

Amended Rule 37(e): How Rule 37(e) Has Refocused ESI Spoliation Measures (Aug. 12, 2019)

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I: Introduction

Since December 1, 2015, Federal Rule of Civil Procedure Rule 37(e) (“Rule 37(e)” or the “Rule”) has provided a uniform approach to addressing spoliation of electronically stored information (“ESI”) which should have been preserved. Absent a finding of specific intent,² severe measures such as adverse jury instructions are no longer available merely upon a finding of negligence or gross negligence.³

As one District Judge put it, “[a]mended Rule 37(e), relative to its predecessor, significantly limits a court’s discretion to impose sanctions.”⁴ However, courts have a

¹ © 2019 Tom Allman. Mr. Allman, a former General Counsel, is Chair Emeritus of Working Group 1 of the Sedona Conference and was a member of the E-Discovery Panel at the 2010 Duke Litigation Conference.

² “Only upon finding the party acted with the intent to deprive another party of the information’s use in the litigation.”

³ According to the Committee Note, the Rule rejects “cases such as *Residential Funding v. De George*, 306 F. 3d 99 (2nd Cir. 2002), that authorize the giving of adverse inference instructions on a finding of negligence or gross negligence.”

⁴ *Jenkins v. Woody* 2017 WL 362475, at *12 (E.D. Va Jan 21, 2017).

broad range of alternative measures available to address prejudice in order to give courts a choice “between serious sanctions and doing nothing.”⁵

For example, courts may permit juries to receive evidence and argument about the loss of ESI and be instructed on their use of that evidence. In *Nuvasive v. Madsen Medical*, for example, the court refused to permit the jury to infer that missing evidence was “unfavorable” since the party had not acted with an “intent to deprive.”⁶ However, the court allowed the moving party to submit evidence to the jury about the loss and argue for its “likely relevance.”⁷

The Committee Note also suggests that the jury may decide if an “intent to deprive” exists. In *EEOC v. GMRI*, for example, the jury was to be told that it could reach an adverse inference about the missing ESI “if (but only if) it concludes” that [the party] acted “with [an] intent to deprive.”⁸

This Essay evaluates these and other aspects the Amended Rule. It includes, for example, an explicit standard of care (“reasonable steps”) which, if met, immunizes parties from measures even if irreplaceable ESI is lost.

After describing the evolution of the Rule in Part II, we summarize the threshold conditions which must be satisfied in Part III. We then focus in Part IV on establishing whether “intent to deprive” exists and Part V examines the severe measures available when that is shown. In Part VI and VII, we deal with broad range of measures available to address prejudice in the absence of such finding and in Part VIII we deal with the unique jury management issues involved.

II: Background

The spoliation doctrine – involving the failure to preserve or the destruction of discoverable information – seeks to ensure a just resolution of litigation on the merits in a bench or jury trial despite such discovery misconduct. Some misconduct is dealt with by measures which do not involve the trial process.

However, when spoliation threatens to upset the evidentiary balance at trial, it can prevent a court or jury from reaching a fair result in the absence of remediation. Dismissals or defaults are available, if appropriate. However, evidentiary measures such as an instruction to the jury that it may or must infer that the missing information was unfavorable are frequently sought.

⁵ Discovery Subcommittee Meeting, February 20, 2011, at 10 (“[The court] should not be left with a choice between serious sanctions and doing nothing”); copy at Agenda Book, April 4-5, 2011 Rules Comm. Mtg., at 300.

⁶ 2016 WL 305096 (S.D. Cal. Jan. 26, 2016). Prior to the amendment, it would have done so as recommended by the Magistrate Judge.

⁷ *Id.* at *3. See discussion *infra* at Part VI, subsection 3 (“Admission of Spoliation Evidence”).

⁸ 2017 WL 5068372, at *31 (S.D. Fla. Nov. 1, 2017).

Prior to the Amended Rule (and today where the Rule is inapplicable), some Circuits find that negligent or grossly negligent conduct suffices to justify an adverse inference as to the contents of the missing information;⁹ in others, it is available only if the party intentionally destroyed the evidence in bad faith.¹⁰

This lack of consistency struck many at the time, including the Author, as unfair and worthy of correction by federal rulemaking.¹¹ It was argued that it provided an incentive to undertake excessive costs of preservation to avoid such risks.¹²

The Initial Effort: Rule 37(e)(2006)

An initial version of Rule 37(e), adopted as part of the 2006 Amendments, provided a limited safe-harbor from rule-based sanctions when ESI was lost as a result of “routine, good faith operation of an electronic information system.”¹³ The provision was little used,¹⁴ since “a court could impose whatever sanctions it deemed appropriate”¹⁵ by simply relying on its inherent authority to deal with litigation abuse.

Other courts “effectively read the intended safe harbor” out of the rule by concluding that once litigation was foreseeable, any deletion of relevant data was, by definition, not in “good faith.”¹⁶ Not surprisingly, some argued that “Rule 37(e) should be removed from the FRCP”¹⁷ or, at the least, modified to address its inadequacies.

Reassessment/Action

In May 2010, the E-Discovery Panel¹⁸ at the Duke Litigation Conference, recommended replacing Rule 37(e) with a rule which would deal with the outlines of the duty to preserve and detail the sanctions available upon its violation.¹⁹ The suggestion

⁹ Residential Funding v. DeGeorge, 306 F. 3d 99, 108 (2nd Cir. 2002).

¹⁰ Schreane v. Beemon, 575 Fed. Appx. 486, 490 (5th Cir. 2014) (citation omitted).

¹¹ Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206, 208 (2001) (parties that proceed in good faith are unfairly at risk that perfectly appropriate business actions will later be deemed inappropriate in some Circuits).

¹² Committee Note (“[r]esolving the circuit split with a more uniform approach to lost ESI, and thereby reducing a primary incentive for over-preservation, has been recognized by the Committee as a worthwhile goal”).

¹³ PROPOSED RULES, 234 F.R.D. 219 (2006)(“[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good faith operation of an electronic information system”).

¹⁴ Charles Alan Wright, Arthur R. Miller and Richard Marcus, 8B FEDERAL. PRACTICE. & PROCEDURE. § 2284.2 (3d. ed.) (2018).

¹⁵ Security Alarm Financing v. Alarm Protection, 2016 WL 7115911, at *2 (D. Alaska Dec. 6, 2016).

¹⁶ Montana State Univ. v. Montana First Jud. Ct., 2018 MT 220, 2018 4327887 at *9 and n. 17 (S.C. Mont. Sept. 11, 2018) (comparing the original Rule –as adopted in Montana – to the Amended Rule).

¹⁷ Nicole D. Wright, *Federal Rule of Civil Procedure 37(e): Spoiling the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 821 (2009).

¹⁸ The Panel included Author, the Hon. Shira Sheindlin, the Hon. John Facciola and three practitioners, with Gregory Joseph serving as Chair.

¹⁹ Memorandum, to Hon. John Koeltl, May 11, 2010 (Chair of Conference)(summarizing views of Members of Panel on recommended elements of such a rule).

was well-received by the Rules Committee and the Standing Committee, which undertook to address the task.

The Discovery Subcommittee of the Rules Committee (the “Discovery Subcommittee”) evolved several alternative approaches, one of which, known as a “back-end” provisions, focused on providing measures which might be available for a failure to preserve. It incorporated the common law duty to preserve and its comprehensive nature made reliance on internet authority unnecessary.²⁰

After a 2011 Mini-Conference, the Rules Committee selected the “back end” rule provision for further development and ultimate publication.

The Initial Proposal

In August 2013, the Rules Committee released an initial draft of amended Rule 37(e)(the “Initial Proposal”), as part of a package of Rule Amendments arising from the Duke Conference.²¹ It replaced existing Rule 37(e) and outlined the measures available when a party failed to preserve “discoverable information” that should have been preserved in the anticipation or conduct of litigation.

Curative measures were made available regardless of the prejudice, if any, caused by the failure to preserve.²² “Sanctions” or “an adverse-inference jury instruction” were available when a party’s actions caused “substantial prejudice” in the litigation and was undertaken either “willful[ly] or in bad faith.”²³ These measures were also available if a party was “irreparably deprived” of a meaningful opportunity to present or defend claims.²⁴

The Committee Note suggested that “additional curative measures” could include “permitting introduction at trial of evidence about the loss of information or the allowing argument to the jury about its possible significance.”²⁵

Public Comments

The Rules Committee conducted three well-attended Public Hearings and received 2,345 written comments on the Rules Package, many of which applied to Rule 37(e).²⁶

²⁰ See, e.g. Category 3 Draft Rule, Preservation/Sanctions Issue, at 22 *et seq.*; copy reproduced in Dallas Conference on Preservation/Sanction on 9/9/11 materials, available at [us courts.gov](http://uscourts.gov).

²¹ The text and Committee Note are reproduced at pages 314-28 of the full Rules Package, available at <http://www.hib.uscourts.gov/news/archives/attach/preliminary-draft-proposed-amendments.pdf>.

²² Rule 37(e)(1)(A).

²³ Rule 37(e)(1)(B)(i).

²⁴ Rule 37(e)(1)(B)(ii). The exception was intended to preserve the distinction in *Silvestri v. GM*, where a dismissal was ordered without heightened culpable conduct when a damaged automobile was not preserved because the “prejudice to the [party was] extraordinary, denying it the ability to adequately defend its case.

²⁵ See, e.g., Minutes, Rules Comm. Mtg, April 11-12, 2013, at 23.

²⁶ A summary of the Rule 37(e) Comments was included as part of the May 2, 2014 Report of Advisory Committee on Civil Rules reproduced at Agenda Book, Stdg. Comm. Mtg. May 29-30, 2014, at 306 -310 (Report) and 331-411 (Reporters Comments).

Much of the discussion dealt with the threshold culpability requirement for severe measures such as an adverse inference instruction.²⁷

Testimony during the Public Hearings was equivocal on whether the proposed rule changes would actually address excessive preservation costs.²⁸ The Subcommittee concluded that while “reducing the incentives for over-preservation” remained a worthwhile goal, the benefits in that regard were too uncertain to justify seriously limiting trial court discretion.²⁹

The Final Rule

The final version of the amended Rule was adopted by the Rules Committee at its Meeting in Portland, Oregon on April 10-11, 2014 (the “Portland” meeting). The text as handed out at the Meeting was newly amended³⁰ and was explained in detail by the Chair of the Subcommittee before its adoption.³¹

As revised, the Rule was conditioned on a showing that a failure to take “reasonable steps” had caused a loss of ESI which could not be restored or replaced. Severe measures such as an adverse inference presumption would be available under Rule 37(e)(2) only “upon a finding that the party acted with the intent to deprive another party of the information’s use in the litigation.”

In addition, curative measures were to be available only if “no greater than necessary to cure the prejudice [caused by the failure to preserve].”³² A revised Committee Note, acknowledged the possible use of the jury to assess whether “intent to deprive” exists³³ as well as the form of the jury instructions available for use when evidence and argument about spoliation was admitted to the jury.³⁴

²⁷ See generally Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 SEDONA CONF. J. 1, 5-6, 30-32 (2015).

²⁸ See, e.g., Testimony by representative of a pharmaceutical manufacturer to the effect that it was “uncertain whether the adoption” of the rule would “produce immediate or dramatic changes in his company’s preservation practices.” Preliminary draft of Reporters Comments, 69; Agenda Book of April 10-11, 2014 Rules Comm. Mtg., at 521.

²⁹ [Undated] Subcommittee Report, Rule 37(e), at 2, 4; copy available in Agenda Book of Rules Comm. Mtg., April 10-11, 2014 at 369-392 (“Subcommittee Report”).

³⁰ Ariana J. Tadler and Henry J. Kelston, *What You Need to Know About the New Rule 37(e)*, 52- JAN TRIAL 20, 22 (2016) (“Tadler and Kelston”) (the subcommittee “made substantial revisions between April 10 and 11 and distributed the new version” to the Committee and observers minutes before the Committee convened); see also Thomas Y. Allman, *Rule 37(e): The Report from Portland*, April 14, 2014, at 4 (reproducing revised text as handed out)(Memo available online).

