

Amended Rule 37(e): Case Summaries

Thomas Y. Allman

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This Memorandum provides summaries of decisions found in the WESTLAW database which cite to Rule 37(e) (Appendix A) or should have done so (Appendix B). Some courts, including Courts of Appeal, continue to ignore Rule 37(e).² With over five years of experience, the latter type of decision has decreased, and only particularly interesting examples are now being added to Appendix B.³

The most recent version of the Author's ongoing narrative summary of the evolution of the Rule is Thomas Y. Allman, *Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures*, 26 RICH. J. L. & TECH. 1 (2020).

APPENDIX A Cases explicitly citing Rule 37(e)

1. **ACT v. Worldwide Interactive** [2020 WL 4016241] (E.D. Tenn. July 16, 2020). Court denied motion of sanctions under Rule 37(e) and inherent authority because there was no indication beyond speculation based on the volume of emails produced that the party destroyed emails. (*5). It found that it was a disputed about the sufficiency of evidence, not spoliation, which involve arguments that the jury will weigh and consider. (*7).
2. **4DD Holdings v. United States** [143 Fed. Cl. 118, 2019 WL 2064535] (Ct. Claims, May 10, 2019). In an action alleging infringement of software copyrights measures were imposed under subdivisions (e)(1) and (2). The “inexcusably shoddy” efforts to preserve were “the opposite of taking reasonable steps to preserve.” (*12) After finding prejudice from the party having to “cobble[] together secondary evidence,” fees and expenses under 37(e)(1) were awarded, along with an order of preclusion banning the argument that the “evidentiary gaps” created should be construed in the government’s failure. (*13). Because the irresponsible behavior “lacks any other explanation than intent to deprive [collecting cases] (*13), the court also decided to infer that the agency deleted laptop data that was “detrimental” to it. (*14) It deferred applying the necessary “adverse inferences” until summary judgment or trial.
3. **Abdelgawad v. Mark Mangieri** [2017 65574483] (W.D. Pa. Dec. 22, 2017). In a case involving QuickBook files in digital form and certain documents which resulted in “a

¹ © 2020 Tom Allman. The Author, a former General Counsel, is Chair Emeritus of the Sedona Conference Working Group 1.

² In *Re Sussman*, 816 Fed. Appx. 410 (11th Cir. July 7, 2020); *White v. United States*, 959 F.3d 328 (8th Cir. May 13, 2020); see also Tanya Pierce, *Righting the Ship: What Courts are Still Getting Wrong About Electronic Discovery*, 72 SMU L. Rev. 785, 800 (2019).

³ *Clifford Hearne v. HUB Bellevue Properties*, 2020 WL 2512872, at *5 (W.D. Wash. May 15, 2020); *Cassar Industries v. Horizon Global*, 2019 WL 9441664 (N.D. Cal. Dec. 3, 2019).

spoliation argument as to a combination of paper and electronic documents,” the court applied separate standards in assessing the loss of each. It denied relief because the party had not moved for an order to compel production of bank documents or subpoena the banks for their records (*4) and because the party in possession of the ESI did not take reasonable steps to preserve QuickBooks backup files by uploading them to a remote server or downloading them to a separate hard drive. (*3). It refused to render any sanction, however, in the absence of a “request” for a “proportionate measure and in light of the good faith of the party in attempts to provide access. (*3).

4. **Accurso v. Infra-Red Services** [169 F.Supp.3d 612] (E.D. Pa., March 11, 2016)). In ruling on final pre-trial motions in a dispute with former employee, defendants were denied an adverse inference for destruction of emails without prejudice since no evidence was offered establishing the elements of **Rule 37(e)**. **The court noted they were free to raise** the issue at trial “in light of what is received into evidence,” but cautioned that a witness would not be allowed to testify as to an opinion that the employee intentionally destroyed evidence. The court applied the new rule because it was “procedural in nature” and observed (n. 6) that did not appear to have “substantively altered the moving party’s burden” in the Third Circuit of showing that ESI was destroyed in “bad faith” in requesting an adverse inference.
5. **Adams v. Klein** [2020 WL 2425715] (D. Del. May 12, 2020). A court noted that a court “may take ‘curative measure’ (including the application of an adverse inference) upon a showing that the other party was prejudiced or sanctions upon a showing that the party acted with intent.” Neither was shown and no adverse inference was justified.
6. **Adcox v. UPS**, [2016 WL 6905707] (D. Kan. Nov. 11, 2016). In a thoughtful opinion applying Rule 37(e) to potential failures to preserve, the court ordered curative measures, such as additional discovery, without explicitly finding a failure to take reasonable steps, but decided not to issue an adverse inference at trial because it found no “bad faith or intentional omission” on the part of UPS. The court stressed the Committee Note comment that a court should exercise caution to ensure that the remedies “fit the wrong” committee by a non-producing party.
7. **Agility Public Whsg. v. DOD**, [2017 WL 1214424] (D.D.C. March 30, 2017). In rejecting the argument that inherent authority, not **Rule 37(e)**, applied to ESI which could not be replaced except by additional discovery, the court stated the rule foreclosed reliance on inherent authority “at least in factual situations to which the rule applies, i.e., where the information cannot be substituted from another source.” The court cited to *Living Colors*, 2016 WL 1105297 at *5 and *CAT3*, 164 F. Supp.3d 488, 496-98 for the discussion of the meaning of “lost” under **Rule 37(e)**.
8. **Alasadi v. Intel Corporation** [2020 WL 4035169] (D. Ariz. July 17, 2020). Judge Campbell refused to give a “negative” inference under its inherent authority for a failure to collect ESI data, finding that it was, in fact ESI, and that reliance on *Glover v. Bic*, 6 F.3d 1318, 1329 (9th Cir. 1993) was no longer appropriate for loss of discoverable ESI after the adoption of **Rule 37(e)**. It explained that the intent of Rule 37(e) was to bring uniformity to an area of the law that had been badly splintered and that use of the rule was the exclusive

authority for sanctions that can be imposed for the loss of ESI.(*3) It found no evidence that Intel had lost data intentionally to preclude the party from using the data in litigation and denied a negative inference under Rule 37(e)(2). (*4) However, it agreed that the party would be free at trial to present admissible evidence and argument to the factfinder about the data that was collected to argue it was not a reliable indicator of the exposure to the Plaintiff. (*5). [The unstated implication is that the evidence is admissible because it relates to the *claim* that Intel failed in its duty to not subject the plaintiff to the exposure, not because of Rule 37(e)(1)]. The court rejected the argument that Intel had a duty to create more measurements of the exposure, such as providing a fixed 24/7 system and personal monitoring devices. Accordingly, it denied a negative inference on that ground but held that it “does not preclude” the party from “presenting admissible evidence concerning Intel’s alleged failure” to collect data of hazardous emission levels. (*5) [Again, not because of Rule 37(e)(1), but because of the nature of the claims on the merits]. It also refused to bar Intel from presenting evidence that the measurement was the highest, and found the factfinder would be free to determine the significance, if any, of the failure to take additional measurements. Judge Campbell noted that since it is a bench trial, the court “finds no risk of unfair prejudice or confusion” to be involved by permitted Intel to present its evidence. (*5). Similarly, he declined to refuse references to health effects caused by H2S exposure for that reason and because it is relevant to the standard of care involved. (*11)

9. **Air Products v. Wiesemann** [2017 WL 758417] (D. Del. Feb. 27, 2017). A District Judge refused to sanction Air Products for the wiping of laptops belonging to former employees which came to light only after initial disclosures because the moving party named only one of them as a subject of search terms until after being notified that the wiping had occurred. The court also refused to sanction for lost emails which were available from another source, citing *CAT3 v. Black Lineage*. According to the court “[p]ure speculation is not enough” to find that relevant ESI was destroyed. The court noted that the party had “not met the threshold requirement under Fed. R. Civ. P. 37(e) of showing that ESI [on a server] was actually lost.” The court cited to Rule 37(e) and noted that sanctions are determined under “two different rubrics” depending on the type of evidence.
10. **Aix Insurance v. Terry** [2018 WL 9943825] (N.D. Ala. April 23, 2018). In a case involving failure to take reasonable steps to retain certain audio recordings (held by a brother who deleted them out of fear of being charged for wiretapping) relating to a fire claim, the court concluded that sanctions were available only under Rule 37(e)(1) since the prejudice is not great. “Ms. Terry will not be permitted to offer evidence that her version of events is corroborated by any recording made by her or by [her brother]” which were not produced to the insurance carrier. (*9).
11. **Alabama Aircraft Industries v. Boeing** [319 F.R.D 730] (N. D. Ala. March 9, 2017), *request for certification for interlocutory appeal denied*, 2017 WL 4572484 (N.D. Ala. April 3, 2017). A former subcontractor of Boeing in a dispute over failure of joint bidding arrangement convinced a court that ESI of an unknown nature was “intentionally destroyed by an affirmative act with has not been credibly explained.” (*15). Accordingly, without evidence of the missing contents and rejecting the possibility that it was available from other sources, the court stated that if the case goes to trial, the jury will be instructed that it may presume that

the lost information was unfavorable to Boeing. The court applied **Rule 37(e)(2)** and concluded that the “type of unexplained, blatantly irresponsible behavior leads the court to conclude that Boeing acted with the intent to deprive” the moving party of “the use” of the ESI in connection with the claims. The court also awarded reasonable attorney’s fees and costs to the movant in prosecuting the motion against Boeing, but not its counsel, without citing the authority for doing so.

12. **Al-Sabah v. Agbodjogbe** [2019 WL 4447235] (D. Md. Sept. 17, 2019). The court refused to issue any measures under Rule 37(b)(1) based on the deletion of the electronic copies of 4 photos of an executed agreement which existed in pdf and the lack of which did not prejudice the party. (*5) (citing *Victor Stanley v. Creative Pipe*, 269 F.R.D. 497, 522-23 (D. Md. 2010).
13. [State Case] **American Honda v. Thygesen** [2018 WL 830321, 2018 OK 14, __P3d __](S.Ct. Okla. Feb. 13, 2018). Applying the 2006 version of Rule 37(e), as adopted verbatim in Oklahoma, the Supreme Court ordered the lower court to not enforce a sanction for destruction of design ESI long before the auto accident suit was filed or foreseeable, since the deletion was “the result of the routine operation of Honda’s information-retention” stems. There was no indication it was operating the retention policy in bad faith. Quoting Steve Gensler it noted that this “safe harbor” did not protect a party who failed to implement a sufficient litigation hold once a lawsuit is filed or becomes likely and since there was no duty to preserve data for as long as one of the cars was on the road – antithetical to the design of the Oklahoma rule – and there was no “exceptional circumstance” – the lower court order was not authorized.
14. **Andra Group v. JDA Software** [2015 WL 12731762] (N.D. Tex. Dec. 9, 2015). The court refused to find that **Rule 37(e)** applied to non-party subject to subpoena even if there was a common law duty to preserve as to that party (*16).
15. **Ann Rivera v. Sam’s Club** [2018 WL 4705915] (D. Puerto Rico Sept. 28, 2018). In a tragic case where a defective swing on exhibit at a retail establishment led to the death of a customer, the court sanctions Wal-Mart - and lists the “track record” of Wal-Mart for having spoliation sanctions imposed on it for “strikingly similar circumstances” (*14) - for failure to preserve surveillance videos. Rule 37(e) is mentioned only in passing (n. 13) as part of rejecting the Wal-Mart argument that it is “inapplicable because that rule applies exclusively” to ESI. The court responds that it may use its inherent power as well, citing *Chambers v. NASCO*.
16. **A.O.A. v. Rennert** [2018 WL 11251827, at *3 (E.D. Miss. March 12, 2018)] Refusing sanctions under **Rule 37(e)** because “nothing before me indicates [that the] process of changing computer systems was unreasonable” and the evidence indicates that the failure to preserve was not an attempt to suppress the truth, and circumstantial evidence “demonstrating undue delay in responding to requests” is “insufficient to show intent to suppress relevant evidence,” citing *Hallmark Cards v. Murely*, 703 F.3d 456, 462 (8th Cir. 2013) as well as, at *2, *Applebaum v. Target Corp.*, 831 F.3d 740, 745 (6th Cir. 2016)(“a showing of negligence or even gross negligence will not do the trick”).
17. **Apex v. Chemworld** [2018 WL 4853500] (N.D. Ind. Oct. 5, 2018). In a rambling and disjointed opinion which disclaims reliance on **Rule 37(e)** because the court had earlier

disqualified an expert, the court orders a default judgment because it has “stepped back” and considered conduct as a whole in a case where over 400 docket entries deal with discovery disputes. Curiously, no citations to inherent authority is made; the authority asserted in under Rule 37(b), it concludes that a sanction of default judgment is appropriate and proportionate to the egregious nature of the Defendant’s conduct. (*13).

18. **Applebaum v. Target** [831 F.3d 740] (6th Cir. Aug. 2, 2016). Sixth Circuit affirmed refusal of trial court to instruct a jury that the failure to produce any repair history records warranted an adverse inference (2015 WL 13050013). The court had instructed the jury that if it found that the defendant had disposed of the bike and had not shown a reasonable excuse for doing so, it could infer that the brakes had not been repaired. The Sixth Circuit (Sutton, J.) found no error in refusing to give an additional adverse inference instruction as to records and noted that she had offered no evidence that some of the records even existed, much less that Target had control over them and destroyed them with a culpable state of mind. Moreover, **under amended Rule 37(e)**, to the extent she sought an adverse inference for spoliation of electronic information, the rule required her to show an intent to deprive her of its use, since “a showing of negligence or even gross negligence will not do the trick,” citing to the Committee Note.
19. **Arana v. Temple University** [776 Fed. Appx. 66, 2019 WL 2375181, at *2-3] (3rd Cir. June 5, 2019). The Third Circuit found that there was no basis for a presumption at summary judgment or at trial because the moving party had not shown that the party acted with the requisite intent to deprive under Rule 37(e)(2)(A) or (B).
20. **Aronstein v. Thompson Creek Metals** [2017 WL 1519390, at *2] (D. Colo. April 27, 2017). The court denied a motion under **Rule 37(e)** regarding alleged missing documents and ESI from a computer and shared drive because affidavits establish that all documents on laptop were transferred to another folder and have been maintained. The court also refused to allow an amendment to add tort claims for spoliation because of a failure to “plausibly allege that any evidence was spoiled in this case.”
21. **Arrowhead Capital Finance v. Seven Arts** [2016 WL 4991623, at *20] (S.D.N.Y. Sept. 16, 2016). In a complex cases involving attempts to enforce a judgment against a deadbeat party moving assets around to avoid it, the court in assessing egregious discovery conduct noted that a failure to move or copy ESI on server “could be seen as reckless,” citing the **Rule 37(e)** requirement that a party take reasonable steps to preserve discoverable electronic information.
22. **Auer v. City of Minot** 896 F.3d. 854 (8th Cir. July 19, 2018). The Circuit court noted that it was premature to consider a summary judgment motion before deciding if the allegations of spoliation were sufficient under **Rule 37(e)(2)**’s intent to deprive standard which was required because of the serious consequences of deciding a case on “hypothesized” evidence to “create a genuine dispute of material fact” on some of the claims. It described allegations “which would at most prove negligence” as insufficient to prove “intent to deprive” since it was not the sort of intentional bad-faith misconduct “required to grant an adverse presumption.” It conceded that intent could be proven indirectly and that a “smoking gun” was not necessary, but, citing *Morris v. Union Pacific*, 373 F.3d 896, 901-02 (8th Cir. 2004) held that the record in this case would not support a finding of intent to deprive.

23. **Bagley v. Yale** [318 F.R.D. 234 (D. Conn. Dec. 22, 2016). In a follow-up to its earlier decision [315 F.R.D. 131, 153] (D. Conn. June 14, 2016) ordering production of lists of individuals to whom litigation hold were delivered the court ordered production of the litigation hold notices (and survey results from recipients) over objections based on attorney client privilege and an inadequate predicate showing of possible spoliation. The court noted that they were issued in batches and implied that the delays in doing so might be deemed culpable “or even negligent” and noted that a District Judge has stated that the Second Circuit had “left open” the issue of “whether a sufficiently indefensible failure to issue a litigation hold could justify an adverse inference on its own.” (Citing to *Stimson v. City of New York*, 2016 WL 54684 at *6) (S.D.N.Y. Jan. 5, 2016). (241) The court also noted that amended **Rule 37(e)** provides that “an adverse inference is warranted only when the court finds that a spoliating party” had acted with the intent to deprive and the Advisory Committee Note rejects cases such as Residential Funding that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence. (237) Similarly, the court asserted that inherent power existed to impose sanctions from “two possible source.” (236).
24. **Ball v. George Washington** [2018 WL 4637008] (D.D.C. Sept. 27, 2018). Rule 37(e) was applied to loss of “surveillance footage [that] was recorded on network video recorders that automatically delete old footage as the recorders become full.” (*1) The court denied a spoliation motion under Rule 37(e) because, although a close call, it accepted the theory that the two videos missing were never downloaded and was overwritten - and the moving party did not argue that the duty to preserve attached before overwriting. (n. 2).
25. **BankDirect v. Capital Premium Financing** [2018 WL 1616725] (N.D. Ill. April 4, 2018). The Magistrate Judge in an aggressively worded R&R (subsequently joined another equally aggressive R&R re sanctions, 2018 WL 6694904 (N.D. Ill. Nov. 8, 2018); both pending before Judge Lee as of the date of the latter; recommended that the intent to deprive issue in a **Rule 37(e)(2)** context [only remedies sought] be resolved by a jury, citing *Cahill v. Dart*, 2016 WL 7034139, at *4 (N.D. Ill. 2016), and the Committee Note. As an alternative, it proposed use of a “permissive spoliation instruction” under which the jury would be “informed” of the destruction of the emails and told that they could consider the deletion in considering the claim and counterclaim. The Magistrate judge made repeated comments about the lack of credibility about the motivation for delayed failure to interrupt automatic deletions from an archive, but in dicta sought to completely exonerating outside counsel (Kirkland & Beck) from any role in the matter (“Lawyers only know what their clients tell them about historical facts.” (*7).
26. **Barbera v. Pearson Education** [906 F.3d. 621] (7th Cir. Oct. 12, 2018). A Panel of the Seventh Circuit found that there was no abuse of discretion in the district court declining to find under **Rule 37 (e)** that Pearson or anyone acting for it had “intended to deprive her of her of the emails.” The party had not identified nor had the district court found an evidence of bad faith or intent to deprive. (627) The Seventh Circuit panel found the “cure granted” under **Rule 37(e)(1)** – taking as true six proposed facts concerning the email exchange that was not preserved - was enough to cure the prejudice and that the movant “seems” to acknowledge the lower courts cured the prejudice by taking proposed stipulations as true. The district court was “not unreasonable in declining to find Pearson intended to deprive her of the emails, and,

even it if had, “relief was discretionary.” “The cure was enough” (628). Moreover, even accepting the version of the facts as true, they do not provide a reason to deny summary judgment. The facts “contains neither a fabled smoking gun, nor a shard of colored glass” nor any other reason to deny summary judgement. (628-31).

27. **Barcroft Media v. Coed Media** [2017 WL 4334138] (S.D.N.Y. Sept. 28, 2017). Measures are not available under Rule 37(e) where website screenshots were preserved and are in possession of plaintiff, who listed them as trial exhibits, since they are not “lost” and several remain on the websites and the party retains screen shots. The Motion for sanctions borders on frivolous and, moreover, there is no evidence they acted with intent to deprive or that any prejudice has occurred and the non-moving party does not deny the authenticity of the screenshots nor that they hosted them.
28. **Barnett v. Deere & Company** [2016 WL 4544052] (S.D. Miss. Aug. 31, 2016). In an initial spoliation decision in a product defects case involving lawn mower design, a court denied motion for sanctions because of lost documents and ESI because of destruction of electronic records was pursuant to retention policy as applicable under Circuit law and there was no showing that duty to preserve had attached at the time, since more than the mere possibility of litigation is required. The court did not apply **Rule 37(e)** because it was not timely raised by plaintiff and **because the Fifth Circuit “has not clarified” whether its prior spoliation jurisprudence has been abrogated or amended by the Rule.** The court noted that it would not have granted the motion even if **Rule 37(e)** had applied, but noted that at trial the party could cross-examine witnesses about the circumstances. Subsequently, the Court affirmed its position that the absence of a showing of bad faith barred sanctions where the destruction occurred “under a routine document retention policy,” and also noted that the requested sanctions “were greater than necessary to cure the [purported] prejudice,” **citing Rule 37(e)(1).** [2016 WL 6694827, at *3].
29. **Barry v. Big M Transportation** [2017 WL 3980549] (N.D. Ala. Sept. 11, 2017). The court refused to impose harsh measures on the owner of tractor-trailer or the driver under **Rule 37(e)(2)** for failure to preserve ECM data after an accident because it was “not convinced” that the party had acted “with the intent to deprive.” (*7) However, after examining the limited prejudice involved, it stated that “as an alternative sanction,” it was prepared to “tell the jury that the ECM data was not preserved” and allow the parties to present evidence and argument at trial regarding that failure. In doing so, it refused to “enter a default judgment” or to “enter an order judicially establishing the speed” at which the non-moving party was driving or describing the maneuvers made “in the light most favorable” to the moving party. (*7-8).
30. **Bartlett v. South Carolina Department of Corrections** [2020 WL 5627141] (Sept. 21, 2020). The District Judge adopted the recommendation of the Magistrate that the motion for sanctions under **Rule 37(e)** should be denied because the no specific prejudice was suffered by the loss of ESI nor was there “any reasonable basis” to find that the party acted with an intent to deprive it of the information’s use in the litigation.
31. **Belanus v. Dutton** [2017 WL 1102727] (D. Mont. March 23, 2017). In prisoner case seeking sanctions on multiple grounds, the court refused to enter an adverse interference under **Rule**

37(e)(2) because the moving party “cannot establish the intent to deprive” because a surveillance video was automatically overwritten before the defendants had notice of lawsuit and they were not provided with timely notice that preservation was requested.

32. **Bellamy v. Wal-Mart Stores** [2019 WL 3936992] (W.D. Texas Aug. 19, 2019). In a slip and fall case where Wal-Mart failed to take reasonable steps to preserve a surveillance video and that the failure resulted in prejudice, Judge Rodriguez found that the “appropriate curative measure” under **Rule 37(e)(1)** was to “disallow” the party from “asserting or arguing any comparative negligence” in this case (*6), including “arguing that the danger was open and obvious.” (*7) It also observed that “reasonable and proportionate preservation obligations” were required once Wal-Mart was on notice of the likelihood of litigation.
33. **Below v. Yokohama Tire** [2017 WL 764824] (W.D. Wisc. Feb. 27, 2017). A Plaintiff failed to preserve tires from the pickup truck in which he had been injured as well as possible electronic evidence “that must be preserved under Fed. R. Civ. P. Rule 37(e).” In ruling on a motion in *limine*, the court found that the failure to do so “falls somewhere between negligence and gross negligence, but perhaps short of bad faith or intentional conduct requiring an adverse inference instruction. It ordered, however, that plaintiffs could not argue that defendants had failed to explore or prove something if prevented from doing so by plaintiffs’ negligence in preserving evidence.” It reserved the right to address the issue further, including a request for a spoliation instruction.
34. **Benedict v. Hankook Tire** [2018 WL 738903, at *15 (E.D. Va. Feb. 6, 2018)]. A District Court made it clear that under Rule 37(e), however, it is the role of Rule 37(e) to provide the legal standards for the inferences to be drawn from missing evidence, and barred an expert from expressing his inferences. It held that he may discuss the absence of documents to the extent he is explaining he has received no information on the topic, but is not authorized to imply that the party should have kept the documents or would have done so had they adopted certain practices.
35. **Best Payphones v. City of New York** [2016 WL 792396] (E.D.N.Y., Feb. 26, 2016), *overruled in part* 2018 WL 3613020 (E.D. N.Y. July 27, 2017). In an action by provider of pay telephones challenging regulatory impact, the court refused to impose evidence preclusion or an adverse inference under Circuit law and **Rule 37(e)** for the negligent failure to retain and produce documents and emails. The court applied “separate legal analyses” but found that the failure to pursue the availability of evidence from third parties other sources negated any finding of prejudice and barred relief under both Circuit law and **Rule 37(e)**. (at *6) The court found that the party had not “acted unreasonably as is required” under **Rule 37(e)** given the flux in email preservation standards at the time. Attorney fees were initially awarded under **Rule 37(a)(5)(A)** by the Magistrate Judge, which appeared to also argue that it had inherent authority to award attorneys’ fees and costs to punish and deter egregious conduct. On appeal to the District Judge, the award was modified to be justified under **Rule 37(b)** because **Rule 37(a)(5)(A)** “was not applicable to Defendant’s spoliation motion.” (at *3).
36. **Bird v. Wells Fargo Bank** [2017 WL 1213425, at *7 (March 3, 2017)] A court granted “leave to file a motion for sanctions under [Rule 37(e)]” to the extent the defendant was

unable to restore or replace a terminated employee's email box. The court stepped in and ordered scope of discovery and timing after the parties had failed to do so despite active court guidance on the topic. In doing so, the Bank revealed that it had purged the plaintiff's email after her termination ("in accordance with its neutral practice") and could not say if the email files could be reconstructed.

37. **Bistran v. Levi** [448 F. Supp.3d 454] (E.D. Pa. March 24, 2020). In a long-running complex prisoner case, where the court found it "disturbing" that videotape from a hallway camera had been lost, the court refused to find "intent to deprive" in a **bench trial** under Rule 37(e)(2) because the "circumstantial evidence of intent here is relatively weak." (*12). However, "lesser sanctions" are appropriate upon a finding of prejudice to another party from the loss, which it defined as requiring a showing that it materially affected the substantial rights of the adverse party and requires the offering of "plausible, concrete suggestions" of what the missing evidence would have shown." (*12). The supporting footnotes states that prejudice is about the "actual, ultimate importance of the lost information to the case the non-spoiling party presented at trial." (n. 91). It existed here because it materially affect substantial rights and was critical to the questions of liability, which turned on whether the prisoner was properly searched before being put into the rec pen. (*13) The court listed the "range" of measure available under **Rule 37(e)(1)** as including permitting evidence and argument to the jury and "instructing the jury as to how to evaluate the loss of information, "among other things." In this case, since a bench trial, the court "will consider the video's destruction as one factor among many in making its ultimate decision, as the finder of fact, as to whether" an appropriate search had occurred." While the prejudice "cannot be fully remedied, the Court finds this **lesser sanction** appropriate under all the circumstances." (*13).
38. **Bland v. Sam's East** [2019 WL 407406] (M.D. Ga. Jan. 31, 2019). The failure to retain a video of an altercation with a supervisor and a written statement by a witness was sanctioned by an adverse inference under *Flury* factors because bad faith existed since both could "easily" been saved and the employee lost corroborating evidence of his testimony. The court stated it would instruct the jury that Sam's had a duty to preserve evidence and in considering it "you may conclude that the evidence would have been unfavorable to Sam's, but you are not required to do so." (*4) The court cited *Mt. Healthcare Servs.*, 881 F.3d. 1293, 1308 (11th Cir. 2018) as holding that the 11th Cir. "has not decided whether Rule 37(e) displaces the traditional sanctions analysis" but it would have found an adverse inference appropriate under Rule 37(e) for the same reasons. (n.2)
39. **Blasi v. United Debt Services** [2017 WL 680496] (S.D. Ohio Feb. 21, 2017), the court refused to enter a default judgment, despite evidence of intentional destruction of SI in violation of the Rule, in deference to additional discovery to see if some or all of the prejudice could be cured by lesser sanctions. The court spoke of violating obligations under the Federal Rules and it is unclear if it referred to Rule 37(e), Rule 37(b) or both.
40. **Blazer v. Gall** [2019 WL 3494785, at *5] (D. South Dakota Aug. 1, 2019) After finding an intent to deprive, the court decided to permit the jury to presume missing content was adverse

to parties under **Rule 37(e)** but allowed “reasonable rebuttal,” citing *Stevenson v. Union Pacific*, 354 F.3d 379, 750 (8th Cir. 2004).

41. **Blumenthal Distributing v. Herman Miller** [2016 WL 6609208] (C.D. Cal. July 12, 2016); . In a long and repetitive R&R [whose findings and recommendations were adopted by the District Judge at 2016 WL 6901696 (C.D. Cal. Sept. 2, 2016)], a Magistrate Judge recommended use of an adverse inference under Rule 37(b) with respect to the withholding or spoliation of evidence. It “additionally” recommended an award of monetary sanctions in the form of attorney’s fees and expenses under Rule 37(e) related to a forensic analysis and the taking of depositions to determine the “cause underlying” the inability to export emails from an EMC email archive as well as the lack of ESI produced, while noting that the rule was intended to foreclose reliance on inherent authority. However, the Magistrate Judge also noted that due to the “willful actions” that taken together “amount to more than gross negligence,” the monetary sanctions are “also available under the court’s inherent powers,” citing, *inter alia*, *Chambers*. The District Judge imposed the reasonable costs and attorney’s fees “for the reasons stated in the R&R” at “52-56.” However, in assessing the deletion of emails, the Magistrate Judge ignored the “intent to deprive” requirement and relied upon *Residential Funding* and *Zubulake* in recommending that the jury should be instructed to presume the missing emails were adverse because the party acted with a “conscious disregard” of its obligations, “but not necessarily deliberate intent.” The District Judge merely stated that it would include an adverse inference instruction at trial “[a]s proposed in the R&R at 49.
42. **BMG Rights Management v. Cox Communications** [199 F. Supp. 3d 958] (E.D. Va. August 8, 2016), *rev’d on different grds*, 881 F3d 293 (4th Cir 2018). The District Court described and justified the jury instruction it had utilized which gave what amounted to a permissive spoliation instruction and allowed the defendant to “identify” the spoliation issue in its opening stated. It held that the Magistrate Judge had made of finding of “spoliation” and of “intentionality” [apparently considering that equivalent to an “intent to deprive” under (e)(2)] but concluded that lesser remedies under (e)(1) sufficed “to redress the loss” citing the Committee Note as supporting permitting the party to present evidence and argument regarding the loss. The court gave an instruction alerting the jury to the “fact” of spoliation, identified the missing evidence and permitted the jury to consider the fact in their deliberations (*19), which served the [Silvestri list of] prophylactic, punitive, and remedial rationales underlying the spoliation doctrine. The District Court also held that the Magistrate Judge had properly rejected preclusion of evidence as the “equivalent of dismissal.”
43. **Boone v. Everett** [751 Fed. Appx. 400] (4th Cir. Feb. 7, 2019). After a jury verdict in favor of the defendant in an excessive force prison case, the Fourth Circuit affirmed the refusal to give sanctions for the overwriting of a video surveillance tape in a prisoner case because there was no evidence in the record that the defendant did not himself or anyone acting for him, take “any active steps to erase the video. (402). He testified in a deposition that he did not know the video would be erased and believed it had been preserved. The court permitted the defendant to testify what he saw on the video but instructed the jury that it “was not permitted” to draw any inference “for or against either party” from the fact that the video was not in evidence. (401) The Fourth Circuit noted in footnote 3 that it need not decide if amended

Rule 37(e), which came into effect while the case was pending in the district court governed, since the “district court did not abuse its discretion under either standard.”

44. **Borum v. Brentwood Village** [332 F.R.D. 38] (D.D.C. July 18, 2019). In a case where a community organizer who did not preserve emails did not do so because of an “intent to deprive” supportive of harsh measures, the court found it was foreclosed by **Rule 37(e)** from applying its inherent power since the rule was drafted towards providing clarity and uniformity in cases involving ESI. (*4). It also found that the party failed to take “reasonable steps” because it only gave an oral warning, at most, for two years before imposing a formal litigation hold. (*6) It decided to “cure” the prejudice caused by the expenditure of “additional time and effort” incurred in litigating the spoliation issue by imposing monetary sanctions in the form of attorneys’ fees and costs under **Rule 37(e)(1)**, citing *Karsch v. Blink Health*, 2019 WL 2708125, at *13 (S.D.N.Y. June 20, 2019). (*10). In 2020, the court awarded the fees and costs. 2020 WL 529182, at *2 (D.D.C. Sept. 4, 2020).
45. **Bouchard v. U.S. Tennis Association** [2017 WL 3868801] (S.D.N.Y. Sept. 5, 2017), adopting in its entirety, 2017 WL 10180425 (S.D.N.Y. Aug. 10, 2017). In dismissing a motion for sanctions under Rule 37(e), the court held that the absence of a use of a litigation hold was not dispositive where the party had “fully complied” with its preservation obligations in regard to the videotapes at issue, noting that the failure to adopt good preservation practices is only “one factor in the determination,” citing *Chin v. Port Auth. Of New York & New Jersey*, 658 F.3d 135, 162 (2nd Cir. 2012). The court found it “reasonable” that the party saved only the footage immediately outside the locker room where the slip and fall at the U.S. Open occurred, not the footage of the fitness center, simply because the footage “might” become relevant.
46. **Boudreau v. Shaw’s Supermarkets** [955 F.3d 225] (1st Cir. April 10, 2020). In reviewing the District courts denial of sanction under **Rule 37(e)(1)** for spoliation of video camera footage for a “permissive negative inference, both on summary judgment and before the jury” about the missing contents, the district court found it doubtful that there was any prejudice because at most it would have shown conduct that it was prepared to assume was consistent with other testimony, thus curing any prejudice. On review for abuse of discretion, the “court followed the guidance in the advisory committee notes for assessing prejudice and evaluated the missing video’s important to the litigation” and stated that summary judgment was appropriate, even if it had shown what the party contended, since the incidents at issue did not make the attack on the customer foreseeable, even if they had been observed by Shaw employees.
47. **Boudreau v. Smith** [2020 WL 1532277] (D. Conn. March 31, 2010). The court refused to find that wiping of text messages was done for the purpose of depriving the moving party of the messages, since it was done pursuant to a department wide instruction to wipe cell phones in preparation for migration to a new carrier. (*11). The court declined to impose a “lesser sanction” under Rule 37(e)(1) such as costs because while they might have been relevant, “it is not clear that they were, and so Boudreau was not clearly prejudiced by not having them. (*12).

48. **Brackett v. Stellar Recovery** [2016 WL 1321415] (E.D. Tenn. Feb. 24, 2016). The court refused to issue an adverse inference jury instruction regarding the contents of an audio recording after the party was able to find another copy, citing the fact that **Rule 37(e)** instructs a court to examine whether ESI is lost “*and it cannot be restored or replaced.*” (emphasis in original.) It also denied sanctions as to missing call logs because the defendant was not acting in bad faith when its third party routinely destroyed it (and the recording), nor was it prejudiced by the destruction.
49. **Brewer v. BNSF** [2018 WL 2047581] (D. Mont. May 2, 2018). The District Judge adopted the findings and recommendations of the Magistrate Judge (at 2018 WL 3079499 (Feb. 27, 2018)) that the failure to show how any ESI was lost and, even if it were, how it prejudiced him by preventing him from going to trial or interfering with the rightful outcome of the case. The court also noted that for the default sanction sought the failure to preserve must be intentional and requires more than gross negligence, which has not been shown. The court reserved the right “to impose a lesser sanction after evaluating how the parties present the evidence at trial.”
50. **Brewer v. Leprino Foods Company** [2019 WL 356657] (E.D. Cal. Jan. 29, 2019). A Senior District Judge found grounds to sanction a party whose text messages in a cell phone were lost when she left her Galaxy S3 on the hood of her car and drove away. The court found the “overwhelming objective evidence” suggested that she intentionally spoliated the evidence and acted with an intent to deprive under **Rule 37(e)(2)**. She failed to take any reasonable steps to preserve the messages prior to that time when she had a duty to do so and they could not be restored or replaced because she would not identify the persons with whom she texted nor remember the phone number of the phone itself. (*1)). The court awarded monetary damages in the form of fees and costs associated with the motion for sanction to be determined at the conclusion of the trial. It refused to dismiss the case but stated it might provide “an adverse inference instruction at trial regarding” the intentional spoliation of evidence. (In footnote 7, the court noted that the spoliation gives rise to the “best evidence rule” Fed. R. Evid. (FRE) 1002).
51. **Brittney Gobble Photography v. Sinclair Broadcast Group**, 2020 WL 1809191 (D. Md. April 9, 2020). Based on depositions, interrogatories and the submissions, but without an evidentiary hearing, a Magistrate Judge refused to find the routine deletion of emails to be subject to **Rule 37(e)(2)** measures because the moving party had not been shown by clear and convincing evidence or even by a preponderance of evidence that the other party had any reason to believe that relevant evidence existed on the emails or that the failure to institute a litigation hold was because the party “wanted its emails to be deleted” so the other party could not use them in the litigation. (*9) It also refused “lesser sanctions” under Rule 37(e)(1) because it had not “demonstrated that it could not obtain evidence from others on the topic, thus it had not shown “prejudice.” (*10). The court relied on *Simone v. VSL Pharm*, 2018 WL 1365848, at *7 (D. Md. March 16, 2018) and *Cognate BioServices v. Smith*, 2015 WL 5158732, at *8, *9 (D. Md. Aug. 31 2015)(prejudice would be largely cured if could obtain emails from another source).
52. [State Supreme Court] **Brookshire Brothers v. Aldridge** [57 Tex. Sup. Ct. J. 947, 438 S.W. 3d 9 (S.C. Tex. July 3, 2014)]. The Court reversed a verdict and remanded for a new trial

because of abuse of discretion in use of a jury instruction that permitted the jury to consider the missing video was unfavorable if it concluded that the party knew or should have known that the missing video held relevant evidence and its non-production was not satisfactorily explained. (at 28) (instruction reproduced at 16 and at n. 5 to dissent). The court held that the trial court, not the jury, must determine if a party spoliated evidence and determine the appropriate remedy. A party must “intentionally spoliates evidence in order for a spoliation instruction to constitute an appropriate remedy.” (23) It must also determine that “a lesser remedy would be insufficient to ameliorate the prejudice” before it is within discretion to submit an instruction. (25) Evidence of circumstances of spoliation is inadmissible to the extent that it is “unrelated to the merits but serves only to highlight the operator’s culpability” may be central to the trial court’s rulings, “it has no bearing on the issues to be resolved by the jury.” (26-27) The tendency of “such evidence to skew the focus of the trial from the merits” makes it inadmissible at trial. (26) However, parties may present “indirect evidence to attempt to prove the contents of missing evidence” that is relevant to a party’s claim (26) and “nonspeculative testimony relating to what the missing video would have shown, such as the testimony about the cleanup, was not problematic.” (28). Also, “some degree of questioning about the creation of the video was reasonably pursued as background for its introduction to the jury.” (28-29). The court mentioned the 2006 version of Rule 37(e) in the body of text, explaining that it had not been adopted in Texas (17) and noted that it is in the process of being amended, citing the May 2, 2014 Committee Report and the Allman summary of the approval by the Standing Committee. (n. 3). Federal Judge Xavier Rodriguez noted in *Brookshire Bros: Cleanup on Aisle 9. The Current Messy State of Spoliation Law*, 46 St. Mary’s L.J. 447, 478 (2015) that although the court “does not explicitly state” it was trying to mirror Proposed Rule 37, that “appears to be the attempt.” However, Judge Rodriguez notes that it “will not produce similar results, since the Committee Note to subdivision (e)(1) provides, in regard to negligent spoliation cases, that the juries “are allowed to hear evidence and argument” regarding the loss and may receive instructions other than (e)(2) instructions to assist in the evaluation of the evidence or argument. (citing the May 29-20, 2014 [sic] Report at 325 speaking of directives to weigh in calibrating a response).

53. **Brown v. Duke Energy** [2019 WL 1439402 (S.D. Ohio March 31, 2019)]. The court, citing **Rule 37(e)** granted a summary judgment on the merits of the employment claim despite allegations that destruction of IMs and Documents created an issue of material fact. (*5 & *8) It quoted from *Benefield v. MStreet*, 197 F.Supp. 3d 990, 1000 (M.D. Tenn. 2016) [quoting *Kronish*, 150 F.2d 112, 128 (2nd Cir. 1998) and *Byrnie*, 243 F.3d at 107] to the effect that while destruction of evidence is not enough to permit a party which has not produced evidence to survive a summary judgment, “an inference of spoliation, in common with some (not insubstantial) evidence” can allow plaintiff to survive summary judgment. The court found that the party had not proven the missing IMs were relevant and there was no “circumstantial evidence” which would suggest their contents. (*6). It also refused to draw a rebuttable presumption from the failure to retain document under 29 C.F.R. § 160214 because the documents were not relevant and, in any event, there was no showing the defendant acted with intent to deprive, as required under Rule 37(e)(2) and *Applebaum v. Target*, 831 F.3d 740, 745 (6th Cir. 2016) (*7-8).

54. **Brown Jordan v. Carmicle** [2016 WL 815827](S.D. Fla., March 2, 2016), *aff'd* 846 F3d 1167 (11th Cir. 2017). As part of a **bench trial** regarding termination of a former executive (which it upheld), the court also ruled on motions for sanctions which it had deferred to determine if the missing evidence had been crucial to the entity's case, applying **Rule 37(e)** (*35). The court found that the executive should have preserved ESI, that it was lost because of a failure to take reasonable steps and that it could not be restored or replaced. The court also found that since the executive had acted with intent to deprive it presumed "the lost information was unfavorable" despite also finding that "the missing evidence was not critical" to the moving parties "ability to prove their claims." (explaining, at n. 40, that it was making the presumption not because the evidence lost was insignificant, but because the remaining evidence in support "is overwhelming"). It also would have drawn inferences adverse to the executive under its inherent power, since "deliberate deletion and destruction of evidence and lack of candor" constitutes bad-faith litigation conduct even though the loss of ESI did not prejudice the entity. (*37). Separately, the court awarded judgment under CFAA the SCA and ordered payment of fees an award which was deemed to be non-dischargeable in bankruptcy. 2018 WL 3583054, at *10 (W.D. Ky. July 24, 2018).
55. **Bry v. City of Frontenac** [2015 WL 9275661] (E.D. Miss. Dec. 18, 2015). A failure to retain relevant dash camera data, even if it did exist, was not sanctionable because it would not have captured the issues and because of qualified police immunity since if deletion occurred, it was the result of following standard procedures. The court also stated that remedies under **Rule 37(e)** would not have been available since there was also no evidence of intent to deprive.
56. **Bruner v. American Honda** [2016 WL 2757401] (S.D. Ala. May 12, 2016). The court ordered a (belated) use of a litigation hold because "a party has a duty to preserve ESI if that party "reasonable anticipates litigation," **citing Rule 37(e)**.
57. **Builders Insulation of Tennessee v. Southern Energy Solution** [2019 WL 3779537, at n. 3] (W.D. Tenn. May 22, 2019). In a case denying an adverse inference under Rule 37(e) for a variety of reasons, including a lack of showing of "intent to deprive," given that at most the party acted negligently in converting from one email account to another after the duty to preserve arise, it was noted that "[c]ourts disagree as to whether an adverse inference [is] appropriate in a bench trial setting." The court also found that the emails had been restored and replaced and the moving party had not provided sufficient evidence that there was more emails than what had been produced. (*7).
58. **Bush v. Bowling** [2020 WL 5423986, at *7] (N.D. Okla. Sept. 10, 2020). In a case involving lost surveillance video of a County Jail book area, the court acknowledged the "somewhat limited probative value" of the missing video, but since she was deprived of "video relevant to her claims," she had satisfied her burden to establish she was prejudiced. It awarded attorney's fees pursuant to Rule 37(e)(1) and reserved for later determination the sanctions that are "sufficient, but no greater than necessary, to cure the prejudice." The party requested a mandatory adverse inference instruction that the destroyed images were damaging to the position at trial and other relief. The court noted that government defendants should reasonably anticipate litigation when a person dies while in government custody. It appeared that the video was automatically "written over" and cannot be restored or replaced. The

plaintiff did not satisfy the burden of showing the parties had acted with the intent to deprive her of the video in the litigation.

