

# Selected Recent Court Decisions Regarding Federal Rule of Civil Procedure 37(e)

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## PREFACE

Nearly four years have transpired since the Civil Rules Advisory Committee enacted changes to Federal Rule of Civil Procedure (“FRCP”) 37(e) on December 1, 2015. In so doing, the Committee had two principal objectives in mind. The first was to provide a uniform national standard regarding the issuance of severe sanctions to address spoliation of electronically stored information (“ESI”). The second was to implement a clear framework for determining whether sanctions of any nature should be imposed for ESI preservation failures.

Given the passage of time, The Sedona Conference launched an initiative to analyze whether the 2015 amendments to FRCP 37(e) have satisfied the Committee’s objectives by effectively addressing ESI preservation failures and related spoliation questions. Such a step is not extraordinary, particularly considering the Committee’s actions relating to the original iteration of FRCP 37(e). Three and one-half years after enacting the prior version of the rule in December 2006, the Committee had already convened the “Duke Conference” in May 2010 to evaluate the limitations of the prior rule and begin the process of considering possible alternatives.

To facilitate an evaluation of the rule, The Sedona Conference organized a session at the 2019 Annual Meeting for Working Group One on October 25, 2019 in St. Louis, Missouri. In *Sanctions for Spoliation and Discovery Misconduct: Have the 2015 amendments to the Federal Rules of Civil Procedure changed the sanctions landscape?*, the panel will explore specific questions regarding the effectiveness of FRCP 37(e).

In doing so, dialogue leaders will examine the efficacy of the rule in addressing key motion practice flash points that have arisen since its implementation. Those flash points include the following:

1. What Triggers the Duty to Preserve?
2. When is ESI Deemed “Lost” by a Court?
3. What are “Reasonable Steps to Preserve” ESI?
4. What Constitutes “Additional Discovery” or Replacement Evidence?
5. What Conduct Amounts to “An Intent to Deprive?”
6. When Should an Adverse Inference Instruction be Permissive as Opposed to Mandatory?
7. When Should a Jury Determine the Issue of “Intent to Deprive?”
8. What are Appropriate Curative Measures under FRCP 37(e)(1)?
9. What is the Proper Exercise of a Court’s Inherent Authority over Spoliation of ESI?

While the time allotted the panel will preclude a complete examination of these flash points, the following summary delineates recent case law pertinent to the issues.

## 1. What Triggers the Duty to Preserve?

***Cruz v. G-Star Inc.*, No. 17 Civ. 7685, 2019 WL 2521299 (S.D.N.Y. June 9, 2019), *objections sustained in part and overruled in part*, 2019 WL 4805765 (S.D.N.Y. Sept. 30, 2019).** This case emphasizes the need for a triggering event regarding a litigant's duty to preserve before a court may entertain a request for FRCP 37(e) sanctions. In *Cruz*, plaintiff in a wrongful termination and employment discrimination case sought sanctions against defendants for failing to preserve her work email account. Arguing that the email account undoubtedly included relevant communications, plaintiff requested the court to impose a range of severe measures against defendants under FRCP 37(e)(2). The motion was referred to the U.S. magistrate judge, who found that defendants improperly failed to preserve plaintiffs' messages and recommended that severe measures issue against defendants under FRCP 37(e)(2). In her report and recommendation, the magistrate judge held that defendants' duty to preserve attached when plaintiff complained to defendants' human resources department about the alleged harassment. Even though plaintiff lodged those complaints six months before her counsel notified defendants that she would pursue claims against them, the magistrate judge found the complaints should have alerted defendants to the need to preserve plaintiff's email account. In contrast, the district judge found this determination to be "clearly erroneous." In rejecting the magistrate judge's recommendation, the court observed that plaintiffs' complaints, though detailed and substantive, did not "articulate any sort of legal claim." Concerns about a "hostile work environment," a "conspiracy" and "campaign . . . to terminate" plaintiff, and the fact she was consulting with an attorney, "were not sufficient to alert Defendants that 'litigation was likely.'" Because the court held the duty to preserve did not arise until after defendants dispatched plaintiffs' email account, plaintiff could not prevail on her request for sanctions against them on this issue.