³¹ See Minutes, April 10 -11, 2014 Rules Comm. Mtg., 16-25.

³² Rules Committee Report, May 2, 2014, at 41.

³³ The possibility was discussed by the Subcommittee after the Public Comments closed and it was concluded that the Committee Note should deal with the topic. Notes of Subcommittee Meeting of March 112, 2014, at 3; copy available in Agenda Book of April 10-11, 2014 Rules Comm. Mtg., at 445.

³⁴ The topic had been raised by the Association. of the Bar of the City of N.Y. (“it is hard to understand why the court cannot properly give a jury instruction to guide its consideration of [evidence of spoliation admitted as a curative measure]”); Comment 1054, summarized in Summary of Rule 37(e) Comments at 50 copy available in Agenda Book, Stdg. Comm. Mtg, May 29-30, 2014, at 380.

With only minor stylistic changes, the text of the Rule and Committee Note became effective as of December 1, 2015 by order of the Supreme Court.³⁵

III: Threshold Conditions

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

The Rule is based on the common-law duty; “it does not attempt to create a new duty to preserve.”³⁶ A party has the same duty to preserve evidence for use in litigation as before the amendments.³⁷ It defines the threshold conditions inherent in that duty which must be satisfied before *any* measures are available under either subdivision (e)(1) or (e). In that respect, the Rule functions as a decision tree.³⁸

Scope

The Rule does not apply to losses of tangible property and documents. While the Rules Committee acknowledged that there was “much to be said” for having the Rule cover all forms of discoverable information, it decided, on balance, that it was appropriate to confine the Rule to losses of ESI.³⁹ In *NCA Investors Liquidated Trust v John J. Dimenna, Jr.*, for example, where boxes of documents were destroyed, the court applied the traditional Second Circuit principles.⁴⁰

The suggestion that physical and electronic evidence should be assessed under the the Rule 37(e) standard when present in the same case was rejected in *EPAC Technologies v. HarperCollins*.⁴¹

³⁵ PROPOSED RULES, 305 F.R.D. 457 (2015). In the interim, it was approved without change by the Standing Committee, the Judicial Conference and the Supreme Court (and, implicitly, Congress, by its inaction).

³⁶ Committee Note.

³⁷ *Security Alarm Financing v. Alarm Protection*, 2016 WL 7115911, at *3 (D. Alaska Dec. 6, 2016).

³⁸ Hon. Iain D. Johnston and Thomas Y. Allman, *What Are The Consequences For Failing to Preserve ESI: My Friend Wants to Know*, THE CIRCUIT RIDER (2019)(incorporating annotated flow chart illustrating the impact of the success or failure in satisfying the threshold elements).

³⁹ Minutes, April 10-11, 2014 Rules Committee Meeting, 22-23 (“the loss of a unique tangible object is difficult to capture in a rule” and there is a “well-developed body of law for losses of things other than ESI. Further the abundance of ESI makes it likely that satisfactory ways can be found to work around the loss.”).

⁴⁰ 2019 WL 2720746, at n. 1 (D. Conn. June 27, 2019) (ignoring the “intent to deprive” standard since the case “deals with physical discovery”).

⁴¹ 2018 WL 1542040, at *14 & n. 7 (M.D. Tenn. March 29, 2018)(“the books and ESI [subject to spoliation allegations in the case] are sufficiently distinct that the considerations applying Rule 37(e) apply only to the electronic evidence”).

In addition, “only parties with possession, custody, or control over the evidence may be sanctioned for their failure to preserve [it].”⁴²

Foreclosure of Inherent Powers

Rule 37(e) “supplants” use of inherent authority when it is applicable.⁴³ As explained in *Adriann Borum v. Brentewood Village*, this is because “the rule clearly was drafted with an eye toward providing clarity and uniformity in the application of sanctions in cases involving ESI.”⁴⁴

The Supreme Court has made it clear that while a Federal Rule does not divest a court of its inherent powers, “the court ordinarily should rely on the Rules.”⁴⁵

ESI that “Should have Been Preserved”

The duty to preserve arises “not only during litigation but extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.”⁴⁶ As the Committee Note observes, many decisions hold that a party has a duty to preserve when it knew or should have known that litigation was “reasonably foreseeable.”⁴⁷

A variety of events, including pre-litigation demands, may trigger the duty to preserve.⁴⁸ Courts find that a party reasonably anticipates litigation “after it has a certain type of negative interaction with its potential adversary.”⁴⁹ However, the onset of a duty must be “predicated on something more than an equivocal statement.”⁵⁰

In *Storey v. Effingham County*, a party on notice that litigation was “a distinct possibility, if not very likely,” had a duty to prevent routine destruction of video pursuant to document destruction policy. The court could not “fathom a reasonable defendant who

⁴² There are additional complexities involved in prisoner cases where the employer is immune from suit and not joined as a party. *See, e.g., Davidson v. Nicolou*, 2017 WL 3726712, *3 n. 3 (S.D. Ga. Aug. 29, 2017) (summarizing cases).

⁴³ Charles Alan Wright, Arthur R. Miller and Richard Marcus, 8B FEDERAL. PRACTICE. & PROCEDURE. § 2284.2 (3d. ed.)(2018). According to the Committee Note, the Rule “forecloses” reliance on inherent authority or state law to determine when “certain measures” should be used.

⁴⁴ 2019 WL 3239243, at *4 (D.D.C. July 18, 2019).

⁴⁵ *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991).

⁴⁶ *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2nd Cir. 1998)).

⁴⁷ *Cf. Robert Keeling, Sometimes, Old Rules Know Best: Returning to Common Law Conceptions of the Duty to Preserve in the Digital Information Age*, 67 CATH. U. L. REV. 67, 102 (2018)(a better reading is that there is no duty to preserve until suit filed or imminent).

⁴⁸ *Daniel Small v. UMC*, 2018 WL 3795238, at *59 (D. Nev. Aug. 9, 2018)(duty triggered as of date plaintiffs’ counsel sent preservation letter to its CEO).

⁴⁹ *Philmar Dairy v. Armstrong Farms*, 2019 WL 3037875, at *3 (D. New Mexico July 11, 2019)(noting that it is “possible, though uncommon, for an event to trigger the duty to preserve evidence even without any interaction with a potential adversary”).

⁵⁰ *Cache La Poudre Feeds v. Land O’Lakes*, 244 F.R.D. 614, 623 (D. Colo. March 2, 2007).

would look at [the] facts and not catch the strong whiff of impending litigation on the breeze.”⁵¹ A duty to preserve may also exist because of a failure to meet governmental record-keeping obligations.⁵²

Only “relevant” ESI must be preserved, since only the loss of relevant ESI prejudices the judicial process.⁵³ Historically, relevance and prejudice was assumed to exist when the failure to preserve was particularly egregious⁵⁴ and the Committee Note confirms that a finding of an “intent to deprive” supports “an inference that the opposing party was prejudiced by the loss of information.”

Typically, only a “very slight showing” of relevance or its prejudicial impact is required.⁵⁵ Timing is important. The proper focus in determining relevance is on what is known at the onset of the duty to preserve. The triggering events may “provide only limited information about [the] prospective litigation.”⁵⁶

However, mere speculation about the relevance of the missing content is insufficient. In *Oracle America v Hewlett Packard*, for example, the party had failed to “at least show that categories of irreplaceable relevant documents were likely lost.”⁵⁷

Deciding *what* must be preserved is intensely case-specific and is the subject of many decisions. Typically, a party is expected to preserve what is “reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.”⁵⁸ The topic is intimately related to the assessment of whether a party took “reasonable steps” to preserve.

As noted, however, “[n]o matter how inadequate” a party’s preservation’s efforts may be, it does not justify judicial action “if no relevant information is lost.”⁵⁹

Failure to Take Reasonable Steps

As revised, the Rule applies only when ESI is lost because the party failed “to take reasonable steps to preserve it and it cannot be restored or replaced through additional

⁵¹ 2017 WL 2623775, at 83 (S.D. Ga. June 16, 2017).

⁵² Committee Note. However, only a party within the class of persons sought to be advantaged by the regulation may claim its benefit. *Byrnie v. Town of Cromwell*, 243 F. 3d 93, 108-109 (2nd Cir. 2001).

⁵³ *Snider v. Danfoss*, 2017 WL 2973464, at *5 (N.D. Ill. July 12, 2017)(courts have consistently assumed that only relevant ESI need be preserved since there is a lack of prejudice from irrelevant ESI and the lack of a need to produce it, much less preserve it).

⁵⁴ *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 220 (S.D.N.Y. Oct. 22, 2003) (when evidence is destroyed in bad faith that fact alone is enough to demonstrate relevance).

⁵⁵ *Nunnally v. District of Columbia*, 243 F. Supp. 3d 55, 74 (D.D.C. March 22, 2017) (trier of fact may draw an inference of relevance where document destruction has made it more difficult to prove relevance).

⁵⁶ Committee Note (“[i]t is important not to be blindsided to this reality by hindsight arising from familiarity with an action as it is actually filed”).

⁵⁷ 328 F.R.D. 543, 553 (N.D. Cal. Aug. 7, 2018)(rejecting argument that it did not have to show that specific documents were missing because of the difficulties caused by their deletion).

⁵⁸ *Wm. T. Thompson v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984).

⁵⁹ *Orbit One v. Numerex*, 271 F.R.D. 429, 440-41 (S.D.N.Y. Oct. 26, 2011).

discovery.” The test is whether the conduct at issue falls “below the standard of what a reasonably prudent person would do under similar circumstances.”⁶⁰

Egregious conduct is, almost by definition, not “reasonable.” A classic example is *Alabama Aircraft Industries v. Boeing*, where unexplained, blatantly irresponsible behavior led the court to conclude that the party had acted with an “intent to deprive.” The court found that “without question” the Rule applied.⁶¹ In *CAT3 v. Black Lineage*, the manipulation of email addresses with an intent to deprive was not consistent with taking “reasonable steps” to preserve.⁶²

However, where egregious conduct is not at issue, the results depend upon the unique circumstances. It must, as a minimum, involve negligence, not mere inadvertence;⁶³ “reasonable steps” suffice; the Rule does not call for perfection.⁶⁴ It does not invoke a strict liability standard.

A failure to utilize a “litigation hold”⁶⁵ is frequently at issue. In *BankDirect Capital Finance v. Capital Premium*, the party did “not to take reasonable (and quite easy) steps to preserve” by failing to stop the “automatic deletion” of emails.⁶⁶ In *Holguin v. AT&T*, the party failed to take reasonable steps to preserve by not implementing a litigation which “would have been proportional to the needs of this case and consistent with clearly established applicable standards.”⁶⁷

In *EPAC Technologies v. HarperCollins*, the same conclusion was reached when in-house counsel delayed initiation of a litigation hold process and failed to include information at the core of the dispute within its scope.⁶⁸

However, “not every case requires a legal hold” when a party is able to capture the requisite ESI by other preservation methods.⁶⁹ In *Bouchard v. U.S. Tennis Assoc.*, it was reasonable to save only the video footage relating to the area outside of the locker room where a slip and fall occurred at the U.S Open.⁷⁰

⁶⁰ *Leidig v. BuzzFeed*, 2017 WL 651253, at *10, *12 (S.D.N.Y. Dec. 19, 2017).

⁶¹ 2017 WL 930597, at *11 (N.D. Ala. March 9, 2017).

⁶² 164 F. Supp.3d 488, 500 (S.D.N.Y. Jan. 12, 2016).

⁶³ *Oracle v. Hewlett Packard*, 328 F.R.D. 543, 549 (N.D. Cal. Aug. 17, 2019).

⁶⁴ Committee Note.

⁶⁵ *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 218 (S.D.N.Y. Oct. 22, 2003).

⁶⁶ 2018 WL 1616725 (N.D. Ill. April 4, 2018).

⁶⁷ 2018 WL 6843711, at *6 (W.D. Tex. Nov. 8, 2018) (denying the motion because neither prejudice nor intent to deprive was found to exist).