59. **Butzer v. Corecivic** [2018 WL 7144285] (M.D. Fla. Sept. 12, 2018). In a failure to preserve surveillance video in a privately run prison case, the court acknowledged that the corporate policies required reviewing of tapes and retaining them and that **Rule 37(e)** applied to losses of ESI “like the video at issue here.” It refused to strike the defendants pleadings or enter a default judgment and a “mandatory adverse inference instruction at trial.” (*1). The court acknowledged that under *ML Healthcare*, 881 F.3d 1293 (11th Cir. 2018) it was not yet clear if the multi-factor *Flury* test was still applicable, under which bad faith was required for an adverse inference instruction. (*2). However, there was neither bad faith nor an intent to deprive since **the party did not take any affirmative steps to “destroy, rather it was overwritten automatically” by the system “in the normal course of operations** “which is not sufficient either because negligence is not sufficient for intent to deprive (*Wooden v. Barringer*, 2017 WL 5140518, at *10 (N.D. Fla. 2017) or because spoliation is lacking if documents are destroyed as part of regular business practices and a party “is unaware of their potential relevance to litigation.” (*Wilson v. Wal-Mart*, 2008 WL 4642596, at *2 (M.D. Fla. 2008) (*3) The court distinguished a Tennessee case decided under Sixth Circuit law “which has a different standard for spoliation than the Eleventh Circuit.” (n. 4)
60. **Cahill v. Dart** [2016 WL 7034139] (N.D. Ill. Dec. 2, 2016). Acting after a de novo review of a Magistrate Judge’s Report (2016 WL 7093434 [which ignored Rule 37(e) but relied on Rule 37(c) as statutory authority to sanction]), the District Judge adopted a modified version of the R&R. It noted that it could have decided if an “intent to deprive” existed, but decided that it was best under the circumstances that the jury should make the decision as to whether prison officials had intentionally allowed a crucial party of a videotape segment to be overwritten in violation of **Rule 37(e)(2)** requirements (a “close call”), since it was also an element of a malicious prosecution claim. It also decided that in light of the substantial prejudice involved, the jury should be informed that the missing portions of the video were because the defendants had failed to fulfill their duty to preserve. (at *4). (The Magistrate Judge had recommended, and the District Court agreed, that a witness that had observed the missing video segment could not testify as to its content). The District Judge also noted that if the moving party argued that the actions were intentional destruction and the jury agreed, the jury would be instructed that it must presume that the lost evidence would have been unfavorable to the prison authorities in light of the prejudice involved. (The court quoted (n.3) the Committee Note to **Rule 37(e)** as to how the jury should be instructed if permitted to make the finding of intent). The moving party had sought fees before the Magistrate Judge but the judge did not address the request, as noted by the District Judge without further action.
61. **Cameron v. Arab City Board** [2018 WL 4615850] (N.D. Ala. Sept. 26, 2018). Court refused to sanction Board of Education under **Rule 37(e)** – and perhaps inherent authority - by denying motion for summary judgment otherwise available for alleged spoliation of video and audio evidence when the it was not shown that relevant video or audio ever existed or that the Board had control of it.

62. **Capricorn Management Systems v. Government Employees Insurance**, [2020 WL 1242616 (E.D.N.Y. March 16, 2020), adopting report and recommendation at [2019 WL 5694256] (E.D. N.Y. July 22, 2019)] (“in toto”). In a lucid, well-written opinion, a Magistrate Judge had concluded that a party had failed to take reasonable steps by not putting litigation hold in place until three years after the litigation was contemplated and two years after the action commenced. [2020 WL 1242616 at * 7.] The Magistrate Judge had also refused to conclude that ESI which had been erased or failed to preserve was unfavorable when deciding a summary judgment because although the party had acted with intent to deprive, it declined to do so because the information was “relatively unimportant,” citing the Committee Note. Moreover, although Rule 37(e)(1) permits other sanctions than an adverse inference, and the conduct was “far from model preservation of ESI,” the party had failed to show how they were prejudiced by the loss. (*12). The Magistrate Judge had relied heavily on *Lokai Holdings v. Twin Tiger*, 2018 WL 151055 (S.D.N.Y. Mar. 12, 2018) for reasonable steps and on *Ungar*, 329 F.R.D. 8 (E.D.N.Y.) Nov. 2, 2018) and *Zubulake*, 229 F.R.D. 422 (S.D.N.Y. 2004) for prejudice and litigation holds. The District Judge, citing no authorities, rejected all objections to the part of the R&R addressing the motion for sanctions.
63. **Carpenter v. All American Games** [2017 WL 4517081, at n. 4] (D. Ariz. Oct. 10, 2017)(Campbell, J.). The court found that a party had not shown he was entitled to an adverse inference instruction for failing to preserve the ability to access the contents of a website because the party “failed to address [Rule 37(e)] controlling law.”
64. **CAT3 v. Black Lineage** [164 F.Supp.3d 488](S.D. N.Y. Jan. 12, 2016)(Francis, M.J.)[*Case dismissed & Motion withdrawn with prejudice, each party to bear their own costs and attorneys fees*, 2016 WL 1584011]. Given the failure to take reasonable steps and the inability to restore challenged ESI, Plaintiffs were precluded **under Rule 37(e)(1)** from relying on their altered version of lost email which caused legal prejudice by “obfuscate[ing]” the record by placing authenticity of both original and subsequently produced email at issue. Attorneys’ fees were also awarded because of the economic prejudice of “ferreting out” the malfeasance and seeking relief. The measures were “no more severe than necessary” under **(e)(1)** to cure prejudice. While **Rule 37 (e)(2)** also applied because the party “acted with intent to deprive,” drastic measures are not mandatory under **(e)(2)** or inherent powers. If Rule 37(e) had been inapplicable, the court could have imposed sanctions because of “bad faith” conduct pursuant to inherent power. The court also described the rule as more lenient with respect to sanctions and found it just and practicable to apply it. It suggested, further, that clear and convincing evidence standard should be applied to ascertaining if “intent to deprive” exists. (498)
65. **Charleston Capital Advisors v. Acero Junction**, 18-CV-4437 (JGK)(BCM), 2020 WL 5849096 (S.D.N.Y. Sept. 30, 2020). The court was highly critical of the initial efforts to implement a litigation hold and concluded the party had failed to take reasonable steps, noting the tandard was “roughly a negligence standard” and that once the duty to preserve attaches, any destruction is, at a minimum, negligent,” citing *Zubulake*. (*11) The court refused to find the emails had been restored or replaced because “gaps” remained after production was made from the ipad of the former employee at the heart of the case and there was no “assurance” that all the meaningful emails had been secured, given confusion over the de-duplication efforts managed by counsel. (*13). The loss was prejudicial because it could have resolved

significant factual disputes. (*14) Also, prejudice resulted from being required to expend time and money to discover the truth. (*15) However, “intent to deprive” was not shown by clear and convincing evidence. (*15) The court awarded attorney’s fees (said to be authorized in addition “to any other sanctions expressly contemplated” by Rule 37(e)) (*10) and offered to consider apportioning the monetary sanctions with outside counsel, if sought. (ftn. 19). It precluded the party from contesting the authenticity of key emails and permitted the party to “present evidence to the trier of fact at trial regarding the loss” of the ESI and – in the event the case is tried to the jury – “to seek an appropriate jury instruction, at the discretion of the trial judge, allowing the jury to consider that loss of that evidence, and the circumstances of its loss, in evaluating witness credibility and otherwise making its deliberations.” (*2 & *17). It held that “sanctions of this nature ensure that the finder of fact will have the full context for the evidentiary imbalance that will become apparent at trial,” which it found to be relevant evidence going to credibility and other issues, citing *Karsch*, 2019 WL 2708125, at *27.

66. **Chi Nguyen v. Costco Warehouse Corp.** [2020 WL 413898] (S.D. Fla. Jan. 27, 2020). The Court denied a motion for sanctions for failure to preserve a surveillance video under Rule 37(e) because the court determined the movant failed to demonstrate the retailer had failed to take reasonable steps to preserve video that “would not have captured the alleged slip-and-fall.” (*3). The party had no duty to preserve the allegedly spoliated video for almost two years without any indication from the party that they intended to pursue litigation against Costco.
67. **Christoffersen v. Malhi** [2017 WL 2653055] (D. Ariz. June 20, 2017). The court, perhaps failing to understand that **Rule 37(e)** had been amended, applied Rule 37(e) in a case involving the destruction of documents relating to a trucking business after a duty to preserve attached by citing Judge Campbell’s opinion in *Surowiec v. Capital Title Agency*, 790 F. Supp.2d 997, 1005 (D. Ariz. 2011). The cited pagination does not support the conclusion in *Christoffersen* that Rule 37(e) has been applied to all records, not just electronic records. *Surowiec* is a much cited case for, among other holdings, its statement that the failure to implement a litigation hold is an important factor in determining culpability, “but not per evidence of culpable conduct giving rise to a presumption of relevance and prejudice.” (noting disagreement with *Pension Comm. v. Banc of Amer. Sec.*, 685 F. Supp.2d 456, 465 (S.D. N.Y. 2010).
68. **Cignex Datamatics v. Lam Research** [2019 WL 1118099] (D. Del. March 11, 2019). In a breach of contract action, a party sought sanctions for failures to preserve emails of former employees that had worked on the project when they left employment, when they stopped paying (optional) for future storage. The court refused to strike and dismiss claims or give a “adverse-inference” because, although the party failed to take reasonable steps to preserve, there the lost emails could not be restored or replaced, there are no facts supporting a finding of intent to deprive, leaving only **Rule 37(e)(1)** measures. The court acknowledged that the Rule does not put the burden of proof on either party, “rather the court is to use its discretion to assess whether prejudice exists for the loss of ESI (including which party should bear the burden” citing the Committee Note. (*4). However, the court did not find that there was sufficient evidence of prejudice, including an evaluation of the information’s importance in the litigation, citing *Monolithic Power*. The suggestion as to the potential contents of the lost emails “appears to be speculation.” (*5). Moreover, even if the analysis were to proceed

under inherent authority, the court would decline to impose sanctions because Third Circuit law requires a showing of bad faith, and there has been no showing that the failure to preserve was willful, intentional or otherwise done in bad faith. (*5). **In footnote 6, the court said there appears to be a question about whether the court may deviate from Rule 37(e).** While the Committee Note states that the Rule **forecloses** reliance on inherent authority, the Supreme Court in *Chambers* said it can be invoked even if “**procedural rules exist** which sanction the same conduct.”

69. **Citibank v. Super Sayin’ Publishing** [2017 WL 946348](S.D.N.Y. March 1, 2017). A District Judge affirmed a prior ruling by the Magistrate Judge [2017 WL 462601] (S.D.N.Y. Jan. 17, 2017) under Rule 72(a) and held that it was just and practicable to apply **Rule 37(e)** in a case where the conduct relevant to the motion took place two years before the rule took effect, citing *CAT3 v. Black Lineage*, 164 F. Supp. 3d 488, 495-96 (S.D.N.Y. 2016). The Magistrate Judge refused to apply **Rule 37(e)** or exercise its inherent authority over a motion seeking ‘monetary and evidentiary sanctions’ on both procedural and “substantive” grounds, since the motion did not discuss prejudice and also failed to discuss or show the defendants acted with an “intent to deprive” and failed to establish Rule 37(e) prerequisites. The Magistrate Judge also noted that imposition of sanctions under a court’s inherent powers requires a bad faith finding [citing to *Wolters Kluwer Fin. Srev. V. Scivantage*, 564 F.3d 110, 114 (2nd Cir. 2009)] and that the adverse inference standard announced in *Residential Funding* had been interpreted as overruled in several lower court opinions and that the Second Circuit in *Mazzei v. The Money Store* had stated that the principle had been “superseded in part.”
70. **Clientron Corp. v. Devon IT** [894 F.3d. 568] (3rd Cir. July 5, 2018). The court vacated a judgment in favor of a party in a breach of contract action and remanded it to the court to impose a new discovery sanction under Rule 37 to address the prejudice suffered by Clientron. (582-83) It noted that an adverse inference and/or the preclusion of evidence “are potential options.” It noted generally that by allowing “the consideration of the discovery misconduct within the merits analysis, such measures would ensure that the requisite nexus existed between the sanction imposed and the particular claims at issue.” (583). The court cautioned that its preference was to avoid use of inherent authority when Rule 37 provides an “adequate basis” for sanctions (n.4) and acknowledging that “**Rule 37(e)** is of potential relevance in this case.” (n. 5).
71. **Citrix Systems v. Workspot** [2020 WL 5884970] (D. Del. Sept. 25, 2020). In a complex and confusing opinion, the court determined that the moving party had failed to meet its burden that discoverable evidence was lost, causing prejudice and that the party acted with intent to deprive, thus refusing to find that spoliation measures were available under Rule 37(e) or the courts inherent authority.
72. **Coale v. Metro-North Railroad** [2016 WL 1441790] (D. Conn. April 11, 2016). In an FELA case involving the impact of missing substances in a slip and fall case, the court noted that **Rule 37(e)** applies only to ESI and does not impact the court’s inherent sanctioning authority when spoliation of tangible evidence is at issue. Accordingly, the court applied *Residential Funding* in a case involving loss of substances. While a “self-imposed obligation to preserve evidence” for internal purposes does not create an automatic duty to preserve that evidence for

litigation, the court concluded that it was on notice that it that the fruits of its investigation may be relevant to future litigation and should have been preserved.

73. **Coan v. Dunne** [602 R.R. 429, D. Conn. April 16, 2019). The Court refused to give a “mandatory adverse inference instruction” [citing *Mali v. Fed. Insur.* 720 F.3d 387, 393 (2nd Cir. 2013) for the distinction between a mandatory and permissive instruction] which would preclude the debtor and other defendants from refuting certain facts about transfers made in order to defraud creditors because it could not find an intent to deprive. (440) Such an inference would “effectively direct judgment” in the Trustees favor and “exact a crushing penalty” which was disproportionate. (442) It nonetheless concluded that the party was “entitled to the benefit of a permissive adverse inference instruction at trial.” However, at trial, “if the Trustee chooses to present evidence at trial” concerning the failure to preserve, the court would be prepared to instruct the jury that the party was under an obligation to have preserved the emails and “if the jury concludes on the basis of all the trial evidence and testimony” that it with an intent to deprive, then the “jury may conclude that this intent is evidence of his intent to defraud with respect to the transactions at issue in this litigation.” (442) (citing the Committee Note regarding use of the jury in regard to (e)(2)) to intent finding and jury conclusion and also citing *Mali* 720 F.3d at 391-93)(affirming permissive adverse inference instruction) and *Cahill v. Dart*, 2016 WL 7034139, at *4 (N.D. Ill. 2016)(“jury may determine inference to be drawn from lost law enforcement video to evaluate malicious prosecution claim) and *Cahill v. Dart*, 2016 WL 7034139, at *4 (N.D. Ill. 2016).
74. **Cohn v. Guaranteed Rate** [318 F.R.D. 350] (N.D. Ill. Dec. 8, 2016). In an action against former employees now in competition, the court described **Rule 37(e)** as describing “some” of the remedies available if ESI is destroyed, and noted that a court also has “broad, inherent power to imposed sanctions” which are “over and above the provisions of the Federal Rules.” (353-54). The court then proceeded to analyze and resolve the spoliation motion entirely relying on pre-rule decisions **without again mentioning Rule 37(e)**. It did not analyze whether “reasonable steps” and implies that it was irrelevant that the missing emails were recovered from other parties. The court found “bad faith” conduct intended to hide adverse information thus implying that the information would have been unfavorable but refused an adverse inference since additional discovery might obviate the need to do so.
75. **Colonies Partners v. County of San Bernardino** [2020 WL 1496444] (C.D. Cal. Feb. 27, 2020). The court recommended ordering an adverse jury instruction that it may presume that the information in the lost text messages deleted from a personal phone and emails from an email account were “unfavorable” to defendants, and awarding attorney’s fees because they were prejudice by the spoliation. (*13) The court cited **Rule 37(e)(2)** and spoke of inferring “bad intent” from the parties actions. (*12). It cited **Rule 37(e)(1)** as permitting a court to award “costs and fees” association with spoliation as a sanction given a finding of prejudice, citing *Spencer*, 2018 WL 839862, at *1-2). (*12). The court noted in footnote 2 that some district courts in the Central District used inherent authority despite *Newberry v. County of San Bernardino* and provided a substantial collection of cases before noting that “because” it was relying on the authority exclusively under Rule 37, “this order will not address the possibility of relying on the court’s inherent authority.”

76. **Connor v. Rubin-Asch** [793 Fed. Appx. 427] (7th Cir. Nov. 4, 2019). The Seventh Circuit affirmed the denial of sanctions in a prisoner case under **Rule 37(e)** where there was no evidence of bad faith “like destroying evidence to hide adverse information” which is a prerequisite to imposing sanctions for missing video, thus he could not “rebut the defendant’s attestations that the video was written over (pursuant to normal practices) without first have been downloaded and saved.” At most, the party “points to negligence, not bad faith.” (*3) The court cited *Trask-Morton v. Motel 6*, 534 F.3d 672, 681 (7th Cir. 2008).
77. [STATE case] **Cook v. Tarbert Logging** [190 Wash. App. 448, 360 P.3d 855] (C.A. Wash. Oct. 1, 2015). In state court action discussing nature of the duty to preserve, Court of Appeals cited to then-proposed **Rule 37(e)** as transmitted to Congress by the Supreme Court [Proposed Amendments to the FRCP, 305 F.R.D. 457, 467-468 (2015)] to illustrate its point that by acknowledging a federal common law duty, in contrast to state courts, “[t]he federal courts have been able to avoid dealing with state substantive law in making spoliation rulings in diversity cases by viewing such rulings as evidentiary in nature and thereby not subject to the Erie doctrine.”
78. [STATE Case] **Cooper Tire & Rubber v. Koch** [__S.E.2d __, 2018 WL 1323994] (S.Ct. Ga. March 15, 2018). The Supreme Court of Georgia affirmed by certiorari that the lower courts had appropriately applied a “reasonable foreseeable” test for the duty to preserve, as measured by both actual and constructive knowledge that litigation was forthcoming. In passing, it noted that the loss of the auto and three of the four tires involved was of equal importance to both the plaintiff and the defendant, which “is why fact-finders should not readily presume that lost evidence was favorable to the opposing party absent a showing that the evidence lost intentionally to deprive the other party of its use in litigation.” [citing the 2015 Committee Note to Rule 37(e)](ftn. 6). It also noted that in cases involving “extensive amounts of ESI” that the steps a party reasonably should take to preserve “may be difficult and disputed issues.” (ftn. 5.)
79. **Core Laboratories v. Spectrum Tracer Services** [2016 WL 879324] (W.D. Okla. March 7, 2016). In action for damages from appropriation of trade secrets, the failure to preserve emails at the time of switching to a new email service was said to have caused “prejudice” under **Rule 37(e)(1)** because it deprived the party of all information about certain issues in those emails. However, the court ordered an adverse inference jury instruction that the lost email would have been unfavorable without also finding an “intent to deprive.” The court selectively quoted from *Turner v. Public Service*, 563 F.3d 1136, 1149) (10th Cir. 2009) implying that a showing of prejudice is the only factor that is relevant to entitlement of “spoliation sanctions.” The opinion is ambiguous as to whether or not reasonable steps were taken.
80. **Courser v. Michigan House of Representatives** [__Fed. Appx __, 2020 WL 5909505, at *20 (6th Cir. Oct. 6, 2020). The court held that the lower court [404 F. Supp.3d 1125] did not abuse its discretion in denying a Rule 37(e) motion for sanctions since Courser had failed to explain on appeal how the deleted messages or modified/deleted/inaccessible files “would have helped him.” This led the Circuit court to conclude the information was “unimportant” and he thus failed to “prove prejudice” **as to subdivision (e)(1)**. As to **(e)(2)**, he had not shown

the parties had the intent to deprive him of the information's use and under Applebaum, a showing of negligence or even gross negligence will not do the trick (831 F. 3d 740, 745 (6th Cir. 2016)). It noted that the district court had ruled that nothing in the record indicates that the House Defendants intended to deprive him of information relating to the litigation, nor did he explained to the Circuit court how the court below was wrong to conclude that or how the individual defendants intended to deprive him of any of the information. (*20)

81. **Cox v Swift Transportation** [2019 WL 3573668] (N.D. Okla. Aug. 6, 2019). In a suit between parties to a truck accident, the court refused to sanction the loss of ESI where "non-retention decisions" could be "deemed questionable or negligent," there was no indication that the party acted with intent to deprive the other of the EC[<] or Qualcomm messages "or otherwise engaged in bad-faith conduct." (*3) Since only an adverse inference was sought, the court did no more than deny the requires for the severe sanction of dismissal. The court also refused an adverse inference sought against the plaintiff for the failure to preserve ECM data "or the Logs," which it conceded, in footnote 12 "are not ESI and are governed by general Tenth Circuit law on spoliation, rather than Rule 37(e).
82. **Coyne v. Los Alamos National Security** [2017 U.S. Dist. LEXIS 65758] (D. N.M., May. 21, 2017). Dismissal of case affirmed after de novo review of Magistrate order under Rule 37(e)(2)(c) because the evidence showed that she "willfully" deleted text messages prior to turning an iphone over for forensic imaging. The plaintiff had agreed to the forensic examination, but after an examination of a forensic copy, the examiner found the iphone had been erased and reset shortly before shipment of the phone for examination. The plaintiff "vehemently" denied the assertion but the court found evidence calling into question the veracity of the arguments made.
83. **Coward v. Forestar Realty** [2017 WL 8948347] (N.D. Ga. Nov. 30, 2017). Court sanctioned a party which produced hard drive for storing images of flooded property without a password, claiming they had forgotten it. The court applied Rule 37(e) and found that they had failed to take reasonable steps to preserve, that the loss was prejudicial because the non-moving party failed to prove that it was not, citing *Ala. Aircraft v. Boeing*, 319 F.R.D. 730, 742 (N.D. Ala. 2017) that the burden is on spoliator) (*8). It stated it would allow introduction of the spoliation and argument concerning the effect of the loss, but refused to find that the movant showed the party "acted in bad faith or with intent to deprive." (*9). The court ignored the duty to restore or replace, and in footnote 5 cited Rule 34(b) as requiring production in a usual form and also *D'Onofrio* for the proposing that the party had the duty to restore it to a useable form if software needed to be used.
84. **Creative Movement v. Pure Performance** [2017 WL 4998649] (N.D. Ga. July 24, 2017). In this classic application of Rule 37(e), a court refused to find that the errors of a forensic IT contractor in carrying out transfers of ESI constituted spoliation under the Rule because there was no showing that "either Defendants or their counsel acted" with an "intent to deprive" merely that there was "confusion and ineptitude" (*15). In addition, there was a failure to demonstrate anything other than "a minimal amount of prejudice, if any." Although the party may "never know" what information is missing, it failed to demonstrate how this would affect the remaining claims. (*16). The District Judge did a superb job of succinctly summarizing

the text and Committee Notes (*13-15). In addition, the court refused to find that the moving party had demonstrated by clear and convincing evidence that the party and its counsel acted in contempt of the scheduling order which required the production of digital devices and login information because, among other reasons, it would appear that they were produced. (*17). The court reviewed and refused to dismiss a count dealing with a CFAA claim based on damages (“loss”) caused by access to a website by the former licensee which required restoring a server backup, citing *Brown Jordan*, 846 F.3d 1167 (11th Cir. 2017). (*4).

85. **Crow v. Cosmo Specialty Fiber** [2017 WL 1128505] (W.D. Wash. March 24, 2017). In an action regarding injuries due to exposure from a release of hazardous fume or gas, a court refused to sanction the failure to produce an email under **Rule 37(e)** which was later produced after a more careful search indicated it had not been lost or destroyed. The court quoted that Committee Note to the effect that the rule applies only when the ESI is “lost.” There was “meager prejudice” resulting from the delayed production. The moving party conducted depositions which inquired about the topic and there was no showing that the delayed receipt of the email barred questions or that the outcome of the motion would have been different given other evidence independent of the email. The court also denied the motion under its inherent authority “notwithstanding” that the Rule may “limit the court’s otherwise broad authority to govern discovery.” The court noted that “[r]ather than litigating discovery minutiae,” the parties should submit fact issues to the trier of fact.
86. **Cruz v. G-Star** [2019 WL 4805765, (S.D.N.Y. Sept. 30, 2019)]. A District Judge adopted and approved a Magistrate Judge’s conclusion [at 2019 WL 2521299 (S.D.N.Y. June 9, 2019)] that a party had failed to take reasonable steps to preserve the SAP account at issue, but refused to find an intent to deprive because the record “does not demonstrate that Defendants acted with a culpable state of mind.” (*14)(see also n. 7). It remanded the matter for a determination as to whether prejudice existed and, if so, what remedies were appropriate under Rule 37(e)(1). (*15) The District Judge quoted with approval from the Magistrate Judge’s opinion the *Zubulake* mantra that “once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent” in finding a failure to take reasonable steps. (*11). The Magistrate Judge had found a failure to take reasonable steps due to the prominent failures of both outside and inside counsel to institute and follow up on litigation holds and the delay in informing the other party and the court about it. [2019 WL 2521299 (S.D.N.Y. June 19, 2019)]. The District Court found the defense counsel’s conduct to be “troubling” because of the delay in disclosing deletions to the court or counsel. It noted that “once counsel discovered that relevant information had been destroyed, disclosure should have been made immediately.” (n. 7).
87. **CTB v. Hog Slat** [2016 WL 1244998] (E.D. N.C. March 23, 2016). In a trademark infringement case by a manufacturer of poultry feeding machines claiming to apply the 2015 Amendments (n. 3) [but, in fact, not mentioning Rule 37(e) and referring only to case law based on Circuit authority], an adverse inference instruction was recommended solely because of a delayed use of a litigation hold in violation of an internal preservation policy prevented the retention of data from use of Survey Monkey. The court held this was “willful” destruction because of the “manifest relevance of the evidence and the applicability of the duty to preserve.” (*13-14). The court defined willful conduct as not requiring proof of bad faith, which requires proof of “destruction for the purpose of depriving the adversary of the

evidence.” (*9) The Magistrate Judge proposed that the trial judge instruct the jury that the CTB had deleted data from its 2013 survey that was adverse to the stated conclusion that the trade dress had acquired distinctiveness and secondary meaning.

88. **CTC Global v. Jason Huang** [2019 WL 6357271] (C.D. Cal. July 3, 2019). In a termination dispute involving work in China and potential misuse of patents, the court decided to “counter the prejudicial effects” of spoliation of various devices by issuing an adverse inference instruction under the authority of Rule 37(e)(B) and inherent authority which “will inform the jury of Defendants’ destruction of USB drives and [a PC} and instruct them that they may presume the data Defendants destroyed was unfavorable to Defendants.” Before trial, the Plaintiff may present further argument about the instruction and related details.
89. **Culhane v. Wal-Mart** [364 F. Supp. 3d 768] (E.D. Mich. Jan. 10, 2019). The Magistrate Judge issued a mandatory adverse inference instruction having found an intent to deprive under **Rule 37(e)(2)** to exist where a Wal-Mart employee had saved only the interior, not both the interior and exterior, video of an incident where a garage-type door was lowered on to the head of the plaintiff. No mention was taken of failure to take reasonable steps or not; the court simply concluded that since the defendant “knew or should have known to save the exterior video footage and for whatever reason(s) did not do so, which permitted it to be ‘overwritten’” it was permitted to infer “an intent to deprive from defendants’ actions in this matter” (*5) (citing *Moody v. CSX Transportation*, 271 F. Supp.3d 410, 431 (W.D.N.Y. 2017)).
90. **DiStefano v. Law Offices** [2017 WL 1968278] (E.D. N.Y. May 11, 2017). Court refused to find that Rule 37(e) applied since the conduct involved and an evidentiary hearing on the matter preceded the effective date of the Rule, relying on *CAT3 v. Black Lineage*, 164 F. Supp. 488 ((SDNY 2016) and 2015 US Order 0017, 28 USC § 2074(a). Applying the “benchmark three-part test set forth in *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107-112 (2nd Cir. 2001),” the court found insufficient culpability or prejudice to justify issuance of an adverse inference instruction but stated that it would nonetheless allow the movant to “explore” the issue at trial and awarded attorney’s fees. (*27). The single-practitioner defendant had relied on printouts of key documents, and had produced large volumes of them, and the moving party did not establish the lack of ESI, some of which was available elsewhere, had prejudiced the ability to present the case. However, after concluding that the non-moving party “believed her actions were reasonable and not negligent at the time she undertook them,” (*19), the court nonetheless concluded the actions to be somewhere between negligence and gross negligence, citing Pension Committee for the observation that the fact that she had acted in good faith did not mean the Second Circuit test of culpability was not satisfied. (*21).
91. **Dotson v. Edmonson** [2018 WL 501511 (E.D. La. Jan. 22, 2018)]. In a case **applying Rule 37(e)**, the court refused to impose an adverse inference (it was not technically available as to the individual trooper, a non-party) but intended to permit the moving party would be allowed to elicit testimony “regarding the [missing] cell phone records and text messages” and could question witnesses regard record preservation polices, “as such testimony is relevant and its relevance is not outweighed by the risk of undue prejudice.” (*3).

92. **Drivetime Car Sales v. Pettigrew** [2019 WL 1746730 (S.D. Ohio April 18, 2019)]. The court refused to issue a “mandatory adverse inference” in regard to missing text messages because the movant did not demonstrate that the party had acted with the requisite intent to deprive, quoting Rule 37(e)(2) and the Committee Note, citing *Culhane v. Wal-Mart*, *Moody*, *Jenkins*, *Yoe* and *EPAC*. However, since the party failed to take reasonable steps to preserve the text messages, despite “being on notice to do so” by a litigation hold letter, “it would be unjust to place the burden of proving prejudice” on the moving party. (*5) Accordingly, citing Rule 37(e)(1), the court “finds it appropriate” to “order” that the moving party “will be permitted to introduce evidence at trial, if it wishes, of the litigation hold letter and Pauley Motor’s subsequent failure to preserve the text messages.” DriveTime “may argue for whatever inference it hopes the jury will draw.” The nonmoving party will be permitted to “present its own admissible evidence and argue to the jury that they should not draw any inference” from that conduct. (*6), citing *HLV*, *EPAC* [2018 WL 3322305] (March 2, 2018). The court also held that in ruling on the motions for summary judgment, it “will not bind itself to any adverse inference at this stage, “since the “negligent failure” to preserve the text messages “must be left to the finder of fact.” (*6)
93. **Duncanson v. Wine and Canvas IP Holdings** [2018 WL 2733457, at *2 (S.D. Ind. March 1, 2018)]. A Magistrate Judge refused to find that a reasonable person in the position of the defendant would have printed out hard copies of changes in an electronic portfolio prior to service of a specific request to do so and described the argument that the party should have done as “ipse dixit” where a cease and desist email did not specifically identify the need to do so, refusing to find a violation of **Rule 37(e)**.
94. **Duran v. County of Clinton** [2019 WL 2867273, at *5] (M.D. Pa. July 3, 2019). The court granted a motion in limine to exclude evidence and testimony about a negligent failure to because it could not conclude it would render any fact material to the [party’s claims] in the matter *sub judice* more or less probable,” citing Rule 37(e)(1), FRE 402 and 403. It also found that admitting the evidence was likely to confuse the salient issues result in undue delay at trial). It found that the failure to preserve was at most negligent and that the County did not intentionally destroy or fail to preserve the emails lost during server maintenance.
95. **DVComm v. Hotwire Communications** [2016 WL 6246824] (E.D Pa. Feb. 3, 2016). In action by individual (Sizemore) and the proprietorship he owned to enforce an agreement relating to the defendant’s entry into the Atlanta market (the facts relating to allegation are recited at 2015 WL 2381059)(E.D. Pa. Dec. 23, 2015)), the defendant was granted a permissive adverse inference jury instruction under **Rule 37(e)(2)** because there was circumstantial evidence that the destruction of an early draft of a proposed business plan was done with “intent to deprive.” The court found that the party failed to take reasonable steps and the lost ESI could not be restored or replaced (although it was, in fact, supplied from the former employer of the individual) and may or may not have found prejudice to have existed. The court also asserted that its inherent power applied “without limitation” (§55) and said it would consider “monetary sanctions” later. On February 16, the court ordered the individual owner and the plaintiff entity jointly and severally to pay \$110K in fees and costs as “monetary sanctions” under Circuit authority for “discovery misconduct,” without reference to Rule 37(e) as well as under Rule 37(c)(1) for “reasonable expenses.” (2016 WL 7018554, at ¶31-39, 46). In

March, the court refused to vacate its earlier orders when the party found the missing business plan because “fulsome discovery” is not “amnesty for failing” to meet discovery obligations “after” findings under Rule 37.” (2016 WL 7228629 (E.D. Pa. March 29, 2016)). In May, it acknowledged that an appeal of denial of a “new trial” motion was under way. (2016 WL 2858826 (E.D. Pa. May 13, 2016)). However, there is no indication that there was a trial on the merits in any of the opinions.

96. **Edelson v. Cheung** [2017 WL 150241] (D. N.J. Jan. 12, 2017). In determining if there had been “spoliation of electronic evidence” from deletion of emails, the court quoted Rule 37(e), acknowledging it to be a uniform standard, and applied pre-Circuit case law to determine whether to “impose spoliation sanctions under Rule 37.” The court concluded that the conduct was intended to deprive the other party of the information in question but determined that there had not been sufficient prejudice to impose a default judgment. No reference was made to any of the threshold conditions of the Rule, but the court used the fact that the party could subpoena some of the missing emails to justify instructing the jury that “it may presume the information was unfavorable” citing Rule 37(b) rather than entering a default.
97. **EEOC v. GMRI** [2017 WL 5068372] (S.D. Fla. Nov. 1, 2017)]. In a comprehensive survey of Eleventh Circuit spoliation principles and **Rule 37(e)** in a case where there was loss of both ESI and documents, the court determined to allow the moving party to make a presentation of “competing facts and theories” to the jury about missing evidence – “including whether any were missing at all.” (*2-3, *31) No adverse inferences would be permitted, either at the summary judgement or at trial. (*31) As to the ESI, however, since Rule 37(e)(2) permits a jury to reach a finding of prejudice if the party is shown to have acted in bad faith (as defined in the rule), the party may argue that it may reach “an adverse inference about missing ESI if, “but only if” it concluded that Seasons acted in bad faith (“i.e., with the intent to deprive” the EEOC of the ESI’s use in this lawsuit” “without also obtaining a finding of prejudice to the EEOC.” (*31). (*22).
98. **EEOC v. JetStream** [878 F.3d 960] (10th Cir. Dec. 28, 2017). The Tenth Circuit found no abuse of discretion in a refusal to give a spoliation instruction that the jury could assume that parties on a missing list were good workers and should be hired without a prior finding that the party had acted in bad faith. The court cited **Rule 37(e)** logic that the current “bad faith” requirement for such an instruction in “a virtually identical situation” as providing a “common sense” reason to refuse such an instruction, since to do so might tip the balance in ways the lost information never would have done. The court also found that the presumption created under prior precedent that the missing evidence was favorable would be governed by FRE 301 which merely required production of some evidence it was not favorable, which JetStream had done by testimony. (965-67).
99. **EEOC v. Performance Food** [2019 WL 1057385] (D. Md. March 6, 2019). In this lengthy, well-written opinion, the Chief Magistrate Judge resolved two separate motions by undertaking two distinct series of analyses, on for a Paper Spoliation Motion and the other for an ESI Spoliation Motion.

100. **Edwards v. 4JLJ, LCC**, __F.3d. __, 2020 WL 5628689 (September 21, 2020). After a jury verdict in favor of an employer but with sanctions for the employees [2019 WL 1382983], costs were awarded to the employer [2019 WL 2344752]. On appeal, the Fifth Circuit initially held that the sanctions for the employees were appropriate (**but not under Rule 37 alone**) under inherent power [2020 WL 5229686, Sept. 2, 2020], but upon re-hearing the opinion was withdrawn and the appeal and cross appeals were dismissed for lack of jurisdiction, but the cost were affirmed. [In a pre-trial ruling [2018 WL 2981154 (S.D. Tex. June 14, 2018)]. The court had ordered use of adverse inference to the effect that missing electronic data dealing with the use of trucks, using key fobs issued to drivers, which allowed real time observation of the time of use and other characteristics should be deemed to be favorable to the plaintiffs in a collective FLSA action. The court deemed the failure to preserve as spoliation and issued the adverse inference as a sanction under its inherent authority to deal with litigation abuse without mentioning the requirements of Rule 37(e). It found the conduct to be “culpable” under the *Rimkus* test and inferred from the conduct that the party had acted in bad faith. The Court indicated (see footnote 10) an awareness of the 2015 Amendments, which it applied in part after determining they applied.]
101. **Eisenband v. Pine Belt Automotive** [2020 WL 1486045] (D.N.J. March 27, 2020). The Chief District Judge refused to grant a spoliation motion under the Rule because the evidence of intent was pure speculation “without a shred of evidence of [the party’s] motivation.” (n. 11).
102. **Ellis v. Hobbs Police Department** [2020 WL 1041688 (D. N.Mex. March 4, 2020). After an evidentiary hearing, the Court refused to sanction deletion of audio recording from an iPhone6 under Rule 37(e)(1) because there was no “discernible prejudice” involved. (*6) However, since there was a preservation order in place, it recommended that the plaintiff be prohibited from introducing any “evidence of audio recordings” except for the purpose of impeachment. (*8) In footnote 9, the court explained that because of the “limited culpability and prejudice” involved, the party should be able to use the recording if its content “materially impeaches a witness called by or affiliated with Defendants.” The court also noted that “Rule 37(b) permits more flexibility than Rule 37(e) in the assessment of sanctions,” citing *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992) for the proposition that determination of the correct sanction for violation of a discovery order is a fact specific inquiry that the district court is best qualified to make,” noting that the court may impose any sanctions in the rule as well as “further just orders.” (*7).
103. **Elvis Presley Enterprises v. City of Memphis** [2020 WL 4015476 (W.D. Tenn. July 16, 2020). The court dismissed a motion for spoliation measures under Rule 37(e) because the party failed to demonstrate that it was ‘prejudiced by the failure to produce text messages. In nothod that a “determination of prejudice due to spoliation is a mixed question of fact and law.” It noted that the party was not prejudiced because the party had obtained the deleted text messages from a third party. There was evidence in the record to support the Magistrate Judge’s factual determination that the party was in possession of the deleted text messages and there was law to support the determination that the party was not prejudiced because it obtained the deleted text messages.

104. **Emerald Point v. Hawkins** [294 Va. 544, 808 S.E.2d 384, 392] (Va. Dec. 28, 2017). In reversing an opinion on other grounds, the Supreme Court of Virginia explained that “the resolution of a spoliation issue . . . should be guided by the same standard and applicable to all forms of spoliation evidence.” Accordingly, citing **Rule 37(e)** and *Brookshire Bros. v. Aldridge*, 438 S.W. 3d 9, 24 (Tex. 2014), the court applied Rule 37(e) logic to the loss of tangible property because the “intent to deprive” standard provides a common sense basis for determining if an adverse inference should lie.
105. **Enoch v. Hamilton County Sheriff’s Office** [2019 WL 1755966] (April 19, S.D. Ohio). In this complex case challenging the warrantless arrests and search and seizure of electronic recording devices in the hallways of the Hamilton County Courthouse, the Magistrate Judge denied motions for spoliation regarding deletion of ESI on the grounds, among others, that “defendants have not met their burden of showing they made a good faith effort to pursue alternatives [of the missing ESI] and have found ‘such evidence cannot restore or replaced’ which is a prerequisite for sanctions under Rule 37(e).” (*11) Even if they had met that burden, the movants sought only relief under Rule 37(e)(2), and since the evidence shows at most negligence in loss of the ipad information, there is no evidence for “the severe sanctions they seek.” (*12). There is no direct or circumstantial evidence that trading and upgrading ipads and cell phones, “which defendants only speculate may have had relevant ESI on them,” was done because the plaintiffs intended to deprive defendants of the information’s use in litigation. (*12).
106. **Envy Hawaii LLC v. Volvo Car USA** [2019 WL 1292288] (D. Haw. March 20, 2019). Denying spoliation motions relating to loss of email and data in the hands of third parties since no demonstrations was made that they were irretrievable.
107. **EPAC Technologies v. HarperCollins** [2018 WL 1542040] (M.D. Tenn. March 29, 2018)(Mag. J. (**EPAC #1**)). The Magistrate Judge authorized jury instructions under **Rule 37(e)(1)** for loss of warehouse data [**ESI**](at *26), rejecting the Special Master’s recommendation of preclusion of evidence of lack of merchantability. It also authorized a jury instruction permitting the jury to infer that **missing books** [documents] would have supported EPAC claims under Sixth Circuit case law (at *22). The failures were negligent or grossly negligent but did not involve an intent to deprive (at *18) and were attributable to an in-house counsel’s failure to take an active and primary role in litigation holds and meant the party had failed to take reasonable steps to preserve the ESI. (*22) In **EPAC#2**, 2018 WL 3322305 (May 14, 2018), Chief Judge Crenshaw affirmed the Magistrate Judge’s order involving the instruction regarding the failure to preserve the books, but as to the **warehouse data**, made a “slight alteration” to conform to **Rule 37(e)(1)** by restating the Magistrate’s Judge’s formulation that the missing data “**would have shown**” whether certain adverse facts existed to state that it “**may have shown**” those facts, thus leaving the findings of fact to the jury. It described the result as no greater than necessary to cure the prejudice and stated he would instruct the jury it may give this “whatever weight you deem appropriate as you consider all of the evidence” (at *3). In **EPAC#3**, 2019 WL 109371 (M.D. Tenn. Jan. 4, 2019), Judge Crenshaw granted motions *in limine* to exclude discussion, argument or evidence related to email spoliation, as to which the Magistrate Judge found had been restored and replaced (at *10) and refused to allow introduction of more evidence of spoliation as background as to the

curative instruction regarding [summarizing, in a pithy list, the related findings by the Magistrate in the March opinion at *13, without noting the subtle changes made as result of consideration of Rule 37(e)(1) in the EPAC #2]. According to PACER, the jury returned a Judgment on January 28, 2019 of \$3.1 M compensatory and \$12M in punitive damages. In **EPAC #4**, 398 F. Supp. 3d 258 (M.D. Tenn. July 1, 2019), *notice of appeal filed*, August 1, 2019, the District Judge granted judgment as a matter of law vacating the award of \$12M in punitive damages on the tort claim but entered judgment on the \$3M award of compensatory damages awarded on the breach of contract claim as found by the jury. The court refused to consider renewed challenges to the use of adverse inference instructions because it was not possible to assess their impact as both were permissive in form and thus “the court cannot divine that the jury did or did not [make adverse inferences] from the verdict (*13).

