford).
[242] 2016 WL 3792833, at *13 (D. Del. July 12, 2016)(neither subdivision Rule 37(e)(1) or (e)(2) appeared to support the substantial punitive monetary sanction imposed).
[243] 2018 WL 3656482, at *7 (Aug. 2, 2018)(citing a case where inherent authority was properly utilized because it "is broader than a Rule 37 violation").

fabrication of emails involved amounted to a fraud on the court, which was appropriately dealt with by dismissal under its inherent authority, not Rule 37(e).[244]

In *Hsuech v. New York State*, a court concluded that Rule 37(e) did not apply to the deletion of an audio tape since the loss did not result because the party failed to prevent its loss, but because she took specific steps to intentionally delete it. The court noted that the case lacked "considerations" of improper use of systems to prevent the loss; concerns which underlie the Rule.[245] The court nonetheless concluded that under either Rule 37(e) or its inherent authority, the plaintiff had acted in bad faith and with an intent to deprive and issued an adverse inference.

However, it makes no sense authorize use of inherent authority in contravention with the Rule requirements if it is inapplicable because its requirements are satisfied. As noted, if the duty to preserve is not triggered, the inquiry ends at that point, both for the Rule and for inherent authority, since the common law obligation is met.

Moreover, if a party has undertaken "reasonable steps" to preserve, the fact that the Rule is inapplicable by its terms does not open up the field for inherent authority. In *Steves and Sons v. Jeld-Wen*, argued that a court it retained its authority impose lesser sanctions when the Rule was inapplicable because a party cannot establish all the Rule 37 prerequisites."[246] That is far too broad a statement.

Taken literally, it would make a mockery of the careful rejection of *Residential Funding*, for example, to permit a court to ignore the "safe harbor" under Rule 37(e) for parties that act reasonably in order to impose harsh sanctions for negligent or grossly negligent conduct causing the loss of ESI.[247] This should be the case even if the Rule is inapplicable for other because the duty to preserve did not arise from of a failure to anticipate litigationor the ESI was "destroyed, not lost."[248]

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[244] 2018 WL 4333987 (S.D.N.Y. Sept. 11, 2018)(the court may have partially relied upon Rule 37(b), not Rule 37(e), which it did not mention at all. There was no spoliation after an order compelling discovery was issued).

[245] 2017 WL 1194706, at *4-6 (S.D.N.Y. March 31, 2017).

[246] 2018 WL 2023128, at n. 4 (E.D. Va. May 1, 2018).

[247] Snider v. Danfoss, LLC, *supra*, 2017 WL 6512353 at n. 8 ("[i]f federal courts could simply fall back onto their inherent authority [to issue harsh measures for negligence], the goals of uniformity and standardization would be lost") *report and recommendation adopted*, 2017 WL 3268891 (N.D. Ill. 2017); *accord* Leidig v. Buzzfeed, 2017 WL 6512353, at *7, n. 5 (S.D.N.Y. Dec. 19, 2017). *See also* CAT3 v. Black Lineage, 164 F. Supp. 3d 488 (S.D.N.Y. Jan. 12, 2016)(Francis, M.J.) and James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority*, 17 SEDONA CONF. J. 613, 662 (2016)(the limitation of sanctions resulting from specific intent to deprive "is not a gap" to be filled by the exercise of inherent of inherent authority).

[248] Legacy Data Access v. Mediquant, 2017 WL 6001637, at n. 8 (W.D.N.C. Dec. 4, 2017).

Appendix
Circuit Court Opinions

Circuit	Status	Citation
1st	Unknown	
2nd	Yes	S.A.R.L. Galerie v. Marlborough Gallery, __ Fed.App. ___, 2018 WL 45232610 (2nd Cir. Sept. 2018)(remanding for ruling w/o mention of 37(e); MPLA v. Gateway, 2018 WL 1659671 (2nd Cir. 2018)(acknowledging Rule 37(e); Klipsch v. EPRO E-Commerce, 880 F.3d 620, (2nd. Cir. 2018)(ducking choice); Mazzei v. the Money Store, 656 Fed. Appx. 558 (2nd Cir. 2016)(requiring intent to deprive).
3rd	Yes	Clientron Corp. v. Devon IT, 894 F.3d 568, 2018 WL 3293212, n. 5 (3rd Cir. 2018)(noting potential relevance of Rule 37(e) on remand); *cf* Lexpath v. Welch, __Fed. Appx. __, 2018 WL 3620479 (3rd Cir.)(ignoring Rule 37(e))
4th	Ignored	Integrated Direct Mktg. v. May, 690 Fed. Appx. 822 (4th Cir. 2017)(deletion of files on hard drive).
5th	Ignored	Bryant v. Wal-Mart, 729 Fed. Appx. 369, 2018 WL 3322871 (5th Cir. 2018)(surveillance video); Timms v. LZM, 657 Fed. Appx. 228 (5th Cir. 2016)(texts).
6th	Yes	Applebaum v. Target, 831 F.3d 740 (6th Cir. 2016)(showing of negligence or gross negligence does not justify adverse inferences).
7th	Yes	Barbera v. Pearson Education, 906 F.3d621, 2018 WL 4939772 (7th Cir. Oct. 12, 2018). Cf. Lewis v. McLean, 864 F.3d 556 (7th Cir. 2017)(ignored re surveillance video)
8th	Yes	Auer v. City of Minot, 896 F.3d 854, 2018 WL 3470195 (8th Cir. 2018)(referencing "intent to deprive"); *but cf* Alston v. City of Darien, __Fed. Appx. __, 2018 WL 4492422 (8th Cir. 2018)(ignoring it in dash cam deletion).
9th	Yes	Newberry v. County of San Bernardino, __Fed. Appx.__, 2018 WL 4450831 (9th Cir Sept. 2018); Roadrunner Trans. v. Tarwater, 642 Fed. Appx. 759 (9th Cir. Mar. 2016)
10th	Yes	Helget v. City of Hays, 844 F.3d 1216 (10th Cir. 2017) ((Rule 37(e) provides "further" guidance); EEOC v. Jetstream, 878 F.3d 960 (10th Cir. 2017).
11th	Yes	ML Healthcare Services v. Publix Super Markets, 881 F.3d 1293, (11th Cir. 2018)(Rule 37(e) applies to spoliation of video but impact on *Flury* factors need not be decided).
D.C	Unknown	
Fed.	Yes	Regenereon Pharm. v. Merus, 864 F.3d 1343 (2017), 2017 WL 3184400, at n.7 (Fed. Cir. 2017)(rule supersedes Residential Funding in part).