⁶⁸ 2018 WL 1542040, at *22 (M.D. Tenn. March 29, 2018). Although beyond the scope of this Essay, allegations of counsel malpractice in this context are not unknown. The Committee Note cautions that “counsel should become familiar with their client’s information systems and digital data – including social media – to address [preservation] issues.”

⁶⁹ *Radiologix v. Radiology and Nuclear Medicine*, 2019 WL 354972, at *10 & n. 6 (D. Kan. Jan. 29, 2019) (citing *The Sedona Principles: Third Edition*, 19 SEDONA CONF. J. 1, 104, 103-08 cmt. 5.d. (2018)).

⁷⁰ *Bouchard v. U.S. Tennis Association*, 2017 WL 3868801 (S.D.N.Y. Sept. 5, 2017).

In *Jackson v. Haynes & Haynes*, for example, a failure to retain contemporaneous notes relating to hours of work recorded on a cell phone was not reasonable.⁷¹ In *ILWU-PMA Welfare Plan*, it was not enough to have retained a contractual right to access ESI on former servers when the ESI was subsequently unavailable under the circumstances.⁷²

It is unreasonable, however, to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant [ESI].⁷³ In *ML Healthcare Services v. Publix*, the Eighth Circuit agreed that the failure to retain all of a videotape could have been the result of the party “reasonably and in good faith” concluding that it did not need to comply with such a request.⁷⁴

The fact that the loss resulted from compliance with pre-existing corporate policies is a relevant factor in mitigation.⁷⁵ A party is “not required to hold on to information in perpetuity on the chance it may become relevant.”⁷⁶ In *Marten Transport v. Plattform Advertising*, it was not necessary to do so in the absence of notice of the future relevance of the ESI to amended claims.⁷⁷

The Committee Note admonishes that individuals may be “less familiar with preservation obligations.” In *Zamora v. Stellar Mgt.*, the court indicated it was more sympathetic to a single plaintiff deleting a Facebook message than to a corporation deleting email subject to a formal litigation hold.⁷⁸

“Lost” Because it cannot be Restored or Replaced

The revised Rule clarifies that the missing ESI is not “lost” for purposes of the Rule if it can be “restored or replaced through additional discovery.”⁷⁹ As noted in *Small v. University Medical Center*, “[t]he days of imposing severe, punitive sanctions for loss of ESI that can be restored or replaced by other discovery” are over.⁸⁰

The Committee Note explains that because ESI often exists in multiple locations, a loss from one source “may often be harmless [because] substitute information can be found

⁷¹ *Jackson v. Haynes & Haynes*, 2017 WL 3173302, at *3 (N.D. Ala. July 26, 2017) (the non-moving party claimed to have recorded the data on her daughter’s MacBook, but the daughter was unwilling to surrender it for a forensic exam).

⁷² The contractual arrangements turned out to be “ineffective” and sluggish at best. 2017 WL 345988, at *5 (N.D. Cal. Jan. 24, 2017).

⁷³ Principle 5, *The Sedona Principles*, Third Edition, 19 SEDONA CONF. J. 1, 93, 95 (2018).

⁷⁴ 881 F.3d 11293, 1308 (11th Cir. Feb. 7, 2018); see also Ron Hedges, *What Might Be “Reasonable Steps,”* CZ017 ALI-CLE 81 (2018).

⁷⁵ *Butzer v. Corecivic*, 2018 WL 7144285, at *3 (M.D. Fla. Sept. 12, 2018).

⁷⁶ *Bouchard*, *supra*, at *6.

⁷⁷ 2016 WL 492743, at *9 (D. Kan. Feb. 8, 2016) (noting that the moving party followed the same routine practice of not retaining its computer internet history when it replaced its computers).

⁷⁸ 2017 WL 1372688 (W.D. Mo. April 11, 2017).

⁷⁹ *Envy Hawaii LLC v. Volvo Car USA*, 2019 WL 1292288, at *2-3 (D. Hawai’i (March 20, 2019)).

⁸⁰ 2018 WL 3795238, at *69 (D. Nev. Aug. 9, 2018).

elsewhere.”⁸¹ In *Greer v. Mchiel*, no measures were available under the Rule because copies of the deleted email were located.⁸² In *Marquette Transportation v. Chembulk*, data from a voyage data recorder (VDR) initially believed to be missing was restored by the location of a downloaded copy. No measures were imposed.⁸³

Moving parties must make proportional efforts to recover the information from other sources before the Rule applies.⁸⁴ In *Stovall v. Brykan Legends*, no measures were available because the moving party failed to issue a subpoena to secure a copy of a video held by a third party on their system or hard drive.⁸⁵ In *Steves and Sons v. JELD-WEN*,⁸⁶ relief was denied because the moving party failed to seek a forensic review to secure the substitute information.

The Committee Note explains that “nothing in the rule” limits the courts power under Rule 16 and 26 to authorize additional discovery.⁸⁷

In *Marsulex Environmental Technologies v. Selip*, for example, the court found, that “a forensic investigation [was] necessary to determine whether and to what extent a party had “withheld, suppressed, or deleted evidence” relevant to the moving party’s claims. The non-moving party was ordered to pay for the forensic examination of work computers most likely to show evidence of spoliation. It had earlier denied a motion for more extreme sanctions without prejudice to renewal after the results of the investigation.”⁸⁸

The cases are split on whether oral testimony is an adequate substitute for missing ESI. In *Schmalz v. Village of North Riverside*, the ability to conduct cross-examination at trial about missing text messages was not enough.⁸⁹ In *Freidig v. Target*, eyewitness testimony was also insufficient.⁹⁰ On the other hand, in *Eshelman v. Puma Biotech*, the court concluded that under some circumstances the use of deposition testimony would suffice.⁹¹

⁸¹ See, e.g., *Living Color Enterprises v. New Era Aquaculture*, 2016 WL 1105297, at *5 (S.D. Fla. March 22, 2016)(since “the great majority” of the text messages were provided by a third party, they were not “lost” and sanctions are not available as to them under Rule 37(e)).

⁸² 2018 WL 1626345 (S.D.N.Y. March 29, 2018).

⁸³ 2016 WL 930946 (E.D. La. March 11, 2016).

⁸⁴ Committee Note (“efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information”).

⁸⁵ 2019 WL 480559, at *3 (D. Kan. Feb. 7, 2019).

⁸⁶ 327 F.R.D. 96, 108 (E.D. Va. May 1, 2018).

⁸⁷ Committee Note (“Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems”). See also *Tadler and Kelston, supra*, 52- JAN TRIAL at 22 (“[i]f lost ESI can be restored or replaced through additional discovery, the court has authority to order such discovery under Rules 16 and 26 and, thus, has no need to invoke Rule 37(e)”).

⁸⁸ 2019 WL 2184873, at *12-13 (M.D. Pa. May 21, 2019).

⁸⁹ 2018 WL 1704109 (N.D. Ill. March 23, 2018)

⁹⁰ 329 F.R.D. 199 (W.D. Wisc. Dec. 19, 2018)(the requirements are confined to the ability to recover ESI from “digital backups” when “electronic documents have multiple versions”).

⁹¹ 2017 WL 2483800, at *5 (E.D. N.C. June 7, 2017).

IV. Intent to Deprive

The Amended Rule prohibits the use of severe measures, such as adverse presumptions, unless the party “acted with the intent to deprive another party of the information’s use in the litigation.” This is intended “to provide a uniform standard in federal court”⁹² and was developed and advocated by the Discovery Subcommittee in response to public comments on the Initial Proposal.⁹³

According to the Committee Note, the Rule “rejects cases such as *Residential Funding v. De George*, 306 F. 3d 99 (2nd Cir. 2002), that authorize the giving of adverse inference instructions on a finding of negligence or gross negligence.” Only when a specific intent to ignore preservation obligations exists is it fair to conclude that conduct indicates a “consciousness of guilt.”⁹⁴

Examples

In *GN Netcom v. Plantronics*, a series of “intentional step[s] to interfere” with the prosecution of a claim were sufficient to sustain a finding that the entity had acted with the requisite intent to deprive. An executive had deliberately deleted an unknown number of emails and urged others to do so; witnesses, including the CEO, were not truthful and the company had failed to adequately assess the damage.⁹⁵

In *Alabama Aircraft Industries v. Boeing*, the trial court based its decision that intent to deprive existed on the “unexplained, blatantly irresponsible [preservation] behavior” in the case.⁹⁶ Similarly, in *Moody v. CSX Transportation*, the court cited the fact that the party engaged in “stunningly derelict conduct”⁹⁷ and in *O’Berry v. Turner*, it was found to exist because of “irresponsible and shiftless behavior.”⁹⁸

There is no “need to find a smoking gun.”⁹⁹ Circumstantial evidence and the “totality of the record” often suffice.¹⁰⁰ A conclusion that a party has acted with “intent to deprive” may result from irresponsible behavior that lacks any other explanation.”¹⁰¹

⁹² Minutes, Civil Rules Advisory Committee, April 10-11, 2014, lns. 974-979.

⁹³ Subcommittee Report, *supra*, at 11. (severe measures should be taken only on finding that the party who failed to preserve information “acted with the intent to deprive another party of the information’s use in the litigation).

⁹⁴ Committee Note (Information lost through negligence “may have been favorable to either party, including the party that lost it, and inferring it was unfavorable to that party may tip the balance at trial in ways the lost information never would have). See also McCormick on Evidence, Para. 273 at 809 (“Mere negligence is not enough, for it does not sustain the inference of consciousness of a weak case”);

⁹⁵ 930 F.3d 76 (3rd Cir. July 10, 2019)(the District Court reasonably concluded that [the party] had acted in bad faith).

⁹⁶ 2017 WL 930597 (N.D. Ala. March 9, 2017).

⁹⁷ 2017 WL 4173358 (S.D.N.Y. Sept. 21, 2017).

⁹⁸ 2016 WL 1700403 at *4 (M.D. Ga. April 27, 2016).

⁹⁹ Auer v. City of Minot, *supra*, 896 F.3d at 858 (“intent can be proved indirectly and [the moving party] did not need to find a smoking gun”).

¹⁰⁰ GN Netcom v. Plantronics, 2016 WL 3792833 (D. Del. July 12, 2016).

¹⁰¹ 4DD Holdings v. United States, 143 Fed. Cl. 118 (Ct. Claims May 10, 2019).

However, courts have not hesitated to refuse to make the finding when merely negligent or grossly negligent conduct is involved. In *Auer v. City of Minot*, for example, the Eighth Circuit found that intent to deprive did not exist because the allegations would at most prove negligence in the handling of electronic information.¹⁰² Neither negligent or grossly negligent conduct “does the trick.”¹⁰³

It is not enough that a party intended the results of its conduct, it must also have been intended to deprive the other party of the evidence. As noted in *Williford v. Carnival Corporation*, the conduct. “may have been reckless . . . [or] even grossly negligent [but] that does not equate to an intent to deprive.”¹⁰⁴ The “standard bears a close relationship to the “bad faith” requirement in use in some Circuits but is “defined even more precisely.”¹⁰⁵

Role for Jury

While the Rule speaks only of “the court” making the intent finding,¹⁰⁶ the Committee Note suggests the possibility of leaving the issue to the jury.¹⁰⁷ If that choice is made, “the court’s instruction should make clear that the jury may infer from the loss of information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information’s use in the litigation.”

A number of courts have decided to rely upon the jury to make the finding.¹⁰⁸ The court must first determine that a sufficient basis exists for the jury to act.¹⁰⁹ In *Gipson v. Mgt. & Trg. Corp.*, for example, the court indicated that it would “consider allowing the jury to decide the intent issue” at the charging conference assuming “there is sufficient trial

¹⁰² 896 F.3d 854, 858 (8th Cir. July 19, 2018).

¹⁰³ *Applebaum v. Target*, 831 F.3d 740 (6th Cir. Aug 2, 2016)(“negligence or even gross negligence will not do the trick”).

¹⁰⁴ 2019 WL 2269155, at *12 (S.D. Fla. May 28, 2019).

¹⁰⁵ Report of the Rules Committee, June 2014, reproduced in PROPOSED RULES, 305 F.R.D. 457, 512 at 528 (2015).