108. **EPAC v. HarperCollins Christian Publishing** [810 Fed. Appx. 389] (6th Cir. 2020). In reviewing challenges to the jury verdict in favor of EPAC, the defendant argued that it was entitled to a new trial because it had been “unfairly prejudiced” by two adverse inference instructions given to the jury, one on damaged books [had a duty to preserve breached that duty by “negligently allowing the books in its control to be sold, lost, or destroyed; and you may infer that, if available, the books would support EPAC’s claims and be adverse to Thomas Nelson”) and one on electronic warehouse data (duty to preserve warehouse data and “negligently failed to do so” and “such data , now lost, may have shown” whether books were sold or returned, customer complaints, quantity and timeliness of fulfillment and from what facility they were shipped. “You may give this whatever weight you deem appropriate as you consider all of the evidence presented at trial.”) (*11). The Sixth Circuit held it would review a decision to give “an adverse inference instruction” for abuse of discretion. (*11). However, the district court “didn’t err” in issuing the instructions because, first, they are “merely permissible” in telling the jury what they “may” infer and the fact that Nelson was only “negligent” does not defeat the instructions. “Only mandatory adverse inference instructions require a culpable state of mind in the destruction of evidence.” See generally Flagg, 715 F.3d. 165, 178. Second, “both instructions were no greater than necessary because they were only permissive in nature. Tyson Foods, 374 F.App’x 624, 635 (“The jury instruction the district court gave here was merely a permissive one, allowing, but not requiring, the jury to draw a negative inference”); **Fed. Rule 37(e)(1)**(court “may order measures no greater than necessary to cure the prejudice”). “Given the broad discretion to the district court and even reviewing the propriety of the instructions de novo, we find that Thomas Nelson’s claim for a new trial based on these instructions fails.” (*12)

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

110. **Ericksen v. Kaplan** [2016 WL 695789] (D. Md. Feb. 22, 2016). In an employment action, the District Judge adopted Magistrate Judge's report recommending sanctions for use of "CCleaner" and "Advance System Optimizer" shortly before a scheduled forensic inspection to determine if certain ESI had been created by Plaintiff. The deletion prevented the moving party from authenticating a letter and email relating to her termination which were favorable to the plaintiff. The Order precluded reliance under **Rule 37(e)(1)** and permitted defendants to present evidence relating to the loss to the jury. The measures would "cure the prejudice" created by the loss of evidence by eliminating any risk that the email and letter be deemed authentic. [The Magistrate Judge concluded [under pre-Rule 37(e) principles] that the party "willfully"[but not in bad faith] ran the software despite knowing some ESI could be lost. [2015 WL 6408180]]. The District court also adopted the recommendation to order payment of reasonable attorney fees, perhaps under **Rule 37(a)**.
111. **Eshelman v. Puma** [2017 WL 2483800, at *5] (E.D. N.C. June 7, 2017). A Magistrate Judge to whom a motion for a jury instruction was assigned concluded the Rule 37(e)(2) did not justify imposition of an adverse inference under because of failure of the party to act to prevent the loss of internet browser information (ultimately overwritten by Google) immediately upon receipt of a demand related to the anticipation of litigation. The court concluded that the loss, "at most," resulted from negligent conduct. The party did not have a formal document retention or destruction policy and a litigation hold was not issued until later. The court went through the predicate requirements of Rule 37(e) and held that there was no showing that additional discovery could not provide the same information as the browser history, such as by depositions. Moreover, there had been no showing of prejudice within the meaning of subdivision (e)(1) since it was required to be shown some evidence regarding the particular nature of the missing ESI in order to evaluate the prejudice it was being requested to mitigate. The court noted that the moving party did not argue that the party had acted with an intent to deprive and relied only on case law that predated the 2015 revision to Rule 37(e).
112. **Estate of Esquivel v. Brownsville** [2018 WL 7050211, at *7] (S.D. Tex. Nov. 20, 2018). A Magistrate Judges recommended measures for spoliation of video footage where no finding of intent to deprive was argued or found, including that the jury should be allowed to hear the evidence on the topic pursuant to (e)(1) so that they had the choice to decide that the loss of footage may have prevented the party from producing evidence of liability and, if they prevailed, that they be required to pay an addition amount of the fees and cost to compensate for expenses incurred because of the lost footage. The court refused to recommend preclusion of admission of alternative causation evidence because it would eliminate a central defense, citing the Committee Note to Rule 37(e). The R&R was affirmed by the District Court in all respects. 2019 WL 219888 (S.D. Tex. Jan. 16, 2019).
113. **Estate of Moreno v. Correctional Healthcare Companies** [2020 WL 5740265] (E.D. Wash. June 1, 2020). The court issued a default judgment under Rule 37(e)(2) and, as an alternative, under its inherent power to deal with litigation abuse, because the party had "permanently erase[d] massive amounts of ESI" that had been or could have reasonably been expected to be requested and the prejudice "could not be cured through lesser sanctions." The court concluded that it was not feasible to draft an adverse-inference jury instruction that conveys or remedies "the scope of the harm" caused in the case.

114. **Estate of Vallina v. County of Teller Sherriff's Office** [2017 WL 1154032] (D. Colo. March 28, 2017). Motion for adverse inference, for failure to preserve prison video denied under Rule 37(e) and *Turner v. Public Service*, 563 F.3d 1136, 1149 because of a lack of showing of prejudice, citing *Zbylski v. Douglas Cty. Sch. Dist.*, 154 F. Supp.3d 1146, 1171 (“the prejudice must be actual, rather than merely theoretical”) and no showing of bad faith or intent to deprive under **Rule 37(e)**, since the loss was, at most, the result of negligence when it was automatically overwritten.
115. **Experience Hendrix v. Pitsicalis** [2018 WL 6191039, at *7, *9] (S.D.N.Y. Nov. 28, 2018). A court decided to issue an adverse inference instruction which permitted a jury to infer that the missing devices, a computer, iPhone and desktop computer contained evidence of conduct in breach of their legal duties in connection with sale of Jimi Hendrix-related materials. It applied **Rule 37(e)** which it determined only required a finding that a party acted “intentionally.” The court focuses on the lack of “coherent” explanations for failures to preserve, which it calls a “willful and blatant violation” of the duty to preserve. It apparently assumed that there was no need to separately find a lack of reasonable steps, an inability to restore or replace the information and that the lack of contents would prejudice the trial of the case.
116. **Express Restoration v. Servicemaster Global Holdings** [2020 WL 2084669] (C.D. Cal. Jan. 24, 2020). Magistrate Judge recommended that motion for terminating sanctions be denied and the court refer the matter back to it for consideration of award of fees or monetary sanctions under Rules 11 and 37. The moving party misrepresented the deposition testimony of a Rule 36(b)(6) witness and failed to disclose clarifying information furnished. Moreover, “[t]he failure to demonstrate prejudice is a firm barrier to remedial relief under Rule 37(e)(1).” (at *4).
117. **Faulkner v. Aero Fulfillment Services** [2020 WL 3048177] (S.D. Ohio June 8, 2020). The court rejects an attempt to sanction a good faith error by a party and her counsel after production of the irrelevant contents of a Linkedin account. The court admonished the party but in footnote 10 states, with admirable restraint, that there was no need for an adverse inference or for other action under **Rule 37(e)** since the hypothetically missing content did not result in prejudice.
118. **Feist v. Paxfire** [2016 WL 4540830] (S.D. N.Y. Aug. 29, 2016). In action seeking statutory and actual damages under the Wiretap Act, where the court purported to apply **Rule 37(e)**, the court barred a party from asserting evidence in opposition to a summary judgment motion or at trial. The court found it was not reasonable for a sophisticated plaintiff to utilize a “cleaner” after it filed suit, and while it “does not conclude that [the party] acted intentionally to deprive” she must “bear the risk” of running the cleaner and the court would “presume” that any missing cookies would have been “unfavorable.” It also precluded the party from arguing “that statutory damages are to be awarded in this case” but did not rule on it. [The case has been cited for the proposition that the term “lost” also encompasses deletion, destruction, and in some cases, alteration; see also CAT 3, 164 F. Supp.3d at 497]

119. **Finger v. Jacobson** [2019 WL 7557821] (E.D. La. May 10, 2019). The Magistrate judge refused to consider any sanctions under Rule 37(e) for the act of a plaintiff physician’s assistant changing to auto-delete when the physician was informed his storage limits were exceeded because there was no showing of “prejudice or bad faith” and there was no evidence that “the emails were relevant or proportional to this litigation.”
120. **First American Title v. Northwest Title** [2016 WL 4548398] (D. Utah Aug. 31, 2016). In action against former employees who formed a competing business, hiring other former employees, the court methodically applied **Rule 37(e)** to several losses of ESI. Relief was denied where it was not shown that the ESI could not be restored through additional discovery or where no prejudice was shown. In one case, the new enterprise failed to take reasonable steps to maintain documents and thumb drive brought over by an ex-employee (*5). As to those materials, the court permitted the introduction of evidence and argument under **(e)(1) before the jury**, but since there was no evidence of intent to deprive, denied evidence preclusion, an adverse inference, or monetary sanctions under subdivision **(e)(2)**. In dicta, the court noted that while an oral litigation hold did not per se violate of Rule 37(e), it was problematic.
121. **First Financial Security v. Freedom Equity Group** [2016 WL 5870218] (N.D. Cal. Oct. 7, 2016). In an opinion mixing **Rule 37(e)** measures with those under **Rule 26(b)**, the court recommended a permissive adverse inference jury instruction against a newly formed entity of former employees for actions of its “agents” in deleting text messages under **Rule 37(e)** because it inferred a shared intent of the “agents” of the defendant to deprive the moving party of the use of the deleted text messages. The court held that the failure to preserve text messages occurred at a time when there was an obligation to preserve, that the party “took no reasonable steps to preserve” and that the messages cannot be restored or replaced through additional discovery, allowing an adverse inference instruction upon finding intent to deprive. (*3). Footnote 1 contains an excellent summary of what “the finalized adverse-inference instruction shall be generally similar to” including references to what the party was “required” to preserve “under the law” and why, also “as a consequence,” that the jury may presume that “the deleted text messages may contain information that would help the party to “perove” that it encouraged employees to leave. (n. 1). The failure to produce a database in native format pursuant to a series of court orders was sanctioned by a permissive inference under **Rule 37(b)** by allowing a jury to infer particular facts needed in the claim on the merits, primarily on procedural grounds to punish delay and avoidance of orders, without finding bad faith.
122. **Fishman v. Tiger Natural Gas** [2018 WL 6068295] (Nov. 20, 2018)(Alsup, J). The court outlined a detailed series of steps it would take at trial under Rule 37(e)(1) to ameliorate the prejudice which resulted from a failure to preserve required recordings of telemarketing calls under California regulations. The jury will be “informed” of the destruction of evidence either by evidence put on by counsel or via an instruction, and permitted to decide if the sole remaining recorded call was “representative” of the sales pitches as a whole or not and whether the same conduct occurred class-wide, a finding which the court found to be reasonable. The jury could also infer that other sales calls, had they been preserved, would have been recorded without consent. (*5). The common-law duty to preserve, which attached under Rule 37(e)

[citing the Committee Note], arose because “a reasonable party” in the position of the defendant “would have foreseen putative class litigation regarding misleading telemarketing calls” under the circumstances (*3). In addition, the court concluded that the party had failed to take “reasonable steps to obtain and to preserve” the recordings, despite assuming that a third-party it had retained to do the telemarketing would have done so. It had the responsibility to do so and failed to take any steps to assure recordings were not destroyed, which a “reasonable party” in its position would have understood risked the loss of relevant evidence, even if an early preservation letter had not demanded that it preserve “sales pitches.” (*4).

123. **Fiteq. v. Venture Corp.**[2016 WL 1701794] (N.D. Cal. April 28, 2016) Rulings on pretrial motions in a dispute over an operating agreement relating to a Singapore efforts involving credit cards did not result in measures under **Rule 37(e)** because missed email of an executive was “restored or replaced” once the employee’s former computer was located. The moving party failed to prove that other responsive documents ever existed and duplicates were produced by other parties to whom they had been sent. The Court acknowledged the argument that it was foreclosed from use of inherent authority.
124. **Fitzpatrick v. Sgt. Verheyen** [2017 WL 4792242] (E.D. Wisc. Oct. 23, 2017). The negligent, at most, failure to organize surveillance videos so that they could be promptly located was found not to “reflect an intent to deprive” a party of video evidence under Rule 37(e).
125. **Flair Airlines v. Gregor** [2018 WL 8445779, at *3] (N.D. Ill. Dec. 14, 2018). The court found that sanctions were not warranted because defendants have not established that [the party] failed to take reasonable steps to preserve the recordings and that the ESI was lost as a result. The court cited *Schmalz v. Village of North Riverside* for the proposition that, relative to its predecessor the amended rule “significantly limits a court’s discretion” to impose sanctions for the loss or destruction of ESI. It also refused to find an intent to deprive based on mere speculation. (*4).
126. **Fleming v. Escort** [2015 WL 5611576] (D. Idaho Sept. 22, 2015). In a patent infringement action with a substantial history of discovery abuse by defendant, the court authorizing an adverse inference for failure to preserve **samples of products using challenged source codes** illustrating changes at issue in patent litigation. The court held it had the authority to admit evidence of spoliation and to permit a jury to draw an adverse inference without a finding of bad faith under Circuit authority. (*4) It acknowledged that **Rule 37(e)** (not then in effect) was drafted to deal with costly and burdensome efforts to preserve, but argued that the burden could have been avoided if the defendant had discussed it with the other party, instead of sending it on a fool’s errand to try to buy copies of the product in the market.
127. **Flores v. AT&T** [2019 WL 2746774, at *10] (W.D. Tex. March 27, 2019). The court found it inappropriate to grant sanctions when “no information appears to have been lost.”
128. **Folino v. Michael Hines** [2018 WL 5982448 (W.D. Pa. Nov. 14, 2018)]. The results of a forensic examination of two ipads and a laptop computer discovered that they had been wiped of all data when a factory reset had been undertaken (ipads) and active data had been deleted (laptop), with no ability to recover same. The court found an “intent to deprive” existed and dismissed the case because this “could not have occurred without intent.” (*3). It used

“factors” from *Schmid v. Milwaukee Elec. Tool Corp.* [13 F.3d 76, 79 (3d. Cir. 1994)] as a “guide” in deciding on the remedy (degree of fault, degree of prejudice, availability of lesser sanction) and noted that the defendant has “failed to offer *any explanation at all*” of what had happened (emphasis in original), which convinced the court that “no such good faith explanation exists.” It also awarded the costs and fees to bring the motion and to conduct the forensic examination.

129. **Fox v. Steepwater** [2018 WL 2008308, at *3] (D. Utah May 14, 2018). The court noted the importance of placing a duty to preserve at the time counsel was hired to help an unsophisticated plaintiff file an EEOC charge, since otherwise “counsel would have a perverse incentive to tell clients not to preserve evidence upon filing an EEOC charge.”

130. **Franklin v. Howard Brown Health Center** [2018 WL 4784668] (N.D. Ill. Oct. 4, 2018), *R&R adopted* 2018 WL 5831995 (Nov. 7, 2018). In harshly worded opinion critical of what the court described as a “bollixed” litigation hold, Magistrate Judge Cole found it “astounding and frankly unbelievable” that the attorney could issue a litigation hold and not personally have “checked up on the computer” to be sure preservation had occurred. The court also criticized the General Counsel for having thought that “instant messages” were saved on the cloud-based server for 10 years because “[s]he does not say how she came to this erroneous assumption.” The Magistrate Judge recommended that in light of the gross negligence (“and that’s viewing things favorably”), and that the loss of instant messages was both relevant and prejudicial (“the question is not whether the evidence has great probative weight, but “whether it has any and in some degree advances the inquire”)(*5) that, under Rule 37(e)(1), the court should to allow the moving party to present evidence, and, hopefully, as the trial unfolds, “perhaps the jury might even be allowed to assess the evidence and, properly instructed, find the defendant acted intentionally.” (*7) The Magistrate also rejected criticism that allowing evidence of spoliation risks a trial within a trial because, if “too readily granted” it might exclude evidence under FRE 404(b) or the relief granted under Rule 37(e).

131. **Freidig v. Target** 329 F.R.D. 199 (W.D. Wisc. Dec. 19, 2018). 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 leading it to deny Target’s motion for summary judgment. The court found prejudice because the plaintiff could not corroborate the statement that no one had walked through the area after the employee had (who testified that she had not noticed the puddle) (209). The court denied request for Rule 37(e)(2) because she had not adduced any evidence of intent, having failed to meet her burden of proof of intent, even though there was a rebuttable presumption of unfavourability due to a violation of records retention policy. (210). The court made a number of other interesting rulings. For example, it refused to find that the “restore and replace” requirement was satisfied by obtaining “comparable” evidence, such as eyewitness testimony, because “that is not what Rule 37(e) means. The provision is “referring to digital backups and the likelihood that electronic documents have multiple versions.” It also held that the fact that under its policy, it was to save footage of 20 minutes before and after an accident showed that Target was “aware, as a general matter, that” footage prior to an accident is “commonly relevant” to litigation and, in any event, “a

reasonable person” in Target’s position would have realized it was relevant. It concluded that the duty attached because Target was thus aware that an action like this one “could lead to litigation.”

132. **Friedman v. Phila. Parking Auth.** [2016 WL 6247470](E.D. Pa. March 10, 2016)(Opinion); see also 6246814 (Order). In action by taxi cab company against its local regulators, **Rule 37(e)** was not applied because there was (at least not yet) any showing that ESI was “lost” (§69) or that the party acted with an “intent to destroy” since negligence or gross negligence is insufficient (§73) or that there had been any prejudice under subdivision (e)(1). After additional discovery, the party “may move for evidentiary rulings, short of an adverse inference, relating to the failure to preserve” since “absent prejudice,” the court could not define the scope of the evidence to be admitted or argued to the jury. (§85). However, while court had power to act (“without limitation”) under its inherent authority to remedy litigation misconduct (§75), attorney’s fees were awarded under **Rule 37(a)** as a more “tailored” remedy (§76). The Court held that movants needed to establish by a preponderance of the evidence the “facts warranting findings under Rule 37(e)” and rejected the conclusion in CAT3 that a higher standard of proof was required for sanctions under Rule 37(e) since “non-monetary” sanctions do not involve fraud, the party sought only an adverse inference, the fact that an analysis of the state of mind did not require it and, applying a higher standard might allow a spoliator to benefit and the party was only seeking an adverse inference. (§58-59).
133. **FTC v. DIRECTV, Inc.** [2016 WL 7386133] (N.D. Cal. Dec. 21, 2016). The court refused to sanction a party that had preserved screen shots, but not the fully interactive website. The FTC argued that the party had failed to take ‘reasonable steps’ and that it was entitled under subdivision (e)(1) of **Rule 37(e)** to an order precluding use of an expert report. The Court held that the FTC should have been “more proactive in its efforts to obtain discovery.” (*4). It also noted that the FTC had not shown it was “sufficiently prejudiced to warrant exclusion of the information,” which was greater than what is necessary to cure the prejudice” identified, but ordered an additional deposition of the expert, noting that the case would be resolved by a bench trial, not a jury. “[A]fter the 2015 amendments to Rule 26(b)(1), the FTC is only entitled” to discover information that is relevant and proportional to the needs of the case” and DIRECTTV could not be sanctioned under Rule 37(e) for failing to preserve ESI “solely because” the FTC asserts that “potentially relevant” other ESI may have existed (at *5).
134. **Gaina v. Northridge Hospital** [2018 WL 6258895] (C.D. Cal. Nov. 21, 2018). After finding that a party failed to take reasonable steps and had prejudiced the other party by partial production of text messages, the court awarded attorney’s fees – to be paid by Kirkland and Ellis, counsel to plaintiff, to deal with prejudice under subdivision (e)(1) but refused to give an adverse inference or a jury instruction informing the jury of the discovery conduct and prejudice (n. 4). The court found that there was insufficient evidence of the requisite intent to deprive.
135. **Garrison v. Ringgold** [2020 WL 5511978] (S.D. Cal. Sept. 11, 2020). In a case where the defendant refused to produce and argued that its crypto-asset accounts, wallets, software and transaction had been hacked and could not be produced, the court Magistrate Judge entered

default judgment after finding he had intentionally destroyed ESI with the intent to deprive under Rule 37(e). It also found sanctions appropriate under Rule 37(b) and, since an attempt to frustrate the purpose of the litigation, under inherent authority. The court found that the factors in deciding if terminating sanctions were appropriate were satisfied, in that lesser sanctions were inadequate and could not address the destruction of key evidence.

136. **Gipson v. Mngt. & Trag. Corp.** [2018 WL 736265 (S.D. Miss. Feb. 6, 2018)]. A court dealing with loss of ESI and documents recognized the need to apply **Rule 37(e)** for the surveillance video and inherent authority as to the documents and, despite the delay in doing so, acknowledged that at the charge conference it would decide if the jury would be allowed to decide if an “intent to deprive” existed as to the loss of the surveillance video in this prison case, reaching the same conclusion as to “the logbooks and count slips,” although they are not ESI and fall under inherent authority. In a footnote (4), it noted that the ruling would not change the evidence, since if the prison committee spoliation, “it would likely be admissible under the well-known consciousness-of-guilt theory.” [The case cited referred to a threat against an adverse witness].
137. **Global Material Technologies v. Dazheng Metal Fibre** [2016 WL 4765689, at *9] (N.D. Ill. Sept. 13, 2016). In U.S. action against Chinese steel fiber metal supplier whose claims were limited to a trade secret claim by the preclusive impact of Chinese court proceedings, the Court entered a default judgment on liability (leaving damages for trial) under **Rule 37(e)** because the court concluded that when the parties “discarded one source of electronic evidence and failed to preserve others, they did so deliberately and in order to prevent [the moving party] from obtaining that evidence and using it” in the litigation. The court did not find it necessary to make a finding of prejudice because it was not required under **Rule 37(e)(2) (*10)** and it applied Circuit standards (in addition) in finding that default was appropriate because lesser sanctions were not adequate to reflect the seriousness of the egregious conduct.
138. **GN Netcom v. Plantronics** [2016 WL 3792833] (D. Del. July 12, 2016). *See also* **2017 WL 4417810 (D. Del. Oct. 5, 2017) and 2018 WL 273649 (D. Del. Jan. 3 2018)**(overruling post-trial motions re verdict for Plantronics) **but see 930 F.3d 76 (3rd Cir. July 10, 2019)(affirmed in part, reversed in part, and remanded for a new trial)**. After concluding under **Rule 37(e)** that a senior executive of a party had failed to take reasonable steps to preserve emails which could not be restored or replaced, despite major corporate efforts to meet its obligations, the Court imposed monetary sanctions involving fees and expenses under subdivision **(e)(1)** to partially address prejudice, ordered payment to the moving party of a **\$3M punitive monetary sanction** (three times the penalty imposed by the party on its executive who deleted the emails at issue). It also imposed a permissive adverse inference instruction and expressed a willingness to impose evidentiary sanctions if warranted as the case progressed to trial having found that the party had acted in bad faith and with the intent to deprive on the “totality of the record,” citing the double deletion of the email. (*7-8, *12). The court found that substantial deletions by the executive were “the opposite of having taken reasonable steps” and that the entity could have done more. The conduct was attributable to the employer and was “buttressed” by actions of counsel and the party in the initial refusal to acknowledge retention of an expert (Stroz) and permit them to complete an analysis of the missing email. (*7-8) The court applied Circuit law to shift the “heavy burden to show lack of prejudice” to

the bad faith spoliator, which it did not meet. (*9-12) Subsequently, in **October 2017**, it **issued a pretrial order setting for the “Stipulated Facts” which would read to the jury, as well as the pre-evidence** instructions and post-trial permissive adverse inference instructions, informing the jury of its duty to avoid having the missing ESI tilt the playing field. The jury was to be informed that “Plantronics committed spoliation” and that evidence relevant to this case “may have been destroyed,” meaning that you may hear questions and answers from the parties referencing missing or destroyed emails.” Thus, “[w]hile the exact contents of the spoliated evidence are unknown, you, the jury will be permitted – but not required – to infer that the lost documents were relevant and favorable to GN’s case and/or harmful to Plantronics case.” (*2). In the final instruction to the jury, it was told that it “may, but are not required, to presume” those conditions and “alternatively, you may infer that the evidence not produced would merely have been duplicative of, or similar to, the evidence before you.” (*3). The jury was also told that “your role is to determine whether Plantronics’s spoliation tilted the playing field against GN.” If so, the permission given you by the court to infer “is designed to allow you to balance that playing field, should you feel it is necessary.” (*3). It also read a series of stipulated facts, split evenly between the parties providing fifteen detailed paragraphs of facts dealing with the spoliation and actions of Plantronics and the results of its efforts to recover the missing emails. **2017 WL 4417810 (D. Del. Oct. 5, 2017)**. In January 2018, after a six-day jury trial and a verdict for Plantronics, the court defended its decision to give a permissive adverse inference rather than a dispositive sanction. It explained the “financial sanctions” amounts to nearly \$5M and that “the lesson” was that in cases “in which a dispositive sanctions is not warranted” the court can provide a fair trial to both sides by “permitting the jury to learn of the improper sanction” and the jury to “assess” what impact, if any, it had on the ability to prove the case, while keeping the focus of the trial on the merits.” **2018 WL 273649, at n. 2 (D. Del. Jan. 3, 2018)**. The Third Circuit affirmed in part, reversed in party and remanded for a new trial on July 10, 2109. **930 F.3d. 76 (3rd Cir. July 10, 2019)**. The court found that the District Court acted within its discretion when it denied the motion for default judgment, instead instructing the jurors that hey were permitted to draw an adverse inference against Plantronics because of the missing emails. However, over a dissent by the Chief Judge, the court held the failure to allow an expert to testify on the extent of the spoliation (the court handled it by stipulations) “could have had an impact on the merits of GN’s antitrust claims (*7) and it is “possible, if not entirely probable” that as a result jurors felt only a few hundred emails were deleted where they “might have taken a very different view of whether to apply an adverse inference.” (*8). It granted a new trial because ‘we do not have requisite sure conviction that GN was not prejudiced” by the exclusion of the testimony, and the error was not harmless, so a new trial was granted. (*9).

139. **Goines v. Lee Memorial** [2019 WL 4016147, at n. 10] (M.D. Fla. Aug. 26, 2019). In a case where the court did not impose spoliation sanctions under Rule 37(c), **without mention of Rule 37(e)** (*6), it noted in a footnote that the party was not precluded from introducing into evidence “the facts concerning [the] failure to preserve relevant evidence,” citing two pre-Rule decisions.
140. **Goldrich v. City of Jersey City** [2018 WL 4489674] (D. N.J. Sept. 19, 2018). The District Court, upon reviewing a R&R, determined that the party had “acted with the intent to deprive” with respect to production of information from a laptop and “that an adverse-inference

jury instruction pursuant to Rule 37(e)(2) is more appropriate” (*2), despite the fact that the Magistrate Judge had reached the opposite conclusion as to intent after an evidentiary hearing [at 2018 WL 4492931, at *11]. The Magistrate Judge had found circumstantial evidence alone to be insufficient to find that a Captain in the Jersey City Police Department had lied repeatedly under oath. The District court found that entering a dismissal would be “too severe” of a sanction, since there was no evidence of a pattern of obstruction that necessitated dismissal.

141. **Gonzalez-Bermudez v. Abbott** [408 F. Supp.3d 25] (D.P.R. Sept. 30, 2019). After a substantial verdict for a former employee in an employment claim, the court refused to order a new trial where the defendant had failed a failure to object to the plaintiff’s arguably speculative direct testimony about what the deleted emails might have shown and the defendants had engaged in extensive cross-examination which spotlighted their failure to timely issue a litigation hold. Prior to the trial, the court had refused to find whether there was an intent to deprive because there was not enough facts of record [214 F. Supp.3d 130 (D. P.R. Oct. 9, 2016)]. After the trial, it concluded that post-judgment relief from the verdict for the plaintiff should not be disturbed on the argument that permitting the jury to be informed of spoliation was a de facto spoliation sanction. It concluded it had acted appropriately under Rule 37(e)(1) and the result was consistent with *Virtual Studios v. Stanton Carpet*, 2016 WL 5339601 (N.D. Ga. 2016), a case cited by the defendants. (*47-48).
142. **G.P.P v. Guardian Prot. Products** [2016 U.S. Dist. LEXIS 88926] (July 8, 2016) (E.D. Calif.) In a Memo regarding telephonic resolution of ongoing discovery disputes, the court noted that because a custodial mail box has been produced involving the sole recipient of emails at issue, a sanctions under **Rule 37(e)** were not available since the email not lost, since under **Rule 37(e)** it can be restored or replaced. Further discovery was ordered as to non-email ESI identified to determine if it is in fact lost, which would implicate Rule 37(e). The court also noted the relationship between relevance and the duty to preserve.
143. **Grant v. Gusman** [2020 WL 1864857] (E.D. La. April 13, 2020). In refusing relief under **Rule 37(e)** and **failing to compel under Rule 26(b)(2)(B)**, the Chief Judge of the Eastern District noted that the parties had focused on the “bad faith” requirement previously used in the Fifth Circuit in *Buzman*, 804 F.3d 713. However, the 2015 version does not mention “bad faith” and the Southern District of Mississippi had noted that the Fifth Circuit had not clarified if its prior spoliation jurisprudence had been “abrogated or otherwise amended.” In any event, the party cannot meet either the bad faith nor intent to deprive standard. (at n. 175).
144. **Greer v. Mehiel** [2018 WL 1626345] (S.D.N.Y. March 29, 2018), *motion for relief den.*, 2019 WL 400607 (S.D.N.Y. Jan. 31, 2019), *and aff’d* 805 F. Appx 25 (2nd Cir. 2020). The District Judge refused to sanction deletion of emails under **Rule 37(e)** because they were restored or replaced by copies and the court found no basis to conclude that any was missing, given that it was possible that the witness statement that she had seen one referred to one them. The court went on to say, however, that there was no evidence of “willfulness, bad faith, or any fault” to justify the severe sanction of summary or default judgment citing *Guggenheim Capital*, 722 F.3d 444, 450-51 (2nd Cir. 2013) *in addition to Rule 37(e)(2)*.

145. **Greene v. Bryan** [2019 WL 181528] (E.D.N.Y. Jan. 14, 2019). The court ruled on an in limine motion that Rule 37(e) applied but refused to find that a party was entitled to an order of preclusion or an adverse inference because “he fails to demonstrate that he is entitled to sanctions. The court noted that “the Rule provides for “two categories of sanction” and notes that for evidence other than ESI, a movant can obtain a severe sanction that a party engaged in “negligent spoliation.” [citing Ungar 2018 WL 5777123, at 3]. It also precluded use of certain video footage under FRE 403 because it had little probative value for reasons unrelated to spoliation issues.
146. **Granados v. Traffic Bar and Rest.** [2016 WL 9582430] (S.D. N.Y. Dec. 30, 2015) Motion for sanctions dismissed as premature without showing that missing evidence existed and that it was relevant. To the extent it was ESI, Judge Francis implied that **Rule 37(e)** would apply rather than **Rule 37(b)**, despite the presence of a discovery order which, under the court’s view, applied to spoliation which occurred before the order was issued. (at n.4 & 6). The court also refused to apply its inherent power because of a lack of bad faith.
147. **Guarisco v. Boh Brothers** [2019 WL 4881272, at *8] (E.D. La. Oct. 3, 2019). The court refused to apply Rule 37(e) to address the alteration of digital photographs which were not permanently “lost” since an unaltered photograph of the conditions had been recovered from a Facebook post by the plaintiff after the accident at issue in the case. The court noted, however, that since the use of inherent power was “not limited by overlapping statutes or rules [quoting from *Haeger v. Goodyear Tire*, 793 F.3d 1122, 1131-32 (9th Cir. 2015)], its inherent power “is certainly not restricted when the procedural rule does not sanction the precise conduct at issue – Plaintiff’s unsuccessful attempt to destroy or alter evidence.” Accordingly, it sanctioned the conduct under its inherent powers because for a party to “avoid” sanctions because it was unsuccessful would threaten the integrity of the judicial process, citing *CAT3 v. Black Lineage*, 164 F.Supp.3d 488 (S.D.N.Y. 2016)). It found that the party had intentionally altered evidence and the other party had been prejudiced and concluded that the “least severe sanction” to deter future conduct would be to impose the expert fees incurred in analyzing the topic on the non-moving party.
148. **Hamilton v. Ogden Weber Technical College** [2017 WL 5633106] (D. Utah Nov. 22, 2017). Relying on “Rule 37” but clearly meaning Rule 37(e), a court ordered that because of the delay in imposition of a pre-litigation hold after receiving Notice from the EEOC, which it described as negligent, it would [quoting verbatim from the Committee Note regarding Rule 37(e)(1), because plaintiff is “prejudiced by the loss of an opportunity to discover” information which might have been in the missing emails, it would “will allow both parties ‘to present evidence to the jury concerning the loss and likely relevance of [the lost emails related to the first two requests] and instruct[] the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision,” (*3). The court found the delay in instituting the hold to be “negligent” and spent considerable time speculating how emails in response to the broad requests involved “are relevant because they can reasonably be expected contain” information about possible retaliatory motive and “could shed light” on a number of issues in the case, such as knowledge of the harassment, whether the individual had previously engaged in similar conduct, and the response to the allegation. (*3). The court noted “there does not appear to be any alternative equivalent discovery” that could replace it and since the

“true extent of this prejudice is uncertain,” the “most appropriate sanctions is one that allows the parties to argue the effect of the loss of this evidence to the fact finder. (*3).

149. **Hardy v. UPS Ground Freight** [2019 WL 3290346] (D. Mass. July 22, 2019). The Magistrate judge refused to order forensic examination of a plaintiff’s cell phone in a employment decision alleging racial discrimination because of alleged deficiencies in production highlighted in a deposition. The court treated the request first under Rule 26(b)(1), in terms of proportionality to the needs of the case, citing decisions focusing on the likely recovery will occur. It cited *John B. v. Goetz*, 531 F.3d 448, 459-60 (6th Cir. 2008), *abrogated on other grounds* by *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016) for the point that courts are “wary” to grant such requests unless the information is at the heart of a claim or defense in the ongoing litigation. (*3) It also cited *Riley v. California*, 573 U.S. 373, 403 (2014) and other cases relating to privacy concerns pointed out that there was no demonstration that the missing text messages were not available from the other employee, his supervisor, nor had proposed a protocol to restrict searches. Finally, the movant failed to show that forensic imaging of the cell phone was “a proper sanction” under **Rule 37(e)** for a variety of reasons.
150. **Harvey v. Hall** [2019 WL 1767568] (W.D. Virginia April 22, 2019). In a prisoner case the court ultimately denied any relief because it was “sheer speculation” to conclude that the ability to access the video would have produced evidence to support a claim against the parties to the lawsuit (which did not include the warden or the parties responsible for managing preservation issues). The court refused to penalize the defendants for “their colleagues oversights” but was willing to consider that conduct for purposes of considering the threshold requirements of Rule 37(e). (*6)
151. **Hashim v. Ericksen** [2016 WL 6208532] (E.D. Wisc. Oct. 22, 2016). In a prisoner case where the court refused a dismissal because of the destruction of physical copies of menus pursuant to retention policy, the court held that there was no evidence that the staff destroyed the evidence “with an intent to deprive their use by plaintiff in this litigation,” citing Rule 37(e)(2) as well as *Faas v. Sears, Roebuck & Co*, 532 F.3d 633, 644 (7th Cir. 2008).
152. **Harper v. City of Dallas** [2017 WL 3674830] (N.D. Tex. Aug. 25, 2017). The court refused to grant any relief under Rule 37(e) where the moving party failed to demonstrate that ESI in the form of email and recordings of telephone conversations was lost because of a failure to take “reasonable steps.” (at *16). The court indicated it would entertain the motion only if an appropriate, properly supported motion were submitted.
153. **Hawley v. Mphasis** [302 F.R.D. 37] (S.D. N.Y. July 22, 2014). Pre-effective date description of **Rule 37(e)** as moving away from a negligence standard for spoliation under which “any intentional destruction suffices” and which need not be directed at the spoliation “to the other party’s detriment.” (*47)
154. **HCC Insurance Holdings v. Valda Flowers** [2017 WL 393732] (N.D. Ga. Jan. 30, 2017). In a decision applying **Rule 37(e)** to a pending case because it incorporates the existing duty to preserve (n. 3), the court refused to find that “spoliation” had occurred after reviewing forensic findings by a neutral expert of examinations of personal and work computers and

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

155. **Heena Shim-Larkin v. City of New York** [2019 WL 5198792, at *12] (S.D.N.Y. Sept. 16, 2019). The Court acted “pursuant to Rule 37(e)” [and] the Court’s inherent power” in concluding that the party had control of the contexts of work-related texts on a personal cellphone since the employee had used it “without objection.” (*10). The failure to take affirmative steps to preserve them for 11 months after learning the messages might be relevant permitted the court to conclude that the party had acted intentionally to deprive the party of the use of the texts in the litigation. The court found that the party had thus failed to take reasonable steps to preserve. (*10). Based on the timing, the court infers that “the unpreserved text messages would have been relevant to the issues in this action,” citing *Kronish*, 150 F.3d at 128 to the effect that the court should not hold the prejudiced party to too strict a standard. The court refused to establish certain facts as a sanction, since the statements sought concern “hotly contested matters” that are best left for the jury.” (*11) Accordingly, it will allow the plaintiff to “present to the jury that quantum of evidence that will enable it to consider” the “gravity” of the conduct, the materiality of the evidence and the “import of the remaining proof,” together with an instruction that “it may presume that the lost information was unfavorable to the defendant.” (*12).
156. **Hefter Impact v. Sport Maska** [2017 WL 3317413] (D. Mass. Aug. 3, 2017). In a particularly well-written opinion, a District Judge applied separate standards under **Rule 37(e)** and inherent powers to assess the spoliation of missing ESI and to missing handwritten notes, but awarded no measures for either. It found a weak showing of prejudice and a lack of intent to deprive to bar severe sanctions and a lack of substantial prejudice from failure to preserve notebooks. However, it concluded that “the decision to bring this motion, although not ultimately successful, was an entirely reasonable response under the circumstances, and the court required the party to pay the reasonable attorney’s fees and costs incurred in bringing the action, citing *In Re Ethicon*, 299 F.R.D. 502, 526 (S.D.W. Va. 2014)(*9).
157. **Helget v. City of Hays** [844 F.3d 1216] (10th Cir. Jan. 4, 2017). The Circuit court found that a party had waived the right to challenge the failure to resolve a spoliation motion in any meaningful way before a summary judgment was rendered. A party that fails to raise an evidentiary impediment to “meetings its summary judgement burden” for spoliation sanctions acts at its own peril.”
158. **Henry Schein v. Cook** [2016 WL 3212457] (N.D. Cal. June 10, 2016). A court cited Rule **37(e)** and Rule 26(a) as a basis for an *ex parte* preservation order and a request to order a mirror image of a former employee in a trade secrets case, deeming it a “reasonable request” The court ordered the party to avoid “altering, damaging, or destroying any evidence, electronic or otherwise, that is related to this litigation.”
159. **Hernandez v. Tulare County** [2018 WL 784387] (E.D. Cal. Feb. 8, 2018). A Magistrate Judge applied **Rule 37(e)** to a correction center’s failure to retain video footage of an incident

resulting in prisoner injury resulting from non-compliance with procedures after a duty to preserve attached and acknowledging but not focusing on the “reasonable steps” requirement. However, because other measures addressed the issues, there was no prejudice and since the photo memory card was lost inadvertently, there was no intent to deprive and the court denied all relief under the Rule.

160. **Herzig v. Arkansas Foundation** [2019 WL 2870106] (W.D. Ark. July 3, 2019). The court found that the movant had established that the installation and use of Signal application (which allows users to receive and send encrypted text messages and to change setting to delete after a short period of time) was intentional and bad faith spoliation of evidence which “warrants a sanction.” (*5-6) However, while the court granted the motion for sanctions in part, the requested sanctions were denied as moot because the claims of the spoliating party were dismissed by the granting of a summary judgment, since “no reasonable juror could find in favor of Herzig and Martin on their age discrimination claim.” (*7) Rule 37(e) was not mentioned.
161. **HM Electronics v. R.F. Technologies** [2015 WL 4714908, at *30] (S.D. Cal. Aug. 7, 2015). Pre-effective date recommendation that the District Court impose an adverse inference instruction and other sanctions under Rule 37(b) and inherent powers because the conduct was in breach of discovery orders. The court opined that the result would have been the same if **Rule 37(e)** had been applied. The recommendation was vacated as moot by virtue of settlement, which also vacated the sanctions [171 F. Supp.3d 1020, at n. 4 (S.D. Cal. March 15, 2016)].
162. **HLV v. Page & Stewart** [2018 WL 2197730, at *3-4 (W.D. Mich. March 2, 2018)]. The court ordered, pursuant to Rule 37(e)(1) that an attorney who had received a demand letter and subsequently traded his cell phone for a new one was a breach of the duty to preserve since the moving party “did experience some measure of prejudice, despite securing production of texts and call logs from other sources” citing the Committee Note. It order that the moving party could introduce evidence of the litigation hold letter at trial and the subsequent failure to preserve and “argue for whatever inference they hope the jury will draw, which the nonmoving party can argue against and present “their own admissible evidence.” (*4)(arguing that the loss deprived the moving party not just of texts, but any other records like draft texts, or emails, call logs, and calendar entries”).
163. **Holguin v. AT&T** [2018 WL 6843711] (W.D. Tex. Nov. 8, 2018) The court found that the party had failed to take reasonable steps to preserve by implementing a litigation hold, which would have presented the ESI from being lost. It “would have been proportional to the needs of this case and consistent with clearly established applicable standards.” (*6) However, the court was unable to find prejudice under Rule 37(e)(1) where the party failed to explain why the discovery available was “insufficient to meet his needs.” (at *7-8). Intent to deprive was also lacking because the loss was caused by use routine procedures without bad faith one, year, citing *Russell v. 234 Fed. App’x 195, 208* (5th Cir. 2007). Accordingly, the motion for sanctions was denied.

164. **Horn v. Tuscola County** [2017 WL 1130095, at *4 (E.D. Mich. March 27, 2017)] In an opinion overruling an earlier R&R to the contrary 2016 WL 6683570] (Nov. 8, 2016), the court analyzed the loss of a surveillance video under **Rule 37(e)** and quoted it as requiring an “intent to deprive” standard before presuming the contents of a video were unfavorable, but then applied a pre-enactment case to conclude that the rule was satisfied if the conduct was negligent. However, it refused to grant an adverse inference because the contents of the video were not relevant to the defendant’s liability.
165. **HP Tuners v. Kevin Sykes-Bonnett** [2019 WL 5069088] (W.D. Wash. Sept. 16, 2019). The court sanctioned a party for smashing a flash-drive with a hammer after receiving a demand that he should preserve evidence relevant to the litigation. The court concluded that the destruction indicated an “intent to deprive” and noted but apparently did not credit the testimony that he did so because he knew he should not have it and had not downloaded any of the content. (*3) The court found that the plaintiff was prejudiced by the destruction because it could be inferred from the intent, citing Oracle America, 328 F.R.D. 543 at 549 (N.D. Cal. 2018), and because the party must proceed with “incomplete” evidence. (*4) and prevented the plaintiff from “presenting all relevant evidence in this action.” The court recommended that the court grant an adverse inference instruction “informing the jury of the existence of the flash drive, the information that defendants admit was on the flash drive, that [he] destroyed the evidence and allowing the jury to draw an adverse inference against defendants based on these facts.” (*6).
166. **Hsueh v. New York** [2017 WL 1194706] (S.D.N.Y. March 31, 2017). In granting an adverse inference for plaintiff’s deletion of an audio tape, despite its subsequent recovery and production from a hard drive backup, the court held that **Rule 37(e)** did not apply “because she took specific action to delete it.” The court cited CAT3, 164 F.Supp.3d 488, 495 for the proposition that Rule 37(e) was adopted to address over-preservation concerns which “are not applicable here.” As the court put it: “It was not because Hsueh had improper systems in place to prevent the loss of the recording,” instead, “it was because she took specific action to delete it.” *4). The court ultimately concluded that “under either” **Rule 37(e)** or the courts inherent authority, an adverse inference was the appropriate remedy because the party acted in bad faith “and with an intent to deprive” the defendant of its use, despite an obligation to preserve the highly relevant recording, which was not completely produced in the end. The court also awarded attorney fees and costs. (The court rejected the argument that the audio recording might not be ESI because it could “think of no reason why a digital audio recording would not be ESI” (also at *4).
167. **Hulett v. City of Syracuse** [253 F. Supp.3d 462] (N.D.N.Y. May 30, 2017). A District Judge refused to apply the Amended Rule to the loss of surveillance video because the issue of spoliation was asserted before the effective date “at a time when [the moving party] could have obtained an adverse inference simply by demonstrating that defendants were negligent.” (508) Citing CAT3, the court held that the new rule governs unless its application would be unjust or impracticable.
168. **Hunting Energy Services** [2018 WL 4539818] 2018 WL 4539818 (N.D. Ind. Sept. 20, 2018). The court agreed to permit the jury “rather than the Court to determine whether the

destruction of this evidence [deleted files on a computer] was in bad faith” because “the committee notes to Rule 37 contemplate that possibility.” (*10). It noted that the Seventh Circuit had also issued a pattern jury instruction (Sec. 1.20) and that there was “evidence from which the jury could make such a finding.” The jury could find the “defendants destroyed the evidence to cover their tracks.” The party states he “deleted the documents from his computer because he believed he was not supposed to have” them on his computer after he left. (*10). “If the jury accept the defendant’s explanation, then an adverse inference would not be appropriate.” “This issue thus depends on a credibility analysis and a finding as to the defendants’ mental state. Those are prototypical functions of a jury and questions that the jury will be able to fairly evaluate and resolve.” (*11) The court will “instruct[] the jury that it should infer that any destroyed documents would have been adverse to the defendants if it finds the documents were destroyed in bad faith.” [The court earlier cited to *Bracey v. Grondin*, 712 F.3d 1012 at 1019 (7th Cir 2013)(The crucial element is not that the evidence was destroyed but rather the reason for the destruction)]. “Absent a finding of bad faith, a court can take lesser measures as may be necessary to cure any prejudice if a party has failed to take reasonable steps to preserve evidence. See Fed. R. Civ P. 37(e)(1) (*4).