***Ramirez v. Wal-Mart Stores, Inc.*, No. 1:18-cv-02253-SKC, 2019 WL 4037951 (D. Colo. Aug. 27, 2019).** The duty for Walmart to preserve video evidence (among other things) was not triggered until approximately six months after the alleged incident when plaintiff claimed he suffered bodily harm in connection with his attempt to shoplift merchandise from one of defendant's stores. As defendant had no obligation to preserve the video evidence when it was discarded, the court declined to issue sanctions under FRCP 37(e).

***Bellamy v. Wal-Mart Stores, Texas, LLC*, No. SA-18-cv-60-XR, 2019 WL 3936992 (W.D. Tex. Aug. 19, 2019).** In connection with plaintiff's sanctions motion (*see* Section 8, *infra*), plaintiff argued that defendant's duty to preserve attached immediately after plaintiff's accident. Plaintiff asserted that "internal company policies that [defendant] maintains to investigate customer accidents" should have placed defendant on notice of the need to keep relevant evidence. The court rejected this premise, observing instead that a such a broad concept of the duty to preserve "would impose preservation obligations for countless claims where litigation is neither threatened nor reasonably anticipated." Instead, the court found defendant's preservation obligation ripened when plaintiff informed defendant's "claims manager that she intended to pursue a claim."

***Philmar Dairy, LLC v. Armstrong Farms*, No. 18-cv-0530, 2019 WL 3037875 (D.N.M. July 11, 2019).** In *Philmar Dairy*, the court refused to impose sanctions against defendant for its apparent failure to preserve relevant photos of fire-damaged hay that it was contractually obligated to deliver to plaintiff. Plaintiff argued that the lightning-caused fire alone should have given rise to a duty to preserve the pictures. While the court agreed that certain events in and of themselves can trigger a

duty to preserve, the fire in this instance was not such an event. Discussing applicable case law (including the Eighth Circuit’s *Stevenson v. Union Pacific Railroad Co.*, 354 F.3d 739 (8th Cir. 2004) opinion), the court observed that the fire did not result in death, serious injury, or other significant consequences that might automatically trigger a preservation duty. Moreover, the extant communications between the parties in the days succeeding the fire did not evince an intent by plaintiff to initiate legal action against defendant. For example, plaintiff did not threaten to file suit or otherwise assert a legal claim against defendant at that time. Given these circumstances, any duty to preserve relating to plaintiff’s claims did not arise until long after the relevant photos were destroyed.

***Monolithic Power Systems, Inc. v. Intersil Corp.*, No. 16-cv-1125, 2018 WL 6075046 (D. Del. Nov. 19, 2018).** No sanctions issued against plaintiff for neglecting to preserve or produce relevant WeChat messages. The court took no remedial action against plaintiff because defendant was unable to show that a preservation duty ripened before plaintiff discarded the messages. While there was some evidence suggesting certain of plaintiff’s employees sent the messages at issue to plaintiff’s legal department before they were destroyed, the court held there was “no evidence any message was deleted after anyone associated with [plaintiff] reasonably anticipated litigation to which the messages would be relevant.” The bulk of the evidence demonstrated that plaintiff’s deletion of the WeChat messages arose “in the ordinary course – and consistent with apparent industry practice – to conserve limited space on employees’ phones.”

## 2. When is ESI Deemed “Lost” by a Court?

***Envy Hawaii LLC v. Volvo Car USA LLC*, Civ. No. 17-00040, 2019 WL 1292288 (D. Haw. Mar. 20, 2019).** The court expounded on the need for movants to satisfy the prerequisite that ESI be “lost” before considering a request for sanctions under FRCP 37(e). Relying on notable cases including *Oracle America Inc. v. Hewlett Packard Enterprise, Co.*, 328 F.R.D. 543 (N.D. Cal. 2018) and *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016), the court explored the meaning of the term “lost” under FRCP 37(e) and concluded that it referred to information that was “irretrievable from another source.” Based on this understanding, the court denied defendant’s request for FRCP 37(e) sanctions against plaintiff since defendant had not established that the evidence in question was “lost.” While plaintiff did not have possession of the information at issue—emails and records from an electronic database, defendant had yet to issue subpoenas to third parties in an attempt to obtain such information. Because third parties may very well have had possession or access to that information, defendant had “not demonstrated that the information is irretrievable.”