¹⁰⁶ Greg Joseph has pointed out that “[n]owhere does the Advisory Committee indicate why or when the issue appropriately left to the jury.” Gregory P. Joseph, *Rule 37(e): The New Law of Electronic Spoliation*, 99 JUDICATURE 35, 40 (2015).

¹⁰⁷ The original Note published for public comment in 2013 did not address use of the jury for that purpose.

¹⁰⁸ Examples include *Cahill v. Dart*, 2016 WL 7034139, at *4 (N.D. Ill. Dec. 2, 2016); *Coan v. Dunne*, 2019 WL 1620412, at *9 (D. Conn. April 16, 2019); *EEOC v. GMRI*, 2017 WL 5068372, at *31 (S.D. Fla. Nov. 1, 2017); *Epicor Software v. Alternative Technology*, 2015 WL 12734011, at *2; *Evans v. Quintiles Transnational Corp.*, 2015 WL 9455580 (D.S.C. Dec. 23, 2015)(without citing Rule); *Franklin v. Howard Brown Health Center*, 2018 WL 4784778, at *7 (Oct. 4, 2018); *Fishman v. Tiger Natural Gas*, 2018 WL 6068295 (N.D. Cal. Nov. 20, 2018); *Gipson v. Mgt. & Training Corp.*, 2018 WL 736265, at *7 (S.D. Miss. Feb. 6, 2018); *Hunting Energy v. Kavadas*, 2018 WL 4539818, at *9 (N.D. Ind. Sept. 20, 2018); *Sosa v. Carnival*, 2018 WL 6335178 (S.D. Fla. Dec. 4, 2018) & 2019 WL 330865, at *2-*3 (Jan. 25, 2019).

¹⁰⁹ Gregory P. Joseph, *supra*, 99 JUDICATURE 35 at 40 (whether there was intent to deprive is “a question of conditional relevance for the jury under FRE 104(b)” if the court makes the preliminary determination under Rule 104(a) that a reasonable jury could find by a preponderance of the evidence that the party acted with the intent to deprive).

evidence supporting it.”¹¹⁰ A similar approach was recommended by the Magistrate Judge in *Franklin v. Howard Brown Health Center*.¹¹¹

The Note also provides that “[i]f the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.” However, it may “consider that evidence, along with all other evidence in the case, in making its decision.”¹¹²

Examples

In *Hunting Energy Services v. Kavadas*, the intent issue was to be resolved by the jury because it “depends on a credibility analysis and a finding as to the defendant’s mental state,” a prototypical function of a jury.¹¹³ In *Cahill v. Dart*, the issue was turned over to the jury because it involved a “close call.”¹¹⁴

In *University Accounting v. Schulton*, the court determined that a “reasonable factfinder could conclude” that the party acted with intent to deprive, and that it planned to instruct the jury that “if [it] first finds” that the party acted with the intent to deprive, it “may presume the deleted information was unfavorable to” the moving party, citing Rule 37(e)(2).¹¹⁵

In *Epicor Software v. Alternative Technology*, the court found the issue of intent to be a suitable open factual issue to be resolved by the jury. It permitted the moving party to submit evidence about the topic and stated it would use a jury instruction “that is in accord with the language in the Committee Note.”¹¹⁶

In *EEOC v. GMRI*, the jury was told that it could reach an adverse inference about the missing ESI “if (but only if) it concludes” that [the party] acted “with [an] intent to deprive.”¹¹⁷

For an evaluation of the basis for and efficacy of the use of the jury in this manner, see the discussion in Part VIII, *infra*, Jury Management, at “Deciding Intent to Deprive.”

¹¹⁰ 2018 WL 736265, at *7 (S.D. Miss. Feb. 6, 2018). The court noted in a footnote that use of the jury for that purpose “should not change the evidence” before it, since if the party “committed spoliation, it would likely be admissible under the well-known ‘consciousness -of-guilt-theory.’”

¹¹¹ 2018 WL 4784668, at *7 (N.D. Ill. Oct. 4, 2018) (“as the trial unfolds” the jury may be allowed, “properly instructed” to determine if the defendant acted intentionally).

¹¹² Committee Note (“[t]hese measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice”).

¹¹³ 2018 WL 4539818, at *11 (N.D. Ind. Sept. 20, 2018).

¹¹⁴ 2016 WL 7034139, at *4 (N.D. Ill. Dec. 2, 2016) (also deciding to tell the jury that the missing video was as the result of a failure to preserve).

¹¹⁵ 2019 WL 2404512, at *7 (D. Ore. June 7, 2019).

¹¹⁶ 2015 WL 12734011, at *2 (C.D. Cal. Dec. 17, 2015).

¹¹⁷ 2017 WL 5068372, at *31 (S.D. Fla. Nov. 1, 2017).

V: Severe Measures

Rule 37(e)(2) authorizes a court, upon a showing of “intent to deprive,” to (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.”

1. Adverse “Presumption” Instructions

Courts applying the Rule have issued adverse jury inference presumptions in both mandatory or permissive form,¹¹⁸ although the use of mandatory inference (presumption) instructions is rare.¹¹⁹ The primary difference is that a permissive adverse inference is subject to reasonable rebuttal,¹²⁰ while an instruction that the jury “must” make the presumption is not.

According to the Chair of the Discovery Subcommittee, the mental act involved for the jury upon receiving such an instruction is one of drawing inferences from that presumption, “not the rebuttable presumption of evidence law.”¹²¹ The jury may be instructed about or permitted to receive evidence about the circumstances and may be instructed that certain facts are deemed admitted and must be accepted as true.¹²²

¹¹⁸ Examples include 4DD Holdings v. United States, __ Fed. Cl. __, 2019 WL 2064535 (Ct. Clms. May 10, 2019); Alabama Aircraft v. Boeing, 319 F.R.D. 730 (N.D. Ala. April 3, 2017); Bland v. Sam’s East, 2019 WL 407406 (M.D. Ga. Jan. 31, 2019); Brewer v. Leprino, 2019 WL 356657 (E.D. Cal. Jan. 29, 2019); Brown Jordan v. Carmicle, 2016 WL 815827 (S.D. Fla. March 2, 2016); Cahill v. Dart, 2016 WL 7034139 (N.D. Ill. Dec. 2, 2016); DVComm. v. Hotwire, 2016 WL 6246824 (E.D. Pa. Feb. 3, 2016); First Am. Title v. Northwest Title, 2016 WL 4548398 (D. Utah Aug. 31, 2016); First Fin. Secur. v. Freedom Equity, 2016 WL 5870218 (N.D. Cal. Oct. 7, 2016); Goldrich v. City of Jersey City, 2018 WL 4489674 (D. N.J. Sept 19, 2018); Gonzalez-Bermudex v. Abbott, 214 F.Supp.3d 130 (D. P.R. Oct. 9, 2016); Hendrix v. Pitsicalis, 2018 WL 6191039 (S.D.N.Y. Nov. 28, 2018); Hsueh v. New York, 2017 WL 1194706 (S.D.N.Y. March 31, 2017); Moody v. CSX, 271 F. Supp.3d 410 (W.D.N.Y. Sept. 21, 2017); Nunally v. DC, 243 F. Supp.3d 55 (D.D.C. March 22, 2017); Nutrition Dist. v. PEP, 2018 WL 6323082 (S.D. Cal. Dec. 4, 2018); O’Berry v. Turner, 2016 WL 1700403 (M.D. Ga. April 27, 2016); Ottoson v. SMBC Leasing, 268 F. Supp.3d 570 (S.D.N.Y. July 13, 2017); Postle v. Silk Road, 2019 WL 692944 (D. N.H. Feb. 19, 2019); RealPage v. Enterprise Risk, 2017 WL 3313729 (E.D. Tex. Aug. 3, 2017); Ronnie Van Zant v. Pyle, 2017 WL 3721777 (S.D.N.Y. Aug. 28, 2017); White v. U.S., 2018 WL 2238592 (E.D. Mo. May 16, 2018); TLS Management and Mktg. v. Rodriguez-Toledo, 2017 WL 115743 (D. P.R. March 27, 2017).

¹¹⁹ In Crown Battery Manufacturing Co. v. Club Car, 185 F. Supp. 3d 987, 1004 (N.D. Ohio May 9, 2006) the court issued a “mandatory, non-rebuttable adverse-inference instruction that the missing evidence because the moving party was “without means” to prove a key fact. The court in O’Berry v. Turner, 2016 WL 1700403 (M.D. Ga. April 27, 2006) utilized a mandatory adverse inference without explaining its reasoning.

¹²⁰ See, e.g., Blazer v. Gall, 2019 WL 3494785, at *5 (D. South Dakota Aug. 1, 2019)(instruction permitting jury to presume missing content was adverse to parties but allowing “reasonable rebuttal”).

¹²¹ Minutes, Rules Committee Mtg, April 10-11, 2014 at 24. See, generally, Committee Note, subdivisions (e)(1) and (2); see also White v. U.S., 2018 WL 2238592, at *4 (E.D. Mo. May 16, 2018)(emphasizing distinction).

¹²² Morrison v. Veale, 2017 WL 372980, at *8 (M.D. Ala. Jan. 25, 2017)(“the harshest adverse inference instruction results in the court instructing the fact-finder that certain facts are deemed admitted and must be accepted as true”).

As discussed *supra*, the Committee Note states that, at their discretion, courts may choose to utilize juries to conclude whether the party acted with an intent to deprive. In *EEOC v. GMRI*, for example, the court explained that the jury would be permitted to reach an adverse inference “only if” it concluded the party acted with an intent to deprive.¹²³

Examples

In *GN Netcom v. Plantronics*,¹²⁴ *supra*, the jury was instructed that it could infer that deleted emails were relevant and material and favorable to one party’s case and/or harmful to the other. At the outset of the trial, it was read a series of “stipulated facts” and at its conclusion, it was told that its role was “to determine if [the party’s] spoliation had tilted the playing field against” the plaintiff and that it could make inferences “to balance that playing field, should you feel it is necessary.”¹²⁵

On appeal after a verdict against the moving party, the Court of Appeals remanded for a new trial, finding the choice of a permissive instruction to be appropriate, but also finding abuse of discretion in not allowing an expert to provide testimony on the scope of the spoliation in addition to the stipulations on the topic. The Court concluded that that the potential for prejudice from the testimony did “not outweigh, much less substantially outweigh, the evidence’s high probative value.”¹²⁶

In *Experience Hendrix v. Pitsicalis*, the court decided to instruct the “finder of fact that it could draw an adverse inference from the failure to preserve “the devices in question [computers, iPhones and a desktop computer] because they contained evidence of conduct in breach of legal duties in connection with the sale and marketing of Jim Hendrix-related materials.”¹²⁷

Impact of Denial

According to the Committee Note, in the absence of an intent to deprive, a court which is unable to impose an adverse inference instruction nonetheless has discretion to “permit[] the parties to present evidence and argument to the jury regarding the loss of information” including “instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies.”¹²⁸

¹²³ 2017 WL 5068372, at *31 (S.D. Fla. Nov. 2017) (observing that it is not necessary to make a predicate finding of “prejudice” to exercise this option, since an adverse inference is available without such a finding under Rule 37(e)(2)).

¹²⁴ 2016 WL 3792833, at *14 (D. Del. July 12, 2016).

¹²⁵ 2017 WL 273649 at *3 (D. Del. Oct. 5, 2017).

¹²⁶ 930 F.3d. 76 (3rd Cir. July 10, 2019) (the excluded testimony “could have shaped the jury’s verdict and the error in its exclusion was not harmless”).

¹²⁷ 2018 WL 6191039, at 10 (S.D.N.Y. Nov 28, 2018).

¹²⁸ According to the Committee Note, the court may instruct the jury “that it may consider that evidence, along with all the other evidence in the case, in making its decision.”

This option, directed at addressing prejudice under Rule 37(e)(1) by curative measures, is discussed in more detail in Part VII below.