169. **Hyatt v. Rock** [2016 WL 6820378] (N.D.N.Y. Nov. 18, 2016). In discussing the potential need to produce an image from a digital camera (not at that time), the court “highlights the requirement that steps be taken by the Defendants to preserve all electronically stored evidence for trial,” citing Rule 37(e)).
170. **IBM v. Naganayagam** [2017 WL 5633165] (S.D.N.Y. Nov. 21, 2017). The court did not find it unjust to apply **Rule 37(e)** to a case filed prior to the effective date where the issue of spoliation was briefed and argued later. The court found that the party was not entitled to an adverse inference under the rule because the only allegation was that the party acted negligently rather than intentionally. Moreover, less severe sanctions were unavailable because the party failed to establish that prejudice existed, since the contents of the allegedly spoliator emails was “fairly evident,” but were “immaterial” to the action. (*6) Similarly, even if the strategic plans for the area where he subsequently worked were spoliated, the party failed to show how they would be relevant, so that the party was not prejudiced by its alleged spoliation. (*7).
171. **Incardone v. Royal Caribbean Cruises** [2019 WL 3779194] (S.D. Fla. Aug. 12, 2019). In an unsigned [in the WESTLAW version] and typically lengthy opinion by what appears to the same Magistrate Judge that has written recent opinions in other cruise ship cases involving Carnival Line cases, the court refused to sanction a fail to preserve all of the hours of video surveillance from all the cameras of a ship caught in a hurricane. The court found that to have done so would not be “proportional,” a view said to be confirmed by “the Sedona Conference’s recent updates to the Sedona Principles [quoting to the effect that “it is **unreasonable** to expect parties to take **every conceivable step** or disproportionate steps to preserve each instance of relevant electronically stored information.”] (emphasis in original) (*23).
172. **ILWU-PMA Welfare Plan v. Connecticut General** [2017 WL 3459880 (N.D. Cal. Jan. 24, 2017). In a thoughtful opinion by a District Judge applying Rule 37(e) “framework” because it is “directly on point” (but reserving right to assert inherent authority) the court held

that it could not, on the record before it, determine if additional sanctions were appropriate beyond additional discovery ordered, at defendants expense. The case involved an ERISA action by trustees against a service provider which failed to preserve ESI which was contained on servers it had sold to ADP and as to which it had contractual access. The court found that it was not “per se” unreasonable to have failed to make copies of the ESI and depend upon third parties, but that under the circumstances, the party had failed to take “reasonable steps to preserve relevant information for this reasonably foreseeable litigation.” It reopened discovery and ordered subpoenas to and depositions of ADP and stated that further sanctions, if any, would be considered under “either Rule 37(e) or inherent power” after the all available evidence is placed before the trier of fact at trial so that the importance of any remaining gaps can be assessed.

173. **Infogroup v. DatabaseUSA** [2018 WL 6624217 (D. Neb. Dec. 18, 2018)]. After a seven day trial resulting in an award of \$53.6M, the court refused to order a new trial based the fact that the deletion of a database was made pursuant to a routine retention policy because it was the “circumstances surrounding its destruction – create a sufficient strong inference of an intent to destroy it for purposes of suppressing evidence. (*6) The party had argued it was not lost with an intent to prevent its use under Rule “37.” The court responded that it is “difficult to imagine a scenario where the database’s destruction was a result of anything other” than that intent. (*5).

174. **In re Abilify (Aripiprazole) Products Liability Litigation** [2018 WL 4856767] (N.D. Fla. Oct. 5, 2018). In an opinion applying both Rule 37(e) and inherent authority, the court refuses to find that the duty to preserve email arose prior to the deletion of emails pursuant to a former email policy with a short deletion period (*8) The law and analysis is the same for either. (n. 3) The opinion cites the Sedona Commentary on Legal Holds for the proposition that the duty arises only when an organization is “on notice of a credible probability that it will become involved in litigation, seriously contemplates litigation, or when it takes specific action to commence litigation.” (*3). It also rejects theories based on shifting duty, industry wide events, existing DOJ litigation and duties arising under FDA. Whether Rule 37(e) “also applies to non-ESI spoliation claims is “unresolved” in the 11th Cir, citing *ML Healthcare Services v. Publix*, 2018 WL 747392 at *10 (11th Cir. Feb. 7 2018). (*8) It finds no record evidence that the deletion of emails under the former policy was carried out to deprive Plaintiffs of the information and it cannot find bad faith based on circumstantial evidence. (*9)

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

In re CCA Recordings 2255 Litigation [2020 WL 6077623] (D. Kan. Oct. 15, 2020). The Chief District Judge in charge of this complex litigation involving governmental surveillance and access to privileged communications set an evidentiary hearing for 2021 on a Rule 37(e)

motion for sanctions regarding a loss of data on a computer noting that the sanctions it had just issued under Rule 37(b) will likely make it moot. The court discussed at great length the impact of the various considerations involved in the deliberate decision by the DOJ to refuse to provide electronic and other discovery.

176. **In re Disposable Contact Lens Antitrust** [329 F.R.D. 336, 431-32] (M.D. Fla. Dec. 4, 2018). The court refused to “compel, much less sanction” a party under **Rule 37(e)** for failing to preserve materials “controlled by a non-party that they had the ability to obtain themselves.” The court held that the Rule was applicable to information retained by non-parties when there is a legal right to the information or a relationship, including one where the party has the practical ability to comply compliance. It held that the membership in a Facebook group did not provide that control here merely because some employees were members and refused to find that subpoenas issued by the New York AG had triggered “preservation obligations which were owed to the moving parties (the plaintiffs)(“the “shifting duty” argument”)(431). It took the matter of spoliation under advisement and agreed to revisit it at trial before the jury instructions were finalized and after both parties had further developed the issue of spoliation (432).
177. **In re Erick Etienne Lagrous v. Buzulencia**. [2019 WL 2453878, at *3 (N.D. Ohio June 11, 2019). In an adversary proceeding involving a failure to preserve text messages and emails, the court found no prejudice from the loss of the information and found no measures available under Rule 37(e)(1), nor was this “the rare situation where a party ‘acted with the intent to deprive another party of the information’s use in the litigation’ under Rule. 37(e)(2).”
178. **In re Ethicon** [2016 WL 5869448] (S.D. W. Va. Oct. 6, 2016). In follow-up to earlier decision by the Magistrate Judge denying sanctions in an MDL based on allegations of spoliation decided prior to 2015 amendments [299 F.R. D. 502 (Eifer, M.J.)], the District Judge denied a motion by one plaintiff under **Rule 37(e)** for additional sanctions under either **(e)(1)** or **(e)(2)** because of the loss of a custodial file. The court held the rule applicable because the threshold requirements outlined in the rule were satisfied and the movant had demonstrated that not “all” of the emails and electronic documents were restored or recovered by other means. However, there was no prejudice simply because she had “to piece together information from other sources to try to recover relevant documents” since the party did not provide the court with “any concrete finding of prejudice to her case as a whole.” As a result no sanctions were available under the Rule. [Similar rulings were made as to the same custodial file in 2016 WL 5869449 and 5858996 involving motions by two other individual plaintiffs].
179. **In re Marc Anthony Correra** [2018 WL 4027001, at *39] (N.D. Tex. Aug. 21, 2018). In a lengthy but well-written analysis of Rule 37(e), the court awarded legal fees and costs for prejudicial misconduct and conditional sanctions (with more promised in the form of inferences and invalidity of exemptions in bankruptcy if missing ESI is produced from flash drives which were inserted around the time that the computer at issue was tampered with).
180. **In re Petters Company** [606 B.R. 803, 2019 WL 5109866] (D. Minn. July 1, 2019). A Bankruptcy court concluded that a violation of Rule 37(e) by destruction of email backup tapes justified an adverse inference instruction *as well as* the admission of evidence of spoliation as

well and as an order barring objection to introduction of emails secured from third parties. It agreed that preclusion of specific factual testimony “should be left to the trial judge as they go beyond an adverse inference.” (*21). It refused the argument that the court “should decline to decide” the motion and leave it to the District Judge to address it in “the first instance,” since the motion is “premature” and “as a practical matter,” the “parties will raise the same evidentiary issues of spoliation before the District Judge” which will “ultimately result in duplicative litigation.” The Court pointed out that its authority to impose “spoliation sanctions arises from its inherent power as a federal court, citing *Stevenson*, 3543 F.3d. at 750 in a footnote. It noted that it was intimately familiar with the discovery record, the allegations of the case and had read hundreds of pages, resolved discovery disputes and had held several formal hearings, and “judicial economy favors this Court making the findings and determination about the appropriate discovery sanctions.” In the alternative, if the District Court finds it lacks authority to issue an adverse inference instruction, it recommends that it do so. (*22).

181. **In Re Premera Blue Cross** [2018 WL 5786206] (D. Ore. Nov. 5, 2018). Court found non intent to deprive but found that destruction of the logs under Rule 37(e)(1) caused prejudice and stated it would inform the jury of the destruction and allow arguments about the implications but would not instruct the jury that “it must or even may” make adverse inferences. (*3).
182. **Integrated Comm. & Tech**, Civil No. 16-10386-LTS, 2020 WL 4698535, at *5 (D. Mass. Aug. 13, 2020). The District Court, in a bench trial, relied upon subdivision (e)(1) in resolving a dispute over destroyed or lost emails by, *inter alia*, “permitting the introduction of evidence, by all parties, regarding the destruction of loss of evidence as well as the reason(s) therefor.” This was imposed “in connection with” assessing claims and corresponding defenses because the prejudice to the moving party was substantial. In addition, the court stated that it would allow “an appropriate instruction permitting the drawing of an adverse inference.” The court also cited its inherent power to impose sanctions on parties that have spoliated evidence, noting that of particular importance is “the prejudice to the non-offending party and the degree of fault of the offending party (citing *Collazo-Santiago v. Toyota*, 149 F.3d 23, 29 (1998)).
183. **International Financial v. Odara Jabali-Jetere** [2019 WL 2268961] (E.D. Pa. May 28, 2019). In an action for against a former employee, and after an evidentiary hearing, a Magistrate Judge granted a motion for spoliation sanctions after finding she had “withheld” files and “willfully tampered” and “deleted metadata” under her personal laptop” (*20). Despite quoting and citing **Rule 37(e)** (*11), the analysis was entirely conducted under *Bull v. UPS* and Schmidt requirement of suppression in “bad faith” (*15) in determining that there was prejudice because of finding “evidence linking” the party to “alleged misappropriation of trade secrets” (*17). It was recommended that the court order an “adverse spoliation inference sanction,” and monetary sanctions to level the evidentiary playing field. The jury should be instructed that if the Plaintiff had been able to inspect the files, any evidence would have been unfavorable. It found that the party had acted in bad faith as well. (*17). The court also found a “prima facie case” of civil contempt (*20) for violation of for violation of a temporary restraining order to preserve and prevent destruction of databases, files or hard drives and

certified facts for a hearing for that purpose. (*18). The Magistrate Judge had quoted Rule 37(b)(*11) and the Magistrate Act 28 U.S.C. 636€(6)(B).

184. **Internmatch v. Nxbigthing** [2016 WL 491483] (N.D. Cal. Feb. 8, 2016), *vacated by order of Ninth Circuit*, 2017 WL 8944065 (N.D. Cal. Nov. 17, 2017). Plaintiffs seeking declaration that a party fraudulently obtained a trademark registration (and its cancellation) were granted an adverse inference and evidence preclusion where defendant consciously disregarded its preservation obligations regarding ESI which could have established the genuineness of use documents used in its defense. The party made bogus claims of power surges and other conduct in in bad faith and prevented the plaintiff from verifying the genuine of the evidence of certain use documents. (*13-14). It also awarded monetary sanctions in the form of attorney fees under its inherent powers as a result of the bad faith conduct, since the plaintiff had to spend substantial resources in investigating the spoliation. In footnote 6, it stated that whether it must make the findings set forth in **Rule 37(e)** before exercising its inherent authority “has not been decided,” but that it need not resolve that issue since it also concluded that defendants had acted with the requisite “intent to deprive” under **subdivision (e)(2)**.

185. **Itron v. Johnston** [2017 WL 11372353] (S.D. Miss. Oct. 26, 2017). The court found no intent to deprive and thus refused to find that Rule 37(e)(2) measures were available. It implied that it need no consider Rule 37(e)(1) measures because “the relief [he] seeks may be obtained only under subsection (e)(2)” which was, apparently, all he sought. The court rejects the use of Zubulake, 229 F.R.D. 422 (S.D.N.Y 2004) to infer bad faith and intent to deprive from the failure of counsel to take possession of or otherwise safeguard all potentially relevant backup tapes since it was decided “prior to the 2015 amendments and at that time the Second Circuit permitted a fining of spoliation on a showing of negligence or gross negligence.” (*3).

186. **Jackson v. E-Z-Go Division of Textron** [2018 WL 3575924, at *4-5 (W.D. Ky. July 25, 2018)]. A District Court refused to grant a motion in limine to bar “evidence of or reference to spoliation” during an upcoming product defect trial even though the requisite degree of fault and prejudice did not exist, since “the standard of relevance for admissibility at trial is much lower.” In “the context of introducing evidence of spoliation, as opposed to tendering an adverse inference instruction, “[i]f relevant, courts have allowed spoliation evidence at trial.” [citing VSI Holding v. SPX, 2006 WL 568333, at *2 (E.D. Mich. March 7, 2006)(collecting cases)].(*4) The court held it to be relevant and admissible under FRE (“the court will allow Plaintiffs to put on evidence of what they believe was spoliation of evidence in 2004.” (*5). The court relied upon prior Sixth Circuit precedent but noted that **Rule 37(e)** “likewise provides guidance on spoliation sanctions.

187. **Jackson v. Haynes & Haynes** [2017 WL 3173302] (N.D. Ala. July 26, 2017). A District Judge rendered a summary judgment against an individual pursuing an FSLA claim after barring use of summaries of data to create a genuine factual dispute about hours worked because she had failed to take “reasonable and prudent steps” as required under Rule 37(e) to preserve contemporaneous original notes relating to hours worked. The court found that this resulted in prejudice, but that this negligent and irresponsible conduct was not sufficient to show an intent to deprive. The court went through a litany of reasons, such as relying on a free version of an “Hours Tracker” on her cell phone (without paying for one that allowed

export from a cell phone) and problems with use of Excel and Word spreadsheets that the Genius Desk at Apple could not resolve, compounded by her daughter's refuse to furnish the MacBook on which the information was stored. The court did not credit the veracity of the individual plaintiff and summarized the reasons in substantial detail in the text of the opinion and in footnotes.

188. **Jaffer v. Hirji** [2017 WL 1169665] (S.D. N.Y. March 28, 2017). In resolving a family dispute involving ownership of residential property, the court denied an adverse inference based on deletion of a recording of a conversation when the file was transferred from a cell phone to a computer. The court noted that the "standard" under Residential Funding that it was sufficient that the evidence was destroyed negligently has been "partially supplanted" by the Rule 37(e) which requires a finding of an intent to deprive. Litigants seeking an adverse inference for destruction of ESI "face a tougher climb than in years past." (*6). While the Second Circuit has "not yet published an opinion examining the impact" courts in the Second Circuit have recognized "that Rule 37(e) replaces the prior framework for spoliation claims," citing *Citbank* [2017 WL 462601] and *In re Bridge Construction Services of Florida* [185 F. Supp. 3d 459, 472-73]. Given that there was no showing of intent to deprive nor of prejudice, the court declined to draw an adverse inference or impose any other sanctions.
189. **Jarvis v. TaylorChandler** [2020 WL 4820713] (M.D. Ala. Aug. 19, 2020). In a case involving destruction of electronic and tangible evidence, the court found that the plaintiff should be sanctioned for both, although the tests differed. (*10) Although there was little prejudice involved, "flouting of the rules cannot go unaddressed." (*12). The electronic information was deleted with an intent to deprive under **Rule 37(e)**, but it is unlikely they "would have materially changed the case," and monetary sanctions suffice, awarding the costs and fees associated with the evidence that was spoliated. (*14).
190. **Jenkins v. Woody** [2017 WL 362475] (E.D. Va. Jan. 21, 2017). In an action seeking redress from a prisoner's death, the court applied the four prerequisites to **Rule 37(e)**, identified the need for use of a clear and convincing standard of proof, and concluded that defendants had failed to take reasonable steps which it could easily have done to preserve digital video of the prisoner (*16). The video could not be restored or replaced by testimony since the video was "the best and most objective evidence" of what happened. (*16) It did not find that the failure to preserve was undertaken with an intent to deprive and refused to impose an adverse inference. (*17) However, in view of the substantial prejudice its loss caused, it decided that it would tell the jury that the video was not preserved and that both parties could present evidence and argument at trial and the jury could consider the evidence along with all the other evidence in the case in making its decision. (*18)(and n. 34) The court also precluded any evidence or argument that the contents of the video corroborated defendant's version of the events or that similar circumstances had existed in another death and awarded payment of fees and expenses. It found the measures necessary, but not greater than necessary, to cure the prejudice [as required by Rule 37(e)(1)] (*19) . The court also awarded monetary sanctions for late delivery of audio files under **Rule 37(b)**, as a result of violating **Rule 37(d)**, and as carefully limited to the "time and money" spent as a result.

191. **Johnson v. Brennan** [2017 WL 5672692, at 8 (S.D. Tex. Nov. 27, 2017)]. The Senior District Judge refused to find Rule 37(e) remedies were available because of the late delivery of emails since the rule applies only if the ESI “*cannot be restored or replaced through additional discovery*” (emphasis in original)).
192. **Johnson v. City of Bastrop** [2017 WL 3381340, at n. 6 & 7] (W.D. La. Aug. 3, 2017). The court declined to grant pro se motions for contempt and sanctions)a case primarily involving allegations of violation of Rule 26(g), the court found that any relief under **Rule 37(e)** would be “duplicative and redundant” and, in any event, there was no evidence of prejudice or that the non-moving party had acted with an intent to deprive.
193. **J.S.T Corporation v. Robert Bosch** [2019 WL 2296913] (E.D. Mich. Or May 30, 2019), adopting findings and recommendations of Report and Recommendation No. 11 [2019 WL 2324488] (E.D. May 30, 2019)(Kevin F. Brady, Expert Advisor) as its “findings and conclusions.” The Expert Advisor found that prejudice existed from the deletion of the Yang emails (*9-10) under Rule 37(e)(1) but did not find sufficient circumstantial evidence of an “intent to deprive” to make a specific finding that it had occurred under Rule 37(e)(2). Bosch was prohibited from affirmatively using any emails authored by or addressed to Yang, or the absence of such emails, at summary judgment or at trial. Her emails secured from others could be used only in rebuttal to emails put in evidence by the moving party there absence could not be used to prove or disprove any fact even in rebuttal.” (*10). The court also ordered that Bosch was also barred from calling Yang as a witness at trial or providing a declaration in connection with any summary judgment motion, as recommended by the Expert Advisor. The Court ordered that the expert fees incurred be paid by Bosch; the Expert Advisor had recommended that this be done pursuant to the Court’s inherent authority (*11).
194. **Karsch v. Blink Health** [2019 WL 2708125, at *27] (S.D. N.Y. June 20, 2019). The Magistrate Judge granted the motion for discovery sanctions and concluded that under Rule 37(e)(1) the Defendants will be permitted present evidence to the jury about the loss of ESI and potential relevance of the ESI once contained in servers and devices and may seek an instruction informing the jury that it may consider that evidence in making its decision, along with all the other evidence in the case in “evaluating credibility and making its decision.” The “precise scope” of the evidence to be allowed and the form of any instruction will be reserved for decision by the district judge at the time of trial. (*28). The Magistrate Judge court cited three reasons why it was appropriate to do so. First, it will help “rectify the evidentiary imbalance” created by the party and its counsel spoliating relevant ESI, citing *Linde v. Arab Bank*, 706 F.3d 92, 102 (2nd Cir. 2013). Second, it provides the jury “as finder of fact, with context for that evidentiary imbalance, which is itself relevant evidence going to the parties’ credibility and other factual issues.” Third, it leaves the district judge free to determine the scope of the spoliation evidence to be admitted and to craft any related jury instructions. (*27). It noted that this flexibility was important since the “sanctions motion was made on a relatively thin record – at the conclusion of written discovery – before any depositions were conducted.” (*27). [The Magistrate Judge had earlier determined that the moving party had failed to meet its burden of showing the party acted with intent to deprive another party of the information’s use in the litigation, which is “both stringent and specific” even though it failed to take reasonable steps to preserve the ESI or to search the backup. (*21-22)]

195. **KCI USA v. Healthcare Essentials** [__ Fed. Appx. __ (2020), 2020 WL 260429 (6th Cir. Jan. 16, 2020)], reversing and remanding an award of \$365K in fees and costs against the law firm and \$290K against an individual on due process grounds. Related decisions included [2018 WL 4327802 (N.D. Ohio Sept. 10, 2018)]; [2018 WL 3428711 (N.D. Ohio July 16, 2018)] and [2018 WL 4510118 (N.D. Ohio Sept. 19, 2018)].
196. **Keim v. ADF Midatlantic** [2016 WL 7048835] (S.D. Fla. Dec. 5, 2016). In a putative class action under the TCPA, the plaintiff was unable to produce text messages relevant to his claim and sanctions were sought under **Rule 37(e)(1)**. The court famously noted that the rule “does not set forth a standard for preservation and does not alter existing federal law as to whether evidence should have been preserved or when the duty to preserve attaches.” The court ultimately refused to apply the rule because it could not be certain that the deletions at issue had not occurred prior to attachment of the duty. It noted, therefore, that the “better practice” would have been for the plaintiff’s counsel to “sequester and copy the contents of a plaintiff’s cell phone at the time that litigation is anticipated” so that a court can later determine which preserved portions must be produced,” saving costly and time-consuming motions that use significant court and attorney resources (n.4).
197. **Klipsch Group v. Epro E-Commerce** [880 F.3d 620] (2nd Cir. Jan. 25, 2018). On an interlocutory appeal before trial the court found no abuse of discretion in the findings of discovery misconduct due to “willful spoliation” of unstructured data due to use of data-wiping software resulting in the permanent deletion of files (629), resulting a permissive inference jury instruction (see footnote 5, referenced at *6). It also found no abuse of discretion in the conclusion that lost data on backups did not contain relevant information or caused prejudice to the party. (630) It affirmed the imposition of \$2.7M in monetary sanctions for reimbursement of counsel fees under its inherent authority, noting that the costs were carefully limited to those incurred in direct response to the party’s noncompliance with deadlines and necessitated motion practice (631), While the monetary sanctions were challenged under **Rule 37(e)** they were imposed under the court’s “inherent power to manage its own affairs.” (632) In footnote 6, it noted that the court found that ePRO had “acted with the requisite bad faith” and “accordingly” we “have no occasion to address” whether the amendments that took effect on December 1, 2015 apply to this case.” In footnote 7, it rejected the argument that the monetary sanctions “are punitive measures that violate its due process right” since “consistent with *Goodyear Tire v. Haeger*” [137 S.Ct. 1178 (2017)] the amount only for the legal bills that the litigation abuse occasioned.” It also rejected the argument that the award improperly awarded the party for excessive discovery since a “compensatory discovery sanction” is decided independent of the ultimate recovery and the proportionality that matters that it was proportional to the costs inflicted on the party in its reasonable efforts to remedy misconduct. (635) If it turns out the account of actual damages in this case is “modest” in relation to the costs spent, it “would be a highly regrettable outcome” in light of Rule 1 and amended Rule 26(b) (636).
198. **Knight v. Boehringer Ingelheim**, 323 F.Supp.3d 837, 2018 WL 3037442 (S.D. West Va. June 19, 2018). In a single plaintiff medical device products case (Pradaxa), the District Court found it fair to and applied Rule 37(e) (n. 1) and, perhaps, its inherent powers (n. 3) to

determine that no spoliation sanctions were to be utilized for the loss of a custodial file and “minor” documents, which were an “unimportant portion of the information in question.” (n. 10). In the course of the opinion it quoted and endorsed the statement by another court in that jurisdiction that authority to impose sanctions for spoliation rested under both Rule 37(e) and inherent authority. (at *2, citing *Steves and Sons v. JELD-WEN*, 2018 WL 2023128, at *3 (E.D. Va. May 1, 2018)). It also refused to apply “bad faith” findings made in earlier litigation in closed litigation in Illinois because while a bad faith finding “could supply a basis from which to find an intent to deprive,” one cannot conclude that the failure to retain information establishes that a party acted with “the intent to deprive.” [pinpoint citation unavailable]

199. **Kologik Capital v. In Force Technology**, 2020 WL 1169403 (D. Mass. March 11, 2020). The Magistrate Judge reserved a request for a jury instruction or allowing the plaintiff to present evidence about the destruction at trial for the trial judge. (*3) However, holding that “plain language of Rule 37(e) does not require a showing of intent” except for certain severe sanctions, it sanctioned the party under Rule 37(e)(1) because it found prejudice to exist because the failure to preserve led to “months of fact discovery trying to recover” the missing information, preparing for depositions without ESI and loss of good will from customers pulled into the litigation. (citing *Hefter*, 2017 WL 3317413, at *6, n. 3 (D. Mass. Aug. 3, 2017)). It **ordered the party to take responsibility for recovering the lost information from third parties** (*3) and, in footnote 3, deemed the defendants to have “waive[d] an argument that Rule 37(e) does not apply because the information can be restored or replaced through discovery. It denied monetary relief without prejudice and **reserved the request for “a jury instruction or allowing plaintiff to present evidence at trial for the trial judge.”**(*3)
200. **Konica Minolta Business Solutions v. Lowery Corporation** [2016 WL 4537847] (E.D. Mich. Aug. 31, 2016). In a case involving potential spoliation of emails by former employees who formed a competitive firm, the court ordered more discovery to determine if that reasonable steps had not been taken, since the Rule would not be applied if they had since “[s]anctions are not automatic.” The court also ordered more discovery to determine if there was an ability to restore or replace the lost information. The opinion is a pithy, well-written playbook outlining “four predicate elements” to use of **Rule 37(e)**, and includes a finding that it was just and practicable to apply the new Rule because no changes were made in a manner “adverse” to the party.
201. **Kortright Capital v. Investcorp** [2019 WL 306450] (S.D.N.Y. Jan. 18, 2019). A party sought an adverse inference in mid trial (a bench trial?) under Rule 37(c) for the failure to disclose information in a timely fashion. The court found that under Residential Funding, it was available for non-production and spoliation upon a showing of ordinary negligence. It conceded a uniform standard had been “codified” in Rule 37(e) to remedy the loss of ESI, but that it did not govern the “non-production of evidence nor supersede it in that context, citing the Federal Circuit decision in *Regeneron Pharms. v. Merus*, 864 F.3d 1343, 1364, n. 7 (Fed. Cir. 2017)). The court awarded attorneys fees and expenses under *Phoenix Four*, 2006 WL 1409413, at *3 (S.D.N.Y. 2006) and noted that Residential Funding “appeared to root the authority to sanction is part to the Federal Rules” having cited Rule 37(b)(2)(A)(n. 2).

202. **Philpot v. LM Communications** [2018 WL 3371038] (E.D. Ky. July 10, 2018). A court denied a spoliation motion brought under its inherent authority, but also citing to Rule 37(e), where a failure to preserve a digital copy of photograph was not shown to have occurred at the time the party had notice of its relevance to the case (*5).
203. **Laughlin v. Stuart** [Case No. 19-cv-2547 (ECT/TNL), 2020 WL 4747665, at *2] (D. Minn. Aug. 17, 2020). In denying a motion for sanctions where the party had not furnished information to the party sufficient for it to determine if prison video should have been preserved, the court noted that the duty extends only to relevant ESI as viewed from the perspective of the party that lost it. Absent that assistance, officials would “likely be required to preserve every video, audio recording, and scrap of paper ever created, a burden that exceeds what is required under Rule 37(e).
204. **Lawrence v. City of New York** [2018 WL 3611963, at *5] (S.D.N.Y. July 27, 2018). The court refused to apply “Rule 37” to consider sanctions imposed for creating fraudulent digital photograph because it “did not fail to comply with discovery orders, to supplement an earlier response, or to preserve electronically store information”),
205. **Learning Care v. Armetta** [315 F.R.D. 433] (D. Conn. June 17, 2016). In a contract dispute where a former employees’ laptop was destroyed “in the ordinary course of business” after the duty to preserve attached the Court declined to apply **Rule 37(e)** because it would be “unfair” to do so since the issue had been raised in September, 2015 at a time when Second Circuit authority would not have barred an adverse inference for negligence. (437) The negligent wiping of hard drive of laptop was sanctioned by an award of reasonable attorney’s fees to deter the party from “doing it again” which was deemed proportionate to the prejudice involved, which resulted from “careless,” but not grossly so. The court applied the *Residential Funding* “relevance” requirement of specifying “the type and substance of the destroyed evidence and that the evidence was favorable to his position,” but held there was enough evidence to satisfy it. (438-439) It also rejected the argument that prejudice could have been reduced by third party discovery since that goes to the type of sanctions the court imposes. (439)
206. **Lee v. Horton and Kroger Dedicated Logistics** [2018 WL 4600303] (W.D. Tenn. Sept. 25, 2018). In adopting the R&R recommendation that Kroger had no duty to preserve a daily electronic log because it had no “reason to foresee” litigation the court emphasized that there was no traffic citation issued and the moving party did not seek medical treatment while the damage to the automobile was minimal. The court refused to find that the boilerplate labeling of the incident report as prepared in anticipation of litigation “is insufficient” to demonstrate a duty to preserve, contrasting *Zuulake*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003), where it occurred against a backdrop of wide knowledge of the potential litigation.
207. **Legacy Data Access v. Mediquant** [2017 WL 6001637] (W.D.N.C. Dec. 4, 2017). In a post jury verdict decision discussing why the court had permitted the jury to consider evidence of spoliation of the contents of an SD card, the court applied its inherent power **without mentioning Rule 37(e)** because “[t]his case involves the destruction of ESI, not the loss of ESI. Therefore, **Rule 37(e)(2) is inapplicable.**” (at n. 8).

208. **Leidig v. BuzzFeed** [2017 WL 6512353] (S.D.N.Y. Dec. 19, 2017). In an action brought against BuzzFeed for libel in asserting that it had broadcast fake news, a foreign entity and Leidig deleted two websites and did an “amateurish” collection job of emails. The court found that they had not taken reasonable steps to preserve, but did not conclude that it and they had acted with an intent to deprive although were “certainly negligent” (*12) since that is “roughly a negligence standard.” (*10) (discussing a failure to take reasonable steps). The court noted in a footnote that it was irrelevant if they were grossly negligent, as “**Rule 37(e)(1)** provides no reason to distinguish between gross negligence and ordinary negligence. (n. 8). It also refused to find that securing screen shots were not sufficient to restore or replace. It noted that under the “standard applicable” to spoliation prior to the Amendments, the actions “might have been sufficient” to obtain a harsh sanction such as an adverse inference sanction. (*11) However, not here, since an intent to deprive requires not merely an intent to perform an act but “rather the intent to actually deprive another party of evidence.” (*11) It decided to allow BuzzFeed to present evidence of destruction of metadata (so as to suggest alternative creation dates); disabling of websites; and can use evidence from internet archive if it chooses to do so and plaintiffs will be precluded from arguing the evidence is inadmissible.” (*14). **In footnote 12**, it noted that the ruling “should not be construed as opining on whether a permissive (rather than a mandatory) adverse inference instruction” is appropriate as the result of the loss of evidence. It noted that the Second Circuit had made clear that a “permissive adverse inference does not necessarily reflect a sanction, and its delivery to a jury does not require the same findings necessary to impose a spoliation sanction.” See *Mali v. Fed. Ins. Co.*, 7201 F.3d 387, 391-94 (2nd Cir. 2013); *Kilpich v. Big Box Store* [2014 WL 904595, at *4]. It stated that such an instruction could be requested at the time pretrial order materials are submitted to the court.
209. **Leroy Bruner v. American Honda** [2016 WL 2757401] (S.D. Ala. May 12, 2016). The duty to preserve inherent in **Rule 37(e)** was invoked to justify an order requiring a litigation hold to prevent the deletion of email.
210. **Lewis v. Erfe** [2020 WL 4581724] (D. Conn. Aug. 10, 2010). The court decided to allow testimony about the failure to preserve surveillance video in case involving defendants who did not have custody and control but could have requested its preservation after prisoner complaints. Although a bench trial, the did not regard the request for an adverse inference to be moot since it could be converted to a jury trial. The court found prejudice because it could bear on disputed testimony and the credibility of the defendants relating to the deliberate indifference claim “to the extent they had the ability to affect is preservation and failed to make a reasonable attempt to assure its preservation” (*4).
211. **Lexpath Techs. Holdings v. Brian R. Welch** [744 Fed. App. 74] (3rd Cir. July 30, 2018). In a decision not explicitly mentioning **Rule 37(e)**, the Court of Appeals affirmed a jury verdict for defendants, who had left the employment and successfully defended the claims and prevailed on their counterclaim that the suit was brought in bad faith. The moving party below argued it was unfairly denied a spoliation instruction after the judge changed his mind about giving an order that “would tell the jury” a paragraph or two about spoliation and “instruct that the jury may consider the lost information unfavorable” to the defendant. (77) [The lower court had stated in 2016 WL 4544344 (D. N.J. Aug. 30, 2016) after an evidentiary hearing that it would

use the “**second option under Rule 37(e)**” [ie, (e)(2)] and instruct the jury that it may presume the information to be unfavorable]. The court was willing to “charge spoliation” but not give a presumption, but the moving party asked the spoliation charge not be included. (78-79). [In footnote 2, the Court of Appeals noted that the details of the charge were not in the record, but “we presume the Court meant that it would tell the jury that it was up to them to determine whether or not spoliation had occurred.” The Court of Appeals refused to find that the denial was an abuse of discretion. The court had repeatedly told the parties that it was “up to the jury to find whether spoliation in fact occurred” and after hearing the evidence it concluded that a presumption was not warranted given the lack of testimony on certain key issues. The Court said that “a district court’s findings of fact in deciding a pretrial motion cannot foreclose a jury from making its own factual findings” (79). In a footnote at that point, note 3, the Third Circuit observed “we have not yet spoken on the “proper division of fact-finding labor, Nucor Corp. v. Bell, 251 F.R.D. 191, 202 (D.S.C. 2008), between judges and juries when issuing a spoliation sanctions” and need not do so on this appeal because it was not an abuse of discretion “to decline to give an adverse inference charge” under these circumstances. The court also noted that the lower court had “never indicated” that it would instruct the jury that, as a matter of law, spoliation had occurred” and had repeatedly reminded the court before trial that “the facts should be tried by the jury.” (79) Also, “it was within the Court’s discretion to revise its prior ruling upon hearing the evidence at trial.” (80)

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

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

214. **Lokai Holdings v. Twin Tiger** [2018 WL 1512055] (S.D.N.Y. March 12, 2018). A Magistrate Judge sanctioned an entity sued for trade dress copying of a bracelet as a result of the loss of emails under confusing circumstances sufficient, in the courts view, to justify remedial measures under Rule 37(e)(1) but not under (e)(2) given a lack of intent to deprive (*15-*16) and a failure to show selective deletion (*16). The attorney for the non-moving party came in for criticism for failure to follow *Zubulake* standards of overseeing compliance with a litigation hold and not becoming familiar with policies and architecture. (*11). While

the court found that prejudice existed, it was clear that it had been able to obtain discovery sufficient to support its claims. It exercised its discretion to order reimbursement for attorney's fees and costs to ameliorate "economic prejudice" citing CAT3 and precluded the nonmoving party from using unpreserved emails unless duplicate copies obtained any testimony suggesting such emails would support defenses or counterclaims. It permitted the movant to seek an instruction from the trial judge that the jury is permitted to make "reasonable extrapolations or interpolations" from existing sales data if it is shown that material gaps resulting from deletions of email exist (*17). It explained that the "prior version of Rule 37, an array of sanctions, including severe sanctions, could be imposed for spoliation of evidence merely upon a court's finding that the non-moving party had destroyed evidence through negligence" (citing Residential Funding). However, the amended Rule 37 makes it "more difficult for a moving party to obtain sanctions for spoliation of ESI, by rejecting the Residential Funding standard that authorized the giving of adverse-inference instructions on a finding of negligence or gross negligence. (8*).

215. **Love v. City of Chicago** [2017 WL 5152345, at *5] (N.D. Ill. Nov. 7, 2017). The court, applying former version of **Rule 37(e) because the current version** is not retroactive held that there was no duty to preserve audio recordings overwritten in the regular course of business absent notice of the duty (citing *In re Pradaxa*, 2013 WL 5377164 at *3 (S.D. Ill. 2013)).
216. **Love v. Medical College of Wisconsin** [350 F. Supp.3d 730] (E.D. Wisc. Nov. 20, 2018). The court denied a motion for sanctions under Rule 37(e) despite the failure to take reasonable steps to preserve the emails of a third party witness because there was no satisfactory explanation of the degree of prejudice suffered and the moving party had access to an "abundant amount of preserved information on the topic," since production had been made of some of the emails from other sources.
217. **Mafille v. Kaiser-Francis Oil Company** [2019 WL 2189515] (N.D. Okla. May 21, 2019). In ruling that it was premature to find a party should be sanctioned under Rule 37(e), the court noted that on the record to date there was no factual showing of prejudice and that efforts were still available to search a LAN server for the missing ESI. The court decided against sanctions without prejudice, but expressed the hope in a footnote that there would be no need to address it further and "the focus of the litigation" will not "devolve into a search for a tenuous basis for sanction."
218. **Malone v. Weiss** [2018 WL 3656482, at *7] (E.D. Pa. Aug. 2, 2018). The court used its inherent authority to deal with spoliation because it is "a more appropriate rubric" here since the Rule 37(e) by its very terms "only" applies when a party has failed to take reasonable steps to preserve. The Rules "does not speak to the current dispute" which were "more serious" given that there was "intentional manipulation of emails and contracts." The court cited to a pre-2015 decisions that found it appropriate to impose sanctions under inherent power because the misconduct at issue was "broader than a Rule 37 violation."
219. **Man Zhang and Chunman Zhang v. The City of New York** [2019 WL 3936767] (S.D.N.Y. Aug. 20, 2019). In a Rikers Island case involving death of the prisoner from allegedly denial of medical care, the court sanctions for loss of ESI but not documents, in part

because the conduct was “at worst negligent,” since nothing in the record suggested the defendants had destroyed evidence in bad faith or with an intent to deprive, but was awarded attorney’s fees under **Rule 37(e)(1)**.

220. **Mannion v. Ameri-Can Freight Systems** [2020 WL 417492] (D. Ariz. Jan. 27, 2020). A court order setting for the reasons it had denied an adverse-inference instruction after concluding a trial on the merits and dealt with related issues as to the division of labor between court and jury. At one point, the court famously stated that “judges, not juries, should be the ones deciding whether to impose spoliation sanctions.” (*4). It subsequently noted that *Nucor v. Bell*, 251 F.R.D. 191, 202 (D.S.C. 2008) had noted (at 202-03) some courts permit the jurors to “re-assess” the evidence and determine whether spoliation” has occurred at all.” The court noted that it was “not convinced that such reassessment by the jury is ever necessary or appropriate.” (*4) [citing *Aaron v. Kroger*, 2012 WL 78392 and *Brookshire Bros*, 438 S.W.3d 9 (2014)]. While the entire opinion is useful and instructive, footnote 5 speaks of allowing the court to “delegate” only one “spoliation-related factual finding” to the jury, citing *Woods v. Scissons*, 2019 WL 3816727 (D. Ariz. 2019) and *Glover*, 6 F.3d at 1329-30. The opinion can be cited for the proposition that “this type of issue” should be raised via a pretrial motion, “not via trial briefs submitted in the middle of trial.” (*6)
221. **Manufacturing Automation v. Hughes** [2019 WL 266970, at *6] (C.D. Cal. Jan. 15, 2019). In deciding a motion in *limine* prior to trial, a District Court decided not to allow the party to inform the jury of an award of monetary sanctions by the Magistrate Judge under Rule 37(e) during discovery which was paid and not appealed. [NOTE: In 2018 WL 5914238, at *18 (C.D. Cal. Aug. 20, 2018), the court had separately imposed fees and expense under Rule 37(e), placing the burden on the non-moving party to demonstrate that no prejudice had resulted from the failure to take reasonable steps to preserve and had sanctions counsel and the party \$4500 under Rule 37(b) for a breach of professionalism in complying with an earlier order.] The moving party argued that it “simply want[s] to be able to present evidence to the jury of the plaintiff’s spoliation, so the jury may draw its own conclusions about what that means,” citing the Committee Note to Rule 37(e). The court agreed that “it would be improper to provide an additional remedy,” but also held that this would nor “preclude” the moving party from “identifying for the jury any missing documents that may pertain to plaintiffs claim” and that both parties may inquire at trial how each party handles document retention policies, including failures to adhere to them, as this evidence was “relevant to the merits and burden of persuasion.”
222. **Marquette Transportation v. Chembulk** [2016 WL 930946] (E.D. La. March 11, 2016). In an action alleging negligent operation of a vessel near New Orleans, allegedly causing a moored boat to capsized, **Rule 37(e)** was not applicable even if reasonable steps had not been taken to initially preserve because certain key audio and radar data, which had been deleted, was acquired after a DVE/CD-ROM to which it had been downloaded had been found by the captain of the vessel. The court also refused a request under **Rule 37(c)** for costs of expenditures for expert during period before the full data set was recovered because “the matter involves VDR data, which is electronically stored information (“ESI”).”