***Mafille v. Kaiser-Francis Oil Co.*, No. 18-cv-0586, 2019 WL 2189515 (N.D. Okla. May 21, 2019).** The *Mafille* decision spotlights a key concept from the FRCP 37(e) committee note, *i.e.*, that ESI “often exists in multiple locations” and that a “loss from one source may often be harmless when substitute information can be found elsewhere.” In *Mafille*, plaintiff moved for sanctions against defendant (her former employer) for not preserving relevant information from her work computer. Despite having “lectured” plaintiff regarding the need to preserve relevant information, defendant failed to keep plaintiff’s computer, donating the device to a charitable organization. Given that the computer was now “lost,” plaintiff sought various sanctions against defendant under FRCP 37(e). While the computer itself was no longer available, the data stored on the computer had been uploaded to a server prior to its disposition. Because the information from the computer—the locus

of plaintiff's spoliation motion—was available from another discoverable source, the court denied the request for sanctions.

### 3. What are “Reasonable Steps to Preserve” ESI?

***Incardone v. Royal Caribbean Cruises, Ltd.*, No. 16-20924, 2019 WL 3779194 (S.D. Fla. Aug. 12, 2019).** Plaintiffs sought damages for psychological harm incurred while traveling as passengers on one of defendant's cruise ships during a severe storm. Plaintiffs brought a motion for sanctions under FRCP 37(e) after they learned the cruise line only preserved 91 minutes of relevant closed circuit television (“CCTV”) footage. While 91 minutes of footage constituted a nominal percentage of the overall 14,400 hours of the recorded CCTV feed, the court declined to impose sanctions against defendant. It was both reasonable and proportional, the court reasoned, for defendant to preserve so little footage under the circumstances. Even though the tempest that assailed the cruise ship lasted for several hours, the 91 minutes of CCTV footage captured a relevant snapshot of the storm's force and effect on the ship. While defendant could have arguably preserved additional footage, the court refused to engage in speculative hindsight analysis: “There might be disagreement over the issue of whether 91 minutes is sufficient or whether 110 minutes should have been saved or whether some other amount of CCTV should have been preserved. But the Undersigned finds that RCCL took reasonable steps, under the circumstances.”

***Courser v. Michigan House of Representatives*, --- F. Supp. 3d ---, 2019 WL 3034905 (E.D. Mich. July 11, 2019).** This case involved wild allegations of spoliation by plaintiff Todd Courser, a former Republican state representative in Michigan, against several Democratic members of the Michigan state house. Plaintiff accused defendants of deleting several categories of relevant electronic records and requesting case ending sanctions under FRCP 37(e)(2). The court rejected plaintiff's arguments and instead found that plaintiff had failed to establish the basic predicate requirements for sanctions to attach under Rule 37(e). In particular, plaintiff failed to show that defendants neglected to take reasonable steps to preserve relevant information. Defendants directed the Michigan State House's Director of Information Systems (IS) to preserve records from pertinent computer files. The director of IS did so by, among other things, taking custody of certain employee computers and making copies of the local files from the computers' respective hard drives. This was done pursuant to the Michigan House's litigation hold policy. Because there was nothing “unreasonable” about taking such steps, plaintiff could not demonstrate that defendants (even if relevant information was inadvertently lost) had failed to take reasonable steps to preserve that information.

***Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226 (D. Minn. 2019).** The estate of the international pop star Prince sued a number of parties to enjoin them from promoting and distributing unauthorized recordings. In this action, a duty to preserve relevant information was triggered, which gave rise to an obligation for defendants to retain, among other things, relevant text messages exchanged by defendants. The duty to preserve was spotlighted by four different court orders, all of which provided defendants with clear direction to retain relevant text messages. In the face of these orders, defendants still failed to keep relevant texts. Among other things, they failed to put a litigation hold in place, failed to suspend the features on their phones that enabled the automated destruction of their messages, and failed to take advantage of cloud storage back-up options. After all this, defendants intentionally wiped and destroyed data on their respective phones. While finding all the elements justifying sanctions to be present, the court declined to issue the

requested presumption or adverse inference jury instruction until trial, when the appropriate parameters of such a sanction would be apparent. But given the evidence of intentional destruction, the court felt it was within its powers under both FRCP 37(b) and 37(e) to impose an award of attorney fees and costs to the moving party, plus a \$10,000 fine payable to the court.