2. Dismissals or Default Judgments

A finding of “intent to deprive” is also required for the imposition of a dismissal or default. However, courts are wary of issuing case-dispositive sanctions, and usually do so only “after consideration of alternative, less drastic sanctions.”¹²⁹

In *Malone v. Howard Weiss*, however, the court concluded that the only available remedy suitable for the “deleterious conduct” involved was outright dismissal of the party’s claims as a sanction for spoliation of evidence.¹³⁰ As the Supreme Court explained in *National Hockey League v. Metropolitan*, “[this] most severe in the spectrum” of sanctions must be available not just to “penalize” those who conduct warrants it but also to deter those who might be tempted to such conduct.¹³¹

In *Roadrunner Transportation v. Tarwater*, the Ninth Circuit affirmed a dismissal for deletion of data from laptop computers because a less drastic sanction could not have adequately redressed the prejudice.¹³² In *Global Material Tech. v. Dazheng Metal Fibre*, a dismissal was entered because an adverse inference would not be sufficient to “punish” the party for their dishonesty.¹³³

3. Equivalent Measures

Measures which have the same effect as those listed in subdivision (e)(2) also require a showing of “intent to deprive.” This includes the “strick[ing] of pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case.”¹³⁴

In the *Ethicon* medical products litigation,¹³⁵ for example, a court refused to strike statute of limitations and learned intermediary defenses in the absence of a showing of intentional conduct under Rule 37(e)(2).¹³⁶

Ordering that facts are established in order avoid the entry of summary judgment may require a finding of an intent to deprive.¹³⁷ In *Auer v. Minot*, the Eighth Circuit

¹²⁹ Cruz v. G-Star, 2019 WL 2521299, at *14 (E.D.N.Y. June 19, 2019).

¹³⁰ 2018 WL 3656482, at *7-9 (E.D. Pa. Aug. 2, 2018)(applying inherent authority).

¹³¹ 427 U.S. 639, 642 (1976).

¹³² 642 Fed. Appx. 759, 759-60 & n. 1 (9th Cir. March 18, 2016) (noting that the party had acted with the intent to deprive the other party of the spoliated information’s use in the litigation).

¹³³ 2016 WL 4765689, at *10 (N.D. Ill. Sept. 13, 2016). “In short, defendants lied.” *Id.* at *9.

¹³⁴ Committee Note.

¹³⁵ In re: Ethicon, 2016 WL 5869448, at *3-4 (S.D. West Va. Oct. 6, 2016).

¹³⁶ 2018 WL 7050211, at *7 (S.D. Tex. Nov. 20, 2018).

¹³⁷ Crumb v. Kohl’s Department Stores, 2019 WL 250178, at *2 & *4 (D. Colo. Jan. 17, 2019) (noting the importance of ruling on spoliation issues prior to summary judgement issues, citing *Helget v. City of Hays*, 844 F.3d. 1216, 1227 (10th Cir. 2017)).

required such a showing since “deciding a case on hypothesized evidence is strong medicine.”¹³⁸

In *GN Netcom v. Plantronics*, *supra*, the Third Circuit noted with approval that the District Court acted to “punish [the spoliating party] and to deter misconduct of this nature,” by levying “punitive sanctions and costs on [the party] to the tune of nearly five million dollars.” The trial had done so as part of a “package of sanctions in lieu of default judgment although it had found bad faith and intent to deprive.”¹³⁹

However, the Supreme Court has emphasized in *Goodyear Tire & Rubber*¹⁴⁰ that monetary penalties imposed for spoliation must be compensatory in nature to avoid due process concerns. It has been observed that the “courts [since *Goodyear* are] generally leery of imposing non-compensatory financial penalties as civil sanctions.”¹⁴¹ In *Paisley Park Enterprises v. Boxill*, nonetheless, a party was ordered to pay a “fine of \$10,000” to the court under Rule 37(e)(2).¹⁴²

VI: Addressing Prejudice

Subdivision (e)(1) provides that “upon finding prejudice to another party from loss of the information, [a court] may order measures no greater than necessary to cure the prejudice.”

The court is authorized to impose such measures only when a “finding of prejudice is made.”¹⁴³ The Rule does not define prejudice. However, the Committee Note explains that assessing prejudice “necessarily includes an evaluation of the information’s importance in the litigation.” It also notes that the rule “does not place a burden of proving or disproving prejudice on one party or the other” and “leaves judges with discretion to determine how best to assess prejudice in particular case.”¹⁴⁴

Some courts require a showing that the missing ESI would support the claim or defense.¹⁴⁵ In *Leon v. IDX Systems*, the Ninth Circuit held that “the prejudice inquiry looks to whether the spoiling party’s actions impaired the non-spoiling party’s ability to go

¹³⁸ 896 F.3d. 854, 2018 WL 3470195, at *2 (8th Cir. July 19, 2018).

¹³⁹ 930 F.3d. 76 (3rd Cir. July 10, 2019).

¹⁴⁰ ___ U.S. ___, 137 S. Ct. 1178, 1186 (2017).

¹⁴¹ Gregory P. Joseph, 1 SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 28(B)(1)(Fines)(5th Ed).

¹⁴² 330 F.R.D. 226, 238 (D. Minn. March 5, 2019)(also referencing the violation of a pretrial scheduling order); *cf* *Passlogix v. 2FA Technology*, 708 F. Supp. 2d 378, 422-23 (S.D.N.Y. 2010)(\$10K fine to U.S. District court for spoliation of ESI).

¹⁴³ Committee Note.

¹⁴⁴ “Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations.”

¹⁴⁵ *Ungar v. City of New York*, 329 F.R.D. 8 (E.D.N.Y. Nov. 2, 2018).

to trial or threatened to interfere with the rightful decision of the case.”¹⁴⁶ In *Storz Management v. Carey*, the court refused to impose measures because the movant was “unable to articulate how defendants’ action impaired a claim or defense.”¹⁴⁷

In *Jenkins v. Woody*, however, the prejudice was obvious because loss of the surveillance video prevented use of the “best and most compelling evidence” of the events at issue.¹⁴⁸ In *4DD Holdings v. United States*, the “inexcusably shoddy” efforts to preserve, created prejudice because the party had to “cobble[] together secondary evidence” because of the gaps created by the loss.¹⁴⁹

Mere speculation about the impact of the missing ESI does not suffice. In *ML Healthcare Services v. Publix Super Markets*, the Eleventh Circuit found prejudice lacking where the alleged importance of the missing video was “purely speculation and conjecture.”¹⁵⁰ Similarly, in *Creative Movement & Dance v. Pure Performance*, the party failed to “detail” how the missing evidence would affect the underlying case.¹⁵¹

On the other hand, in *Matthew Enterprise v Chrysler*, it was enough that the lost emails “could” have contained information which would have permitted Chrysler to present anecdotal evidence to undercut statistical evidence.¹⁵² In *Sinclair v. Cambria County*, a “plausible, good-faith explanation” of what missing text messages may have included sufficed.¹⁵³

Courts may place the burden on the non-moving party. In *Drive Time Car Sales v. Pettigrew*, the court refused to require the moving party to prove that prejudice existed because it would be unjust to do so.¹⁵⁴ When a party acts in bad faith, courts are prepared to place the burden on that party to show a lack of prejudice¹⁵⁵ based on a presumption as to its presence.

The Note observes, however, that when the “abundance of preserved information” is enough to meet the needs of all parties, it is reasonable to decline to find prejudice. In *Holguin v. AT&T*, the party failed to explain why the available discovery was “insufficient

¹⁴⁶ 464 F.3d 951, 959 (9th Cir. Sept. 20, 2006 (finding prejudice because the deletion threatened to distort the resolution of the case).

¹⁴⁷ 2019 WL 2615755, at *5 (E.D. Cal. June 26, 2019).

¹⁴⁸ 2017 WL 362475, at *18 (E.D. Va. Jan. 21, 2017)(allowing all parties to present evidence and argument at trial about the failure to preserve, precluding argument that the contents corroborated the defendants version and informing the jury that the video was not preserved).

¹⁴⁹ 143 Fed. Cl. 118 (Ct. Claims, May 10, 2019); cf. *In re Ethicon*, 2016 WL 5869448, at *4 (S.D. W. Va. Oct. 6, 2016)(finding no prejudice from having to “to piece together information from other sources to try to recover relevant documents” when the party did not provide the court with “any concrete finding of prejudice to her case as a whole”).

¹⁵⁰, 881 F. 3d 1293 (11th Cir. Feb. 7, 2018).

¹⁵¹ 2017 WL 4998649, at *16 (N.D. Ga. July 24, 2017).

¹⁵² 2016 WL 2957133, at *4 (N.D. Cal. May 23, 2016).

¹⁵³ 2018 WL 4689111, at *2 (W.D. Pa. Sept. 28, 2018).

¹⁵⁴ 2019 WL 1746730, at *5 (S.D. Ohio April 18, 2019).

¹⁵⁵ See, e.g., *Micron technology v. Rambus*, 645 F. 3d 1311, 1328 (Fed. Cir. 2011)(if it is shown that the spoliator acted in bad faith, it must bear the burden of showing “a lack of prejudice to the opposing party”).

to meet his needs.”¹⁵⁶ In *Snider v. Danfoss*, prejudice was lacking since some emails were recovered from other recipients and the plaintiff could testify as to the contents of others.¹⁵⁷

In *Borum v. Brentwood Village*, the expenditure of “additional time and effort” incurred in litigating the spoliation issue sufficed to justify imposing monetary sanctions in the form of attorneys’ fees and costs.¹⁵⁸

VII: Curative Measures

Rule 37(e)(1) provides that a court may order proportional measures to cure prejudice shown to have resulted from the lost ESI. A broad range of measures are available and there is no “all-purpose hierarchy of the severity” of the measures. “Much is entrusted to the court’s discretion.”¹⁵⁹

Curative measures are available for remediation of prejudice caused merely negligent or grossly negligent conduct.¹⁶⁰ However, they also likely may be ordered, as appropriate, to supplement severe measures awarded under Rule 37(e)(2).

1. Admission of Spoliation Evidence

According to the Committee Note, a court may permit parties to “present evidence and argument to the jury regarding the loss of information or giving the jury instructions to assist in its evaluation of such evidence or argument.” It may also instruct the jury that it “may consider that evidence, along with all the other evidence in the case, in making its decision.”

However, the jury may not be instructed that it can conclude that the missing ESI was “adverse” based on its loss alone.¹⁶¹

The use of the option is entirely discretionary. In *Gaina v. Northridge Hospital Medical Center*, for example, the court did not offer it to the moving party after failing to find an “intent to deprive,” despite having highlighted its availability in the opinion summarizing its ruling.¹⁶²

¹⁵⁶ 2018 WL 6843711, at *7-8 (W.D. Tex. Nov. 8, 2018).

¹⁵⁷ 2017 WL 2973464 (N.D. Ill. July 12, 2017), *report and recommendation adopted*, 2017 WL 3268891 (N. D. Ill 2017); *accord* Living Color Enterprises v. New Era, 2016 WL 1105297 (S.D. Fla. March 22, 2016) (citing Committee Note).

¹⁵⁸ 2019 WL 3239243, at *10 (D.D.C. July 18, 2019)(citing *Karsch v. Blink Health*, 2019 WL 2708125, at *13 (S.D.N.Y. June 20, 2019). *See also* “Monetary Sanctions,” *infra*.

¹⁵⁹ Committee Note.

¹⁶⁰ *Cignex Datamatics v. Lam Research*, 2019 WL 1118099, at *2 (D. Del. March 11, 2019).

¹⁶¹ The Discovery Subcommittee had proposed that the jury could be instructed that it could determine that the loss information was “unfavorable.” Proposed Committee Note, Subcommittee Report at 22, copy at Agenda Book, Rules Mtg. April 10-11, 2014 at 390 of 580.

¹⁶² 2018 WL 6258895, at n. 4 (C.D. Cal. Nov. 11, 2018).