223. **Marshall v. Dentfirst** [313 F.R.D. 691](N.D. Ga. March 24, 2016). No measures were available under **Rule 37(e)** (or if the Rule did not apply, under Eleventh Circuit standards, which are “substantially similar”) for failure to retain browsing history or emails of terminated employee since there was no evidence that they existed when the duty to preserve attached after filing of an EEOC charge. Even if they had existed when the computer was wiped and recycled there was no evidence that the party acted in “bad faith” or with “intent to deprive” under **Rule 37(e)(2)**. Moreover, there was no prejudice from their loss since there was no evidence it was relied upon in the termination process and the party can depose them on the topic. **Rule 37(a)(5)(A)** did not allow award of attorney fees and expenses since the motion was not granted (n.9).
224. **Marten Transport v. Plattform Advertising** [2016 WL 492743](D. Kan. Feb. 8, 2016) In a trademark and unfair competition action based on continued use of plaintiff’s mark after termination of the agreement permitting it to do so, the court refused to find a breach of the duty to preserve under **Rule 37(e)**. While it was clear that the ESI at issue was not preserved (internet browsing history) the party “did not know or have reason to know” that it would be relevant at the time. (*3). By the time it became clear that it was at issue, the employee had moved to a new work station and the browsing history had been recycled pursuant to standard procedures in effect at both parties. The court noted that the **Rule 37(e)** Committee Notes expressly instruct that reasonable steps suffice, the rule did not call for perfection and the “routine good faith operation of an electronic information system” is a relevant factor in determining if a party took reasonable steps. (*5) It refused to use a “perfection standard” or “hindsight” in determining the scope of the duty to preserve. (*10).
225. **Martinez v. City of Chicago** [2016 WL 3538823] (N.D. Ill. June 29, 2016)(Dow, J.) In ruling on motions in limine filed prior to a trial arising out claims against police after arrests, the court apparently applied existing Circuit Principles to refuse to permit use of a dash cam video to the extent it captures references by an officer to “another” lawsuit involving one of the suspects (it would open the door to irrelevant information with the capacity of unfairly prejudicing both sides, citing FRE 401 & 403)(*16) and refused to instruct the jury that they should draw an adverse inference from a failure to produce other “videos from the cameras” in the squad cars (*23- 24). The court noted that **Rule 37(e)** negated use of gross negligence as a basis for adverse inferences, but since no evidentiary showing of bad faith existed, it was not necessary to rule on the interaction between **Rule 37(e)** and Seventh Circuit rulings on adverse inferences where the Circuit had not yet “addressed how, if at all, the Rule 37 impacts its rulings on adverse inferences.” [“the Committee [Note] is silent on how the amendment impacts presumptions based on document retention policies.”(*24).] The Court also noted since plaintiff only sought an adverse inference, it had “no occasion” to determine if a less severe remedy might be available. [n.11].
226. **Matthew Enterprise v. Chrysler** [2016 WL 2957133] (N.D. Cal. May 23, 2016). In action by car dealership challenging failure to adjust sales incentive thresholds, a “lackadaisical” preservation effort was made by dealer after it threatened to sue Chrysler. No effort was made by plaintiff to have outside vendor retain communications (which were deleted after 2 years) and email was not retained when switching email providers. These efforts did not qualify for the “genuine safe harbor” available under **Rule 37(e)** for parties that take “reasonable steps.”

Prejudice existed because lost customer communications “could” have contained information whose loss denied Chrysler the ability to undercut statistical evidence by anecdotal evidence of customer communications. As a remedy, Chrysler would be allowed to use evidence of communications post-price discrimination period, to support arguments as to reasons for choosing dealership and present evidence and argument about spoliation of communication lost if Plaintiff offers testimony. Moreover, “if the presiding judge deems it necessary,” it can provide instructions to assist the jury in evaluation. In n. 55, **Rule 37(e)(2)** measures such as instructing the jury to presume the information unfavorable were inapplicable because of the absence of “intentional spoliation.” The court refused to assess the deletion of emails under **Rule 37(b)** because the issue “is spoliation and not compliance with” the court’s order on motion to compel” their production. (n. 37 & 47).

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

228. **MB Realty v. Gaston County Board of Education** [2019 WL 2273732] (W.D. N.C. May 28, 2017). The court refused to grant motions for spoliation measures under **Rule 37(e)** because there was no intent to deprive and no prejudice. The defendant that forwarded emails to another account before deleting them took reasonable steps to preserve and, even if not, the court was “unpersuaded” that it had acted with intent to deprive. The defendant that misunderstood that her duty to preserve included text messages, not just emails testified in her deposition that she deleted the texts as part of her routine practice, not an attempt to to deprive the other party of them and attempted to recount their contents to the other party. The record “does not support” a finding she acted with intent to deprive. (*5) It was “mere speculation” to assert that the missing text messages would have been favorable to the party seeking them. (*5).

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

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

231. **McIntosh v. US** [2016 WL 1274585] (S.D.N.Y. March 31, 2016). Court refused to apply **Rule 37(e)** to deletion of video surveillance tape because it would make no sense to apply it to

a case briefed before the new rules came into effect. The court acknowledged that the movant is on “shakier legal footing” in seeking adverse inferences if the new Rule were to be applied, and while reluctant to reward the “capriciously aggressive tactics” in submitting the request after the rule went into effect, it would apply the “familiar law” of Residential Funding since the plaintiff is proceeding pro se. In footnote 34, it noted that courts differed as to whether Rule 37(e) applied to “videotape.”

232. **McQueen v. Aramark Corporation** [2016 WL 6988820] (D. Utah Nov. 29, 2016). In a case involving loss of ESI and documents involving work orders relating to a work-related death, a court found that reasonable steps had not been taken to preserve due to a delay in use of a litigation hold and the information could not be restored or replaced through additional discovery, citing **Rule 37(e)**. It found that prejudice existed because it “may well have an effect on Plaintiffs’ ability to pursue their claims.” It did not find that the party acted with “intent to deprive” under **(e)(2)** because it could not find that the “actions were intentional or that its conduct establishes bad faith.” As a “lesser sanction,” it ordered that the parties be permitted to present evidence of spoliation of the work orders and ESI and to “argue any inferences they want the jury to draw.” It added that the jury “will not, however, be specifically instructed regarding any presumption or inference regarding the destruction of those materials.” (*4) The court also awarded reasonable expenses for bringing the motion under **Rule 37(a)**, interpreting it to apply to all motions “seeking discovery” because the “failure to preserve records was not substantially justified” and court intervention was necessitated. The court also observed that under *Turner v. Pub. Serv.*, 563 F.3d 1136, 1149 (10th Cir. 2009), “[t]he Tenth Circuit has applied the same Rule 37 analysis to non-ESI spoliation issues.” (*3).

233. **ML Healthcare Services v. Publix Super Markets** [881 F.3d 1293] (11th Cir. Feb. 7, 2018). The Eleventh Circuit affirmed the rejection of a spoliation motion for retention of a limited amount of video in a slip and fall case under federal law, citing both its previous rulings based on *Flury*, where it had found Georgia spoliation law consistent with federal principles, and under **Rule 37(e)**, while declining to determine if the *Flury* principles still applied since the court did not abuse its discretion under either. Specifically, it found that the failure to retain more video “did not constitute bad faith or demonstrate and intent to deprive” since it had immediately saved the most relevant part of the video – the hour during which the fall occurred. The court ruled that despite later requests for broader preservation, “it might reasonably, and in good faith, have concluded that it did not have to comply with such a broad and far-reaching request.” (*10). The court also noted the lack of evidence of bad faith, since it acted consistent with its normal video-retention policies and while plaintiff might have hoped to show other aspects of causation, it narrow narrowed its request nor is that any reason to believe the video would have actually shown conflicting testimony, inconsistent statements or observations from others. Similarly, since the court found there was no prejudice, any additional benefit was purely speculative since the resolution was not clear enough to see any liquids, even if videos were available. Under “**either *Flury* or Rule 37(e)**,” it was no abuse of discretion for the

court to deny requests for exclusion. Ron Hedges, in his article on reasonable steps describes this as showing how proportionality fits into a **Rule 37(e) analysis**.⁴

234. **Monolithic Power Systems v. Intersil Corp.** [2018 WL 6075046] (D. Del. Nov. 11, 2018). Chief Judge Stark refused to impose sanctions under **Rule 37(e)** for losses of WeChat messages which were deleted in the ordinary course of business (“there is no evidence that the messages were deleted for any reason other than in the ordinary course –and consistent with industry practice – to conserve limited space on employees’ phones”) before the Legal Department of the entity involved became aware of the need to preserve. (“There is no evidence any message was deleted after anyone associated with [the party] reasonably anticipated litigation to which the messages would be relevant”). (*2) It also denied measures - perhaps under the Rule, but perhaps not - for samples of a product that was not destroyed, and may exist (and the party had not sought its recovery from third parties.). The court cited to *Schmidt v. Milwaukee Tool*, 13 F.3d 76, 79 (3rd Cir. 1994) and a 2012 decision, speaking of the need to show bad faith.
235. **Montana State University v. Montana First Judicial Court** [2018 MT 220, 2018 WL 4327887] (S.C. Mont. Sept. 11, 2018). In a well written opinion blending the former Rule 37(e), as adopted verbatim in Montana circa 2006, with Rule 37(e), as amended in 2015, the court reversed a lower default judgment based on alleged spoliation of email after a duty to preserve attached. The court provided a concise summary of how federal courts had “effectively read the intended safe harbor” out of the initial rule by concluding that once the duty to preserve arises “and it arises as soon as litigation becomes foreseeable – any deletion of relevant data is, by definition, not in good faith.” (n. 17 and text at *9). It “construed” the former rule (still in effect in Montana) “in the context of [amended Rule 37(e)’s] duty , breach, prejudice and proportionality analysis,” as the good faith and exceptional circumstances are “necessarily subsumed into the prejudice and proportionality elements” of the new analysis. (*10 and n. 20).
236. **Montgomery v. Iron Rooster-Annapolis** [2017 WL 1902699] (D. Md. May 9, 2017). In refusing to recommend that the loss of text messages on a cell phone was not done with an intent to deprive, the Magistrate Judge recommended that under (e)(1) that the court “given an instruction to the jury that Plaintiff had a duty to maintain potential ESI contained on her phone, but failed to so.” It also noted that the court may instruct the jury “as to any inference to draw from the . . .failure to preserve texts” and the court can consider whether the moving party can show if there were in fact texts between the plaintiff and others during the time frame and whether “there is any evidenced to show those communications would have been favorable to Defendant’s claim of exempts status of Plaintiff.” (*2).
237. **Montoya v. Loya Insur.** [2019 WL 5456797] (D. New Mex. Oct. 24, 2019). The court refused to enter a default judgment under Rule 37(e)(2) for a failure to preserve an audio tape of the plaintiff since any prejudice suffered does not justify the relief sought and the court “dies

⁴ Ronald J. Hedges, What Might Be “Reasonable Steps” to Avoid Loss of Electronically stored Information,” 18 DDEE 143, March 1, 2018.

not consider whether lesser sanctions would be appropriate because Plaintiff does not request any.” (*2).

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

239. **Morgan Art Foundation v. Michael McKenzie** [2020 WL 5836438] (S.D.N.Y. Sept. 30, 2020). While many emails were deleted – by someone at some point – after a meticulous effort demonstrated that only two emails were after the duty to preserve attached, they were not “permanently lost” and do not warrant sanctions under Rule 37(e). “Ordinarily, if emails were sent to or from other parties,” they can be replaced in discovery by obtaining them from those other parties. The movants failed to carry their burden as to the “two threshold elements need before spoliation sanctions can be assessed.” (*23)

240. **Morrison v. Veale, M.D.** [2017 WL 372980] (M.D. Ala. Jan. 25, 2017). In FLSA action by former employee who accessed and deleted emails from a gmail account, the court acknowledged **Rule 37(e)** but held it was not binding because it became effective after the filing of the case. It applied Eleventh Circuit case-law and conducted an evidentiary hearing after which it found the non-moving party’s explanatory testimony not to be credible. It concluded that since the party “deliberately” logged on to its former employers email in bad faith, “the fact-finder must accept as true the time cards/timesheets” plaintiff had created (a “mandatory evidentiary presumption”).

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241. **Moser v. Health Insurance** [2018 WL 6735710, at *6 and n. 1 (S.D. Cal. Dec. 21, 2018)]. A court refused a defendants demand under Rule 34 for direct access to examine all of the electronic devices forensically where it is not clear the duty to preserve may not have attached, there are other means to get the information and there was not prejudice shown by the overwriting of the browsing history under **Rule 37(e)**. The court noted that 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.”

242. **MPLA v. Gateway Community College** [717 Fed. Appx. 96] (2nd Cir. April 6, 2018). The Circuit court affirmed, without discussion, the refusal of the district court to reopen the judgment in a Section 1983 case because of illness of an attorney and the refusal to enter sanctions based on the failure to preserve surveillance video of the library from which he was

banned. The court held that Rule 60(b) did not apply and, moreover, he did not demonstrate that he was prejudiced by the alleged failure, **citing Rule 37(e)**.

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

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

245. **Nationwide Life Insur. V. Betzer** [2019 WL 5700288] (M.D. Fla. Oct. 28, 2019). In an interpleader action where the issue was whether a beneficiary had drained a decedents assets, a mandatory adverse inference instruction was sought under **Rule 37(e)(2)** for the deletion of data on the decedents computer. A forensic examination confirmed the deletions. After a complex recitation of the application of the predicate conditions and the circumstantial evidence of bad faith, the Magistrate Judge stated that it could, “as a sanction under Rule 37(e)(1),” allow the parties to present evidence concerning the loss of ESI and its likely relevance to the jury and, “in allowing that presentation,” prohibit the other party from presenting certain rebuttal testimony to the forensic examiner conclusions. However, given the extent to which it appeared the party acted with an intent to deprive, it recommended an instruction to the jury that “it must presume the information was unfavorable.”

246. **Neely v. Boeing** [2019 WL 1777680] (W.D. Wash. April 23, 2019). In a case where a box of documents held by counsel for Plaintiff was inadvertently rerouted and ultimately

landed in the lap of counsel for Boeing, the Plaintiff sought sanctions for the alleged spoliation of the documents and of pst. records of Boeing employees, which had made considerable efforts to do so. The exercised its inherent powers to refuse entry of a default judgment and applied Rule 37(e) in concluding that there was no basis for entry of default judgment under the Rule.

247. **Newberry v. County of San Bernadino** [750 Fed. Appx. 534] (Sept. 18, 2018). A Panel of the 9th Circuit affirmed a decision not to impose sanctions under Rule 37(e) while noting that the parties had improperly framed the issue as one involving the district court's inherent authority since "at the time the sanctions motion was filed, sanctions" were governed by the current version of Rule 37(e). The court noted that the "detailed language of Rule 37(e) 'therefore foreclose[d] reliance on inherent authority,' citing the Committee Note. The Panel described the Rule as providing "[t]wo categories of sanctions" and concluded that the court did not abuse its discretion in concluding that sanctions "were not warranted" under either subsection. The district court reasonably concluded that the missing "emails cause not prejudice," since the officers played only minor role and that the court "properly exercised its discretion in finding spoliation unlikely in this case," and terminating sanctions "unjustified, given the relative insignificance of any gap in the Count's production." (537).

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

249. **New Mexico Oncology v. Presbyterian Healthcare Services** [2018 WL 1010284 (D. New Mex. Feb. 21, 2018)]. The District Judge, after a de novo review, adopted in full the findings of Magistrate Judge at 2017 WL 3535293, at *13 (D. New Mex. Aug. 16, 2017) which denied adverse inference and default judgment under Rule 37(e) but awarded attorney fees under its inherent powers citing *dicta* in *Browder v. City of Albuquerque*, 209 F. Supp. 3d 1236, 1295-1296 (2016) because it would "serve the interest of justice," citing *In re Rains*, 946 F.2d 731, 733 (10th Cir. 1991)). The Magistrate Judge spoke of awarding "lesser sanctions" under *Browder*, which included, using inherent authority "an award of attorneys fees; an order that the culpable party produce related documents regardless of any laims of privilege or immunity; eclusing evidence or striking part of a party's proof; allowing the aggrieved party to question a witness in front of the jury about the missing evidence; and imposing costs for creating a substitute for spoliated data." (at *12, quoting from 187 F. Supp. 3d at 1295-96).

250. **NITV Federal Services v. Dektor Corporation** [2019 WL 7899730, at *9](S.D. Fla. Sept.20, 2019). After finding both prejudice and intent to deprive, the court issued a default judgment pursuant to **Rule 37(e)** to penalize because the misconduct was so pervasive and impactful that “normal sanctions are not enough.
251. **Nunnally v. District of Columbia** [243 F. Supp. 3d 55] (D.D.C. March 22, 2017). In a lengthy opinion adopting after review a R&R dealing in an employment retaliation case, the court ordered an adverse inference instruction at trial for negligent failure to preserve potentially relevant email despite acknowledging (in note 10) the existence of **Rule 37(e)**. The court held that since Rule 37(b) did not apply in absence of a discovery order, the court may issue appropriate sanctions under its inherent power. The court also held that only “a very slight showing” of relevance was required since the burden on the party seeking the adverse inference is lower.
252. **Nuvasive v. Kormanis** [2019 WL 1418145] (M.D. N.C. March 29, 2019). In a decision **not citing Rule 37(e) but adopting an R&R that does [2019 WL 1171486]**, the District Court agreed that the court should “submit to the jury, with appropriate instruction, the disputed question” of whether the party had acted to deprive the moving party of the use of the lost text messages in litigation. The Magistrate Judge had recommended that course after a detailed analysis and had also determined that the party had failed to take reasonable steps to preserve text messages which could not be restored or replaced through additional discovery. The District Judge agreed to “defer until trial a decision on whether more serious measures are need to cure the prejudice.”
253. **Nuvasive v. Madsen Medical** [2016 WL 305096] (S.D. Cal. Jan. 26, 2016) Chief District Judge vacated his earlier decision to impose a permissive jury instruction [2015 WL 4479147] at an upcoming trial because **Rule 37(e)** applied and there was no finding that the party had “intentionally” failed to preserve text messages so they could not be used in the litigation. The Court decided, however, to allow both parties to “present evidence regarding the loss” to the jury and will instruct is that it may consider such evidence “along with all the other evidence in the case in making its decision” to serve as a “remedy or recourse (*3).
254. **Nutrition Distribution v. PEP Research** [2018 WL 6323082](S.D. Cal. Dec. 4, 2018). In a decision concluding that spoliation of Facebook posts occurred after the duty to preserve attached with a culpable state of mind under pre-2015 precedent, the court granted a “Motion for Sanctions pursuant to **Fed. R. Civ. P. 37(E)**” and stated the jury would receive an instruction that the party failed to preserve social media posts after the duty to preserve attached and you may, but are not obligated to, infer that the deleted posts were favorable to the Plaintiff and unfavorable to the defendants. (at *5, relying on the *Apple v. Samsung*, 888 F. Supp.2d 976.995 (N.D. Cal. 2012)).
255. **O’Berry v. Turner** [2016 WL 1700403](M.D. Ga. April 27, 2016) A mandatory adverse inference was imposed under **Rule 37(e)** because it was “beyond the result of mere negligence” to make a single hard copy of downloaded ESI without taking further steps to preserve. The copy was placed in a file folder, ultimately moved to a new building and not reviewed until much later, when it was found missing. The court concluded that all the facts “when

considered together” lead the court to but “one conclusion – that [defendants] acted with the intent to deprive Plaintiff of the use of this information at trial.” The “minimal” effort undertaken to preserve was a failure to take “reasonable steps.” There no discussion of the “prejudice” caused by loss of the data, which was apparently presumed to have occurred.

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

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

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

259. **Orion Drilling Company v. EQT Production Company** [__Fed. Appx.__, 2020 WL 5089437 (3rd Cir. Aug. 28, 2020). In refusing to find any errors in instruction the jury about an adverse inference upon finding a bad faith failure to preserve notes relating to performance of a contract, the Third Circuit that District Courts “permissive and tailored adverse inference instruction was reasonable and not an abuse of discretion,” citing, *inter alia*, *GN Netcom*, 930 F.3d at 83 (noting that a permissive adverse inference instruction is a lesser sanction). No explicit mention was made of **Rule 37(e)**, **but that was the source of the authority cited in GN Netcom** when comparing the adverse inference instruction to dismissal or default.

260. **Oracle America v. Hewlett Packard**, 328 F.R.D. 543 (N.D. Cal. Aug. 17, 2018). In declining to hold that any measures were available under Rule 37(e) because of deleted emails

In the case at bar, many of the Co-CEO's deletions were undertaken either before the duty to preserve attached or copies were furnished by other custodians and the court refused to infer that HPE had failed to at least "show that categories of irreplaceable relevant documents were likely lost, as in the cases on which it relies," citing *Alabama Aircraft Indus. v. Boeing Co.*, 319 F.R.D. 730, 553 (N.D. Ala. 2017), *Matthew Enter. v. Chrysler*, 2016 WL 2957133, at *5 (N.D. Cal. May 23, 2016). (553) The court also noted that the Rule "essentially functions as a decision tree" with measures such as was sought here, namely "non-dispositive measures to cure any resulting prejudice. (549) It explained that the threshold inquiry is whether ESI has been "lost" which, in turn, requires a showing that (a) discoverable ESI existed when the duty to preserve arose but was not preserved due to a party's negligent failure to take reasonable steps to preserve it *and* (b) that it cannot be restored or replaced (emphasis in original). (549).

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

262. **Ottoson v. SMBC Leasing** [268 F. Supp.3d 570] (S.D. N.Y. July 13, 2017). The court imposed an adverse inference under its inherent authority because it exists "in addition" to authority to act under Rule 37(e). It acted because the party had acted "willfully or in bad faith," relying on *Residential Funding* and *Pension Committee*. (*11) The court also found that the party had failed to take reasonable steps to preserve and had either deleted the emails or still had them without producing them, which was sufficient evidence to meet the "requisite level of intent required" by **Rule 37(e)**. It collected a series of recent cases finding a lack of "reasonable steps" (**Arrowhead Capital**, 2016 WL 4991623, at *20; **CAT3**, 164 F. Supp.3d 488, 501; **First Fin.**, 2016 WL 5870218, at *3-4; **GN Netcom**, 2016 WL 3792833, at *6; **O'Berry**, 2016 WL 1700403, at *3-4; **Brown Jordan**, 2016 WL 815827, at *37; and **Internmatch**, 2016 WL 491483, at *4-5, *12-14 [Note: *vacated* Nov. 17, 2017, 2017 WL 8944065].) The court also stated it would award fees and costs under Rule 37(a)(5)(A) on the theory that granting any discovery motion requires such payment band because it has inherent authority to do "outside the context of a Rule 37(e) dispute" so as to punish and deter, citing *Best Payphones*, 2016 WL 792396 (E.D. N.Y. 2016). At no point did the Court mention the Committee Note statement that Rule 37(e) foreclosed reliance on inherent authority to determine when certain measures should be used. [According to *Cruz v. G-Star*, it also held that a failure to take any reasonable steps to preserve satisfies the requisite level of intent required by Rule 37(e)(2)(582)].

263. **Paisley Park Enterprises v. Boxill** [330 F.R.D. 226] (D. Minn. March 5, 2019). The Magistrate Judge concluded that certain parties had intentionally destroyed text messages through conduct that was more egregious than a negligent failure to disengage the auto-delete function. (*7) It postponed "consideration" of sanctions under (e)(1) and (e)(2) until a later date, closer to trial. (*8) In the meantime, it ordered that the party to pay "into the court a

“fine of \$10,000” citing Rule 37(e)(1) and (2), while noting that that “many courts have imposed monetary sanctions under Rule 37(e)(1).

264. **Palmer v. Allen** [2016 WL 5402961] (E.D. Mich. Sept. 28, 2016). Rule 37(e) was applied to alleged destruction of video in prisoner case since Applebaum (831 F.3d 740 (6th Cir. 2016)) and Konica Minolta had applied the new rule to cases initiated before the rule became effective and because the “spirit and principles underlying them have not materially changed in a manner adverse to [the moving] party.”
265. **Pals v. Interstate Highway Construction** [2019 WL 7482263] (D. Neb. June 18, 2019). A court was unable to determine if items were lost or destroyed with an intent to deny the other party its use, and, citing Rule 37(e), determined to have parties present evidence of the issue to the jury which would decide the spoliation issue. (*2-3).
266. **Palomo v. Demaio** [2019 WL 1323927] (N.D.N.Y. March 25, 2019). Where the moving party did not show that the party had a duty to preserve the disputed audio files, the first element of Rule 37(e) is not met and the court need not reach the remaining arguments.
267. **Pelino v. Gilmore** [2020 WL 2572361] (W.D. Pa. May 21, 2020). In a prisoner case where motions to preserve had resulted in orders to do so, the court sanctioned for loss of a surveillance video under **both Rule 37(b)(2) and 37(e)(1)**. It “appears” to come within the latter “relative to a party’s negligent or grossly negligent failure to preserve ESI” but “at this point” the court has no evidence that the failure to preserve was “intentional destruction.”(*6) Rule 37(e)(1) permits order of measure necessary to cure the prejudice caused by the loss of any ability to “rebut” the claim about the use of “cages” to shield private areas from the cameras view. (*5) Accordingly, “at time of trial, the jury will be given an appropriate permissive adverse inference instruction” for failure to preserve in violation of an order and will be prevented from introducing any evidence at trial supporting any defense during the search and will be prevented from introducing any evidence in support of a motion for summary judgment, and the defendants must reimburse for postage and copying cost relating to the motion.
268. **Pettit v. Smith** [2014 WL 4425779] (D. Ariz. Sept. 9, 2014)(Campbell, J.). In a pre-effective date opinion written by the then Chair of the Rules Committee, a digital video recording in a prison case was deleted without deliberate attempt to make them unavailable in the lawsuit. The court planned to allow the parties to present evidence and argument and would instruct the jury that the there was a duty to preserve and that they may infer that the lost evidence would have been favorable. In ftn. 6 the court stated that although the case involved “deletion of a digital video file, **it does not concern ESI in the sense addressed in the proposed amendment [ie, Rule 37(e)]**, which is concerned more with the operation of modern ESI systems and ease with which information can be added to and lost by such systems.”
269. **Philmar Dairy v. Armstrong Farms** [2019 WL 3037875] (D. New Mexico July 11, 2019). In deciding that Rule 37(e) did not apply because the alleged spoliation of photos on a cell phone of a small fire occurred prior to the duty to preserve attached, the court perceptively noted that the duty to preserve applied only when the litigation was “imminent” (*2) and that

most courts find that a party “reasonably anticipates litigation” after it “has had a certain type of negative interaction with its potential adversary,” with an excellent collection of cases (*3). It contrasts that situation with the fact that it is “possible, though uncommon, for a event to trigger the duty to preserve evidence, even without any interaction with a potential adversary,” citing *Stevenson v. Union Pacific* and other serious accidents, events “commonly producing litigation, including *ArcelorMittal v. Amex Nooter*, 2018 WL 509890, at *6 (N.D. Ind. Jan. 232, 2018).

270. **Porter v. City and County of SF** [2018 WL 4215602] (N.D. Cal. Sept. 5, 2018). The court refused to give an adverse inference instruction against the City for failure to preserve a call reporting an AWOL/escape from the Zuckerberg General Hospital and Trauma Center under because there was “no evidence” that it was intentionally erased as it was erased pursuant to a two-year ESI retention policy, which was at most gross negligence ‘not intentional malfeasance.’ (*4). However, an appropriate sanction under Rule 37(e)(1) is to “inform the jury that the call was spoliated.” Thus, “the court orders that the jury may hear a short factual statement at trial regarding the spoliation” including that there was a duty to preserve, it was erased and is no longer available, which has prevented the jury from hearing what was communicated, how it was communicated and what was said in response. The Magistrate Judge also noted that “subject to discretion and direction of the trial judge,’ the factual statement shall be provided to the jury.” The court also ordered payment of the reasonable attorney’s fees and costs in bringing the motion which will cure the prejudice but “goes no further.” (*5)

271. **Postle v. Silk Road Technology** [2019 WL 692944] (D. N.H. Feb. 19, 2019). A former employee notified the employer of an intent to form a competing company and subsequently sued it for back wages when his contract was suspended. The former employer demonstrated that the employee had deleted ESI with intent to deprive after showing a failure to take reasonable steps by “as a minimum” leaving the devices in the state they existed without taking affirmative steps to alter that state. (*6). The decided not enter a dismissal or a default judgment on the counterclaim under **Rule 37(e)(2)** but concluded instead that it would “presume that the evidence deleted from the Dell laptop was unfavorable” to the former employee and “will instruct the jury at trial that it may presume likewise.” (*7) As to a “Surface Book,” the evidence was less clear and the former employer had not demonstrated by clear and convincing evidence that he had intentionally disabled encryption before returning it to prevent accessing the data. The court decided to delay ruling on **Rule 37(e)(1)** remedies until trial to see if prejudice to claims or defenses arising from the lack of information exists. The court ordered the former employee to pay one third of the reasonable costs and attorney’s fees without citing its authority to do so. (*8) It held that a party seeking spoliation sanction must establish them by clear and convincing evidence. (*3), citing *Wai Feng v. Quick Fitting*, 2019 WL 118412, at *5 (D.R.I. Jan. 7, 2019) and comparing it to the preponderance of the evidence standard used in *Watkins v. NYC Transit*, 2018 WL 895624, at *10 (S.D.N.Y. Feb. 13, 2018).

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

273. **Quetel Corporation v. Hisham Abbas** [819 Fed. Appx 154] (4th Cir. July 16, 2020), *affirming* 2017 WL 11380134, at *5 (E.D. Va. Oct. 27, 2017). The Fourth Circuit found it was not an abuse of discretion to enter a default judgement where the party had acted in bad faith and with the intent to deprive the other party of the ESI. The district judge found that the party had been “irreparable harmed” and rejected the Magistrate Judge’s recommendation for a jury instruction as insufficient because the “purposeful spoliation” had effectively deprived the party of its ability to pursue the claims. The Circuit court could discern no abuse of discretion based on the finding that “no less drastic sanction would adequately address the prejudice suffered” or “adequately deter the type of spoliation that occurred in this case.” (156)
274. **Radiologix v. Radiology and Nuclear Medicine** [2019 WL 354972, at *9 (D. Kan. Jan. 29, 2019)]. The court applied the intent to deprive standard of Rule 37(e)(2) in barring use of adverse inference where party “engaged in reasonable discovery efforts under the facts presented.” It observed that any errors were “the product of negligence and mistake- not intentional conduct or bad faith.” It rejected the view that the party violated discovery obligations because it never implemented a litigation. “But not every case requires a legal hold.” (*10). The Court relied on the Sedona Principles (Comment 5.d.)(2018) and the 2010 Commentary on Legal Holds. It reviewed and rejected complaints about the review process for relevancy being conducted by a non-layer (*12); all of the sanctions requested on both sides were denied.
275. **Ramirez v. Wal-Mart Stores** [2019 WL 4037951] (D. Colo. Aug. 27, 2019). In a theft and apprehension by private security at a store the court refused any measures since litigation was not “imminent” at the time of the overwriting of the video footage other than that which Wal-Mart retained for law enforcement purposes, citing *Burlington N. & Santa Fe v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007) and the Committee Note to Rule 37(e). In a footnote, it refused to apply Colorado precedent, stating that “Federal courts apply the Federal Rules of Civil Procedure and **federal common law** to discovery offenses.”) (n. 1).
276. **RealPage v. Enterprise Risk Control** [2017 WL 3313729](E.D. Tex. Aug. 3, 2017)(the court drew a presumption that a third party’s acts of massive deletion may be “imputed to the employer” when foreseeable considering the employees duties. the party regularly consulted with the employee and decisions relevant to the enterprise and the court found sufficient evidence to establish a prima facie case that the individual was acting within the scope of his employment. Citing **Rule 37(e)**, the court drew a presumption that the missing information was sufficiently unfavorable to the party’s case that it had made out a prima facie showing of misappropriation of trade secrets. *Id.* at *11-12.
277. **Reed v. Royal Caribbean Cruises** [2020 WL 6878814, at *9] (S.D. Fla. Oct. 2, 2020). The Chief Magistrate Judge denied a motion for spoliation sanctions because, *inter alia*, the party “preserved a reasonable” among of video footage and the portion that was taped over was not preserved in the “normal course of business” and not all of the requirements of **Rule 37(e)** were met.

278. **Regeneron Pharmaceuticals v. Merus** [864 F.3d 1343, 2017 WL 3184400] (Fed. Cir. July 27, 2017). The Federal Circuit, in dicta (the case involved discovery misconduct but not a failure to preserve), while applying Second Circuit authority, including Residential Funding, noted in footnote 7 that “Residential Funding may have been superseded in part by the 2015 Amendment to [FRCP] Rule 37(e)” quoting from the Committee Note as to rejection as to adverse inferences based on findings of negligence or gross negligence. The Court noted that for sanctions based on other discovery misconduct, Residential Funding remains good law in the Second Circuit.
279. **Reifler v. North Carolina Mutual Life** [2019 WL 396525] (S.D.N.Y. Jan. 31, 2019). A District Judge upheld a default judgment entered under **Rule 37(b)** as a sanction for spoliation of ESI of emails, texts, etc. using Eraser in a bankruptcy proceeding where the party had intentional deleted emails, not all of which were “irrevocably destroyed.” (*8) The court also cited to CAT3 [“**quoting Fed. R. Civ. P. 37(e)(2)**”] to show that the party had acted without the intent to deprive another party of the information’s use in the litigation” and distinguished a series of cases under Rule 37(e) as “inapposite” as they involved negligent spoliation. (ftn. 9).
280. **Resnik v. Coulson** [2019 WL 1434051, at *11] (March 30, 2019). The court, finding that a party was collaterally estopped by the findings in a state action, but also that Rule **37(e)(2)** provided it may do so, decided to utilize an adverse inference instruction to inform the jury that the spoliated ESI would have “tended to corroborate Plaintiff’s theory of statutory damages. In response to the intentional destruction of recordings from spyware installed by the party on the party’s wife’s telephone, the court also ordered that he would be precluded from denying that he made use of it to monitor her whereabouts or listened to her telephonic and live conversations. The court described this as “an adverse inference (*11).
281. **Rhoda v. Rhoda** [2017 WL 4712419] (Oct. 3, 2017). The court acknowledged Rule 37(e) but refused to apply it under the Supreme Court Order because it would be unjust to apply a rule rejecting Residential Funding because the issue was raised before the Rule became effective. However, since the party has not met the burden of showing that “the missing ESI would have contained relevant information *unfavorable* to” the non-moving party or “that [the moving party] is now prejudiced without” the emails, no adverse inference is appropriate. (emphasis in original). In dicta, the Court asserted that it had authority to impose sanctions for misconduct in discovery in addition to the authority under Rule 37(e)(2), without mentioning the Committee Note on Foreclosure.
282. **Richard v. Inland Dredging** [2016 WL 5477750] (W.D. La. Sept. 29, 2106). In personal injury action relating to a barge, post-accident photos alleged stored on a hard drive were lost when the barge sank. The Court refused a request for adverse presumption or inference under **Rule 37(e)(2)** because there was no showing that digital copies of the photographs existed which could have been lost or should have been preserved. In addition, even if the Rule applied, there was no showing that the party intentionally sunk the barge in order to hide or destroy the evidence from the plaintiff.

283. **Rivera v. Hudson Valley Hospitality** [2019 WL 3955539, at *8 (S.D.N.Y. Aug. 22, 2019)]. The District Court, without reference to **Rule 37(e)**, agreed with the Magistrate Judges recommendation that evidence of the destruction of the original handwritten time records would be admitted as well as the excel spreadsheets based on them although an adverse inference was unwarranted.
284. **Rivera v. Mathena** [2017 WL 3485012] (W.D. Va. Aug. 14, 2017). In a prisoner video case, the court concluded that no prejudice had resulted from missing video, and refused to sanction the failure to preserve under Rule 37(e) while also granting a motion for summary judgment on one of the claims because it could find no basis to believe that the unavailable video footage would change the outcome” of a summary judgment.
285. **Roadrunner Transportation v. Tarwater** [642 Fed. Appx. 759] (9th Cir. March 18, 2016). The Ninth Circuit affirmed default judgment and attorney’s fees award for willful destruction of emails and files on laptop in a case where the court had ordered the party to preserve all data on its electronic devices. The court noted that the district court did not clearly err in finding that the party had been “deprived of its ‘primary evidence’” of the alleged misappropriation and that a “less drastic sanction could not have adequately redress the prejudice to Roadrunner.” (759-60) It also noted in a footnote that even if **Rule 37(e)** applied to the case, the district court findings would lead to the conclusion that the party “acted with the intent to deprive” Roadrunner of the spoliated information’s use in the litigation.
286. **Robyn Bragg v. Southwest Health System** [2020 WL 3963714] (D. Colo. July 13, 2020). After an evidentiary hearing, the Magistrate Judge found that it was pure speculation to contend that user-created files were deleted after a litigation hold was in place. The employee could not identify what information was involved and there was no reason to believe (“pure speculation”) that spoliation occurred. The court noted that there may a case where overwriting unallocated space may result in the loss or destruction of potentially relevant information, but “this is not such a case.” The court also noted that if her logic were followed ‘mundane acts like turning a computer on and off or putting it in sleep mode will automatically crease system files which then overwrite unallocated space” and the party would be engaging in spoliation which “result would be absurd.” The court also found that the party had taken reasonable steps to preserve, the party had not been prejudiced in any way or did they act with an intent to deprive the party of the use of any ESI in the litigation, per **Rule 37(e)**.
287. **Robertson v. USAA** [2016 WL 5864431] (S.D. Fla., Sept. 22, 2016). **Rule 37(e)** measures were not available regarding failure to preserve computer notes because there was no evidence of intent by defendants to deprive the moving party of the information or that the party had otherwise acted in bad faith, such as where a party purposefully “tamper[s] with evidence.” (citing Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997).
288. **Robinson v. Renown Regional Medical Center** [2017 WL 2294085] (D. Nev. May 24, 2017). Court refused to impose sanctions under **Rule 37(e)** because it accepted the defendant’s IT affidavit that the server containing the telephone call logs and attendant data had “failed” prior to the events at issue. The plaintiff had argued that the failure to preserve them connotes and “intent to deprive” the party of access to them.

289. **Romero v. Regions Financial** [2019 WL 2866498] (S.D. Fla. July 3, 2019). In an employment dispute over a bank tellers interaction with a customer, the court failed to find the failure to preserve a longer segment of video than the bank did of the scene to be relevant, quoting from *ML Healthcare* to make the point that there was no showing of prejudice under Rule 37(e)(1). There was also nothing in the record to show that the defendant bank had acted with an intent to deprive her of the footage at issue.
290. **Ronnie Van Zant v. Pyle**, 270 F. Supp. 3d 656, 2017 WL 3721777 (S.D.N.Y. Aug. 28, 2017), *reversed on other grounds*, 906 F.3d 253 (2nd Cir. Oct. 10, 2018). The District Judge in a footnote (n.16) rejected the argument that the recent amendments to **Rule 37(e)** “and its advisory notes limit a court’s ability to exercise inherent powers to remedy spoliation.” Citing *CAT3 v. Black Lineage*, 164 F. Supp.3d 488,497 (S.D.N.Y. 2016), the court noted that “even after the 2015 amendments, courts have continued to recognize powers to sanction the destruction of evidence outside of Ruled 37(e)” because certain implied powers cannot be dispensed with because they are necessary to all others. On appeal to the Second Circuit, the injunction issued in the lower court was reversed without mention of this footnote.
291. **Roscoe v. Mullins** [2019 WL 4281719] (W.D. Va. Sept. 10, 2019). Finding that the party had not been prejudiced under **Rule 37(e)** nor that the party had acted with any intent to deprive him of the use of the video evidence in the litigation, the Motion by the prisoner for sanctions was denied.
292. **Rothman v. City of New York** [No. 19-CV-225 (CM)(OTW), 2019 WL 6210815] (S.D.N.Y. Nov. 21, 2019). Magistrate Judge denied motion for sanctions relating to video tapes and audio tapes finding not basis for intent to deprive or significant prejudice worthy of sanctions. In finding no basis to infer and intent to deprive, it noted that there was no basis for Rule 37(e)(2) “sanctions, i.e., an adverse inference instruction, a preclusion order, or a default judgment.” (*4). It refused (e)(1) sanctions because they are “discretionary” and any award would be disproportionate to the needs of the case given the facts, the lack of showing or relevance and the small degree of prejudice involved. (*5). It suggested that given the need to dispose of the case expeditiously and at a minimal coast, the “parties need to go to trial as soon as possible.” (*2).
293. **Russell v. Nebo School D. District** [2018 WL 4627699, at *2 (D. Utah Sept. 26, 2018)] there was no duty to retain text messages simply because the party had complained about harassment, since it is the “existing common law” – not whether inherent power or **Rule 37(e)** applies - that is determinative. In the case before it, the defendants had failed to show that the plaintiff “knew, or should have known, that litigation was imminent.”
294. **Saller v. QVC** [2016 WL 4063411] (E.D. Pa. July 29, 2016). In action by former employee based on discrimination based on disability and denial of FMLA where moving counsel did not “even allude” to **Rule 37(e)**, court rejecting the intimation that spoliation had occurred since it was “far from certain” that the documents (or ESI from which the documents were generated) were lost because of Defendant’s failure to take reasonable steps since they were overwritten before the litigation began.

295. **Saulsberry v. Savannah River Remediation** [2019 WL 459064] (D.S.C. Sept. 19, 2019). Refusing to impose **Rule 37(e) sanctions for loss of a hard copy file** since it is not ESI, and proceeding under its inherent authority. (*3) It notes that “[q]uestions of trial management are quintessentially the province of the district courts” but refuses, on the record before it, to rule on a motion in limine to bar the ability to “elicit testimony regarding the circumstances of the disappearance” of the file, instead reserving the matter to be handled at the trial. “An evidentiary ruling” on such an issue “depends on the particular content of the evidence and argument and the context in which the party seeks to introduce it.” (*3) (internal quotes omitted)
296. **Scalpi v. Amorim** [2018 WL 1606002] (S.D.N.Y. March 29, 2018). District Judge denied motion for spoliation sanctions under Rule 37(e)(1) because there had been neither prejudice from the loss nor an “intent to deprive.” (*17-18). In the course of describing and applying Rule 37(e), the court in dicta remarked that “the Second Circuit has not yet published an opinion examining the impact of the new Rule 37(e) and collected key cases such as *In re Bridge*, 185 F. Supp. 3d 459, 472-473 (S.D.N.Y. 2016) (noting rejection of Residential Funding)(Koeltl, J.)]. In footnote 26 the court notes that neither party discussed whether or not the surveillance video at issue was ESI, citing cases under the former rule which imply it did not apply.
297. **Schein v. Cook** [2016 WL 3212457] (N.D. Cal. June 10, 2016). Court cited **Rule 37(e)** in connection with an ex parte preservation order.
298. **Schmalz v. Village of North Riverside** [2020 WL 4464263] (N.D. Ill. Aug. 4, 2020). The District Judge responsible for this case noted that its predecessor had disagreed with the recommendation of the Magistrate Judge and had concluded (in an unpublished order) that the evidence was sufficient to show bad faith and had reserved until “closer to trial” the issue of instructing on an adverse inference. The Magistrate Judge [2018 WL 1704109, at *7] (N.D. Ill. March 23, 2018) had recommended a finding that it was grossly negligent to fail to retain “highly relevant” text messages and that under **Rule 37(e)(1)**, the court should allow evidence of their destruction and likely relevance to be presented to the jury along with an instruction that it may be considered by the jury when making its decisions. The Magistrate Judge also granted reasonable attorney’s fees under Rule 37(a) and commented on the guidance to be given if its recommendation was accepted.
299. **Schmidt v. Shifflett** [2019 WL 5550067] (D. New Mex. Oct. 28, 2019). In a case involving the discarding of a cell phone and the failure to preserve mobile phone data of a former employee, the court cited **Rule 37(e)(1) at the outset** (*1) and appears to have interpreted it as mandating that, as a lesser sanction in the absence of an adverse inference instruction, “a court must impose the sanctions necessary to cure any resulting prejudice.” (*6) It suggested that the “two most important factors” were “culpability and actual prejudice,” citing *Browder v. City of Albuquerque*, 187 F. Supp. 3d 1288, 1297 (D.N.M. 2016)(*4-6) and concluded that “[b]alancing the spoliation considerations, the Court will allow Plaintiffs to introduce evidence of [the other party’s] purported willful spoliation of his personal cell phone

and will also allow” introduction of the personal cell phone records from T-Mobile. It reserved for ruling at trial as to whether an adverse inference instruction warranted. (*6)

300. **SEC v. CKB168 Holdings** [2016 U.S. Dist. LEXIS 16533](E.D. N.Y. Feb. 2, 2016). In an action challenging a “multi-national pyramid scheme revolving around a series of related entities” [2016 U.S. Dist. LEXIS 18624 (E.D.N.Y. Feb. 12, 2016)] a Magistrate Judge withdrew its earlier recommendation [reported at 2015 WL 13742421 (E.D.N.Y. Nov. 3, 2015)] for an adverse inference in light of **Rule 37(e)** since the deficiency could not be said to the result of an “intent to deprive” under the record before the court. However, if the case goes to trial and the SEC makes the requisite showing of intent associated with the loss of ESI, the SEC was authorized to renew its motion under the Rule. The court also noted (n. 7) that it had not recommended that “certain facts be deemed established” but that a “forceful closing argument by counsel for the SEC could well persuade the jury to draw such a conclusion without a jury charge from the Court giving it express permission to do so.” The District Judge upheld the recommendation in all respects. [2016 U.S.Dist. LEXIS 136922 (Sept. 28, 2016)].