***Franklin v. Howard Brown Health Center*, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018); *report and recommendation adopted*, 2018 WL 5831995 (N.D. Ill. Nov. 7, 2018).**

The court in *Franklin* was forced to consider allegations of spoliation that arose from defendant's inability to implement a proper legal hold and take reasonable follow up steps to ensure relevant information was preserved. After being constructively discharged in this employment discrimination suit, plaintiff contacted defendant to communicate her intent to bring a lawsuit. Despite the clarity of this communication, defendant took no action to place most of the information that could be deemed relevant on hold. Two days after plaintiff made that communication, defendant terminated one of the alleged harassers, but seven days later allowed his computer to be wiped without placing any of its contents on legal hold. One month later, plaintiff sent defendant a demand letter. In response, defendant issued a litigation hold, but took no actionable steps to follow up and ensure that relevant documents were actually placed on hold. In the meantime, plaintiff contacted the EEOC to investigate his claims of discrimination. Two years later, plaintiff filed suit. In the intervening time period, defendant neglected to preserve relevant ESI including messages that employees sent through the company's Microsoft Lync instant messaging service. Defendant did not preserve the instant messages ("IM") because its in-house counsel did not have sufficient understanding of how the organization's retention system functioned for the messages. Counsel mistakenly believed the retention practice for IMs was the same as its email system: ten years in the cloud. Instead, the IMs were kept in a temporary storage repository for a maximum of two years, after which they were destroyed. This critical misunderstanding led to the loss of relevant messages, which eventually resulted in a Rule 37(e)(1) curative measure that would allow plaintiff to present evidence and argument to the jury regarding defendant's preservation failure.

#### 4. What Constitutes "Additional Discovery" or Replacement Evidence?

***Cruz v. G-Star Inc.*, No. 17 Civ. 7685, 2019 WL 2521299 (S.D.N.Y. June 19, 2019), *objections sustained in part and overruled in part*, 2019 WL 4805765 (S.D.N.Y. Sept. 30, 2019).** The court declined to impose sanctions against defendant for its failure to preserve plaintiffs' work email account and relevant ESI from one of its databases (the SAP data). *See* Section 1, *supra*. Instead the court remanded the matter to the magistrate judge to determine whether plaintiff had suffered prejudice from defendant's failure to preserve the relevant SAP data such that curative measures under FRCP 37(e)(1) should issue. *See* Section 5, *infra*. In evaluating whether defendant failed to properly preserve the relevant SAP data, the magistrate judge found that defendants neglected to take reasonable steps to preserve the data and that the data could not "be restored or replaced through additional discovery." In connection with her latter finding, the magistrate judge mentioned that defendants had successfully restored much of the destroyed SAP data. Nevertheless, as defendants could not restore all of the SAP data, the magistrate judge deemed "the reconstructed SAP data . . . incomplete" and thus unable to be sufficiently "restored or replaced." The district judge did not address the issue of whether defendants' reconstruction efforts adequately restored the SAP data. However, the court observed that defendants "made expeditious efforts to recover the data, and succeeded in retrieving much of what had been lost." Neither the magistrate judge nor the

court examined whether other sources of evidence could have been obtained to bridge the gap between defendants' restoration efforts and an adequate record of the relevant SAP data.

## 5. What Conduct Amounts to "An Intent to Deprive?"

***Cruz v. G-Star Inc.*, No. 17 Civ. 7685, 2019 WL 2521299 (S.D.N.Y. June 19, 2019), objections sustained in part and overruled in part, 2019 WL 4805765 (S.D.N.Y. Sept. 30, 2019).** The court held that defendants did not destroy relevant database (SAP) ESI with "an intent to deprive" plaintiff of such information. In her report and recommendation, the magistrate judge found an "intent to deprive" based on a variety of circumstances. However, that "intent to deprive" finding was principally based on defendants' failure to timely preserve plaintiff's work email account, which the district court determined was "clearly erroneous." *See* Section 1, *supra*. Regarding the relevant SAP data, the court held that defendants fell short of keeping the ESI after their preservation duty matured. That failure, though, was the result of defendant's negligence. This was apparent, the court reasoned, from two different circumstances. First, the relevant SAP data was lost due to a technical "glitch" and not from an effort to conceal adverse information. Second, defendants sought to restore the lost SAP data and expended "significant resources" in doing so. *See* Section 4, *supra*.