While some commentators have dismissed this as a “small escape hatch based on language in a Note and not in Rule 37,”¹⁶³ it has, in fact, become an attractive option for many courts loath to deny evidentiary relief for negligent spoliation.¹⁶⁴

In *Leidig v. BuzzFeed*, for example, where it was conceded that prior to the Amendment, the moving party “might have” obtained a harsh sanction “such as an adverse inference instruction,” that measure was unavailable because of a lack of intent to deprive.¹⁶⁵

Nonetheless, because the conduct had resulted in prejudice, the court authorized the party to present evidence and arguments about the spoliation to the jury.¹⁶⁶

¹⁶³ Richard Briles Moriarty, *And Now For something Completely Different: Are The Federal Civil Discovery Rules Moving Forward Into a New Age or shifting Backwards into a “Dark” Age?*, 39 AM. J. TRIAL ADVOC. 227 (Fall, 2015).

¹⁶⁴ Examples include: *Bank Direct v. Capital Premium*, 2018 WL 1616725 (N.D. Ill. April 4, 2018); *Barry v. Big M.*, 2017 WL 3980549 (N.D. Ala. Sept. 11, 2017); *BMG Rights Mgt. v. Cox Comm.*, 199 F. Supp. 3d 958 (E.D. Va. Aug. 8, 2016); *Cahill v. Dart*, 2016 WL 7034139 (N.D. Ill. Dec. 2, 2016); *Coan v. Dunne*, 2019 WL 1620412 (D. Conn. April 16, 2019); *Coward v. Forestar Realty*, 2017 WL 8948347 (N.D. Ga. Nov. 30, 2017); *EEOC v. GMRI*, 2017 WL 5068372 (S.D. Fla. Nov. 1, 2017); *Dotson v. Edmonson*, 2018 WL 501511 (E.D. La. Jan. 22, 2018); *Drivetime Car Sales v. Pettigrew*, 2019 WL 1746730 (S.D. Ohio April 18, 2019); *EPAC Technologies v. HarperCollins*, 2018 WL 322305 (M.D. Tenn. May 14, 2018); *Epicor v. Alt. Technologies*, 2015 WL 12734011 (C.D. Fla. Dec. 17, 2015); *Ericksen v. Kaplan*, 2016 WL 695789 (D. Md. Feb. 22, 2016); *Estate of Esquivel v. Brownsville*, 2018 WL 7050211 (S.D. Tex. Nov. 20, 2018); *First Am. Title v. Northwest Title*, 2016 WL 4548398 (D. Utah Aug. 31, 2016); *Fishman v. Tiger Natural Gas*, 2018 WL 6068295 (N.D. Cal. Nov. 20, 2018); *Franklin v. Howard Brown Center*, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018), *R & R adopted* 2018 WL 5831995 (N.D. Ill. Nov. 7, 2018); *Gipson v. Mngt.*, 2018 WL 736265 (S.D. Miss. Feb. 6, 2018); *Goldrich v. City of Jersey City*, 2018 WL 4492932 (D.N.J. Sept. 19, 2018); *Hamilton v. Ogden Weber Technical College*, 2017 WL 5633106 (D. Utah Nov. 21, 2017); *HLV v. Page & Stewart*, 2018 WL 2197730 (W.D. Mich. March 2, 2018); *Hunting Energy Services v. Kavadas*, 2018 WL 4539818 (N.D. Ind. Sept. 20, 2018); *Jackson v. E-Z-Go Division of Tectron*, 2018 WL 3575924 (W.D. Ky. July 25, 2018); *Jenkins v. Woody*, 2017 WL 362475 (E.D. Va. Jan. 21, 2017); *Karsch v. Blink Health*, 2019 WL 2708125 (S.D.N.Y. June 20, 2019); *Leidig v. BuzzFeed*, 2017 WL 6512353 (S.D.N.Y. Dec. 19, 2017); *Lexpath v. Welch*, 744 Fed. Appx. 74 (3rd Cir. July 30, 2018); *Lokai v. Twin Tiger*, 2018 WL 1512055 (S.D.N.Y. March 12, 2018); *Mfg. Automation v. Hughes*, 2019 WL 266970 (C.D. Cal. Jan. 15, 2019); *Matthew Enterprise v. Chrysler*, 2016 WL 2957133 (N.D. Cal. May 23, 2016); *McQueen v. Aramark*, 2016 WL 6988820 (D. Utah Nov. 29, 2016); *Montgomery v. Iron Rooster-Annapolis*, 2017 WL 1902699 (D. Md. May 9, 2017); *Mueller v. Taylor Swift*, 2017 WL 3058027 (D. Colo. July 19, 2017); *Muhammad v. Mathena*, 2017 WL 395225 (W.D. Va. Jan. 27, 2017); *Nuvasive v. Madsen Medical*, 2016 WL 305096 (S.D. Cal. Jan. 26, 2016); *Oppenheimer v. City of La Habra*, 2017 WL 1807596 (C. D. Cal. Feb. 17, 2017); *Porter v. City and County of SF*, 2018 WL 4215602 (N.D. Cal. Sept. 5, 2018); *Schmalz v. Village of N. Riverside*, 2018 WL 1704109 (N.D. Ill. March 23, 2018); *Security Alarm v. Alarm Protection*, 2016 WL 7115911 (D. Ala. Dec. 6, 2016); *SEC v. CKB168 Holdings*, 2016 U.S. Dist. LEXIS 16533 (E.D.N.Y. Feb. 2, 2016); *Shaffer v. Gaither* 2016 WL 6594126 (W.D. N.C. Sept. 1, 2016); *Small v. Univ. Medical*, 2018 WL 3795238 (D. Nev. Aug. 8, 2018); *Sosa v. Carnival Corp.*, 2018 WL 6335178 (S.D. Fla. Dec. 4, 2018); *Storey v. Effingham Co.*, 2017 WL 2623775 (S.D. Ga. June 16, 2017); *Virtual Studios v. Stanton Carpet*, 2016 WL 5339601 (N.D. Ga. June 23, 2016); *White v. U.S.*, 2019 WL 2238592 (E.D. Mo. May 16, 2018); *Waymo LLC v. Uber Technologies*, 2018 WL 646701 (N.D. Cal. Jan. 30, 2018); *Williford v. Carnival Corporation*, 2019 WL 2269155 (S.D. Fla. May 28, 2019); *Willis v. Cost Plus*, 2018 WL 1319194 (W.D. La. March 12, 2018)(ignoring Rule).

¹⁶⁵ 2017 WL 6512353, at *11 (Dec. 19, 2017)(the movant has shown only an intent to perform an act that destroys ESI).

¹⁶⁶ *Id.* at *12-14 & at n. 12 (leaving open the question of requesting a permissive instruction at the time).

Examples

In *EPAC Technologies v. Thomas Nelson*,¹⁶⁷ the court permitted the moving party “to present evidence and argument to the jury regarding the loss” of certain data after concluding that there was no intent to deprive. The jury was told the party had negligently failed to preserve data, now lost, which “may have shown” information about sales, returns, customer complaints and other information. It was also told that “[y]ou may give this whatever weight you deem appropriate as you consider all the evidence presented at trial.”¹⁶⁸

In *BMG Rights Management v. Cox Communication*, the court “alerted the jury to the fact of spoliation, identified the missing evidence, and permitted them to consider that fact in their deliberations.” It also gave the party “leave to identify the spoliation issue in its opening statement” and at the close of trial told the jury that they “may, but are not required to, consider the absence” of the missing evidence.¹⁶⁹

In *Tipp. V. Adeptus*, involving the shredding of handwritten notes, the court admitted evidence and argument about the spoliation to the jury, citing the Committee Note as justification for not permitting an adverse inference, while acknowledging that Rule 37(e) did not govern the matter.¹⁷⁰

For an evaluation of this use of the jury and the risks of undue prejudice and jury confusion involved, see Part VIII, *infra*, Jury Management.

2. Preclusion of Evidence

The preclusion of evidence or testimony at trial does not necessarily require a showing of intent to deprive according to the Committee Note.¹⁷¹ In *Ericksen v. Kaplan*, a party was barred from offering an email into evidence because of deletion of information contradicting its authenticity. This was done in order to “cure the prejudice” by eliminating any risk the jury would deem them authentic.¹⁷²

In addition, the jury was to be instructed that they might consider the circumstances of the loss along with other evidence at the trial.¹⁷³

¹⁶⁷ 2018 WL 3322305, at *3 (M.D. Tenn. May 14, 2018).

¹⁶⁸ The District Judge refused the Magistrate Judge’s recommendation that the missing evidence “would have shown” the information existed in order to conform to the spirit of Rule 37(e)(1). 2018 WL 1542040, at *26 (M.D. Tenn. March 29, 2018). After a verdict in favor of the moving party and the court refused to consider objections to adverse inferences used. 2019 WL 2724795 (M.D. Tenn. July 1, 2019).

¹⁶⁹ 199 F. Supp. 3d 958, 985 (E.D. Va. Aug. 8, 2016).

¹⁷⁰ 2018 WL 2018 WL 447256, at *4-5 (D. Ariz. Jan. 17, 2018). The court decided to allow the moving party to present evidence of the destruction and argue, as a minimum, that the notes would have been helpful to the parties case.

¹⁷¹ Committee Note.

¹⁷² 2016 WL 695789, at *2 (D. Md. Feb. 22, 2016).

¹⁷³ *Id.*

However, a finding of intent to deprive is needed to preclude “a party from offering any evidence in support of, the central or only claim or defense in the case.”¹⁷⁴ In *Estate of Esquivel v. Brownsville*, a court refused to preclude a party from introducing alternative causation evidence which would eliminate a central defense.¹⁷⁵

In *CAT3 v. Black Lineage*,¹⁷⁶ a party was precluded from relying on an altered version of lost email which “obfuscated” the record by placing authenticity of both original and subsequently produced email at issue. This measure was ordered as an alternative to ordering dismissal or an adverse inferences, which were available, because it adequately protected the party from legal prejudice resulting from the party’s conduct.¹⁷⁷

In *Leidig v. Buzzfeed*, the court precluded a party that had negligently failed to preserve content of a website from arguing that use of evidence from the internet archive by the innocent party was inadmissible.¹⁷⁸ In *Matthew Enterprise v. Chrysler Group*, permitted the party to introduce evidence and argument about the loss of ESI if the party that lost the evidence raised the issue of the missing content.

3. Missing Evidence Instructions

In *Mali v. Federal Insurance*,¹⁷⁹ the Second Circuit approved a jury instruction permitting a jury to infer that a missing photograph “would have been unfavorable” without making a predicate finding of intentional conduct. The Discovery Subcommittee discussed the impact of *Mali* and concluded that it involved a “curative missing evidence instruction,”¹⁸⁰ since there was credible evidence that the missing evidence existed at the time of trial.¹⁸¹

Accordingly, the Committee Note provides that Rule 37(e)(2) does not “limit” the discretion of a court to give “traditional missing evidence instructions based on a parties failure to present evidence it has in its possession at the time of the trial.”¹⁸² The relevant distinction, based on the factors involved, is that the party has the evidence in its “possession” and chooses not to produce it; it is not unavailable because of a failure to preserve at some point prior to trial.

¹⁷⁴ *Id.* (“an example of an inappropriate (e)(1) measure might be an order ... precluding a party from offering any evidence in support of, the central or only claim or defense in the case.”)

¹⁷⁵ 2018 WL 7050211, at *7 (S.D. Tex. Nov. 20, 2018) (refusing to preclude alternative causation theory).

¹⁷⁶ 164 F.Supp.3d 488 (S.D. N.Y. Jan. 12, 2016).

¹⁷⁷ *Id.* at 502 (the harsher alternatives would “unnecessarily hamper the [non-moving] parties in advancing what might, in fact, be legitimate claims”).

¹⁷⁸ 2017 WL 651253, at *14 and n. 12 (S.D. N.Y. Dec.19, 2017).

¹⁷⁹ 720 F3d 387 (2nd Cir. 2013).

¹⁸⁰ Minutes, Discovery Subcommittee, February 8, 2014, *supra*, at 3 (“the district court [in Mali] gave a curative missing evidence instruction, leading to a defense verdict”).

¹⁸¹ 720 F.3d 387 at 391.

¹⁸² See e.g., *Bell Aerospace Services v. U.S. Aero Services*, 2010 WL 11425322, at *3 (M.D. Ala. Feb. 18, 2010) (allowing “the jury [to] make its own inference” as to whether the missing evidence would have supported its claim).