301. **Security Alarm Financing (SAFE) v. Alarm Protection Technology (APT)** [2016 WL 7115911] (D. Alaska Dec. 6, 2016). the District Judge found that customer recordings requested by APT from SAFE for defense in a claim of illegal competition for home security alarm customers [per 743 Fed. Appx. 786, 787 (9th Cir. July 30, 2018)] had been lost by SAFE as the result of a failure to take reasonable steps and could not be replaced under **Rule 37(e)**. SAFE had selectively retained recordings favorable to it, which it produced. The court was “not persuaded that the failure to preserve” was “done with the intent to deprive” the party of the recordings. (*6) But because the “call notes and depositions” would be inferior evidence, there was prejudice from their loss. The court stated under the Rule, it intended to instruct the jury that the party was under a duty to preserve and had failed to do so. “In addition,” the court will “permit the parties to present limited evidence and argument in this regard, consistent with this order.” “The court finds that these remedies should put the parties on equal footing with regard to all of SAFE’s recordings, and are no greater than necessary to cure the prejudice to APT.” (*7). In its conclusion, it noted that “APT shall not argue that the jury may or should presume that the spoliated evidence was favorable to APT.” (*8). In footnote 51, it stated that even if SAFE had acted with an intent to deprive under (e)(2), it “would have imposed only those sanctions necessary to cure the prejudice to APT.” In footnote 61, it explained that it “does not intend to permit extensive evidence or argument on any ancillary matters. After trial, however, the jury found for SAFE on all counts and assessed damages in the amount of \$920,700 which was affirmed by the Ninth Circuit. 743 Fed. Appx. 786 (9th Cir. July 30, 2018).

302. **Shaffer v. Gaither** [2016 WL 7331561 (Dec. 12, 2016)] (“Shaffer II”). In an employment action by a former ADA, the Court twice denied motions to dismiss in two opinions. The court did not find an intent to deprive, but stated that under Rule 37(e)(1), the defendant would be “allowed to fully explore the alleged document alterations in front of the jury, making the alleged alterations an issue of weight, not admissibility. It is for the jury to determine how much weight it will give to the alleged name-change.” In doing so, it “adapted” its reasoning from the September opinion, where it had held that missteps were “fertile ground for cross examination, not dismissal” and that texts might be going, the defendant would be “free to

examine those witnesses in front of a jury; they may deny those texts ever existed; and the jury ese texts.” The court did not rule out giving a spoliation or modified spoliation instruction at trial “after it has heard the evidence at trial. (at *2). The earlier opinion is at 2016 WL 6594126 (“Shaffer I”) (W.D. N.C. Sept. 1, 2016).

303. **[NO CITATION OF RULE] Showcoat Solutions v. Butler**, 2019 WL 3332617 (M.D. Ala. June 7, 2019). In a decision that did not mention Rule 37(e) because [apparently] it involved a civil contempt proceedings, the Magistrate Judge stated that since it had recommended granting the Motion for Contempt as to spoliation of a cell phone and hard copy labels, it would also recommend sanctions. (*5). While it refused to strike pleadings, since it was a drastic remedy which “would not ensure compliance with the courts orders,” it recommended that as to spoliation of the cell phone a forensic expert be hired to try to retrieve the information from the cloud-based server and, if needed adverse inferences be issued. As to the counterfeit labels, if the moving party wishes to introduce evidence regarding them, it recommended an adverse inference for any unrecoverable evidence. It also recommended imposing the costs and attorney’s fees.
304. **Simon v. City of New York** [2017 WL 57860] (S.D.N.Y. Jan. 5, 2017). Court refused to impose measures under **Rule 37(e)(1)** for failure of plaintiff to retain cell phone video of assembly of group near at time of arrest in context of civil actions for false arrest. The court held that there was no allegation of an attempt to deprive defendants of the video footage and that there was no showing of prejudice under (e)(1) because it was “pure speculation” as to the contents of the video or whether it would be helpful to the defense. Moreover, even if it showed location of a weapon, it would be “largely irrelevant” to the issue of probable cause, quoting from *Mazzei v. Money Store* [656 Fed. Appx. 558 (2nd Cir. July 15, 2016)] to the effect that no measures are available if the ESI would “not have made any difference” at the trial. The court applied **Rule 37(e)** because it was neither ‘infeasible nor [would it] work injustice” to do so.
305. **Simon v. Northwestern University** [2017 WL 467677] (N.D. Ill. Feb. 3, 2017). A Magistrate Judge in an action by an individual complaining he had been falsely accused by an investigative journalism class, the court refused to compel production of certain ESI in light of the party’s willingness to produce relevant information and its obligation to “retain electronic records for the duration of this litigation (thus making them available for later, more focused discovery requests)” citing to **Rule 37(e)** as “describing repercussions for failing to preserve electronically stored information.”]
306. **Sinclair v. Cambria County** [2018 WL 4689111] (W.D. Pa. Sept. 28, 2018). The District Judge ordered a plaintiff to pay the reasonable fees and costs incurred in pursuing a sanctions motions as a remedy under **Rule 37(e)(1)** where through the efforts of counsel copies of many of the missing text messages deleted after a duty to preserve attached were recovered. The court concluded that defendants were “not severely prejudiced” and the conversations were not likely to have contained information that materially damaged the ability to pursue claims. The court found that it was not necessary to show the contents of the missing messages because, according to *GN Network v. Plantronics*, 2016 WL 3792833, at *9 (D. Del. July 12, 2016) the moving party need only offer a “plausible, good-faith explanation of what the deleted

text messages may have contained.” (n. 6; also citing the 2015 Committee Note that it may be “unfair” to put the burden of showing prejudice on the party that did not lose the information).

307. **Six Dimensions v. Perficient** [2018 WL 7108060 (S.D. Tex. Dec. 14, 2018)] The court refused to strike an Answer because the evidence “did not establish” that the party disposed of a cell phone with the intent to deprive the moving party of the texts stored on it as required under Rule 37(e). The same applied to the two other measures sought, namely precluding an offer of evidence on one the party’s defenses and for a “spoliation instruction.”

308. **Small v. University Medical** [2018 WL 3795238] (D. Nev. Aug. 8, 2018). A fifty-page Opinion de novo review by a Magistrate Judge of a Special Master Report (Garrie) and a record of independent conclusions by the court leading to a jury instruction (apparently under Rule 37(e)(1), but perhaps also (b), by which the jury will be informed that the party breached its duty to preserve and failed to comply with court orders resulting in the loss of “some” ESI which was relevant to the claims and defenses, which the jury may consider with the other evidence in the case for whatever value it deems appropriate. The Court makes extensive use of the Committee Notes to Rule 37(e), which it finds appropriate to apply since the rule does not deal with conduct, since the duty to preserve is unchanged. The court is unsparing in condemning former and current counsel for inadequate attention to detail and poor coordination with ediscovery vendors. Although *Zubulake* is cited, the court does not seem to hold counsel responsible for the errors.

309. **Snider v. Danfoss** [2017 WL 2973464] (N.D. Ill. July 12, 2017), *report and recommendation adopted*, 2017 WL 3268891 (N.D. Ill. 2017). The Magistrate Judge recommended that no sanctions be imposed under either Rule 37(e) or inherent authority for the failure to interrupt the automatic deletion of emails after a party was placed on notice of impending litigation. The court was able to determine that their loss was not prejudicial and there was no showing of intent to deprive. The Magistrate Judge found that all the prerequisites for use of **Rule 37(e)** were satisfied, and that inherent authority was foreclosed because the purpose of the rule was to address differing standards and to allow otherwise would be to impair the “goals of uniformity and standardization.” (n. 8). The court noted that Rule 37(e) was not restricted on its face to the loss of “relevant” ESI, which could have been done, but stated its assumption that “should have been preserved” encompasses both “the concept of relevance and duty to preserve.” (n. 9). It also noted that **“limiting sanctions to the failure to preserve relevant ESI makes complete sense on many levels, including the lack of prejudice in the loss of irrelevant ESI and the lack of a need to even produce irrelevant ESI, let alone preserve it.”** (at *4)The court also implied that Rule 37(e)’s failure to expressly authorize awards of attorney’s fees barred their use but gave no recommendation for or against their imposition (*5).

310. **Sosa v. Carnival Corporation** [2018 WL 6335178] (S.D. Fla. Dec. 4, 2018), reconsideration denied 2019 WL 330865 (Jan. 25, 2019). In a fifty page initial opinion (December 4, 2018) dealing with the application of **Rule 37(e)** to the unexplained loss of surveillance video footage [which the moving party contends is not ESI but the court, after much agony, holds is, indeed, ESI] after it was initially viewed by defendants key witness, the

court made preliminary findings that Rule 37(e) applied and decided to leave it to the jury (subject to a choice by the party) as to whether “intent to deprive” existed. The court found that the burden of proof is on the moving party to show a failure to take reasonable steps (*16), which was satisfied because the key employee did not act reasonably (*19). The court also concluded that (e)(1) measures apply, since the Rule does not require a finding of “great” prejudice or that it was crucial to the case (*20), contrasting it with what the moving party would have to overcome [but could not have] if inherent power applied – a requirement that “outcome-determinative” evidence be involved. (ftn. 8). The court rejected the use of eyewitness testimony to “restore and replace” the missing footage (*20). The opinion concludes with what the court obviously believes to be a clever compromise result: It refused to decide if an intent to deprive existed so that an adverse inference instruction is appropriate; leaving that decision be made by the jury. However, the moving party must choose among two remedies: (1) allowing the jury to hear the testimony about the contents of the surveillance video and its loss from the key witness or (2) refusing to permit Carnival witnesses from testifying about the contents of the video and the court will simply “advise the jury that Carnival had CCTV video footage at one time, but it is no longer available.” (*21) It left it to the trial judge to decide if a further “remedial” measure should be given, instructions “to assist” the jury in evaluation of the evidence or argument [quoting from the Committee Note]. **In refusing to reconsider its decision in 2019 WL 330865** (S.D. Fla. Jan. 25, 2019), the court noted that merely because most courts decide the intent issue, it does not mean it is foreclosed from doing so, and rejected the argument that it was inappropriate to do so for, among other reasons, that Carnival had not cited any case, binding or otherwise, in support of its view that the rule mandates that the judge, instead of the jury, decide the intent to deprive issue. It noted it had acted because the “record is murky, the critical witness [in the case] has not testified, some of the circumstances are odd and arguably suspicious, and the [court] is not convinced of [the critical witness’s] credibility.” (*3)(emphasis in original).

311. **Soule v. P.F. Chang’s China Bistro** [2020 WL 959245, at *6 and *9] (D. Nev. Feb.26, 2020). The Magistrate Judge ordered that “in accordance with Rule 37(e)(1), [the innocent party] shall be entitled to an adverse inference instruction to the trier of fact at the time of trial as the result of [non-moving party’s] spoliation [which] shall state, in sum that video footage . . . which was within the control of and made unavailable by [the non-moving party] “could have provided “information unfavorable” to the [non-moving party]. The court confused the parties in the actual text, which is corrected here. The court also erred by citing Rule 37(e)(1), then relying on earlier case law which did not emphasize that a finding of prejudice was required. However, a fair reading of the court’s opinion is that it found prejudice to exist.
312. **Spencer v. Lunada Bay Boys** [2018 WL 839862 (C.D. Cal. Feb. 12, 2018)]. The court adopted a recommendation that it award monetary damages in the form of attorney’s fees as a sanction for the failure to preserve “unrecoverable text messages” in violation of Rule 37(e)(1). In doing so, the court rejected the argument that the silence as to remedies available under Subdivision (e)(1) necessarily implied that that inherent authority must supply the basis for measures. The court held that the Committee Note “expressly contradicts” that argument because it provides that the rule “forecloses reliance on inherent authority” and allowed the recovery of reasonable attorney’s fees as well as further discovery as to spoliation since the Magistrate Judge had found prejudice to exist.

313. **Steves and Sons v. Jeld-Wen** [327 F.R.D. 96] (E.D. Va. May 1, 2018). In a well-written, thorough opinion, a Senior District Judge first found that no measures were available under Rule 37(e) because, despite having taken no reasonable steps to preserve, the moving party failed to demonstrate compliance with its duty to show that the lost ESI cannot be restored or replaced. (*9). Moreover, the court would not have found remedies available because of a failure to establish that the lost evidence would have caused prejudice (“would have significantly improved” the movants ability to prove trade secret misappropriation) since much of the information was obtained by other parties to the communications. Also, because the connectiOn between an expresses intent to delete and an intent to harm in future litigation was “hard to draw,” there would be no basis for an adverse inference. (*10). The court reached the same conclusion as to the loss of any tangible evidence under its inherent authority; moreover, it was speculation to assume any had existed. (*11). In a footnote, the court expressed the view that the “foreclosure” of inherent authority is an open question, citing CAT 3, 164 F. Supp.3d 488 at 497.
314. **Stevens v. Brigham Young University** [2019 WL 6499098] (D. Idaho Dec. 3, 2019). The court refused to find that plaintiff had acted with an intent to deprive as defined in **Rule 37(e)** in the selective deletion of text messages, but ordered that the evidence could be submitted to the jury in light of prejudice involved. The court referenced the “decision tree” analysis of Oracle America v HP, 328 F.R.D. 543, 549 (N.D. Cal. 2018) and concluded that the intent was to preempt us of other sources of sanctions, such as the use of inherent power. It noted that it could do so under Rule 37(e)(1) to address prejudice, but “[e]ven if Rule 37(e) is inapplicable,” the deletions of texts are relevant to her credibility and the court “will allow a full inquiry at trial into these matters.” (*5). Also, while it might increase the length of the trial and create a trial within a trial, it was necessary to do so to give the defendant a “fair opportunity to challenge the narrative created by “selective, intentional, and substantial deletions of text messages.” (*4) [Note: on the same day, the court ruled on a motion for sanctions by Plaintiff dealing with the interactions of the University with a witness, also referring the issue to the jury despite risks of “trial-within-a-trial.”. 2019 WL 6499097// 2019 U.D. Dist. Lexis 209982 (D. Idaho Dec. 3, 2019)].
315. **Stinson v. City of New York** [2016 WL 54684] (S.D.N.Y. Jan. 5, 2016). The court refused to apply **Rule 37(e)** because motion was fully submitted prior to effective date of new Rule. The court granted a permissive adverse inference based on gross negligence without finding any prejudicial impact under existing Residential Funding standards. In Note 5, the court acknowledged that “new standards” in Rule 37(e) were in effect but found that it was not just and practicable to apply them since the motion for sanctions had been briefed before the effective date. It also noted that the amended rule presented a “thorny” issue of application where a party fails to preserve both ESI and hard-copy evidence.
316. **Storey v. Effingham County** [2017 WL 2623775] (S.D. Ga. June 16, 2017). A court concluded that a failure to preserve videotapes which might have shown the tasing and roughing up of a prisoner occurred at a time when there was a duty to preserve under Rule 37. (The court “cannot fathom a reasonable defendant who would look at those facts and not catch the strong whiff of impending litigation on the breeze”). The court held that the “multi-step:

process to determine if sanctions or curative measures are appropriate was satisfied. However, given that the “negligence – even recklessness – in allowing the normal video destruction policy to patter away unimpeded does not rise to the stringent ‘intent’ requirement set forth in the **amended Rule 37(e)**, it denied an adverse inference. However, because some prejudice had occurred, the court expressed the intent to tell the jury that “the video was not preserved” and would allow the parties to present evidence and argument at trial” about the destruction or failure to preserve the videos. In n. 5, the court made it clear there will not be any adverse inference instruction “that the destroyed evidence is *unfavorable* to the defendants.” (emphasis in the original). The court inexplicitly (presumably in error) quoted the original (2006) rule as if it were still part of Rule 37(e), but it played no role in the decision.

317. **Storz Management v. Carey** [2019 WL 2615755] (E.D. Cal. June 26, 2019). The court refused to sanction by entering a termination sanctions because there was no indication of what relevant ESI was lost (“something more is need beyond a vague reference to the unknowable”) and because “beyond vague and conclusory assertions,” the movant was “unable to articulate how defendants’ action impaired a claim or defense.” (*5) The court quoted *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (“The prejudice inquiry looks to whether the spoiling party’s actions impaired the non-spoiling party’s ability to go to trial or threatened to interfere with the rightful decision of the case.” (*5).
318. **Stovall v. Brykan Legends** [2019 WL 480559, at *2 (D. Kan. Feb. 7, 2019). The court noted that Rule 37(e) permits the court to sanction the loss of ESI [under (e)(2)] only if (1) the ESI should have been preserved, (2) a party took “reasonable steps” to preserve it, and (3) it cannot be restored or replaced. If these three prerequisites are met, the court may go on to determine [if intent to deprive exists].” The court found that they were not met, but even if they had been, the court would have refused the harsh measures sought under Rule 37(e)(2) because “the court is not convinced that defendant’s negligence – even recklessness” – is not taking steps to preserve a second copy of a video surveillance tape “rises to the stringent ‘intent’ requirement of the Rule (at *4).
319. **Syntel Sterling v. TriZetto Group** [328 F.R.D. 100] (S.D.N.Y. Sept. 19, 2018). In an incredibly long, unnecessarily complicated opinion, a Magistrate Judge sanctions a law firm and its client, jointly, for permitting its review team to apply what the court deems inconsistent relevance standards to a small number of hits on search terms. The court finds that repeated representations that it had produced all responsive documents from the “devices” of a witness where, therefore, at best misleading [citing a case holding sanctions are available for negligent counsel sanctions, *Jindan Wu v. Seoul Garden*, 2018 WL 507315, at *13 (E.D.N.Y. Jan. 22, 2018). Accordingly, the court concluded that the failure to produce certain documents “appears to have been a deliberate choice to limit the scope of discovery.” (at *20). It also indicates a willingness to sanction a failure to preserve a “live inventory” of computer assets as spoliation under Rule 37(e) but citing *Watkins v. New York City Transit Auth.*, 2018 WL 895624, at *10 (S.D.N.Y. Feb. 13, 2018) suggests it is best raised though a request for “a jury instruction or motion *in limine*, at the appropriate time.” (*24).
320. **Systems Spray-Cooled v. FCH Tech** [2019 WL 10154221] (W.D. Ark. Feb. 22, 2017). In a decision applying an adverse inference under Rule 37(e) because the party acted with an

intent to deprive, the court granted attorney's fees and costs under pre-rule authority because the party had acted in bad faith.

321. **Tchatat v. O'Hara** [249 F.Supp.3d 701 at n.2] (S.D.N.Y. April 14, 2017), *affirmed on grds relating to spoliation allegations*, ___ Fed. Appx. ___, 209 WL 6998892 (2nd Cir. Dec. 20, 2019). In a case involving alleged spoliation of videotape and digital photographs, the Magistrate Judge did not "consider" Rule 37(e) because "[n]either party has argued that Rule 37(e) applies here." The court also said that its ruling would have been the same even if the rule applied. After a jury trial in favor of the defendants, the party acting pro se sought a reversal based on the denial of the spoliation decision, as tested on review for abuse of discretion. The Appellate court agreed that there was no error since the surveillance tapes and eyeglasses at issue were never possessed by the defendants. No mention was made in the appellate opinion of whether Rule 37(e) did or did not apply.
322. **Terral v. Ducote** [2016 WL 5017328 (W.D. La. Sept. 19, 2016)]. A failure to preserve surveillance video in a prisoner excessive force action pursuant to a routine retention policy did not meet the moving party's burden to show a failure to take reasonable steps under **Rule 37(e)**.
323. **The Fashion Exchange v. Hybrid Promotions** [2019 WL 6838672] (S.D.N.Y. Dec. 16, 2019). The court found that a party had failed to take reasonable steps to preserve ESI which should have been preserved and that it could not be replaced by reviewing tax returns which had been produced and by seeking discovery from accountants and backs. Measures under Rule 37(e)(2) were not available, however, because the level of negligence involved was not "akin to an intent to deprive" and alleged resulted from a "server crash, an event over which Plaintiff assumedly had no control." (*5-6) Nonetheless, the court found that the prejudice involved justified from being unable to challenge royalties permitting the moving party to present evidence of evidence at trial regarding pursuant to subdivision (e)(1) in order to address and "evidentiary imbalance" caused by the destroyed server. (*7) It sanctioned the counsel and the party jointly for failing to meet Zubulake standards noting that had wide authority to "apportion" sanctions (*9).
324. **Thomas v. Butkiewicz** [2016 WL 1718368] (D. Conn. April 29, 2016). Court refused to apply **Rule 37(e)** to loss of video surveillance tape since the issue would likely have been resolved before the effective date if new counsel had not been substituted. The court described Rule 37(e) as "procedural" and noted that it "overrules" Second Circuit precedent on state of mind required for an adverse inference.
325. **Thomley v. Bennett** [2016 WL 498436] (S.D. Ga. Feb. 8, 2016). Court refused to apply **Rule 37(e)** where loop-type video of prison incident was recorded over before there was demand for its production at a time when they had no reason to know it should be preserved. In n.18, the court also stated that there was no showing of prejudice or that defendants had acted with an intent to deprive.
326. **Thompson v. Clarke** [2019 WL 4039634] (W.D. Va. Aug. 27, 2019). Prior to trial on multiple issues arising out of prisoner allegation of mistreatment, the court denied a request

for spoliation sanctions for failure to preserve “videos” which had been recorded over as part of the video surveillance system. The court asserted it had both **Rule 37(e)** and “inherent power” to control the judicial process, citing *Silvestri*, 271 F.3d 583, 593 (4th Cir. 2001)[including the argument that if so prejudicial that relief was available (*4)] and the court addressed it under both sources. It acknowledged the problem with imputing failures to preserve by non-parties to the party officer, but ducked that issue by concluding that the missing footage was not relevant to the remaining claims in the case. (*4) [in footnote 5, it noted that courts had taken different positions on imputing actions on non-party prison to individuals]. “Sanctions are not appropriate for the destruction of irrelevant evidence.” “Put differently, if the evidence was not relevant, then there can be no prejudice to Thompson from any failure to preserve it and sanctions under Rule 37(e)(1) are not permitted or necessary.” Citing *Knight v. Boehringer Ingelheim*, 323 F.Supp.3d 837, 845 (S.D. W. Va. 2018). Relief under inherent authority was also denied because it would have to conclude, which it could not, that the lost evidence would have supported its claim.

327. **Thurman v. Bowman** [199 F. Supp.3d 686] (W.D.N.Y. August 10, 2016). The District Court applied Circuit case law in affirming that the movement of Facebook posts to “private” was not sanctionable because the contents remained available. A failure to institute a litigation hold did not alone establish the relevance of any missing ESI as a matter of law, since it occurs only “in the most egregious cases,” which this case was not. In a footnote 5, the District Judge noted that the Magistrate Judge applied current law because “neither party advocated for retroactive application” of Rule 37(e). **The Magistrate had commented [2016 WL 1295957 (March 31, 2016)] that the outcome would have been the same since the deletion did not cause prejudice nor was it done with an intent to deprive.**
328. **Tipp v. Adeptus** [2018 WL 447256, at *5 (D. Ariz. Jan. 17, 2018)]. The court held that **Rule 37(e)** provides “helpful rationale” in deciding a case involving shredding of hand-written notes); see also *Emerald Point v. Lindsay Hawkins*, 808 S.E.2d 384 (Va. 2017) and *EEOC v. Jetstream*, 878 F3d 960 (10th Cir. 2017).
329. **Title Capital Mgt. v. Progress Residential** [2017 WL 5953428, at *4 (S.D. Fla. Sept. 29, 2017)]. A court applying **Rule 37(e)** found the onset of the duty did not have to include the exact type of litigation which ultimately ensued, since reading such a requirement “into the Rule” would allow misbehaving parties to escape through “the careful splitting of hairs.” It rejected as “disingenuous” the argument that the actual litigation commenced must be reasonably foreseeable. However, the court did not apply any remedy under either subsection as it could not find that prejudice had resulted or that the “draconian sanction of dismissal” because the “intent” issue was “a close call and one that will be better made after completion of all discovery.” (*6) [It also collected cases where emails, information stored on laptops, iphones and external hard drives constituted ESI] (at *4).
330. **TLS Management and Marketing Services v. Ricky Rodriguez-Toledo** [2017 WL 115743] (D. Puerto Rico March 27, 2017)]. The court ordered an adverse inference and forensic examination of a hard drive because the non-moving party acted with an intent to deprive when it discarded a laptop after it malfunctioned, rejecting the argument that the existence of copies in the cloud and on flash drive negated allegations of prejudice in violation

of **Rule 37(e)**. *Id.* at 2 (“Defendants have not . . . proffered clear and convincing evidence that all information that might have been stored . . . including metadata – is discoverable from the information transferred to the cloud computing service and the USB flash drive”). This was sufficient to satisfy the **Rule 37(e)(2)** intent to deprive requirement, since the party “willfully discarded or deleted” ESI from a laptop and external hard drive.

331. **TLS Management and Marketing Services v. Mardis Financial Services** [2018 WL 3673090] (S.D. Miss. Jan. 29, 2018). The court ultimately granted a default judgment on liability because of the deletion of documents and ESI by finding, under **Rule 37(e)(2)**, intentional destruction, including use of CCleaner, although it spoke entirely of “bad faith,” without specifically finding “intent to deprive,” which it nonetheless referenced in Note 61. The court noted that “similar” tools are available through a court’s inherent power, citing *Rimkus v. Cammarata*, 699 F. Supp.2d 598, 611 (S.D. Tex. 2010) to the effect that such power is used “only when evidence destruction ‘occurs before a case is filed or if, for another reason, there is no statute or rule that adequately addressed the conduct.’” (Note 2) The court here held that Rule 37(e) adequately and justly address Defendant’s conduct, and does so in the same way this Court’s inherent power would.

332. **Toussie v. Allstate Insurance** [2018 WL 2766140, at *4] (E.D.N.Y. June 8, 2018). In the course of reaffirming an order requiring continued storage of tangible things pending determination of the adequacy of photographs in an insurance case, the court comprehensively discussed the authority of courts to issue preservation orders, and noted the Committee Note to **Rule 37(e)** which predicted greater use of preservation orders in light of the 2015 amendments to Rules 16(b)(3)(B)(iii) and 26(f)(3)(C), as well as citing **Rule 37(e)** itself because it limits a courts ability to sanction. The court also cited the reference in the 2006 Committee Note to Rule 37(f) to the effect that a preservation obligation “may arise from . . . a court order in the case.” It also derived a standard (“the proper standard”)(at *7) as involving the “balancing test” of the danger to destruction absent a court order, whether irreparable result is likely to result and the burden of preserving the evidence.

333. **Trainer v. Continental Carbonic Products** [2018 WL 3014124] (D. Minn. June 15, 2018). The court refused to find that a duty to preserve had been triggered since the party to understand the implications of deleting some texts (he could have saved them and sought a protective order under Rule 26(c) against their production). It denied intrusive forensic examination of devices used to send text messages and email since 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.

334. **UMG Recordings v. Grande Communications** [2019 WL 4738915] (W.D. Tex. Sept. 27, 2019). In a decision acknowledging Rule 37(e), the court noted that while ESI at issue was captured in a temporary table in a database which exists only when the software is actively lost, once the process as acquired the data its removed. The court concluded that this did not mean that it was “lost” within the meaning of Rule 37(e). (*3). Since the software does not identify and retain the bitfield data, it is a “far cry from proof that” the party destroyed it; the system was “never intended, and was not designed, to retain it.” As “best the Court can understand,” what the party is complaining about is a “criticism of the software, not the

spoliation of evidence.” (*4). Even if the data should have been retained, it was not done so with an intent to deprive and spoliation sanctions are unwarranted.

335. **Ungar v. City of New York** [329 F.R.D. 8] (E.D.N.Y. Nov. 2, 2018). A Magistrate Judge had, after an evidentiary hearing, found a surveillance video had been overwritten at a time when there was a duty to preserve it but there had been no intent to deprive, the court also found that other sanctions would have been inappropriate because the movant had not established the destruction was “prejudicial to his claim.” The District Judge reviewed the matter as a non-dispositive matter for clear error. It concluded that aside from modifying the state of mind required, the amendments did not significantly alter the elements required at common law. “The movant is still required to show prejudice,” which may be inferred from the intent to deprive. However, “where prejudice cannot be inferred” it “may be proven circumstantially” and sanctions other than those specifically enumerated I subdivision (e)(2) may be awarded. “Although Rule 37(e)(1) requires a finding of ‘prejudice’ in order for sanctions to issue, the Rule is unclear as to what is meant by the word. The Advisory Committee Note does not provide a clear answer, other than to state that “[a]n evaluation of information necessarily includes an evaluation of the information’s importance in the litigation.” The court explained that “[t]wo different views of ‘prejudice’ may be hypothesized, and, in the instant case, our choice between the two is outcome determinative. Under one view, “prejudice may be taken to mean merely that the evidence is probative, similar to the concept of relevance under Fed. R. Evid. 401. Under the alternative view, prejudice may required proof that the evidence was not only probative, but that it would affirmatively support the movant’s claim.” Court in this Circuit generally require some proof of the prejudice in the latter sense before sanctions will issue.” The District Judge found that proof of the “second, narrower type of prejudice” is not categorically necessary in all instances, but affirmed the Magistrate’s ruling because it was within the magistrate’s discretions to place the burden of proof on the movant where it could not be inferred the deleted video would have corroborated the claims nor was there any “independent, circumstantial evidence tht showed the video would have shown what the Plaintiff claims it showed.” [citing Note to effect that rule does not place burden on proving or disproving prejudice on one party or the other, leaving it to judges discretion to determine how best to assess prejudice in particular cases.”

336. **University Accounting v. Schulton** [2020 WL 2393856] (D. Ore. May 11, 2020). The trial court refused to provide additional terminating sanctions for UAS after a jury verdict in its favor because the adverse inference instruction for the jury had been sufficient. The jury was instructed that if found that deletion of ESI had been done with the intent to deprive it could “presume or infer from the loss of that information that the information was unfavorable to” the spoliating party. (*22) In a pretrial ruling announcing its intent to do so, the court had determined that a “reasonable factfinder could conclude” that the party acted with intent to deprive, and that it would not be necessary to show prejudice [2019 WL 2404512, at *7 (D. Ore. June 7, 2019)].

337. **U.S. v. Capitol Supply** [2017 WL 1422364] (D.D.C. April 19 2017)], the court held that “by its express terms, **Rule 37(e)** does not govern the instant spoliation motions” because “the data was not overwritten “in the anticipation or conduct of litigation’ but rather . . . in violation of the defendant’s regulatory and contractual obligations.” (*10) The defendant did not argue

that it was “overwritten unknowingly or accidentally” but because of a practice or for many years in violation of clear regulatory and contractual obligations to retain the information for specific periods. (*10) Applying Circuit law, the court held that the plaintiff was entitled to an adverse inference instruction because the violation of a record retention regulation creates a presumption that the missing evidence contained evidence adverse to the spoliator [citing, among other cases, *Hicks v. Gates Rubber*, 833 F.2d 1406, 1418-19 (10th Cir. 1987)].

338. **U.S. v. Karl Carter** [2019 WL 3798142, at *63] (D. Kan. Aug. 13, 2019). In the course of assessing the loss of ESI under retention policies, where the Government acted with intent to deprive the Special Master of evidence in complex Sixth Amendment violations, the court found it had “purposefully” delayed issuing a litigation hold and withheld information about the hold. It noted that “[t]o the extent a litigant can show that information relevant to his or her case was lost during these various litigation hold delays and cannot be restored,” **Rule 37(e)** arguably may be invoked, potentially “triggering sanctions that may include adverse inferences.” (63). It “easily” found that the Government “did not take reasonable steps to preserve at the time the duty to preserve arose. It must suspend a document retention or destruction policy to ensure the preservation of relevant documents. (*62) (collecting cases under Rule 37(e)). **NOTE: The opinion is quite long, with over 600 footnotes. It focuses on both spoliation sanctions under Rule 37(e) and non-spoliation for violations of preservation orders, including sanctions under Rule 37(b) and its inherent authority. (*63 et. seq.).** It found the elements for a finding of contempt to be met and awarded “a compensatory award” either a remedy for contempt or for abuse of the judicial process under its inherent authority. (*66-67) It noted it must find a “but-for” causal link under *Haeger* and ordered submission of application for attorneys fees and costs. (*67)
339. **U.S. v. Ind. Univ. Health** [2016 WL 4592210] (S.D. Ind. Sept. 2, 2016). In case not involving spoliation, the court cited **Rule 37(e)(2)** as an example of where “the Court-as-factfinder is free to evaluate the credibility of, and assign weight to, all offered evidence.”
340. **U.S. v. Safeco** [2016 WL 901608] (D. Idaho March 9, 2016). Court exercising inherent power refused to sanction loss of tangible property (notebook) because the court was not persuaded conduct was “willful or done in bad faith.” The court noted that **Rule 37(e)** requires a finding of “bad faith intent” but that it applies only to ESI, not to missing tangible evidence.
341. **U.S. and States ex. rel Schutte and Yarberry** [2018 WL 3388133, at *4-5] (C.D. Ill. July 12, 2018). A court delayed consideration of measures under Rule 37(e) until after the moving parties had had a chance to interrogate relators about the circumstances under which spoliation may have occurred and “if it comes to light” that parties acted inappropriately, the court was be prepared to consider the possibility of “excluding evidence, informing the jury and permitting an adverse inference, or any other appropriate measure.”
342. **U.S. v. Woodley** [2016 WL 1553583] (E.D. Mich. April 18, 2016)]. **Rule 37(e)** does not apply to allegations of government spoliation of surveillance video in a criminal case.
343. **Virtual Studios v. Stanton Carpet** [2016 WL 5339601] (N.D. Ga. June 23, 2016). In a breach of contract case, the court applied **Rule 37(e)** because reasonable steps were not taken

to preserve emails (although does not explicitly find that they could not be restored) whose loss was “certainly prejudicial” since it would have been helpful in evaluating the merits of the case. The court declined to “impose sanctions” under **Rule 37(e)(2)** because it was not shown that the party “acted in bad faith or with intent deprive.” While the party could have taken greater care, the evidence indicates that the party was “negligent or careless” at most. Instead, the “appropriate sanction” is to allow the moving party to “introduce evidence concerning the loss of emails and to make an argument to the jury concerning the effect of the loss of the emails.” (*11).

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

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

346. **Wai Feng v. Eastern Foundry** [2019 WL 118412, at *8 (D. R.I. Jan. 7, 2019). In a case where the party did not establish a basis for establishing the prerequisites for either measure to cure prejudice or to find bad faith or intentional destruction, the court and it did not preclude further motions, noting that many courts reject such requests “until a party lays the evidentiary foundation at trial.”

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

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

349. **Watkins v. New York Transit Authority**, 2018 WL 895624, at *10 (S.D.N.Y. Feb. 13, 2018). The District Court, in denying a motion for sanctions without prejudice to renewal

before trial addressing the elements of **Rule 37(e)**, held that while the plaintiff had a duty to preserve a cell phone, the motion would be denied because the moving party had not established either that the ESI could not be restored or replaced through additional discovery or that the party acted with a culpable state of mind. Citing *Best Payphones v. City of N.Y.*, 2016 WL 792396, at *5 (E.D.N.Y. 2016), the court noted that the party could have questioned or requested production from other employees or “sought to subpoena Plaintiff’s cell phone records.” The court also noted that there was no proffer of evidence that the party acted with the requisite intent to deprive the moving party of relevant evidence, “rather than negligence.” The court cited to *Rhoda v. Rhoda*, 2017 WL 4712419 (S.D.N.Y. Oct. 3, 2017) for the proposition that the movants have the burden of proving intent to deprive under **Rule 37(e)(2)**.

350. **Waymo v. Uber Technologies** [2018 WL 646701] (N.D. Cal. Jan. 30, 2018)]. Judge William Alsup issued an “Omnibus Order” governing treatment of allegations of discovery misconduct by Uber at trial. The Court observed that “Waymo seems unwilling or unable to prove its case at trial with qualified witnesses and evidence and seeks to have the Court fill in the gaps with adverse inferences instead.” (*18). The stated goal was not “to transform this trial on alleged trade secret misappropriation into a trial on Uber’s litigation conduct (or misconduct”). (*22) Allegations of breach of an earlier preliminary order governing discovery were part of the Waymo approach. The court agreed to instruct the jury about the order and the obligations, and that Uber failed to disclose the destruction of five discs, but “the jury will *not* be directed to draw any adverse inference based on these facts “but will be free to do so (or not) of its own accord.” (*13) (emphasis in original)(see also*23 [“Summary”]). Separately, the District Court dealt with the argument that Uber had failed preserve text messages, discs, emails and had denied access to personal laptops in violation of **Rule 37(e)(2)**. The court rejected the argument that the missing evidence was irrelevant (“Tell this to the jury”)(*17) because five discs and personal laptops “could have been a link” in the chain of funneling information or could “potentially support” a narrative that Uber was trying to *avoid* misappropriation.” (*17)(emphasis in original). The court delayed ruling on whether “intent to deprive” existed and whether or not the jury “will be instructed that it may or must presume the lost information was unfavorable” until after Waymo presented its “case-in-chief” at trial, during which “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” as well as addition evidence on point which it will use to supplement the issue of intent. (*18). (The “Summary” notes that if it instructs on an adverse inference, it will explain how then nature of the adverse inference “remains up to the jury” [giving as example for reader the possible Uber argument])(*23). The court also noted that evidence and argument about misconduct and corporate culture (such as use of ephemeral communications [Slack is mentioned in fn. 12] may be relevant and admissible insofar as it reasonably bears on the merits, such as why Waymo has been unable to find stronger proof of its claims. However, it will not be allowed to “consume the trial to the point that it becomes a distraction from merits or turns into a public exercise in character assignation.” (*23). [nor: “inflame[s] the jury” (*13) or is used to “poison” the judge “if not the jury [excluding same under FRE 403] (*22). Finally, the court ordered that no opening statement or voir dire could reference the courts intention to inform the jury of certain facts, although the opening statement could reference an intent to prove underlying facts such a violation of prior orders. (*23)

351. **Wellington Lake Health System** [2019 WL 4918686, at *8] (N.D. Ohio Oct. 4, 2019). The court refused to issue the disproportionate sanctions sought under **Rule 37** regarding lost text message, but noted that “the questionable statements made by the party in regard to her cell phone are the type of statements that *may* be admissible at trial as relevant to her credibility” (emphasis in original).
352. **Weride Corp. v. Kun Huang**, 2020 WL 1967209 (N.D. Cal. April 16, 2020). In a trade secret case with some factual similarity to Waymo alleging spoliation source code evidence and other malfeasance with ephemeral messaging, deleted email accounts, laptops and the like, with FTI providing expert opinion evidence bordering on legal fact finding, the court struck answers and issued a default judgment under **Rule 37(b)** and **(e)** (“terminating sanctions”). It found intent to deprive because “the totality of the circumstances” indicate that the spoliation was “intentional.” (*12) The court held that a “lesser sanction” was not appropriate as to the spoliation involved because it prejudiced the ability to raise an affirmative case, meaning that specific jury instructions or an exclusion of evidence “cannot cure the prejudice.” (*16).
353. **Western Power v. TransAmerican Power** [316 F. Supp. 3d 979] (S.D. Tex. June 7, 2018). After the impact of a cyberattack on servers and personal workstations caused the loss of information subsequently sought in litigation, the court held that in light of **Rule 37(e)** and the Committee Note to the topic, it would consider giving a spoliation instruction to the jury if, after hearing evidence at trial, it concluded that the entity “did not take reasonable steps” to protect against such an attack. The moving party argued that it was prejudiced by the loss and there was sufficient circumstantial evidence to infer that the party “intended to deprive” it of the relevant data.
354. **Wheeler v. Jones** [2016 WL 11480400] (M.D. Ala. May 20, 2016). A Magistrate Judge applying the Flury v. Daimler Chrysler doctrine [427 F. 3d 939, 944 (11th Cir. 2005), cert. den. (2006)] in the Eleventh Circuit uses Alabama law which it finds to be consistent with **Rule 37(e)** in ordering an adverse inference because it is fundamentally fair to do so. (*6-7). It also shifts attorney’s fees and expenses, in part because the movant is the prevailing party under Rule 54(d) on the motion for sanctions, but primarily because it believes Rule 37(a)(5) entitles it to do so. (*9). It refuses to apply **Rule 37(e)** since the suit was filed before the rule became effective, although it views it as “instructive and persuasive” since it is “wholly consistent with Alabama and Federal case law” on spoliation. (n. 3).
355. **White v. United States** [959 F.3d 328] (8th Cir. May 13, 2020). The Circuit Court found the district court did not abuse its discretion in refusing to draw an adverse inference at the trial below because the ATF deleted data from its servers without making copies. The Court found that the lower court finding that the party did not act in bad faith “is supported by evidence that the interruption of the wireless signal likely caused the problems with the recordings and that the ATF followed its standard procedure in copying data and deleting it from its servers.” Rule 37(e) was not cited in the Opinion, which relied on pre-Rule precedent for the principle that only upon a finding of bad faith were “severe spoliation sanctions” appropriate. (331). The court held there was no evidence proffered that the original recordings were “intentionally destroyed” to suppress the truth or to contradict the government’s evidence. [The district court, in opinion dealing with a Motion in *Limine*, had declined to issue an adverse inference

and “withdrew” its “earlier statement that ‘plaintiffs will be permitted to argue an inference – as opposed to a presumption – that the missing parts of the video would have been detrimental to defendants.’” It noted that it had held that the party failed to show “culpable intent” and “prejudice” sufficient to warrant severe sanctions. [2018 WL 10419742, at *2 (E.D. Mo. July 16, 2018)]. **The earlier opinion, unlike the July opinion, had explicitly referenced Rule 37(e)** [2018 WL 2238592 (E.D. Mo. May 16, 2018)].