***DriveTime Car Sales Co., LLC v. Pettigrew*, No. 2:17-cv-0371, 2019 WL 1746730 (S.D. Ohio Apr. 18, 2019).** *DriveTime Car Sales* spotlights the "stringent" standard for granting an adverse inference instruction under FRCP 37(e)(2). One of the defendants (Pauley Motor) failed to preserve relevant text messages from his mobile phone after upgrading to a new phone. While plaintiff satisfied the other prerequisites for the issuance of FRCP 37(e) sanctions, it could not demonstrate an "intent to deprive" from the mere fact that defendant acquired a new phone: "Although Bruce Pauley failed to take reasonable steps to preserve the text messages when he switched to a different phone, there is no evidence that he did so intentionally beyond DriveTime's speculation. This is not sufficient to impose a mandatory adverse inference under Rule 37(e)(2)."

***Culhane v. Wal-Mart Supercenter, d/b/a Wal-Mart Stores, Inc.*, 364 F. Supp. 3d 768 (E.D. Mich. 2019).** In *Culhane*, the court issued a mandatory adverse inference instruction under FRCP 37(e)(2) against defendant for failing to preserve relevant video footage of an accident involving plaintiff. The court was particularly concerned by defendant's failure to observe its extant litigation readiness measures. Defendant had implemented a "customer accident investigation" policy, which spotlighted the importance of preserving evidence (including video footage) relating to incidents such as the one involving plaintiff. In addition, defendant had a claim form that directed the preservation of "any and all information and evidence" relating to incidents such as the one involving plaintiff. Despite those measures and plaintiff's demand letter requesting preservation of relevant video footage, defendant's employee charged with investigating the incident could not explain why he neglected to keep an exterior video camera feed that might have provided evidence of the garage door lowering and ultimately striking plaintiff. The collective actions and omissions of defendant, particularly deviating from an established litigation readiness process without a reasonable explanation, ultimately led to the court to find "an intent to deprive."

## 6. When Should an Adverse Inference Instruction be Permissive as Opposed to Mandatory?

***GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76 (3d Cir. 2019).** The trial court issued an adverse inference instruction against defendant (Plantronics) for its destruction of relevant ESI. The spoliation at issue involved a senior Plantronics executive who deleted thousands of his own emails and directed subordinates to destroy many of their own messages. Since the spoliation was undertaken to enhance the company's position in litigation, the trial court held that it evinced bad faith and an "intent to deprive" plaintiff of the emails. And yet, Plantronics' "egregious conduct" only resulted in a permissive adverse inference instruction. This meant the jury was free either to consider or to reject evidence of Plantronics' spoliation in connection with its verdict. A mandatory instruction would have obligated the jury to presume the lost evidence was unfavorable to Plantronics. The trial court declined to issue a more severe sanction because it wished to preserve a trial on the merits of plaintiff's antitrust claims. Issuing a mandatory instruction, reasoned the court, would unduly favor plaintiff at trial. Concerned that a permissive adverse inference would not sufficiently remedy the harm Plantronics caused, the trial court coupled it with other remedial measures in the interest of justice. They included financial sanctions of approximately \$5 million and the possibility of imposing "evidentiary sanctions" if needed to further redress the harm from Plantronics' spoliation. In its final pretrial order, the trial court described the preliminary and final adverse inference instructions that it would provide the jury. In both instructions, the court made clear that Plantronics intentionally destroyed evidence. The court additionally provided the jury with a lengthy statement of "Stipulated Facts" regarding the nature and extent of Plantronics' spoliation. Despite all of the information it received about Plantronics' spoliation, the jury reached a defense verdict on the merits of plaintiff's claims. Almost reflexively, plaintiff moved for a new trial based on what it argued was reversible error: the trial court's failure to issue a mandatory adverse inference resulting from Plantronics' spoliation. The trial court rejected this assertion for all of the reasons encapsulated in its previous orders. Moreover, the trial court held that any error it might have committed in not issuing a "dispositive sanction" was harmless. Simply put, plaintiff failed to adduce evidence, particularly from its "own files – of lost sales or customers," for the jury to accept its version of the facts. On appeal, the Third Circuit affirmed the trial court's issuance of a permissive adverse inference jury instruction, yet ordered a new trial because it found the trial court had not allowed plaintiff's expert to offer oral testimony on the scope of Plantronics' spoliation.