Mali also famously noted that the permissible instruction it used was “no more than an explanation of the jury’s fact-finding powers” because it had not been given as a sanction.¹⁸³ Not all forms of permissive jury instructions require a showing of culpable intent. For example, the instructions available under Rule 37(e)(1) to assist the jury in evaluating evidence and argument about spoliation are examples of permissive instructions which do not require such a finding.¹⁸⁴

4. Monetary Sanctions (Attorney’s Fees)

Courts routinely award monetary sanctions under Rule 37(e) in addition to monetary or evidentiary remedies available under the Rule, often without citing authority for their action. This permits recovery of the expenditure of time and effort necessary to bring the issue of spoliation before the court.¹⁸⁵ In *Experience Hendrix v. Pitsicalis*, the court ordered payment of the fees and costs incurred in “bringing and litigating” under the Rule.¹⁸⁶

Courts have also ordered reimbursement of attorney’s fees and costs as monetary sanctions without also imposing other forms of relief.¹⁸⁷ In *Adriann Borum v. Brentwood Village*, for example, the court imposed monetary sanctions alone in the form of fees and costs.¹⁸⁸

Some have highlighted the lack of explicit authority in the Rule to award attorney’s fees and expenses in Rule 37(e).¹⁸⁹ In *Snider v. Danfoss*, for example, the court noted that “absent from Rule 37(e) is the mention of attorneys’ fees as a sanction, either for having to file the motion or for the failure to preserve the ESI.”¹⁹⁰ However, the requirement of

¹⁸³ *Id.* at 393 (“[w]hile such an instruction is indeed an ‘adverse inference instruction,’ in that it explains to the jury that it is at liberty to draw an adverse inference . . . it is no more than an explanation of the jury’s fact-finding powers”).

¹⁸⁴ *Cf.* Hon Shira A. Scheindlin and Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 *FORDHAM L. REV.* 299, 1301 (2014); *Leidig v. BuzzFeed*, 2017 WL 6512353, at n. 12 (S.D. N.Y. Dec. 19, 2107)(there is a type of adverse inference does not necessarily reflect a sanction and does not require as intent to deprive).

¹⁸⁵ *CAT3 v. Black Lineage*, 164 F. Supp.3d 488, 502 (S.D.N.Y. Jan. 12, 2016) (addressing “economic” prejudice). *Jenkins v. Woody*, 2017 WL 362475, at *18 (E.D. Va. Jan. 21, 2017) (awarding fees and expenses to moving party as necessary but not greater than necessary to cure significant prejudice incurred). Typically, the non-moving party is required to make the payment. In *Monica Gaina v Northridge Hospital Medical Center* 2018 WL 6258895, at *6 (C.D. Cal. Nov. 21, 2018), however, the court ordered counsel for the party to pay the fees incurred in bringing the motion.

¹⁸⁶ 2018 WL 6191039, at *11 (S.D.N.Y. Nov. 28, 2018).

¹⁸⁷ *Phoneix Four v. Strategic Resources*, 2006 WL 1409413, at *9 (S.D. N.Y. May 23, 2006) (citing *Turner v. Hudson Transit Lines*, 142 F.R.D. 68, 77 (S.D.N.Y. 1991)).

¹⁸⁸ 2019 WL 3239243, at *7, *9-10 (D.D.C. July 18, 2019).

¹⁸⁹ Steven Baicker-McKee, *Mountain or Molehill?*, *supra*, 55 *DUQ. L. REV.* 307, 321 (2017)(“This anomalous lack of authority for an attorney’s fees. in Rule 37(e) seems like an oversight, and may be corrected by the Advisory Committee or the courts over time”).

¹⁹⁰ 2017 WL 2973464, at *5 (N.D. Ill. July 12, 2017)(“[a]nd the Advisory Committee Notes are shockingly silent on the issue as well”).

specific authority under the American Rule¹⁹¹ is met. The Subcommittee approved the award as routine¹⁹² and until the final revisions it was in the text of the Rule. This is not the only example of authority existing for fee shifting under such circumstances.¹⁹³

Some courts have incorrectly rely on Rule 37(a) authority.¹⁹⁴ In *Ottoson v. SMBC Leasing*, the court interpreted that rule to apply “when[ever] a discovery motion is granted pursuant to Rule 37.” However, Rule 37(a) is inapplicable.¹⁹⁵ As explained in *Wal-Mart Stores v. Cuker Industries*, however, the rule “pertains” only to denials of motions to compel disclosure or discovery.”¹⁹⁶

Other courts rely on their inherent authority, as was also the case prior to the Rule,¹⁹⁷ although it is best seen as available only upon a showing of bad faith conduct. In *Klipsch Group v. EPRO E-Commerce*, the Second Circuit approved an award of \$2.6M of fees and expenses where it found bad faith to exist.¹⁹⁸ It rejected the argument that this was a “punitive measure[] that violate [the party’s] due process right[s],” since it reimbursed for the legal bills that the litigation abuse occasioned.¹⁹⁹

VIII: Jury Management

The enhanced court discretion for use of the jury as advocated in the Committee Note has called attention to policy concerns necessarily involved in such an expanded role. We deal here with several of them.

Determining Intent to Deprive

The Committee Note - not the Rule - acknowledges use of the jury to determine whether the failure to preserve ESI has involved an “intent to deprive.” It provides elaborate instructions that eventuality.²⁰⁰

¹⁹¹ *Baker Botts v. ASARCO*, ___ U.S. ___, 135 S. Ct. 2158, 2164 (2015) (only Congress may authorize courts to shift the costs of adversarial litigation).

¹⁹² *See, e.g.*, Minutes, March 4, 2014 Subcommittee Meeting, Agenda Book, April 10-11, 2014, at 440.

¹⁹³ *Horowitz v. 148 South Emerson*, 888 F.3d 13, 24-26 (2nd Cir. April 20, 2018) (interpreting Rule 41(d) to permit fee shifting despite absence of express authority in the Rule).

¹⁹⁴ Rule 37(a)(5)(A).

¹⁹⁵ *See e.g.*, *Best Payphones v. New York City*, 2018 WL 3613020 at *3 (E.D.N.Y. July 27, 2018)(rejecting conclusion that Rule 37(a) provided authority to award fees and expenses for successful spoliation motions)

¹⁹⁶ 2017 WL 239341, at 239341 (W.D. Ark. Jan. 19, 2017).

¹⁹⁷ *See, e.g.*, *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284 (S.D.N.Y. 2009) and *In re Ethicon*, 299 F.R.D. 502 (S.D. W. Va. 2014).

¹⁹⁸ 880 F. 2d. 620, 633-636 & n. 6 (2018)(noting that it had “no occasion” to determine if the Rule applied since it had found bad faith).

¹⁹⁹ *Id.* at n. 7 (citing *Goodyear Tire v. Haeger*, 137 S. Ct. 1178 (2017)).

²⁰⁰ “If a court were to conclude that the intent finding should be made by a jury, the court’s instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information’s use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.”

Prior to the Rule, commentators had cautioned against such jury involvement due to the risk of undue prejudice and jury confusion.²⁰¹ The argument was also made that this was an inappropriate allocation of responsibility as between court and jury.²⁰²

However, a court must be satisfied that sufficient evidence exists from which intent could be found²⁰³ before assigning the fact-finding task to the jury.²⁰⁴ Moreover, there is precedent for the enlisting the jury in assessing spoliation intent. In *Rimkus Consulting v. Cammarata*, for example, the court instructed that only if the jury found there had been bad-faith destruction of evidence could draw the inference that the lost information would have been unfavorable.²⁰⁵

In *Lexpath Tech. Holdings v. Welch*, a panel in the Third Circuit observed that “[w]e have not yet spoken to the proper ‘division of fact-finding’ labor [between court and jury], but “a district court’s findings of fact in deciding a pretrial motion cannot foreclose a jury from making its own factual findings.”²⁰⁶ In *Sosa v. Carnival*, the court held it was not clearly erroneous or contrary to law for the jury to hear evidence and decide whether the party had acted with an intent to deprive, noting the lack of any authority for the argument.²⁰⁷

It had earlier appropriately noted that if the jury did not find “intent” to exist, presenting the evidence and argument to the jury was authorized as a curative measure under Rule 37(e)(1),²⁰⁸ citing to the Committee Note. Judge Scheindlin has argued that “[w]hile trial courts typically resolve evidentiary matters, the evaluation of competing factual scenarios and determining a party’s intent are exactly the type of functions that juries routinely perform.”²⁰⁹

²⁰¹ Wm. Grayson Lambert, *Keeping the Inference in the Adverse Inference Instruction: Ensuring the Instruction is an Effective Sanction in Electronic Discovery Cases*, 64 S.C.L. Rev. 681, 702, n. 140 (2013)(the decision “cannot be entrusted to a jury because knowledge of the facts, even if ultimately never to be admitted into evidence at trial, could be so prejudicial to a party”).

²⁰² *Nucor Corp. v. Bell*, 251 F.R.D. 181, 203 (D. S.C. Feb. 1, 20018). See, e.g., Hon. David C. Norton, Justin M. Woodward, Grace A. Cleveland, *Fifty Shades of Sanctions: What Hath the Goldsmith’s Apprentice Wrought?*, 64 S. C. L. REV. 459, 494 (Spring 2013)(“[i]t is time to forgo jury instructions that allow jurors to consider anew whether spoliation occurred after a judge trained in the law has already made such a finding”). Judge Norton served on the Evidence Advisory Committee and issued the decision in *Nucor Corp. v. Bell*.

²⁰³ *Franklin v. Howard Brown*, 2018 WL 4784668 at *7 (N.D. Ill. Oct. 4, 2018), *report and recommendation adopted*, 2018 WL 5831995, at *1 (N.D. Ill. Nov. 7, 2018)(permitting evidence and argument to the jury” regarding failure to preserve evidence).

²⁰⁴ Gregory P. Joseph, *Rule 37(e): The New Law of Electronic Spoliation*, 99 JUDICATURE 35, 40 (Winter 2015)(hereinafter “Joseph”)(it functions as a question of conditional relevance under FRE 104(b)).

²⁰⁵ 688 F. Supp.2d 598, 620 (S.D. Tex. 2010); Cf. *Pension Committee v. Banc of America Securities*, 685 F. Supp.2d 456, 470 & n. 251 (S.D.N.Y. 2010)(suggesting that the jury was “bound” by the court’s determination that “as a matter of law” that parties had destroyed documents after the duty to preserve had arisen).

²⁰⁶ 744 Fed. App. 74 (3rd Cir. July 30, 2018).

²⁰⁷ 2019 WL 330865 at *3 (S.D. Fla. Jan. 25, 2019).

²⁰⁸ 2018 WL 6335178, at *3 (S.D. Fla. Dec. 4, 2018).

²⁰⁹ Hon. Shira A. Scheindlin and Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 FORDHAM L. REV. 1299, 1309 (2014).

Admitting Evidence and Argument of Spoliation

As a practical matter, a court has ample discretion to admit evidence and argument to assist the jury when faced with resolving disputed issues of material fact relating to spoliation.²¹⁰

The most obvious example is when a court has decided to give an adverse inference instruction under Rule 37(e)(2). The existence of spoliation becomes an issue for the jury to consider, and evidence relating to it easily clears relevance hurdle of Rule 401 and 402. Evidence of spoliation is also admissible and relevant under Rule 37(e)(1) if prejudice exists and the evidence has a tendency to make factual allegations material to the case more probable than it would be without the evidence.²¹¹

In *Karsch v. Blink*, for example, the court justified admission of such evidence because it would help rectify the evidentiary imbalance, provide context for the fact-finder, allow it to assess credibility and help the court to determine the proper scope of the evidence to be admitted and to craft related instructions.²¹² In *Waymo v. Uber Technologies*, the court planned to admit evidence and argument about spoliation when it reasonably bears on the merits.²¹³

Admission of the such evidence assists the jury in fulfilling its assigned responsibility and may be essential to providing a fair trial.²¹⁴ According to the Chair of the Discovery Subcommittee, there is a “proper evidentiary aspect to lost information, something that is not a ‘sanction.’”²¹⁵

It has been argued that reliance on the common sense and experience of the jury in dealing with the ambiguities of spoliation evidence may improve the outcomes.²¹⁶ This is because “contrasting though reasonable inferences may be drawn from almost any piece of [spoliation] evidence.”²¹⁷ Moreover, when intent to deprive – a tough standard to satisfy

²¹⁰ *Paice v. Hyundai Motor Co.*, 2015 WL 4984198 (D. Md. Aug. 18, 2015) (court must make initial determination under FRE 104(a) and should not admit evidence about missing ESI which is not relevant for purposes of punishing and which would divert trial).