356. **Wichansky v. Zowine** [2016 WL 6818945] (D. Ariz. March 22, 2016)(Campbell, J.)). In a case where Rule 37(e) was not applied because “the parties do not contend that the lost information constitutes [ESI](n. 1), Court declined to issue an adverse inference because there was no need to put its “thumb on the scale” with an adverse inference instruction. The moving party “has not been seriously prejudiced by the loss of the recording,” since it has admissions from depositions that support its version of the altercation. Accordingly, the “grievance about the missing recording can be presented to the jury through evidence and argument.” It allowed the moving party to present evidence that there had been a recording, and that the police have no record of it “(assuming [they] can provide admissible evidence on this point and they preserved it in the final pretrial order)” and that “the recording contained information contrary” to non-moving party’s description of the altercation.

357. **Williams v. Amerian College of Education** [2019 WL 4412801] N.D. Ill. Sept. 16, 2019. After an evidentiary hearing, the District Judge determined, citing Rule 37(e) and its inherent authority, that a former employees claims should be dismissed with prejudice based on his installation of a new operating system which rendered it impossible to determine what files had been rendered unrecoverable. The former employee denied he had done so and argued that the expert had examined the wrong laptop or someone had reinstalled the the operating system. The court found that “by a preponderance of the evidence” the spoliation was “willful” – not only “intentional” but “also that he knew that the reinstallation would destroy relevant” data. (*14). It “presumed” that the wipe files were detrimental to his case.” (*15) Rule 37(e) makes the “common sense assumption” that parties who engage in “intentional spoliation have something to hide,” which meant that “some of what Williams destroyed would have damaged his case.” (*15). There was “no way to approximate the presumably unfavorable effect of that information, and thus no way to craft instructions or presumptions that would eliminate – or even substantially mitigate - the prejudice to ACE.” (*16). The opinion does not analyze or suggest what the form of the lost ESI might have been or how it would have been relevant relevance to the claims or defenses.

358. **Williams v. State Farm** [2019 WL 6036808] (W.D. Mich. Nov. 14, 2019). The court refused to dismiss a case as a spoliation sanction under Rule 37(e)(2)(C) because there had been no prior warning of such measures given. It deferred to the trial judge was to whether a jury instruction should be given, but did award reasonable fees and costs under its inherent authority, citing Goodyear Tire & Rubber v. Haeger as authority based on a finding of bad faith. To the extent they duplicated those awarded under Rule 37(a)(5)(A) earlier, they were “excluded from this sanction.”

359. **Williford v. Carnival Corporation** [2019 WL 2269155] (S.D. Fla. May, 28, 2019). Magistrate Judge Goodman, relying on the same type of analysis he used *Sosa v. Carnival*

(*12), found that Carnival failed to take reasonable steps to preserve x-rays (ESI) but did not do so with a intent to deprive. (“It may have been reckless . . .[or] even grossly negligent, But that does not equate to an intent to deprive.”)(*12) Thus, remedies were available only under Rule 37(e)(1). The missing x-rays prejudiced the plaintiff because they make it “more difficult for her to successfully and strategically demonstrate to the jury that that the medical evacuation expenses” were due to an incorrect interpretation of the x-rays. (*12) Thus, it permitted plaintiff to decide if it wished to present evidence to the jury about the loss and destruction of x-rays (ESI) which resulted in a diagnosis requiring her removal from a cruise ship, since there are some “negative consequences flowing from it.” (“that evidence might cause some or all of the jurors to sympathize with Carnival’s it’s-no-our-fault position” (*13). She can also have *all* the evidence presented or prevent Carnival from introducing any and have the court advise the jury “had the images at one time, but they are no longer available.” (*13)(emphasis in original). If that choice is made, Carnival will be permitted to present evidence of the circumstances which it believes demonstrates an innocuous reason for the inability to find the x-rays and they it is not at fault for their being missing. (*1) Carnival may, at trial, stipulated that the x-rays did not reveal a fractured hip and that the resulting medical expense were caused by a medical staffer incorrectly interpreting the x-rays. Such a stipulation would negate the medical malpractice claims and allow Carnival to challenge liability based on meeting its standard of care as to the slippery stairs or because of negligence on the plaintiffs part (*1). The trial judge will decide whether the court should give the jury instructions to assist in evaluation of such evidence or argument, citing the Committee Note. (*13).

360. **Willis v. Cost Plus** [2018 WL 1319194, at *6 (W.D. La. March 12, 2018)]. In a diversity action for personal injuries where challenges were made to the contention that video surveillance tapes of the shopping injury were at issue, the District Judge concluded that the Louisiana Supreme Court would likely permit an independent tort action for intentional spoliation [citing, *inter alia*. BASF v. Man Diesel, 2016 WL 5817159, *41 (M.D. La. 2016)] but that there was no evidence that the video was intentionally destroyed (*5). It also opined that while Louisiana did not necessarily foreclose permit such an action for negligent spoliation that does not apply since evidentiary presumptions which permit an adverse inference are controlled by federal procedural law in diversity actions involving state substantive law and require a showing of bad faith, **ignoring the standards of Rule 37(e).** (*6). The court held that there was no showing that the surveillance video was destroyed for the purpose of hiding adverse evidence, citing *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015) and “indeed” has not shown such evidence ever existed. The court went on to say, however, that the party may question witnesses about the absence of video surveillance and any alleged failures to follow internal policies, citing Federal Rule of Evidence 607 (witness credibility) – and may argue for whatever inference she deems may be draw due to the absence of items of potential evidence. (*6).

361. **Wilson v. South Carolina Dept. of Corrections** [2020 WL 5627148] ((D.S.C. Sept 21, 2020). In the absence of any “specific prejudice” from the failure to preserve certain emails nor any “reasonable basis” to conclude the Department acted with an intent to deprive, the court adopted the recommendation that a motion for sanctions be denied.

362. **Wilmoth v. Murphy** [2019 WL 3728280] (W.D. Ark. Aug. 7, 2019). In a prisoner case where photographs were not produced, despite a litigation hold demand timely served, the defendant's counsel "buried her head in the sand" and never committed to producing evidence or discovering where it was, leading the court to conclude that there was an "intent to deprive." (*3). It also found prejudice ("easily does so") and ordered that a prison officer directly involved in failure to preserve be barred from being called by the defendant as a witness. (*4). The court cited its finding of intent and Rule 37(e)(2)(B) as justifying an instruction to the jury that it may, but is not required to, presume that the photographs would have supported the claimed injuries from the in-cell confrontation and that the lack of such evidence should not be held against the moving party in the case. (*5). In a footnote, it agreed that the moving party could call the witness but they could not be cross-examined on their recollection of the injuries unless the party opened the door. (n. 6).
363. **Winecup Gamble, Inc. v. Gordon Ranch** [Case No. 3:17-CV-00163-RCJ-WGC], 2020 WL 3840420, at *5 (D. Nev. July 8, 2020). On remand, the trial court that the failure to allow a computer to be upgraded without backing up information and without altering backup settings provided sufficient facts "for the Court to draw an inference that [the party] acted intentionally." (*5) No findings on specific intent were made, but a finding of intentionality was deemed sufficient under Rule 37(e)(2) to justify dismissal of the complaint and entry of a judgment. The court found that a presumption that the lost information was unfavorable would not "sufficiently cure Defendant's prejudice" since the lost ESI would provide the most relevant evidence for determination of the issues in the case. The court noted that the amendment forecloses a court from relying on the courts inherent authority, citing *Newberry v. Cty. of San Bernardino*, 750 F. App'x 534, 537 (9th Cir. 2018). It also found *Zubulakev. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004) to provide an "aptly analog[ous]" case and that the 2015 amendment "did not lessen Plaintiff's burden" and "did not perform reasonable steps to preserve the information." (84)
364. **Winfield v. City of New York** [2017 WL 5664852, at *9 (S.D.N.Y. Nov. 27, 2017)] The opinion, which involves challenges to the use of TAR relies on Sedona *Principle* 6 and cites other reasons to defer to party choices, including the statement that "perfection in ESI discovery is not required" citing to **Rule 37(e)**.
365. **Wolff v. United Airlines** [2019 WL 4450255, at *4 *(as to Defendant) & *6 (Plaintiff)(D. Colo. Sept. 17, 2019). The Court concluded that "the circumstances involved in this dispute do not warrant sanctions for alleged spoliation notwithstanding the Parties' respective preservation failures." It quoted Rule 37(e) and *Turner v. Public Service*, 563 F. 3d 1136, 1149 (10th Cir. 2009)("mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case")(*2-3). The court noted that it was "perplexed that Defendant apparently made no effort to suspend the automatic deletion of emails related to Plaintiff at any time." (*4) However, "though negligent and careless," there was no indication of "intentional conduct or bad faith" or "acted with intent to deprive Plaintiff of that evidence, or otherwise engaged in bad faith conduct." (*4-5). It also declined to sanction with a judgment and "further declines to impose a lesser sanction because Plaintiff has not been prejudiced by the loss of these emails. (*5) It was "equally perplexing" that the

Plaintiff lost the iPhone either by losing it because it fell in a lake or because it turned it in for an upgrade. (*6).

366. **Wooden v. Barringer** [2017 WL 5140518, at *4] (N.D. Fla. 2017). Court found no spoliation conduct covered by Rule 37(e) for loss of video recordings “which presumably are digital”). The court found the same result to obtain if, *arguendo*, the video recordings were not ESI, (n. 3).

367. **Woods v. Scissons** [2019 WL 3816727] (D. Ariz. Aug. 14, 2019). In an excessive force case arising from an arrest by the defendant which may have been captured on dash cams which were automatically deleted, the court found that the non-party City had a duty to preserve which it breached and the resulting “spoliation” could be imputed to the employee “for the purpose of imposing sanctions.” (*6) (collecting cases). It concluded that allowing the Police Department to destroy relevant evidence and “declining to impose appropriate sanctions” because it was a non-party would be unjust. (*6). Since it could not find an intent to deprive, it decided it would be appropriate to allow the parties to present evidence to the jury regarding the potential existence of video footage. If, based on the evidence, the jury decides that the City of Prescott or the Prescott Police Department acted with the intent to deprive, it may “assume” that the video footage would have been favorable to the moving party. (*6). It found the remedy no greater than necessary to cure the prejudice and would “allow the determination of intent to be made on a more fully developed evidentiary record” and is in harmony with the “Advisory Committee Note.”

368. **Wooten v. Barringer** [2017 WL 5140519, at *4 (N.D. Fla. Nov. 6, 2017)]. The court held that Rule 37(e) applied because “the [prisoner surveillance] video recordings (which presumably are digital) constitute ESI” to the exclusion of inherent authority, which was foreclosed by the Rule, which “significantly limits a court’s discretion to impose sanctions for ESI spoliations.” The court applied a “step-by-step” analysis of the Rule and found that even if there was a lack of reasonable steps taken, there was no prejudice and no intent to deprive since, at most the failure to preserve was negligent. It also held that it could not conclude that that officer-defendant was in control of the missing videos, since “[w]hile employer-employee relations may render control of data, those instances are applicable only where a non-party employee possesses the data, not a non-party employer.” (at *8).

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

obtain given the lack of evidence from which a “reasonable inference can be made that relevant evidence was destroyed.” (n. 12).

370. **Worldpay v. Haydon** [2018 WL 5977926 (N.D. Ill. Nov. 14, 2018)]. The court refused to find that Rule 37(e) authorized sanctions although reasonable steps were not taken since “intent to deprive” was not shown simply by deletion of an email account, even if intended to be permanent, since it was not clear that “she did so for the purpose of hiding adverse information.” (*5). The court noted the similarity of that test to the pre-amendment case law in the Seventh Circuit defining destruction in bad faith as for the purpose of hiding adverse inference. In a footnote, the court refused to “answer the question definitively” of whether the Rule was the exclusive means of ordering sanctions for spoliation of ESI, holding that even if it assumed its inherent authority was available, it would deny sanctions (n. 1).

371. **Wyndham Vacation Ownership v. American Consumer Credit** {2019 WL 4748328} (S.D. Fla. Aug. 30, 2019). Dismissal was found justified under Rule 37(b) and (e) since “no lesser sanction [exists] that could remedy prejudice to Wyndham, who acted willfully and in bad faith.

372. **Yoe v. Crescent Sock** [2017 WL 5479932] (E.D. Tenn. Nov. 14, 2017)], as revised in May, 2018 at 2018 WL 2187404 (E.D. Tenn. May 11, 2018). In the initial, convoluted decision, the court held that Rule 37(e) measures addressing prejudice were available, repeatedly stressing that culpability was not required (although it hinted at a finding of gross negligence), and seemingly held that there was no “intent to deprive.” Its key ruling was that “in its discretion” (quoting the Committee Note) that sufficient prejudice existed to justify Rule 37(e)(1) measures because the missing ESI “would, and certainly could, be relevant to a claim or to a defense.” (at *11 - *13). In the REVISED opinion, also quite long, the court concluded that it would reserve rulings on monetary remedial measures until post trial proceedings.

373. **Zamora v. Stellar Mgt.** [2017 WL 1372688] (W.D. Mo. April 11, 2017)]. A district court in the Eighth Circuit applying **Rule 37(e)** must make a finding of “prejudice to the opposing party” and of “intentional destruction indicating a desire to suppress the truth” before an adverse inference is warranted. The court found it premature to find that prejudice existed “when at least some” of the absent material “is available through other discovery” and ordered extensive further discovery of cell phones, with a special master determining which communications are relevant, at a cost to be split. Because it could not find prejudice, it need not determine intent, noting that the memory of the plaintiff cannot be relied upon and that the record “might permit a reasonable inference” that she was aware of the importance of preserving information when she reset her company phone and deleted a Facebook message. The court acknowledged that it was somewhat sympathetic to a lay witness in contrast to a corporation subject to a formal litigation hold.”

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

APPENDIX B

Cases Ignoring Rule 37(e)

1. *Alston v. City of Darien*, 750 Fed. Appx. 825 (11th Cir. Sept. 19, 2018). In a civil rights case involving a traffic stop, the plaintiff sought a dash cam video which was not provided and sought a presumption for spoliation. The Eleventh Circuit Court of Appeals found that, assuming it was destroyed, “Alston has failed to show that he was prejudiced by its absence or that the video had practical significance.” The concession by the party that it might exonerate the police officer “fails to demonstrate the necessary prejudice.” (835). The party testified about what happened and the trial judge nonetheless determined that summary judgment should be granted as a matter of law, thus indicated that he was not prejudiced by the failure to produce. He also “failed to show the video was destroyed intentionally or in bad faith,” demonstrating that it was not an abuse of discretion to deny spoliation sanctions. **Rule 37(e) was not mentioned but would have made no difference had it been applied.**
2. *Alston v. Park Pleasant*, 679 Fed. Appx. 169 (3rd Cir. Feb. 15, 2017). The Third Circuit Court of Appeals affirmed denial of motion for sanctions for failure to preserve ESI in storage devices sold prior to discovery. The party had retained information it thought might be relevant, but it turned out not to be sufficient. The non-moving party offered to make older storage devices available but never heard back from the requesting party. The Court of Appeals affirmed the denial under an abuse of discretion standard and concluded that the conduct of the non-preserving party did not qualify for a finding of bad faith, even if the ESI had existed and was relevant, under Third Circuit authority which required a showing of “actual suppression or withholding of evidence.” The court noted that there was no actual suppression as withholding “requires intent.”
3. *Alvarez v. King County* [2017 WL 3189025] (July 27, 2017). The court resolved a motion in limine excluding evidence of failure to preserve recordings of radio calls as to individual defendants because it was not just to attribute the negligence of the Prosecutors office to the Sheriff’s personnel, given that they had no notice of the duty to preserve when they were routinely overwritten. Rule 37(e) should have been cited, and it would have given an additional reason to apply a safe harbor had individual culpability been assessed, namely, that the individuals did not have an “intent to deprive” when they failed to act.
4. *Archer v. York City School District* 710 Fed. Appx. 94 (3rd Cir. Sept. 27, 2017). Without expressly citing to **Rule 37(e)**, but relying on *Bull v. UPS*, 665 F.3d 68, 73 (3d Cir. 2012), the court found no abuse of discretion in lower court decision concluding that there was no evidence that the deletion of former employees email account was intentional done to suppress or withhold evidence. (See Next Entry).
5. *Archer v. York City School District* [2016 WL 7451562] (M.D. Pa. Dec. 28, 2016). In granting summary judgment to School District which refused to renew a charter school authority to operate, the court refused to sanction deletion of email because there was no duty to preserve at the time and there was no evidence that the party acted with intent at the time (*16) which was one of four requirements of the Third Circuit test. **There was no mention of Rule 37(e).**

The court explained in a footnote (20) that determining whether “spoliation” occurred was separate and distinct from the elements for selection of spoliation sanctions under *Bull v. United Parcel*, 665 F.3d 68 (3rd Cir. 2012).

6. *Archer Daniels Midland v. Chemoil* [2016 WL 9051173] (C.D. Ill. Oct. 19, 2016). A court refused to find that an eight month delay in instituting a litigation hold justified sanctions where some of the “central participant” witness’s emails were destroyed after he left the company but the company was able to restore them by getting copies from recipients. The court **did not cite Rule 37(e)** but held that there was no evidence of prejudice as a result of the delay and nothing to suggest the ADM acted with “willfulness, bad faith or fault.” The court refused to order additional searches citing to **Rule 26(b)(2)(B)** and concluded that the company had made “reasonable efforts to locate” the documents in its possession and the costs of an additional search would “outweigh the need for the discovery.”
7. *Arkeyo v. Cummins Allison* [2017 WL 2813224] (E.D. Pa. June 28, 2017). In a case involving the posting of software on the internet in a trade secrets dispute, a court denied a motion for a preliminary injunction. The court discussed, in footnote 10, whether the removal of URL to it and placing it in a ZIP file without making a forensic copy, constituted spoliation, finding that it did not because the action was not taken in bad faith.
8. *Ballard v. Wal-Mart* [2018 WL 4964361] (S.D. West Va. Oct. 15, 2018). Spoliation motions regarding disposition of surveillance video and photographs decided **without any reference to Rule 37(e)**, with costs to be shifted if additional discovery is needed in regard to delay as well as attorneys fees and costs associated with briefing the issue, as well as permitting party to present evidence of spoliation to the jury. (*4). It found that “**ordinary negligence**” was sufficient in the Fourth Circuit. (*2).
9. *Beck v. Access E Forms* [2018 WL 3752842] (E.D. Tex. August 8, 2018). The court resolved allegations of the deletion of ESI prior to a lawsuit being filed without reference to Rule 37(e). It denied sanctions because there was no evidence that the party had “purposefully” deleted emails or engaged in targeted deletions.
10. *Beeman v. Caremark* [2018 WL 4191486] (C.D. Cal. Jan. 4, 2018). Terminating sanctions imposed for willful spoliation of documents and ESI in long-running case, perhaps at times before the amendment to Rule 37(e), with the court finding that the five-factor test of *Leon* is satisfied.
11. *Benefield v. MStreet Entertainment* [2016 WL 374568] (M.D. Tenn. Feb. 1, 2016). In an employment dispute where the text messages were not preserved, the court noted that it would give a “spoliation instruction to the jury” **without mentioning Rule 37(e)** or making a finding of elevated culpability. The court cited the text of Rule 37(c) as making appropriate sanctions available where a party has failed to provide information as provided by Rule 26(a) or (e). *Bergeron Davilla v. Melissa Moran* [2018 WL 4188474] (E.D. Wisc. Aug. 31, 2018). In a prisoner surveillance tape case, the court dismissed the motion for sanctions relying on *Bracey v. Grondin*, 712 F.3d 1012, 1018 (7th Cir. 2013)(bad faith destruction occurs when a party

destroys evidence for the purpose of hiding adverse information- the crucial element is not that evidence was destroyed but rather the reason of the destruction.

12. *Bordegarary v. County of Santa Barbara* [2016 WL 7260920] (C.D. Cal. Dec. 13, 2016). Court resolved allegations of spoliation of Power Control Module (“PCM”) data in police car and a diagram about the incident involving allegations of excessive force by applying Ninth Circuit case law without explaining why Rule 37(e) was not applicable. The Court stated it would give an adverse inference as to the missing contents to deter spoliation without examining the intent of the defendants since under Ninth Circuit case law based on *Apple v. Samsung*, 888 F.Supp.2d 987, 993 (N.D. Cal. 2012) the fact that there was a “failure to preserve” constitutes spoliation.
13. *Botey v. Green* [2016 WL 1337665] (M.D. Pa. April 4, 2016). Adverse inference denied **under Pennsylvania state law without mention of Rule 37(e)** for loss of documents and data records since the merely careless conduct involved did not reach intentionality.
14. *Brice v. Auto-Owners Insur.* [2016 WL 1633025] (E.D. Tenn. April 21, 2016). In insurance recovery case, entry of a summary judgment against plaintiff based on negligent deletion of text and emails was too “harsh” but court did authorize use of an adverse inference under Sixth Circuit authority at trial without mentioning Rule 37(e). **Rule 37(e) should have been applied; result would be different.**
15. *Browder v. City of Albuquerque* [2016 WL 10538347] (D. N.M. April 15, 2016)(loss of cell phone); as amended (slightly) and reissued [187 F.Supp.3d 1288] (D. N.M. May 9, 2016)(text messages on cell phone); and [209 F.Supp.3d 1236] (D. N.M. July 20, 2016)(“electronic data”). In the April and May decision, the court treated the loss of a cell phone as sanctionable without citing Rule 37(e) because of failure to issue litigation hold (discussing *Pension Committee* and *Chin*) and because it had “reason to suspect” there was consciousness of a weak case. It determined that it would give a jury instruction that allows any inference as well as admitting the evidence of spoliation. In the July decision involving loss of “electronic data, such as the video footage here” by former police officer after accident, court sanctioned without mentioning Rule 37(e) because of “questionable information management” practices [citing *Phillip Adams*, 621 F. Supp. 2d 1173, 1193 (D. Utah 2009) and allowed the plaintiff to present evidence of the spoliation since lacking bad faith and only minimal prejudice. **Rule 37(e) should have been applied; result would likely to have been different.**
16. *Brown v. Albertsons* [2017 WL 1957571] (D. Nev. May 11, 2017). A failure to preserve surveillance video, copies of an incident report and email between a prior store manager at the time of slip and fall was sanctioned without reference to Rule 37(e). The court asserted authority under its inherent powers and “Rule 37” (mentioning (b) and (d), which did not require a finding of bad faith for non-dispositive sanctions, including adverse inferences. It allowed introduction of evidence of the loss of the video and emails, which was, at the most “negligent” and none of the evidence lost “threatens the rightful decision of the case on the merits.” (*11). Albertson was permitted to introduce evidence of its explanations for the losses.

17. *Brown v. Certain Underwriters* [2017 WL 2536419] (E.D. Pa. June 12, 2017). A court allowed an adverse inference and introduction and argument about the loss of a cell phone at trial **without mentioning Rule 37(e)**. Although a “close call,” it declined to enter a dismissal given that an adverse inference would be likely sufficient to cure the prejudice. It decided it would instruct the jury that they may infer, had inspection of the cell phone been permitted before it was lost, that the evidence would have been unfavorable. In n. 4, the court concedes that information about the missing text messages are available from the cellular carrier and raised the possibility that none were sent or received around the key date in the case. Given the finding of bad faith, the court awarded fees and costs, including efforts to obtain records from the cellular carrier.
18. *Brown v. Sam’s West Inc.* [2018 WL 576826] (D. Nev. Jan. 26, 2018). Court analyzes alleged spoliation of surveillance video without mentioning Rule 37(e), but while speaking of video recordings and that after installation of new recording equipment they video footage no longer exists.
19. *Bryant v. Wal-Mart Louisiana* [729 Fed. Appx. 369] (5th Cir. July 5, 2018). Appellate court affirmed as not an abuse of discretion a lower court decision refusing to find that Wal-Mart acted in bad faith in deleting videos since none showed the relevant area and **the deletion was “pursuant to a standardized retention policy.”** No mention of Rule 37(e).
20. *Bush v. Lumileds* [2018 WL 4576676] (E.D. Mich. Sept. 25, 2018). Court, in a case dominated by Rule 37(b) compliance issues, declared itself satisfied with an affidavit stating that the reason an emails existed was *not* that they had not been preserved; after the plaintiff filed a EEOC charge, a litigation hold was “promptly placed on email accounts of key players **“which turned off any auto-delete function”** for those accounts and they were also instructed to retain all hard copy and electronic documents relating to plaintiff and her claims. (*6). The court found this “indicates a good-faith effort to preserve all documents it thought relevant to this lawsuit,” and sanctions were not warranted.
21. *Carroll v. ATA Retain Services* [2016 WL 8417377] (N.D. Ga. Jan. 8, 2016). Without explanation, the court resolved a spoliation dispute over failure to preserve text messages and email without mentioning Rule 37(e). In n. 14, it conceded that federal law governs spoliation sanctions because they constitute an evidentiary matter, but following Flury, applied both federal and state law.
22. *Carpenter v. Gregg Scott* [2017 WL 4270624] (C.D. Ill. Sept. 26, 2017). In a decision involving alteration of a video, the Court analyzed a pro se request for sanctions for failure to preserve video surveillance within prison without citing to Rule 37(e).
23. *Cassar Industries* [2019 WL 9441664] (N.D. Cal. Dec. 3, 2019). The court refused to sanction a party for destroying emails that should have been preserved and whose contents “were potentially relevant” because there was no evidence “at this time” that the party had acted with a culpable state of mind, ordering further discovery and noting that the defendants may “later renew the motion for spoliation of evidence.” It stated that a court may “impose sanctions pursuant to both inherent power of the court and” Rule 37, **without mentioning Rule 37(e)**.

(*3-4). **In contrast**, the court noted that there was a rebuttable presumption of prejudice from delays in producing documents under Rule 37(b), which had not been overcome by arguing it had been disorganized (a “frivolous excuse”) and that it had **eventually produced the documents at issue**, especially since it barred the party from reviewing the calculations before expert reports were due or during depositions. It vacated the upcoming trial date and ordered a variety of sanctions, not including dismissal, which should be considered only if there is no less drastic alternative. Importantly, it stated that **“no remedy by the court nor Plaintiff can cure prejudiced caused by this failure to produce documents.”** (*4)

24. *Carter v. Butts County* [2016 WL 1274557] (M.D. Ga. March 31, 2016). In case where police officer charged with unlawful arrest had destroyed or altered a police report and deleted photos on digital camera, an adverse inference granting rebuttable presumption and evidence preclusion was imposed under Eleventh Circuit authority **without mentioning Rule 37(e)** after finding the officer had acted in bad faith. Attorney who signed responses was sanctioned \$500 under **Rule 26(g)**.
25. *Champion Pro Consulting v. Impact Sports*, 845 F.3d 104 (4th Cir. Dec. 22, 2016). In appeal from summary judgment on a claim that competitive sports agents had violated North Carolina unfair and deceptive practices acts, the appellate court found that an appeal based on the failure to rule on a motion spoliation based on lost or deleted text messages was moot since summary judgment was properly granted **without mention of Rule 37(e)**.
26. *Charles v. City of New York* [2017 WL 530460] (E.D.N.Y. Feb. 8, 2017). A District Judge refused to dismiss a case or issue an adverse inference as to the contents of a video on a cell phone which was negligently lost by a Plaintiff who had recorded her interaction with the police. It cited *Zubulake*, 229 FRD 422, 431 (S.D.N.Y. 2004) for the proposition that it could not be inferred from mere negligence that the recording would likely be favorable to the defendants.
27. *Commodity Futures Trading Comm. v. Gramalegui*, 2017 WL 2570022, at *3 (D. Colo. June 14, 2017). Without discussing the impact of **Rule 37(e)**, a Magistrate Judge recommended a finding of presumption of authenticity of websites retained by one party when the other had a duty to preserve them, but had not done so, despite the fact that the websites “‘may’ be relevant to pending or imminent litigation.” The court then found bad faith based on observing conduct which indicated that the defendant has manipulated and obfuscated the discovery process to suit its ends.
28. *Cooksey v. Digital* [2016 WL 5108199] (S.D.N.Y. Sept. 20, 2016)(Koeltl, J.) Without mentioning Rule 37(e), a complaint seeking spoliation sanctions was dismissed as frivolous where no evidence of destruction or prejudice when party accused of spoliation removed the accused (libel) article from website but preserved a screenshot.
29. *Cooley v. Leonard* [2019 WL 6250964] (N.D. Cal. Nov. 22, 2019). In denying a request for an adverse inference instruction arising out of deletion of email during 2018, the court did not mention Rule 37(e) and that an “adverse inference instruction” may be “appropriate in the absence of a finding of bad faith,” citing *Unigard and Glover*.

30. *Comlab v. Kal Tire* [2018 WL 4333987] (S.D.N.Y. Sept. 11, 2018). The court dismissed an action for breach of contract under its inherent authority after considering “the full complement of options available to it under the applicable rules and its inherent authority.” (*8). It concluded that fabricated emails were inappropriately deleted after a duty to preserve attached in order to support an attempt to commit a fraud on the court by avoiding proof of that fact, which could have been made had native copies of the emails and invoices been retained. The court referenced the authority to issue sanctions for “spoliation” under rule 37(b)) and inherent authority without any mention of Rule 37(e). It described the burden of proof “for a claim of fabrication, which effectively amounts to a fraud on the court” as clear and convincing evidence. (*7).
31. *Confidential Informant v. USA* [2016 WL 3980442] (U.S. Ct. of Claims, July 21, 2016). In assessing alleged spoliation of tape recording of telephone call (which Gov’t denied existed), the court used *Residential Funding* inherent power logic **without mentioning Rule 37(e)**.
32. *Core Laboratories v. AMSPEC* [2018 WL 6220099] (S.D. Ala. July 25, 2018). In a case dealing with lost text messages and email **without reference to Rule 37(e)**, the court refused to consider sanctions in the nature of an “adverse inference” jury instruction for failure to take steps to preserve emails or text messages because there is no indication they are “irretrievably lost” since they never moved to compel production prior to close of discovery (*4) leading the court to conclude that they were not sufficiently prejudiced by being deprived of that evidence. In a footnote (N. 6), the court cited an Eleventh Circuit Opinion, *Oil Equip. v. Modern Welding*, 661 F. App’x 646, 652 (11th Cir. 2016) to the effect that courts should primarily consider the extent of prejudice caused by the spoliation” based on the importance of the evidence to the case,” whether the prejudice can be cured, and the culpability of the spoliator.
33. *Creighton v. The City of New York* [2017 WL 636415] (S.D.N.Y. Feb. 14, 2017). Issues of potential spoliation of the contents of a surveillance video were resolved **without any reference to Rule 37(e) despite** explicit discussions of digital considerations and metadata.
34. *Crittenden v. City of Tahlequah* [2018 WL 3118182]. Court refuses to utilize allegations of spoliation of failure to preserve original versions of body camera tapes after transferring them to a hard drive because there was no loss.
35. *Dallas Buyers Club v. Doughty* [2016 WL 1690090] (D. Ore. April 27, 2016, amended April 29, 2016 [as 2016 WL 3085907]). **Without citing to Rule 37(e)**, court stated that jury will be permitted as an “evidence-weighting” matter to presume adverse information was contained on cell phone which was destroyed under Ninth Circuit authority which raises a presumption that missing information was adverse without a showing of bad faith.
36. *David Mizer Enterprises v. Nexstar Broadcasting* [2016 WL 4541825] (C.D. Ill. Aug. 31, 2016). In breach of contract action where a hard drive had crashed before the filing of the lawsuit and no spoliation occurred, there was **no mention of Rule 37(e). It would have made no difference had it been cited.**

37. *Davis v. Crescent Electric* [2016 WL 1637309] (D. S.Dak. April 21, 2016). In an employment dispute where the plaintiff sought sanctions for production of what it deemed to be a fabricated email, the court, **without reference to Rule 37(e), refused sanctions because it could not determine by clear and convincing evidence that a violation of Rule 26(g) had occurred (*4-5)**, but allowed her to testify as to not sending it and left it for the jury to determine its authenticity, but urged the parties to consider an alternative to avoid delaying the trial on an issue peripheral to the issues in the case, given FRE 403.
38. *Decker v. Target* [2018 WL 4921534] (D. Utah Oct. 10, 2018). A District Judge agreed to instruct a jury to draw an adverse inference this missing video surveillance tape would have shown that a cart in the area of the incident was left unattended. The two employees who made the decision not to retain the entire video did not act in bad faith, but since they “were not acting as individuals” but as employees, Target acted in bad faith as to the evidence. Target failed to properly instruct its employees as to the retention policy involved and the argument by counsel that the gap permits an inference that the cart was being worked “leads the court to conclude Target acted in bad faith.” (*4) (“counsel now seeks to take advantage of the evidence” it failed to preserve).
39. *Doe v. County of San Mateo* [2017 WL 6731649] (N.D. Cal. Dec. 29, 2017). Judge Orrick evaluated allegations of spoliation of “camera recordings” from security cameras in a prison without mentioning Rule 37(e).
40. *Dubois v. Board of County Comm.* [2016 WL 868276] (N.D. Okla. March 7, 2016). Sanctions denied in case involving loss of surveillance video and photographs.
41. *Edifecs v. Welltok* [2019 WL 5862771] (W.D. Wash. Nov. 8., 2019. In a dispute as to the hiring of former employees by a competitor, the District Judge refused to impute spoliation to the new employer of text message on personal cell phones of the former employees where there was no evidence deleted text messages to protect the employer, as opposed to protecting themselves or clearing space on their phones. (*5). However, it sanctioned the new employer **without mentioning Rule 37(e)(1)** for deletion of job posting information for which the former employees applied, despite finding the evidence of prejudice from its loss was not particularly strong, after concluding that it was inappropriate to grant an adverse inference which would have too severe. (*6, citing *Apple*, 888 F. Supp.2d at 992; *Rimkus, Keithley and Zubulake*, 220 F.R.D., at 219-20). It ordered that the party would not be allowed to present testimony or evidence as to the contents of any particular job postings for the positions to which the employees applied. It permitted the new employer to present evidence and argue that the employees applied in response to job postings, without discussing their contents, and the former employer could cross examine and argue the significance of the job postings. (*7)
42. *Edmundo Caltenco v. G.H. Food* [2018 WL 1788147] (E.D.N.Y. March 7, 2018). In an FSLA case where a Brooklyn waiter claimed to have worked 72 hours, not the 62 his employer conceded, the court, **without mentioning Rule 37(e)** found that the employer had no duty to preserve the ordinal copies of the sheets upon which it had written the payments in case, and to which the employee had assented.(*3) It conceded that the party should have “taken greater care in moving the few documents relevant to this litigation when conducting the office move”

but concluded that there was no showing of prejudice sufficient to warrant relief and to do so would “convert a document management issue into an adverse inference of doubtful accuracy at trial.” (*8). However, in a footnote, the Magistrate Judge said the Plaintiff is not precluded from raising the issue of spoliation at trial if permitted, and a court could “consider the differing accounts as to the accuracy of the photocopies and the explanations for non-production of the original in deciding whether to credit the legitimacy of the records. (n. 2).

43. EEOC v. Draper Development [2018 WL 3384427] (N.D.N.Y. July 11, 2018). In a case involving failure to preserve text messages, the court resolved the matter - which involved little prejudice and perhaps no duty to preserve - without reference to Rule 37(e).
44. EEOC v. Office Concepts [2015 WL 9308268] (N.D. Ind. Dec. 22, 2015). Court refused to sanction recycling of hard drive and deletion of email after termination of employee because even if the duty to preserve was triggered by notice of the EEOC policy in 29 CFR § 1602.14, the emails were not material and the EEOC was not prejudiced because it had alternative sources. **No mention of Rule 37(e)**. The court relied on *Bracey v. Grondin*, 712 F.3d 1012, 1019 (7th Cir. 2013)(no bad faith unless “for the purpose of hiding adverse information”).
45. Eshasn Mohamad Ouza v. City of Dearborn Heights [2019 WL 339616 (E.D. Mich. Jan. 28, 2019)]. The court applied the wrong culpability standard to loss of dash cam and body microphones and ignored Rule 37(e) under circumstances where it would have made no difference. In footnote 14, it acknowledged circuit differences, but said it would have made no difference since it was granting an adverse inference at the time.
46. Elton Masn v. State of Washington [2019 WL 414504 (W.D. Wash. Feb. 1, 2019)]. The court ignored Rule 37(e) in a case of lost email under circumstances when there was a failure to show a culpable state of mind.
47. Erhart v. Bofl [2016 WL 5110453](S.D. Cal. Sept. 21, 2016). In an action by whistleblower for retaliatory firing, the court refused to impose sanction in the form of a terminating sanction, adverse inference or monetary sanctions without mentioning **Rule 37(e)** because moving party had not suffered any meaningful prejudice from loss of ESI which could largely be located elsewhere. The court refused to place the burden of showing the files still existed on the non-moving party.
48. Estakhrian v. Obenstine [2016 U.S. Dist. LEXIS 66143] (C.D. Cal. May 17, 2016). District Court adopted Special Master’s recommendation for an adverse inference [under Rule 37(c)(1)] **without mention of Rule 37(e)** because it recommended sanctions for violation of Rules 26(a), (e) and 34, not the spoliation of evidence. (*17). [The Special Master’s Report reflected a failure to disclose documents stored on a laptop (at *7 of Special Masters report]
49. Evans v. Quintiles Transnational [2015 WL 9455580] (D.S.C. Dec. 23, 2015). In an employment dispute involving an ex-employee who argued that her recycled company furnished laptop had contained a hidden file relevant to her retaliation claim, the court decided to let the jury hear and decide if the file existed and if the party had willfully lost or destroyed it (*5) which would determine if an adverse inference would be available. **Rule 37(e) was**

not mentioned. The court concluded the disputed facts rested on credibility findings which it was “not in a position to make” at this time and decided to allow the party to introduce evidence and argument on the topic (*10).

50. *First Financial Security v. Lee* [2016 WL 881003] (D. Minn. March 8, 2016). The District Judge agreed, after a de novo review, to instruct a jury as recommended by a Magistrate Judge in a R&R found at 2016 WL 7971666 (D. Minn. Jan. 19, 2016). The instruction would tell the jury that the non-moving party did not fully respond to discovery of ESI as ordered by the court, and that it may infer a series of facts (*7) as to text messages not preserved after a February 2015 Discovery Order (per the District Judge interpretation – see footnotes 6 & 8). The Magistrate Judge did not find that the inherent authority to act existed as to texts and emails not preserved before that time because while the record supported an “inference” that the non-moving parties had “intentionally” failed to preserve the earlier texts, the record did not support a conclusion that they did so in “bad faith.” (R&R, *11). The Magistrate Judge found the District Court agreed that “[the party and its counsel] willfully violated court orders compelling discovery” even though Rule 37(b) does not list an adverse inference as “one of the enumerated but inexhaustive options.” (R&R). The District Court refused to strike certain affirmative defenses given that it was not clear that responsive documents had been withheld but stated that if at trial it is shown that “responsive documents existed and were not produced” and there is prejudice to counter affirmative defenses, the court will reconsider its ruling.” (*6). **NOTE: A case involving the same Plaintiff (and similar allegations) in the N.D. Cal. subsequently applied Rule 37(e). [That case is summarized in Appendix A].**
51. *Flemming v. Kelsh* [2016 WL 27573980] (N.D. N.Y. May 12, 2016). Spoliation of “video footage” taken with “handheld video camera” of prison incident was resolved **without mention of Rule 37(e)**. The court utilized *Residential Funding* standards in holding that there was no evidence of culpable state of mind. **Rule 37(e) should have been applied, unlikely it would have led to different result.**
52. *Florilli Transportation v. Western Express* [2015 WL 12804273] (W.D. Miss. Dec. 29, 2015). In truck on truck collision case, operational data recording speed in the plaintiff’s truck was lost because it was not requested until after the 6-12 month retention period. The Plaintiff’s Safety Manager had reviewed it on a screen but did not print it out. The court refused to sanction the failure to preserve under its inherent authority **without mentioning Rule 37(e)** since while it may have been negligent to fail to preserve, it was not done “intentionally” with “a desire to suppress the truth.” Moreover, there was no evidence of an attempt by the Defendant to secure the information directly. The court noted that the request for a spoliation sanction could be renewed at trial outside the hearing of the jury. **Rule 37(e) should have been cited, but given the similarity in culpability standards, it would likely have had no impact.**
53. *Gibson v. C. Rosati* [2016 WL 5390344] (N.D.N.Y. Sept. 27, 2016). Allegations of spoliation of a video which was inadvertently lost (it turned out it was actually available) were resolved **without reference to Rule 37(e). It would have made no difference if the Rule had been cited.**

54. *Garcia v. City of Santa Clara* [2017 WL 1398263] (N.D. Cal. April 19, 2017). Judge Illston refused to impose an adverse inference or monetary damages for a negligent failure to place a “more robust litigation hold” with respect to email or maintenance of police reports and video files because the court was not convinced that “anything highly probative was lost or destroyed such that it will damage” the parties right to proceed. The court did not mention **Rule 37(e)**. It did allow the jury to hear about a missing report and draw “whatever inferences it chooses.” The Court cited to *Goodyear v. Haeger*, 581 U.S. ___, 2017 WL 1377379, at *5 as authorizing a compensatory award of legal fees to redress the party and requires a “but for” causal link between misbehavior and legal fees. It did not find sufficient culpability to award fees under its inherent authority (citing the Leon culpability formulation (bad faith, vexatiously, wantonly, or for oppressive reasons”) but made a minor award under Rule 37(b).
55. *Goines v. Lee Memorial* [2019 WL 4016147] (M.D. Fla. Aug. 26, 2019). The court reviewed the circumstances of deletion of Facebook postings by a party without informing her attorney under the court’s inherent authority, citing *Austrum v. Fed. Cleaning*, 149 F. Supp.3d 1343 (S.D. Fla. 2016), which required it to find that the absence was predicated on bad faith, citing, indirectly, *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997). Because bad faith was not demonstrated, spoliation sanctions were inappropriate. However, the court found, in footnote 10, that while it would not impose sanctions, Lee Memorial is not precluded from introducing into evidence the fact concerning the failure to preserve, citing *Socas v. The Nw. Mut. Life Ins. Co*, 2010 WL 3894142, *9 (S.D. Fla. 2010) and *Wandner v. American Airlines*, 79 F. Supp.3d 1285 at 1300 (S.D. Fla. 2009).
56. *GoPro v. 360Heroes* [2018 WL 1569727] (N.D. Cal. March 30, 2018)]. A court acting without citation to Rule 37(e) awarded a permissive adverse inference and reimbursement of the expenses incurred where a forensic examination determined that the text of audio recordings incorporated into pdf copy of an email had been intentionally altered to improve the legal position. The court refused terminating sanctions holding that these sanctions were sufficient to remedy any potential prejudice and, in n. 2, explained that the jury would be instructed that it could infer from the differences between the actual and produced copies that the party had “tampered” with the evidence and that he had failed to account for the original data. “The jury may consider and draw adverse inferences from these facts.”
57. *Gordon v. Almanza* [2018 WL 2085223] (March 5, 2018). Court denied motion for sanctions for failure to produce cell phone data and documents without mentioning Rule 37(e)
58. *Griffiths v. Tucson, City of* [2016 WL 7227553] (D. Ariz. Jan. 25, 2016). A court dealing with allegations of intentional deletion of text and voicemail messages from a cell phone applied *Surowiec v. Capital Title*, 790 F. Supp.2d 997, 1005 (D. Ariz. 2011), and took the issue of spoliation under advisement but allowed both parties to introduce evidence relevant to the issue and to argue inference from that evidence to the jury. **No mention was made of Rule 37(e)**.
59. *Harfouche v. Stars on Tour* [2016 WL 54203] (D. Nev. Jan. 5, 2016). A court refused to find that spoliation by a party had occurred where former employee who was fired had “deleted” all of the information. The court refused to find there was a duty to preserve at the time since

litigation must be more than a possibility. **No mention of Rule 37(e)**, but it would not have made a difference.