***Culhane v. Wal-Mart Supercenter, d/b/a Wal-Mart Stores, Inc.*, 364 F. Supp. 3d 768 (E.D. Mich. 2019).** The court in *Culhane* imposed a mandatory adverse inference instruction after inferring from circumstantial evidence that defendant acted with an "intent to deprive" plaintiff of relevant video footage. *See* Section 5, *supra*. According to the court, the instruction would inform the jury that it "must presume the information was unfavorable" to defendant unless defendant withdrew its contributory negligence and open and obvious hazard affirmative defenses. In reaching this decision, the court did not address the merits of issuing a permissive instruction as opposed to a mandatory instruction.

## 7. When Should a Jury Determine the Issue of “Intent to Deprive?”

***Gonzalez-Bermudez v. Abbott Labs. PR Inc.*, --- F.Supp.3d ---, 2019 WL 4780781 (Sept. 30, 2019).** When a party seeks “severe measures” under FRCP 37(e)(2), a determination must be made as to whether the responding party acted with “an intent to deprive” the requesting party of relevant ESI in the instant litigation. The 2015 committee note to FRCP 37(e) indicates that courts may make that determination or allow the jury to decide the “intent to deprive” issue. While many counsel expect the judge will handle this determination, courts have at times defied those expectations and tendered the “intent to deprive” issue to the jury. *See Sosa v. Carnival Corp.*, 18-cv-20957, 2018 WL 6335178 (S.D. Fla. Dec. 4, 2018), *motion for reconsideration denied*, 2019 WL 330865 (S.D. Fla. Jan. 25, 2019). In *Gonzalez-Bermudez*, the court did not resolve the “intent to deprive” issue in response to plaintiff’s motion for sanctions. Plaintiff sought sanctions in this age discrimination suit after defendants failed to timely preserve relevant emails. While the court found that plaintiff satisfied the four predicate elements for the issuance of sanctions, it declined to rule on the question of “intent to deprive” due to an incomplete factual record at that time. Instead, the court indicated it would reconsider the issue at trial. *See Gonzalez-Bermudez v. Abbott Labs. PR Inc.*, 214 F.Supp.3d 130 (D.P.R. 2016). At trial, the court allowed plaintiff to present direct testimony and cross-examine a key defense witness regarding the email spoliation issue, but did not issue an adverse inference instruction to the jury. After the jury returned a verdict for plaintiff and the court entered judgment, defendants sought post-judgment relief by arguing (among other things) that the court wrongfully allowed the jury to consider testimony about spoliation. By permitting such testimony, asserted defendants, the court issued a de facto spoliation sanction against defendants. The court rejected this notion and reasoned that defendants were responsible for any adverse impact the spoliation testimony might have had on the jury’s verdict. In support of its decision, the court pointed to defendants’ failure to object to plaintiff’s arguably speculative direct testimony about what her deleted emails might have shown *and* their extensive cross-examination of plaintiff that spotlighted their own failure to timely issue a litigation hold.

***Sosa v. Carnival Corp.*, 18-cv-20957, 2018 WL 6335178 (S.D. Fla. Dec. 4, 2018), *motion for reconsideration denied*, 2019 WL 330865 (S.D. Fla. Jan. 25, 2019).** The court held that defendant failed to take reasonable steps to preserve recorded CCTV footage that plaintiff argued would have showed her slipping and falling on the deck of a cruise ship. After determining that plaintiff satisfied the other predicate requirements under FRCP 37(e) for sanctions to issue, the court declined to make a determinative ruling on whether defendant intended to deprive plaintiff of the relevant CCTV footage. Given uncertainties in the evidence over how the recorded CCTV feed was destroyed, the court reasoned it would allow the jury to decide the “an intent to deprive” issue. In response to the court’s order, defendant moved for reconsideration, arguing the court should have definitively addressed the “intent to deprive” issue. Relying on the FRCP 37(e) committee note (“The Advisory Committee Notes expressly explain that ‘a court [could] conclude that the intent finding should be made by a jury’”) and case law, the court held it was proper to leave that issue for the jury’s consideration and denied the motion.