²¹¹ *See, e.g., Dalcour v. City of Lakewood*, 492 F.3d Appx. 924, 937 (10th Cir. 2012).

²¹² 2019 WL 2708125, at *27 (S.D.N.Y. June 20, 2019),

²¹³ 2018 WL 646701, at *22-23 (N.D. Cal. Jan. 30, 2018)(it will not be allowed to “consume the trial to the point that it becomes a distraction from the merits or turns into a public exercise of character assassination”).

²¹⁴ *Issa v. Delaware State Univ.*, 2019 WL 1883768, at *1 (D. Del. April 26, 2019).

²¹⁵ Minutes, April 10-11, 2014 Rules Committee Meeting, at 24 (discussing examples of when a court “might instruct the jury that it is proper to evaluate the loss as suggested by the evidence and arguments”).

²¹⁶ Charles W. Adams, *Spoliation of Electronic Evidence: Sanctions Versus Advocacy*, 18 MICH.

TELECOMM. TECH. L. REV. 1, 6, 56 – 59 (2011) (“the better remedy for spoliation is attorney advocacy rather than sanctions”).

²¹⁷ *GN Netcom v. Plantronics*, 2016 WL 3792833, at *14 (D. Del. July 12, 2016)(deletion of emails may be viewed by a reasonable jury as part of a massive cover-up or the result of a misguided fear that innocuous conduct might be misunderstood by a factfinder); *rev’d and remanded for new trial on other grds*, 930 F.3d 76 (3rd Cir. July 10, 2019).

- does not exist, submitting the evidence and argument to the jury to address prejudice provides an alternative evidentiary remedy. As a member of the Discovery Subcommittee presciently explained, “[the court] “should not be left with a choice between using serious sanctions and doing nothing.”²¹⁸

However, the Committee Note cautions that a jury may not be instructed that it “may draw an adverse inference *from loss of information*” unless the court or the jury has determined that an intent to deprive exists. Otherwise, the jury may only be told that it can “consider that evidence, *along with all the other evidence in the case*, in making its decision.”²¹⁹ (emphasis added)

Nonetheless, it seems probable the juries will default to the functional equivalent of an adverse inference instruction for merely negligent conduct when the instruction is given in that form.²²⁰ As the court in *Mueller v. Taylor Swift* pointed out, “[the jury] will draw their own adverse inferences, whether the Court instructs it or not.”²²¹

Limiting Undue Prejudice and Confusion

A historic concern about admitting evidence and argument about spoliation during a trial on the merits has been the risk of unfair prejudice and confusion of the jury. The evidence may “brand” one party as a bad actor in the eyes of the jury and “open the door” to inappropriate speculation.²²² Courts have serious reservations about evidence may provide an “improper character inference from the bad act of spoliation”²²³

Moreover, introducing spoliation evidence may involve “time consuming mini-trials” on minimally relevant issues. For example, in *Caprarotta v. Entergy Corporation*, a Court of Appeals reversed and ordered a new trial because the “minuscule” probative value of spoliation evidence was outweighed by the danger of “unfair prejudice and confusion of the issues” under FRE 403.

FRE 403 authorizes a court to exclude relevant evidence of spoliation if its probative value is outweighed by unduly prejudicial impact or the risk of confusing the

²¹⁸ Minutes, August 7, 2012 Discovery Subcommittee Call, at 5; copy at Agenda Book, Rules Comm. Mtg., Nov. 1-2, 2012 at 175 of 542.

²¹⁹ The Subcommittee Report issued prior to the adoption of the final version of the Rule had proposed that the jury acting without a finding of “intent to deprive” could be told that “it may determine from the evidence presented during the trial – as opposed to inferring from the loss of information alone – whether the lost information was favorable or unfavorable to positions in the litigation.” Subcommittee Report, at 11-12. The final version of the Committee Note dropped the reference to determining unfavorability.

²²⁰ Alexander Nourse Gross, *A Safe Harbor From Spoliation Sanctions: Can An Amended Federal Rule of Civil Procedure 37(e) Protect Producing Parties*, 2015 COLUM. BUS. L. REV. 705, 756- (2015).

²²¹ 2017 WL 3058027, at *5-6 (D. Colo. July 19, 2017). See e.g., Tadler and Kelston, *supra*, 52- JAN TRIAL at 24 (“In other words, it is possible that if a party satisfies the preamble, the jury might make an adverse inference on its own, based on the arguments and evidence presented”).

²²² *Henning v. Union Pacific R. Co.*, 530 F.3d 1206, 1219-20 ((10th Cir. 2008).

²²³ *Sanchirico, supra*, 53 DUKE L. J. 1215, at n. 297 (citing *Caparotta v. Entergy corp.*, 168 F.3d 754, 756 (5th Cir. 1999).

jury.²²⁴ Various options are available. In *Manufacturing Automation v. Hughes*, for example, a court excluded evidence of a prior spoliation sanction imposed during discovery but allowed the moving party to examine witnesses about missing ESI that “may pertain” to the moving party’s claims.²²⁵

Courts may also employ limiting instructions.²²⁶ As noted in *Issa v. Delaware State Univ.*, while admission of evidence may bring with it “a risk of unfair prejudice confusion of the jury and a waste of time,” any party may propose a limiting instruction at or around the time of admission of the evidence or as part of the final jury instructions.”²²⁷

In *Boone v. Everett*, for example, the trial court instructed the jury that it “was not permitted” to draw any inference from the destruction of a surveillance tape under the circumstances.²²⁸ However, excluding relevant trial evidence comes with a risk. In *GN Netcom v. Plantronics*, *supra*, the Third Circuit ordered a new trial because the decision by the trial court to bar expert testimony in favor of a limited use of written stipulations.²²⁹

IX: Conclusion

“[This proposal is a good rule. It can be adopted, and then tested in application. We will learn more from how it works.” Hon. David Campbell, Chair, Civil Rules Advisory Committee, April 11, 2004.²³⁰

* * *

Experience under the Rule confirms that the Rule is useful and effective, while providing effective measures for spoliation of ESI.²³¹ Its core strength is the logical framework which enables courts and parties alike to appropriately deal with disputes. The key is the distinction between measures which are available to cure prejudice from irreparable losses of ESI and those whose use is cabined by a substantial culpability requirement. It works.

It is true that the Rule “makes it more difficult for a moving party to obtain sanctions” by requiring an intent to deprive.²³² However, the Rule mitigates this result by

²²⁴ Fed. Rule of Evidence Rule 403 provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

²²⁵ 2019 WL 266970, at *6 (C.D. Cal. Jan. 15, 2019)(also permitting the non-moving party to do the same as to the moving party’s policies and failures to comply with them).

²²⁶ *Smith v. Borg-Warner Auto.*, 2000 WL 1006619, at *9-10 (S.D. Ind. July 19, 2000).

²²⁷ 2019 WL 1883768, at *1 (D. Del. April 26, 2019).

²²⁸ 751 Fed. Appx. 400, at *2 (4th Cir. Feb. 7, 2019).

²²⁹ 930 F.3d 76 (3rd Cir. July 10, 2019)(the trial court sought to reduce disruption of the trial, given the inflammatory nature of the evidence).

²³⁰ Minutes, Civil Rules Advisory Committee, April 10-11, 2014 (at lines 1047-1049).

²³¹ Almost 300 reported decisions deal with the Rule. For a summary of the opinions applying the Rule, see Thomas Y. Allman, *Amended Rule 37(e): Case Summaries*, Exhibit A (updated)(copy available from Author on request).

²³² *Lokai Holdings v. Twin Tiger*, 2018 WL 1512055, at *8 (S.D.N.Y. March 12, 2018).

authorizing proportional measures to cure, at the discretion of the court, including the enhanced use of juries to consider and evaluate spoliation. This channels historic practice favoring such use and provides a viable alternative to alleviate the risk of an unfair result at the discretion of the court.

One justification initially advanced for adopting the intentionality requirement for harsh measures was to help address the excessive costs of preservation.²³³ While this has proven to be an ephemeral expectation²³⁴ the “intent to deprive” standard, by virtue of its uniformity has effectively eliminated the confusion in conflicting case law among the Circuits, at least in the ESI context.

This has not come at the expense of a lessening of preservation compliance efforts. The Author believes, based on the anecdotal evidence, that effective and reasonable efforts are being made, especially with the timely assistance of informed counsel. While some had suggested that the new Rule would lead to less preservation,²³⁵ there is no evidence that this is the case.

²³³ Committee Note (“[r]esolving the circuit split with a more uniform approach to lost ESI, and thereby reducing a primary incentive for over-preservation, has been recognized by the Committee as a worthwhile goal”).

²³⁴ Tadler and Kelston, *supra*, 52- JAN TRIAL 20 at 24 (“Rule 37(e) likely will have little effect on the preservation practices or expenses of large corporations. The notion that the circuit split forced over-preservation was dubious from the start, as it postulated that corporate counsel base preservation decisions on the possible severity of an unlikely sanction”).

²³⁵ See, e.g., Charles Yablon, *Byte Marks: Making Sense of New F.R.C.P. (37(e))*, 69 FLA. L. REV. 571, 579 (2017)(“Rule 37(e) will lead to somewhat less ESI being preserved”).

Appendix

Circuit Court Decisions

Circuit	Status	Citation
1st	Unknown	
2nd	Yes	MPLA v. Gateway, 717 Fed. Appx. 96 (2 nd Cir. April 6, 2018); Klipsch v. EPRO E-Commerce, 880 F.3d 620, (2 nd Cir. Jan . 25, 2018); Mazzei v. the Money Store, 656 Fed. Appx. 558 (2 nd Cir. July 15, 2016).
3rd	Yes	GN Netcom v. Plantronics, 930 F.3d 76 (3 rd Cir. July 10, 2019); Wanda Arana v. Temple University, __ Fed. Appx. __, 2019 WL 2375181 (3 rd Cir. June 5, 2019); Lexpath Technologies v. Welch, 744 Fed. Appx. 74 (3 rd Cir. July 30, 2018); Clientron Corp. v. Devon IT, 894 F.3d 568, n. 5 (3 rd Cir. 2018).
4th	Yes	Boone v. C.D. Everett, 751 Fed. Appx. 400 (4 th Cir. Feb. 7, 2019).
5th	Unknown	
6th	Yes	Applebaum v. Target, 831 F.3d 740 (6 th Cir. Aug. 2, 2016).
7th	Yes	Barbera v. Pearson Education, 906 F.3d 621 (7 th Cir. Oct. 12, 2018).
8th	Yes	Auer v. City of Minot, 896 F.3d 854, (8 th Cir. July 19, 2018).
9th	Yes	Newberry v. County of San Bernardino, 750 Fed. Appx. 534 (9 th Cir Sept. 18, 2018)(Rule 37(e); Roadrunner Transp. v. Tarwater, 642 Fed. Appx. 759, n.1 (9 th Cir. Mar. 18, 2016).
10th	Yes	Helget v. City of Hays, 844 F.3d 1216 (10 th Cir. Jan. 4, 2017); EEOC v. Jetstream, 878 F.3d 960 (10 th Cir. Dec. 28, 2017).
11th	Yes	ML Healthcare Services v. Publix Super Markets, 881 F.3d 1293, (11 th Cir. Feb. 7, 2018).
D.C	Unknown	
Fed.	Yes	Regenereon Pharm. v. Merus, 864 F.3d 1343, at n.7 (Fed. Cir. July 22, 2017).