60. *Harmon v. United States* [2017 WL 1115158] (D. Idaho March 24, 2017). In a complex case involving maintenance of canals and ditches for irrigation water, a court **ignored Rule 37(e)** in a case involving failure to enter data in databases and failure to keep logbooks. The court implied a duty to preserve from Federal Records Act regulations and ordered use of a permissive adverse inference instruction (citing *Mali v. Fed. Insu.*, 720 F.3d 387, 393 (2nd Cir. 2013), which it described as least severe since “the jury is always at liberty to draw such inferences from circumstantial evidence.” (*7). The court also found that the missing evidence was “likely” to have been relevant to a contested issue and proceeded to act upon finding the conduct “at least negligent” although there was no evidence the government engaged in intentional or bad faith spoliation because the plaintiff should not be asked “alone to shoulder the consequences of such a violation.” (citing *Chambers v. NASCO* as giving it inherent authority to do so (*5)).
375. *Hearne . HUB Bellevue Properties* [2020 WL 251287] (W.D. Wash. May 15, 2010). A court dealing with the deletion of ESI failed to acknowledge the existence of Rule 37(e) in regard to the deletion of electronic logs dealing with elevator malfunctions, and since relevant to the case at issue, concluded that “an adverse jury instruction is appropriate” and the court will instruct the jury that “it may infer that the elevator lots would have been unfavorable to defendant to Defendant because the log would have shown that Elevator 5 shut down” because of a power fluctuation. (*5).
61. *Heggen v. Maxim Heathcare* [2018 WL 1992196] (N.D. Ind. April 27, 2018). Without mentioning Rule 37(e), the court orders, as a proportionate sanction for negligent deletion of recordings from cell phone, a factory reset, and then lost or deletion of the email transmitting the recordings to the EEOC during the pendency of a lawsuit, the award of reasonable expenses incurred in filing the motion to compel. The court cited Rule 37(b)(2)(C) and found it premature to consider if a spoliation charge should be read to the jury if the case goes to trial.
62. *Henkle v. Cumberland Farms* [2017 WL 563540] (S.D. Fla. June 15, 2017). The court, in refusing to sanction because of a lack of bad faith, discussed the cause of the deletion as being due to overwriting due to “surveillance software” – but **ignored Rule 37(e)**.
63. *In re Abell* [2016 WL 1556024] (D. Md. April 14, 2016). A final judgment was entered **without citation to Rule 37(e)** against parties who engaged in egregious misconduct involving spoliation of documents and ESI which was intended to deprive the Trustee and others of evidence. **Rule 37(e) should have been applied; result would likely to have been the same.**
64. *In re: Ajax Integrated* [2016 WL 1178350] (N.D. N.Y. March 23, 2016). A court analyzed motion for sanctions under Rule 37(b) **without mentioning Rule 37(e)** for deletion of files prior to forensic examination. It noted that summary judgment can be precluded by spoliation, although it did not do so in this case. The Court decided to hold a separate evidentiary hearing to consider if sanctions were warranted. **Rule 37(e) should have been applied.**

65. In re: General Motors LLC Ignition Switch Litigation [2017 WL 2493143] (S.D.N.Y. June 9, 2017). The court granted a motion *in limine* to preclude GM from presenting evidence and argument that the plaintiff had failed to preserve spoliated SDM data from an automobile in a bellweather trial because it would “plainly risk unfair prejudice” under FRE 403. The court indicated it would allow the jury to be told “in a neutral manner” that does not suggest either party was responsible that the SDM data is unavailable. The court reserved the right to enter a permissive adverse inference at trial **without mentioning Rule 37(e). Rule 37(e) should have been mentioned since it clearly would preclude an adverse inference at trial on the facts presented in the opinion.**
66. In Re Sussman, 816 Fed. Appx. 410 (11th Cir. July 7, 2020). Without mentioning Rule 37(e) or its counterpart, the court upheld a sanction for destruction of the ESI in a computer, applying a rebuttable presumption that the party had not used the computer to take a course on it. The court determined after a three-day hearing that the Debtor had acted with the intent to deprive the Estate of the laptop. The court of appeals found the determination that the party had acted in bad faith was not clearly erroneous, citing the changing excuses and that the testimony and demeanor regarding the fate of the laptop was not credible. It affirmed the ultimate dismissal of the case which occurred because the party failed to rebut the presumption.
67. Integrated Direct Marketing v. Drew May, 690 Fed. Appx. 822 (4th Cir. May 30, 2017). The Fourth Circuit did not find an abuse of discretion in refusing to find spoliation from the deletion of files from hard drive where the district court had conducted an evidentiary hearing and examined the non-moving party under oath before concluding that there was insufficient evidence to find spoliation and bar the issuance of summary judgment as a result of drawing an adverse inference of fact. **Rule 37(e) was not mentioned but given the sparse contents of the opinion on appeal, it is not possible to determine if it would have made a difference.**
68. Interjeet Basra v. Ecklund Logistics [2017 WL 1207482] (D. Neb. March 31, 2017). A failure of a trucking company to require its trucker to record Qualcomm/People Net server data in an accident was treated as mere negligence not sufficient to warrant an adverse inference.
69. Issa v. Delaware State University [2019 WL 1883768] (D. Del. April 26, 2019). In ruling on motions for limine, Judge Stark noted that he would permit “contested evidence from both sides” on the issue of whether videos of an altercation existed and were not being presented at trial “in order to “permit the jury to decide the issues it will be presented.” (*1). He noted that whether there was a duty to preserve had not been resolved when he had ruled against granting a spoliation motion from the bench and if a party sought an instruction on the issue [giving a sample of a possible one which did not require a finding of culpability in footnote 2] it would require a proposal supported by argument and authority. [He explained that he had ruled against the motion based on a “factual finding” which “does not necessarily preclude a legal conclusion” that there may have been a duty to preserve videos which were not in the control of defendants but were in the public domain and relied upon in the adverse employment action. The confrontation took place in 2012 but there was testimony in the record that one of the defendants may have viewed it. The judge did not cite Rule 37(e).

70. Jetport v. Landmark Aviation [2017 WL 7732869] (S.D. Fla. July 24, 2017). Spoliation motion relating to permitting overwriting of surveillance video of aircraft location where Boeing 737 collided with smaller jet resolved without mentioning **Rule 37(e)**. **Court resolved intent issue based on “bad faith.”**
71. Jutrowski v. Township of Riverdale [2017 WL 1395484] (D. N.J. April 17, 2017). Court refused to deny a summary judgement as a sanction for failure to preserve dashcams video recording **without citing to Rule 37(e)**. The court could not find that the video actually existed.
72. Kazan v. Walter Kennedy, 2016 WL 6084934 (W.D. Wash. Oct. 18, 2016). A court found refused to consider whether spoliation of the contents of a cell phone occurred when it fell out of a boat on a fishing trip moot while granting summary judgment in favor of party seeking sanctions for spoliation of the phone. **No mention was made of Rule 37(e), but it would have made no difference given the procedural posture of the case.**
73. Keathley v. Grange Insur. [2017 WL 1173767] (E.D. Mich. March 30, 2017). Inconclusive discussion of potential spoliation of digital photographs leading to order of further discovery **without mention of Rule 37(e)**.
74. Kennedy v. Supreme Forest [2017 WL 2225557, at *2] (D. Conn. May 22, 2017). In case where original audio recording on a smartphone was destroyed in violation of duty to preserve, but copies and a transcript were offered in evidence, the court refused to issue an adverse inference without relying on **Rule 37(e)** because the court held that there was no showing that this occurred “with intent to impede its available for trial.” **The failure to cite Rule 37(e) made no difference on the outcome.**
75. Khatabi v. Bonura [2017 WL 1434443] (S.D. N.Y. April 21, 2017). Sanctions were denied for loss of video tape, years after a conviction [which was overturned when a brother confessed] under Residential Funding **without mentioning Rule 37(e)** because there was no duty to preserve and because there was prejudice from its loss despite it having been grossly negligent to fail to preserve.
76. Kische v. Simsek [2018 WL 620493] (W.D. Wash. Jan. 29, 2018). The court analyzed a case allegations of spoliation of quick books and emails **without relying on Rule 37(e)**, and applied per se rules gleaned from pre-Rule cases in the Ninth Circuit, ultimately applying the same jury instruction used in Apple v. Samsung, 888 F. Supp. 976, 995 (N.D. Cal. 2012) under which the jury was instructed that the party had failed to preserve evidence for use in the litigation and whether the fact is “import to you in reach a verdict in this case is for you to decide.” (at *8).
77. LaFerrera v. Camping World RV Sales [2016 WL 1086082] (N.D. Ala. March 21, 2016). An adverse inference was denied where email was deleted in the absence of bad faith **without mention of Rule 37(e)**. **Rule 37(e) should have been applied but the result would likely to have been the same.**

78. *Legacy Data Access v. Mediquant* [2017 WL 6001637] (W.D.N.C. Dec. 4, 2017). In a post jury verdict decision discussing why the court had permitted the jury to evidence of spoliation of the contents of an SD card, the court applied its inherent power without mentioning Rule 37(e) because “[t]his case involves the destruction of ESI, not the loss of ESI. Therefore, Rule 37(e)(2) is inapplicable.” (at n. 8). This is an incorrect and unnecessarily restrictive reading of the Rule.
79. *Lemmon v. City of Akron* [768 Fed. Appx. 410] (6th Cir. April 4, 2019). The court refused to overrule lower court decision refusing to sanction loss of contents of dashcam hard drive without mentioning Rule 37(e).
80. *Lewis v. McLean*, [864 F.3d 556, 2017 WL 3097864 (7th Cir. July 21, 2017)]. The Seventh Circuit raised the issue of an unexplained failure to preserve a portion of surveillance video which could have helped the plaintiff and suggested that upon remand the court should consider reopening discovery and asking recruited counsel to examine the state of mind of the defendants as well as explore why more video was not preserved. **Rule 37(e) was not but could have been referenced, clearing up the issue raised by Judge Dow in *Martinez v. City of Chicago*, 2016 WL 3538823 (N.D. Ill. 2016) when he noted that the Circuit had not yet addressed the impact of Rule 37(e).**
81. *Lexpath v. Welch* [744 Fed. Appx. 74 (3rd Cir. April 17, 2018)]. In an opinion ignoring Rule 37(e), the Third Circuit affirmed a failure to give a spoliation instruction under which the jury could presume that the lost information was unfavorable,” which it described as the “least-harsh form of spoliation instruction,” since it “would not have *required* the jury to presume the lost evidence was unfavorable.” (emphasis in original)(at 79). In footnote 3, the Third Circuit noted that “[w]e have not yet spoke to the proper ‘division of fact-finding labor’ [citing *Nucor v. Bell*, 251 F.R.D. 191, 202 (D.S.C. 2008)], but it was not necessary since it was not an abuse of discretion to “decline to give an adverse inference charge under these circumstances.” **However, the lower court opinion, at 2016 WL 4544344 (D.N.J. August 30, 2016) clearly involves Rule 37(e) – see the summary in the Exhibit A.**
82. *Lyndsay Blank v. Tomorrow PCS* [2018 WL 3136002] (E.D. La. June 27, 2018). Court refused to sanction a party for failure to arrange for (or retain?) email of former employees and utilized culpability standards from 5th Circuit under inherent authority, blended with Residential Funding. **Not at all clear if would have applied Rule 37(e) given posture of case, it finds that none of Residential Fundings predicates are satisfied, but its not mentioned.**
83. *Lologo v. Wal-Mart* [2016 WL 4084035] (D. Nev. July 29, 2016). A court denied a request for (unspecified) sanctions for failure to preserve video footage without citation to **Rule 37(e) by holding that no “culpable state of mind” was shown under inherent authority of court to manage the case.** It also barred references implying that that video footage existed since that was not proven and could be prejudicial. The court also seems to credit statement that no footage existed, mentioning that no depositions were taken of persons “with knowledge of the surveillance system.” **Rule 37(e) should have been applied but it would not have led to different result.**

84. *Management Registry v. A.W. Companies* [2020 WL 1910589, at *20] (D. Minn. April 20, 2010). After finding the discovery conduct had been unreasonable and not conducted in good faith, the Magistrate Judge, relying its inherent authority to deal with discovery conduct which abuses the judicial process, recommended that the “the jury be instructed that the defendants failed to cooperate in discovery during this litigation, a fact from which they may infer that the defendants attempted conceal information that would not have been helpful to their position.” The court did not mention nor did the case involve preservation issues.
85. *Marla Moore v. Lowe’s Home Centers* [2016 WL 3458353] (W.D. Wash. June 24, 2016). A court refused to impose a default judgment because of the deletion of email which occurred prior to attachment of the duty to preserve. The court also held that the party did not act “willfully or in bad faith.” **No mention of Rule 37(e). Rule 37(e) should have been applied; but the result would likely have been the same.**
86. *Marshall v. Target* [2018 WL 3475204] (D. Colo. July 19, 2018). Magistrate Judge, finding minimal prejudice from negligent failure to preserve video that did not show slip and fall declined to recommend adverse inference instruction, given lack of evidence of intentional misconduct, but agreed that Plaintiff should be permitted to present evidence about failure to preserve video. No mention of Rule 37(e). **Rule 37(e) should have been applied; but the result would likely have been the same.**
87. *Marsulex Environmental Technologies v. Selip* [2019 WL 2184873] (M.D. Pa. May 21, 2019). In a very comprehensive Magistrate Judge decision where the court inexplicitly does not mention Rule 37(e), it finds that “a forensic investigation is necessary to determine whether and to what extent Selip withheld, suppressed, or deleted evidence” that was relevant to the parties’ claims. Because the investigation is necessary “solely” because of the failure to properly preserve evidence, the non-moving party was ordered to pay for the forensic examination of certain work computers most like to show evidence of spoliation, but not ordered to pay attorneys fees or costs. The court denied the motion for more extreme sanctions without prejudice to renewal after the investigation. (*12-13)
88. *Martin v. Stoops Buick* [2016 WL 1623301] (S.D. Ind. April 25, 2016). An adverse inference was denied under Seventh Circuit authority because the deletion of emails and other ESI was not the result of bad faith (destroyed for purpose of hiding adverse information). **Rule 37(e) should have been applied but the result would likely have been the same given the similarity of standards applied to the rule.**
89. *Martinez v. Salazar* [2017 WL 4271246] (D. New Mex. Jan. 16, 2017). Court analyzed request for sanctions for failure to search for or preserve taser use data and failure to implement a litigation hold without citing Rule 37(e), concluding that the conduct was grossly negligent, relying on Browder and Pension Committee. It inferred that prejudice existed merely because the loss of the “objective data” from the Taser as to its usage would have been relevant to determining the credibility of witnesses. (*6). “The court decided to allow questioning “limited in scope” to ensure that it did not detract from the main issues in the case, listing the topics that could be covered. It noted that it “may instruct jurors that they are allowed to make

any inference they believe appropriate in light of the spoliation of the Taser data. **Rule 37(e) should have been applied, but it probably would have made no difference since the remedy is allowable under Rule 37(e)(1).**

90. *Mayer Rosen Equities v. Lincoln National Life* [2016 WL 889421] (S.D. N.Y. Feb. 11, 2016). The court refused to hold that spoliation of ESI existed merely because paper copies were scanned since experts were able to determine authenticity of underlying documents by use of the scanned copies. **Rule 37(e) should have been applied but the result would likely to have been the same.**
91. *McCabe v. Wal-Mart Stores* [2016 WL 706191] (D. Nev. Feb. 22, 2016). A court refused to impose an adverse inference regarding missing surveillance video because it did not result from a conscious disregard of preservation obligation. **Rule 37(e) should have been applied but the result would likely to have been the same.**
92. *McCarty v. Covol Fuels* [644 Fed. Appx. 372](6th. Feb. 16, 2016). A Panel of the Sixth Circuit Court of Appeals **ignored Rule 37(e)** in affirming a summary judgment for defendant despite its destruction of ladder, documents, text messages and phone call records on destroyed cell phones. The Court of Appeals held the spoliation issue to be moot since the summary judgment was issued on an independent ground. Moreover, defendants did not act in bad faith and loss of evidence did not preclude putting on a case, distinguishing *Silvestri*. **Rule 37(e) should have been mentioned since ESI was involved; but it would have made no difference given the posture of the case.**
93. *Melanee Bryant v. Wal-Mart Louisiana* [___ Fed. Appx. ___, 2018 WL 3322871] (2nd Cir. September 21, 2018). The Circuit Court left it to the lower court on remand to determine if deletion of emails warrants adverse inference, citing to *Chen v. Port Authority*, 685 F.3d 135, 162 (2nd Cir. 2012), without indicating that Rule 37(e) should – or should not – be applied.
94. *Mid-Atlantic Framing v. AVA Realty* [2018 WL 1605567] (N.D.N.Y March 29, 2018). The District Judge refused to enter a summary judgment based against a party based in party on an inference that missing ESI and documents would have supported specific factual allegations key to the motion. Lacking evidence on that point, it refused to grant summary judgment. Without citing Rule 37(e), it noted that a dispositive motion “based on an adverse inference” is only available if bad faith and willfulness is demonstrated and there is no other remedy is available, citing *Dahoda v. John Deere*, 216 Fed. Appx. 124, 125 (2nd Cir. 2007). It noted that “questions existed” as to the motivation of the party and that lesser sanctions, such as an instruction to the jury to the jury that they can draw an inference. (*17). It cited **Residential Funding** for the requirements for an adverse inference.
95. *Montgomery v. Risen* [2016 WL 3919809] (D.D.C. July 15, 2016). In action by party allegedly libeled in article, the court refused to address spoliation motion for failure to preserve software at issue, since it was prepared to grant summary judgment on the merits and the court “is hesitant to allocate judicial resources to this discovery dispute.” The court **did not mention Rule 37(e)** but noted that it could have applied dismissal as a punitive spoliation sanction only

if there had been proof by clear and convincing evidence that the party had destroyed the software in bad faith. **Would have made no difference to outcome.**

96. *Montoya v. Loya* [2019 WL 5456797] (D. New Mex. Oct. 24, 2019). The court denied a motion for a default judgment based on a failure to retain a recording of a telephone call because the movant was on the call and physical notes were retained, because an prejudice the party “might suffer” is “slight” and does not justify the only relief sought.
97. *Moore v. Philip Parker* [2016 WL 6914884, at *2] (W.D. Ky. Nov. 22, 2016). A court dealt resolved allegations of spoliation due to the overriding of data in a digital surveillance system in a prisoner case **without citing Rule 37(e). The rule should have been cited, but would not have made a difference.**
98. *Moulton v. Bane* [2015 WL 7776892] (D. N.H. Dec. 2, 2015). A court refused to sanction loss of text messages by use of a “punitive” sanction such an adverse credibility inference since they were recovered from the only party with whom they were exchanged and from a forensic examination of the cell phone. The court **did not cite to Rule 37(e)** and noted that the recovery reduced the prejudice. **Rule 37(e) should have been considered but the result would likely to have been the same since the rule would not have applied because ESI was restored.**
99. *Nelda Ayala v. Your Favorite Auto Repair*, 2016 WL 5092588, *19 and n. 28 (E.D.N.Y. Sept. 19, 2016). In an employee wage and hour bench trial, the court precluded use of use of paper records after ESI records of same content were destroyed after an order to preserve. The parties took no steps to make a copy of contents of server or otherwise safeguard the electronic information stored in it. The court **did not mention Rule 37(e)** and stated that it is not clear what state of mind was required, although the “bottom line” was whether the conduct is acceptable or unacceptable under *Pension Committee*. **Rule 37(e) should have been applied and it is not clear whether the court would have found an “intent to deprive.”**
100. *NFL Management Council v. NFL Players Association* [820 F.3d 527] (2nd Cir. April 25, 2016). The Second Circuit held that the NFL Commissioner was within his discretion to conclude that a player had deleted text messages since “the law permits a trier of fact to infer that a party who deliberately destroys relevant evidence . . . did so in order to conceal damaging information from the adjudicator.” **Rule 37(e) should have been mentioned as an analogy although the court would likely have interpreted it as employing the same standard due to the intentionality involved.**
101. *Noftz v. Holiday CVS* [2018 WL 3997983] (M.D. Fla. Aug. 21, 2018). The court resolved allegations that a drugstore chain involved in a slip and fall had failed to adequately preserve video surveillance from other cameras without reference to Rule 37(e). The court faulted the moving party for failing to develop evidence about “the particulars about the photo area camera” and denied the motion for sanctions based on alleged spoliation.
102. *Nunes v. Rushton* [2018 WL 2208301] (D. Utah May 14, 2018). Court resolves allegations of spoliation of social media accounts, including deletion of Google, Yahoo, Goodreads, Twitter and Bogspot accounts without ever mentioning Rule 37(e). It decided to instruct the

jury that one of the Google accounts had been deleted while the case was pending and the jury *may* presume that the documents and emails stored on this account” were deleted in bad faith, since the litigation had been pending for a year and production from the account had been requested.

103. *Oppenheimer v. City of La Habra* [2017 WL 1807596, at *7] (C.D. Cal. Feb. 17, 2017). In a prisoner suicide case, the **court refused to apply Rule 37(e) to the loss of video footage of the cell because “Rule 37 does not directly address destruction of video equipment or video footage.”** (*7). No case dispositive remedy was applied to its loss because there was no showing of ‘willfulness, bad faith, or fault.’ (*10). However, the Plaintiff was “free to argue to the jury the fact that the recording system was destroyed” and were “free to question what the destroyed system might have shown.” (*11) **NOTE: The Rule was applied to losses of text messages and email (see Appendix A).**
104. *Organik Kimya v. ITC*, 848 F.3d. 994, 2017 WL 604689, at *6-7 (Fed. Cir. Feb. 15, 2017), The Federal Circuit approved entry of a default judgment by the ITC under Rule 37(b) as appropriate “not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted” to do so in the absence of such a deterrent. There had been significant destruction of electronic and hard copy files in bad faith causing high prejudice to the moving party. (*Id.*, n. 4). The court ignored, without explanation, **Rule 37(e)**, perhaps because prior orders had been violated and perhaps because of a restrictive reading of the ITC rules applied by the Commission. **Had Rule 37(e) been applied, it would not have made a difference.**
105. *Orologio of Short Hills v. The Swatch Group* [653 Fed. Appx. 134] (3rd Cir. June 24, 2016). In affirming the District Court’s refusal to sanction for destruction of “hard-copy” videotape contents, the Third Circuit Court of Appeals held that there was no abuse of discretion since “bad faith” was required, not mere negligence, under *Bull v. United Parcel*, 665 F.3d 68 at 79 (3d Cir. 2012). **Rule 37(e) should have been mentioned but it would not have changed the outcome.**
106. *Patrick v. Tractor Supply* [2017 WL 396301] (E.D. La. Jan. 30, 2017). **Without reference to Rule 37(e)**, a court found that the fact of a missing video was sufficient to deny motion for summary judgment and that because it was not destroyed in bad faith, no sanctions would lie under First Circuit case law. It also stated that it would allow “the parties to admit evidence of these issues during trial.” **Rule 37(e) should have been applied but court probably would have reached the same result as to admissibility after making the threshold findings since it seems to equate relevance with a showing of prejudice.**
107. *Peters v. Cox* [2018 WL 3577242] (D. Nev. July 24, 2018). Court refused to proceed to sanction a prison officer who may have mishandled a prisoner based on the failure to preserve the relevant videos by others. It rejected in strong, constitutionally based terms (the 7th Amendment), the removal from the jury of the determination of a material fact, namely whether a party had personal culpability and also objected on 11th Amendment grounds to the attempt to impute a state’s actions to a defendant for spoliation purposes only as indistinguishable from an attempt to place direct liability on a state which is immune under the amendment. **The**

court could and should have mentioned Rule 37(e), but its terms were not germane to the thrust of the argument it made.

108. *Pierre v. Air Serv Security* [2016 WL 5136256] (E.D.N.Y. Sept. 21, 2016). A court resolved allegations of spoliation of camera and videotape evidence **without mentioning Rule 37(e)** by finding moving party failed to meet burden of proof of elements of spoliation. **Since based solely on failure to establish common law breach, Rule 37(e) would not have applied.**
109. *Philadelphia Gun Club v. Showing Animal Respect* [2016 WL 5674256] (E.D. Pa. Oct. 3, 2016). In action against animal activists, a court refused to deny summary judgment to defendants based on failure to produce “certain video footage” **without discussing Rule 37(e). Citing Rule 37(e) would have made no difference.**
110. *Presidee Barrett v. FedEx* [2018 WL 1722385] (M. D. Ga. April 9, 2018). The Chief District Judge refused to determine that the failure to interrupt the automatic overriding of data about the length of work periods of a truck driver prejudiced a plaintiff that the truck driver had run off the road. The court relied on Flury factors, which arguably were not materially different, except that on reading the opinion one wonders why the court reached the decision that the practical importance of the missing ESI was low. Rule 37(e) was not mentioned. **If the Judge not found prejudice under Rule 37(e), there would have been no difference; one suspects that the opposite conclusion would have been drawn had the Rule been applied. The accident occurred after the effective date of the Rule.**
111. *Prezio Health v. John Schenk* [2016 WL 111406] (D. Conn. Jan. 11, 2016). After ordering production of email with metadata, only five of eight emails forwarded to the home AOL account were recovered because the wife of the defendant transferred family emails to a new ipad without going to an Apple store to help her do so. The metadata from the emails not recovered was irretrievably lost. The court recommended use of a type of permissive adverse inference similar to that in *Mali*, 720 F.3d 387, 391-94 (2nd Cir. 2013), because it was not “a punitive sanction, as in *Residential Funding*.” **Neither Rule 37(b) nor Rule 37(e) are mentioned, but some commentators believe that Rule 37(b) was, in fact, applied. If Rule 37(e) were applied, it probably would have made no difference, even if no intent to deprive, given the treatment of Mali as consistent with (e)(1) measures.**
112. *Prime Energy and Chemical* [2020 WL 5653351] (W.D. Pa. Sept. 23, 2020). In a classic frivolous lawsuit, the court refused to sanction the loss of text messages resulting from a party turning in a cellphone at a time when litigation involving it was not foreseeable and there was no duty to preserve. **The court cited only pre-Rule case law and never mentioned Rule 37(e).**
113. *Reed v. Kindercare Learning Centers* [2016 WL 6805336] (W.D. Wash. Nov. 17, 2016). In denying motion for an adverse inference based on failure to do a better job of preserving “electronically stored information,” the court **did not mention Rule 37(e). It should have been applied, but would not have made a difference.**

114. *Rega v. Armstrong*, 2016 WL 10999995, at *2 (W.D. Pa. June 20, 2016). Court precluded offering of any evidence about surveillance video footage at trial in a prisoner case because it was not established that sanctionable spoliation had occurred, citing *Bull v. UPS*, 665 F.3d 68, 73 n.5 (3rd Cir. 2012)(distinguishing between finding that spoliation occurred and that sanctions are warranted). There was no evidence that the defendant had seen or controlled the footage, and, if it did exist, there is no entitlement to an adverse inference because there was also no showing of bad faith, as defined in *U.S. Nelson*, 481 F. App'x 40, 42 (3rd Cir. 2012) to require a showing that the evidence was destroyed to prevent it being used by the adverse party. **Rule 37(e) was ignored but would not have made a difference on the culpability finding. This case seems to hold, in contrast to *Willis v. Cost Plus*, 2018 WL 1319194 (W.D. La. March 12, 2018), that speculative evidence of spoliation is not admissible at trial.**
115. *Reyes v. Julia Place Condominium Homeowners Association* [2016 WL 5871278, at n. 2] (E.D. La. Oct. 7, 2016). A court refused to use a spoliation inference drawn from the destruction of a hard drive to supply the missing evidence needed to bar summary judgment on merits, **without considering Rule 37(e)**. It noted a lack of authority for the position that an adverse inference may be used by a non-moving party to defeat a motion for summary judgment,” citing a Handbook on Civil Procedure asserting that an adverse inference cannot “alone” make a sufficient showing. **Citing Rule 37(e) would not have made any difference in result.**
116. *Richards v. Healthcare Resources Group* [2016 WL 7494292] (C.D. Cal. Sept. 29, 2016). The court awarded evidentiary rulings and awarded monetary sanction because of intentional deletion in bad faith in a case where it also granted summary judgment for defendants.. Partial attorney’s fees were also awarded for bad faith conduct under *Haeger v. Goodyear Tire & Rubber*, 793 F.3d 1122, 1135 (9th Cir. 2015).
117. *Rife v. Okla. Dept. of Public Safety* [846 F.3d 1119] (10th Cir. Jan. 23, 2017). The Tenth Circuit refused to consider allegations of intentional destruction of a video surveillance tape in a jail booking area **without mention of Rule 37(e)** in part because the aggrieved party failed to show “bad faith.”
118. *Rockman Company v. Nong Shim Company* [229 F. Supp.3d 1109](N.D. Cal. Jan. 19, 2017). The refused to sanction a party under *Leon v. IDX*, 464 F.3d 951 (9th Cir 2006) where a Korean parent in anticipation of a government investigation in Korea had destroyed documents and ESI based on US case law. The court treated the duty to preserve as uniquely enforceable in civil litigation as enforceable only by a specific party, not a “free-floating or shifting duty which other parties could latch onto,” quoting from *Point Blank Solutions v. Toyobo Am., Inc.*, 2011 WL 1456029, at *1 (S.D. Fla. Apr. 5, 2011), as well as *In re Delat/Air Trans Baggage Fee*, 770 F. Supp.2d 1299 (N.D. Ga. 2011) while distinguishing *Phillip M. Adams v. Winbound*, 2010 WL 3767318, at *3 (D. Utah. Sept. 16, 2010). **Rule 37(e) was not mentioned, but could have since the impact of ESI destruction was at issue, but it would have made no difference in the result.**
119. *Romain v. City of Grosse Point* [2016 WL 7664226 (E.D. Mich. Nov. 22, 2016)], *adopted* [2017 WL 67518] (E.D. Mich. Jan. 6, 2017). A Plaintiff was sanctioned because its private investigator failed to retain copies of a downloaded Google search of images used in

interviewing a witness, which may have been viewed on an electronic device. The court did not cite **Rule 37(e)** nor find bad faith or substantial prejudice. The plaintiff was barred from using the witness testimony and ordered to make payment of expenses and fees. In an April, 2017 clarification, the court pointed out that the preclusion was limited to referring to the images, not to trial testimony about the individual he saw. 2017 WL 1420455, at n. 1 (E.D. Mich. April 21, 2017). **Had Rule 37(e) been applied, there would have been no basis for any sanctions, given the lack of prejudice and lack of intent to deprive.**

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

121. SARL Galerie v. Marlborough Gallery [751 Fed. Appx. 39, at n. 5] (2nd Cir. Sept. 21, 2018). Court remanded summary judgment to lower court because triable issue of facts remained. It refused to decide whether the party was entitled to “an adverse inference” from the decision to delete “all his emails from the relevant period” as a spoliation sanction, citing Chin v. Port Authority, 685 F.3d 135, 162 (2nd Cir. 2002).

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

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

124. Session v. Romero [2019 WL 324777, at *3] (D. Colo. Jan. 25, 2019). In a review of the loss of prison documents, the District Court (without reference to Rule 37(e)) rejected the premise that an adverse inference instruction is mandated “in every case where evidence is improperly lost or destroyed.” The Magistrate Judge had held that while the evidence was

“consistent with bungled record-keeping, bungled records management, and extreme carelessness, it did not show that defendants acted in bad faith. The District Judge agreed, holding that while a failure to preserve after a litigation hold is in place “supports” the imposition of spoliation sanctions, in the Tenth Circuit holds that an adverse inference requires proof of “bad faith *in addition* to evidence of spoliation.” (emphasis in original)(citing *Turner v. Pub. Serv.*, 563 F.3d 1136, 1149 (10th Cir. 2009).

125. *Slater v. J. Lacapruccia* [2019 WL 1723515] (W.D.N.Y. April 18, 2019). The Court ignored Rule 37(e) when assessing the claim that spoliation of an audio tape barred access to evidence of inconsistent testimony, or untruthful statements because of inadequate typewritten transcript based on the original audiotape. The court rejected the spoliation motion because the party had not established that the audiotape would have supported his claims.
126. *Star Envirotech v. Redline Detection* [2015 WL 90933461] (Dec. 16, 2015). The court found that the loss of advertising information, some in digital form and some in hard copy, was not “sanctions-worthy” spoliation since exemplars of the vast majority of the materials existed. The court was not persuaded that the party acted with a culpable state of mind in disposing of the documents, since it is “difficult to imagine what nefarious purpose would have been served” by the destruction. **Rule 37(e) should have been mentioned, but would have made no difference in the result.**
127. *Stedeford v. Wal-Mart Stores* [2016 WL 3462132] (D. Nev. June 24, 2016). In a slip and fall case, the court authorized preclusion of evidence and an adverse inference **without citing Rule 37(e)** under its inherent authority because the court was convinced, based in part on other Wal-Mart cases before it, that Wal-Mart acted with conscious disregard of its duty to preserve but noted that there was no evidence it had “intentionally destroyed” evidence. (*13) In passing, the court noted that dismissal is only warranted when there is clear and convincing evidence of both bad-faith spoliation and prejudice to the opposing party, citing *Micron Technologies*. **Rule 37(e) should have been applied and likely would have led to different result.**
128. *Sudre v. The Port of Seattle* [2016 WL 7035062] (W.D. Wash. Dec. 2, 2016). In a slip and fall case where video surveillance “footage” was overwritten, the court found that it had been destroyed prior to the party receiving notice of the possibility of litigation and concluded that the party “did not have a duty to preserve evidence” at the time. **Rule 37(e) was not mentioned but would have not made a difference.**
129. *Tierra Blanca Ranch v. Gonzales* [2019 WL 652849 at *6 (D. New Mex. Feb. 15, 2019)]. The court delayed its ruling on whether deletion of a voicemail warranted a jury instruction that the missing recording “presumably contained evidence favorable” to the movant until trial. It ruled that it “will not foreclose Plaintiffs from examining witnesses at trial as to the elements of spoliation and renewing their motion after the presentation of evidence outside the presence of the jury. At trial, the Court will have the tools traditionally available to make findings and assess credibility to determine whether the preponderance of the evidence warrants some form of sanction.” The court did not cite Rule 37(e) – or any authority other than *Gates Rubber*,

167 F.R.D. at 104 – on the issue of concern, namely whether there was a reasonable possibility that access to the information would have produced evidence favorable to the case.

130. *Timms v. LZM* [657 Fed. Appx. 228] (5th Cir. July 5, 2016). In affirming dismissal of a plaintiff's case and awarding fees as not an abuse of discretion, the Fifth Circuit noted that the District Court had not found the explanation "of why she did not produce" the text messages to be "credible" and cited the fact that in an attempt to replace them, only a partial production of hard copies from a cloud-based application was made. The Courts both treated the matter under Rule 37(b) as a violation of a discovery order despite testimony that the missing text messages resulted from the crashing of an iPhone. **No mention was made of Rule 37(e), and had it been applied, it might have tempered the assessment that "intent to deprive" existed, barring a dismissal.**
131. *Transystems Corp. v. Hughes Assocs* [2016 WL 3551474] (M.D. Pa. June 30, 2016). Citing *Zubulake* and distinguishing 28 U.S.C. § 1927, court imposed nominal monetary sanctions (\$1000) for negligent failure to preserve ESI by the wiping of hard drives **without mentioning Rule 37(e). The rule should have been applied, but the measure could have been awarded as a result of a failure to take reasonable steps causing prejudice.**
132. *U.S. Commodity Futures Trad. Comm. v. Gramalegui* [2016 WL 4479316] (D. Colo. July 28, 2016). A party that agreed to provide emails and data but did not preserve them until after subpoena was served was said to have failed to meet its duty to preserve, and court ordered further discovery at expense of defendant **without mentioning Rule 37(e).** Court also awarded attorney's fees and costs without specifying authority to do so. **Rule 37(e) should have been applied but likely would have led to different result.**
133. *Van Buren v. Crawford County* [2017 WL 168156] (E.D. Mich. Jan. 17, 2017) and [2017 WL 512767] (E.D. Mich. Feb. 8, 2017), as well as [2017 WL 3479546, at *9-11] (E.D. Mich. Aug. 14, 2017). District Court hearing an excessive force case involving killing of a resident in his apartment resolved two related spoliation claims involving handling of audio recordings **without mention of Rule 37(e).** After an evidentiary hearing the Court denied summary judgments to defendants and stated that it would instruct the jury using a rebuttable presumption that the missing ESI was unfavorable to the officers version of what happened in the apartment. The court concluded that the "actions exceed mere negligence" and at best were "remarkably reckless" which was the result of "grossly incompetent recordkeeping or purposeful obfuscation." (*16-17). In August, 2017, however, a second motion sanctions was considered - without regard to the "restore or replace" language of Rule 37(e) - when the defendants disclosed they had discovered the SD card which would have contained the audio recordings at issue. **Rule 37(e) should have been applied; result would have been different.**
134. *Washington v. Wal-Mart* [2018 WL 2292762 at *5] (W.D. La. May 17, 2018). In a slip and fall where the plaintiff alleged that there was a material issue as to the store management's knowledge of the hazard, the court refused to infer that spoliation of video segments supplied the necessary inference to bar summary judgment in the absence of adequate proof of the requisite culpability. The court used Circuit case law, **not Rule 37(e)**, and based on *Russell v. Univ. of Texas*, 234 F. App'x 195, 208 (5th Cir. 2007) found it insufficient to justify that

inference of knowledge merely because Wal-Mart deleted the surveillance footage as part of its standard operating procedure); *cf. White v. United States*, 2018 WL 2238592, at *4 (E.D. Mo. May 16, 2018)(**permitting party to argue inferences at trial about missing parts of video despite finding no violation of Rule 37(e)**). The opinion is also noteworthy because it finds that the extent of a duty to preserve is “as in other discovery contexts, proportional to the facts of the case,” citing Rimkus and Sedona Principle 2 (2007 Ed.).

135. *Wiedeman v. Canal Insurance* [2017 WL 2501753] (N.D. Ga. June 9, 2017). The court refused to sanction the loss of electronic information on the ECM of a truck which had been in an accident **without mentioning Rule 37(e)**. The court agreed that the primary lessor was not responsible for any spoliation since the vehicle was not in its possession, custody or control at the time of the routine “reset.” The court also found that in the absence of bad faith as to whether the party had knowledge of the “reset” of the data base, it would not award sanctions for spoliation against the principal party, since it was only speculation that they were aware the ECM data had been reset. **The application of the Rule would not have made a difference.**
136. *Williams v. CVS Caremark* [2016 WL 4409190] (E.D. Pa. Aug. 2016). Counsel was sanctioned under 28 U.S. C. § 1927 because no evidence of tampering of a surveillance video was presented at an evidentiary hearing after counsel had had the opportunity to conduct discovery of the alleged spoliation. Although not necessary to case, it would have been useful to have cited the new Rule.
137. *Williams v. Geraci* [2020 WL 5848738] (E.D.N.Y. September 30, 2020). In ruling on a prisoner request for an adverse inference based on overwriting of a surveillance video, the court treated the request under existing Circuit principles for use of inherent authority and did not consider or determine if the “overwriting” was of data under ESI or some other format not subject to Rule 37(e).
138. *Willis v. Cost Plus* [2018 WL 1319194, at *6 (W.D. La. March 12, 2018)]. In a diversity action for personal injuries where challenges were made to the contention that video surveillance tapes of the shopping injury were at issue, the District Judge concluded that the Louisiana Supreme Court would likely permit an independent tort action for intentional spoliation [citing, *inter alia*, *BASF v. Man Diesel*, 2016 WL 5817159, *41 (M.D. La. 2016)] but that there was no evidence that the video was intentionally destroyed (*5). It also opined that while Louisiana did not necessarily foreclose such an action for negligent spoliation that does not apply since evidentiary presumptions which permit an adverse inference are controlled by federal procedural law in diversity actions involving state substantive law and require a showing of bad faith, ignoring the standards of **Rule 37(e)**. (*6). The court held that there was no showing that the surveillance video was destroyed for the purpose of hiding adverse evidence, citing *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015) and “indeed” has not shown such evidence ever existed. The court went on to say, however, that the party may question witnesses about the absence of video surveillance and any alleged failures to follow internal policies, citing Federal Rule of Evidence 607 (witness credibility) – and may argue for whatever inference she deems may be draw due to the absence of items of potential evidence. (*6).

139. *Wilson v. Conair* [2016 WL 7742772, at *5] (E.D. Cal. June 3, 2016). Court postponed until trial consideration of sanctions for loss of text messages on cell phone when replaced by I-Phone despite request to preserve without mentioning Rule 37(e). **Citation to the Rule could have been different as to whether adverse inference would be available if the court had found no evidence of a failure to take reasonable steps.**
140. *Wooten v. BNSF* [2018 WL 2417858] (D. Mont. May 29, 2018). In an extremely well-written and thorough opinion on a wide variety of issues stemming from an alleged workplace injury by a railway conductor, the court resolved allegations of spoliation of videos of the vicinity of the alleged accident and of metadata of digital photos taken **without acknowledging Rule 37(e)**. It asserted that if spoliation occurs “before litigation commences, the court may impose spoliation sanctions pursuant to its inherent authority.” (*8). Ultimately, the court allowed the moving party to introduce evidence of its contentions to the jury, which will be allowed to draw “whatever reasonable inferences may follow from the evidence [about the video] presented.” In addition, the court will have the opportunity to consider giving an adverse inference instruction if warranted. (*10). **The court did not find a failure to take reasonable steps - which it cited Rimkus as involving needed to be reasonable and proportional to the case - nor did it find any culpability - or even any prejudice. Had Rule 37(e) been applied, the court might have stalled its rulings until trial, but it would have been unjust to do so.**
141. *Wright v. National Interstate* [2017 WL 4011206, at *3] (E.D. La. Sept. 12, 2017)]. A court refused (**ignoring Rule 37(e)**) to find that a party had satisfied its “high burden” of showing that missing video footage was the result of bad faith under Rule 37(b), thus barring an adverse inference, but it did agree that a party could be questioned about its “whereabouts” as it goes to the party’s credibility under FRE .
142. *Yu v. Idaho State University* [2019 WL 609613, at *5] (D. Idaho Feb. 13, 2019). A court exercising inherent authority (citing *Glover v. BIC*, 6 F.3d 1318, 1329 (9th Cir. 1993)[trial court has inherent discretionary authority to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence]stated that it would allow the jury to infer that “records” which were missing because of negligence could be inferred to support the claim of discrimination because to do otherwise the failure to produce “would effective be condoned there was not some sanction for its failure.” (*5). **No mention of Rule 37(e) and seemed that the mere fact that the records were not produced, even if they never existed or cannot be found, was not an excuse when the university were required to be obtained and preserved.**
143. *Xyngular Corporation v. Schenkel* [200 F.Supp.3d 1273 at *21-22] (D. Utah Aug. 2, 2016). In litigation between corporation and shareholder in closely held corporation, the court refused to find that the corporation had committed spoliation by deleting electronic documents or reformatting a computer (at *29) **without citing Rule 37(e)**. The court applied clear and convincing evidence standard in making its ruling (*30 & n.194 for std. of proof). **Rule 37 would probably have led to the same result since the information was not “lost” as it was apparently restored and replaced.**