8. What are Appropriate Curative Measures under FRCP 37(e)(1)?

***Bellamy v. Wal-Mart Stores, Texas, LLC*, No. SA-18-cv-60-XR, 2019 WL 3936992 (W.D. Tex. Aug. 19, 2019).** Defendant mistakenly produced a file of attorney-client privileged documents to plaintiff. As the parties neglected to obtain a non-waiver order pursuant to Federal Rule of Evidence 502(d), the court analyzed the question of waiver under Federal Rule of Evidence 502(b). Under Rule 502(b), defendant established that its production of privileged documents was legally inadvertent and thus there was no waiver of the privilege. That, however, did not end the court's inquiry. The contents of the privileged documents apparently revealed several key points including (among other things) that defendant failed to preserve relevant video footage (*see* Section 1, *supra*) and neglected to disclose that fact to plaintiff. In response, the court issued a curative measure under FRCP 37(e)(1) that was, in effect, a preclusion sanction as it will prevent defendant from asserting that plaintiff was contributorily negligent in connection with her slip and fall at defendant's store.

***J.S.T. Corp. v. Robert Bosch LLC*, No. 2:15-cv-13842-AC-EAS, 2019 WL 2296913 (E.D. Mich. May 30, 2019); *report and recommendation adopted*, 2019 WL 2324488 (E.D. Mich. May 30, 2019).** The court-appointed "Expert Advisor" found that prejudice existed from defendant's deletion of the Yang emails under FRCP 37(e)(1). Nevertheless, the Expert Advisor did not find sufficient circumstantial evidence of an "intent to deprive" to satisfy the FRCP 37(e)(2) prerequisite for issuing severe sanctions. As a curative measure, the Expert Advisor recommended that defendant be precluded from using emails authored by or addressed to Yang, or the absence of such emails, to show at summary judgment or at trial that Yang did not receive or share plaintiff's trade secrets. The Expert Advisor also recommended that the court bar defendant from calling Yang as a witness at trial or providing a declaration in connection with any summary judgment motion. The court adopted the Expert Advisor's recommendations in a subsequent order.

***DriveTime Car Sales Co., LLC v. Pettigrew*, No. 2:17-cv-0371, 2019 WL 1746730 (S.D. Ohio Apr. 18, 2019).** The court did not impose FRCP 37(e)(2) sanctions against defendant Pauley Motor given the lack of evidence demonstrating an "intent to deprive." *See* Section 5, *supra*. Nevertheless, the court held that plaintiff satisfied the rule's predicate requirements and determined that plaintiff suffered prejudice as it would be unable to use the spoliated text messages to substantiate the alleged kickback scheme between the defendants. All of which warranted the issuance of curative measures under FRCP 37(e)(1). Accordingly, the court ruled both parties could present evidence and argument regarding Pauley Motor's spoliation to the jury and the inferences that should be drawn. The court also indicated that it would issue an instruction (if necessary) to safeguard defendant Pettigrew from any inferences the jury might draw against Pettigrew from the spoliation at issue.

9. What is the Proper Exercise of a Court's Inherent Authority over Spoliation of ESI?

***Guarisco v. Boh Brothers Construction Co., LLC*, No. 18-7514, 2019 WL 4881272 (E.D. La. Oct. 3, 2019).** A key question that counsel and eDiscovery cognoscenti have repeatedly raised since the enactment of amended FRCP 37(e) is whether a court may properly use its inherent authority to address ESI preservation failings and related issues. The committee note to the 2015 amendments forecloses a court's ability to rely on inherent authority to impose sanctions for spoliation of ESI. Nevertheless, courts have drawn on their inherent powers to sanction litigants for spoliation of ESI that may not fall precisely within the bounds of FRCP 37(e). *See CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488 (S.D.N.Y. 2016). *Guarisco* is just such a case. In *Guarisco*, defendant requested FRCP 37(e) sanctions (attorneys' fees and costs) against plaintiff for modifying a digital photograph and deleting 22 other relevant pictures and videos to enhance its negligence claims against defendant. While it was undisputed that plaintiff had engaged in this misconduct, the court found that FRCP 37(e) did not apply to the spoliated evidence. The fraudulently modified photograph was not "lost" within the meaning of the rule since defendant obtained an accurate version of the picture from plaintiff's Facebook account. As for the deleted pictures and videos, the court indicated they could "still be recovered through additional discovery." With the case drawing to a close (the court had simultaneously granted summary judgment for defendant) and FRCP 37(e) sanctions unavailable, the court invoked its inherent authority to sanction plaintiff so she would not "avoid sanctions merely because the attempt to destroy evidence was unsuccessful." In so doing, the court imposed "the least severe sanction possible to deter future similar conduct" and ordered plaintiff to compensate defendant for the expert fees it spent trying to remediate plaintiffs' spoliation.