

## **Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures**

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“[T]he biggest change the amendments to Rule 37(e) made for ESI was to replace the ‘culpable state of mind’ element under *Residential Funding Corp.* with the more stringent ‘intent to deprive.’”<sup>1</sup>

## I. INTRODUCTION

[1] Since December 1, 2015, Federal Rule of Civil Procedure Rule 37(e) (“Amended Rule 37(e)” or the “Rule”) has provided a uniform approach to addressing spoliation of electronically stored information (“ESI”) which should have been preserved.<sup>2</sup> Only upon a showing of an “intent to deprive” another party of the use of ESI in the litigation are harsh measures available, but if prejudice exists, a broad range of proportional curative measures are available at the discretion of the court.<sup>3</sup>

[2] This uniform approach to harsh spoliation sanctions has made a difference. The Rule makes it more difficult for a moving party to obtain a permissive adverse inference jury instruction by requiring an “intent to deprive.”<sup>4</sup> Some argue that this is the “end of sanctions.”<sup>5</sup>

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<sup>1</sup> *Zhang v. City of New York*, No. 17-CV-5415 (JFK) (OTW), 2019 WL 3936767, at \*5 (S.D.N.Y. Aug. 20, 2019) (referring to the “culpable state of mind” requirement set forth in *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2nd Cir. 2002) which permitted adverse inference jury instructions upon a showing of negligent or grossly negligent conduct).

<sup>2</sup> *See Proposed Rules of the Supreme Court of the United States*, 305 F.R.D. 457, 567–78 (2015) [hereinafter *Proposed Rules*] (containing final text and Committee Note as effective Dec. 1, 2015).

<sup>3</sup> *See Newberry v. Cty. of San Bernardino*, 750 F. App’x. 534, 537 (9th Cir. 2018) (summarizing the “two categories of sanctions” available under the Rule).

<sup>4</sup> *Lokai Holdings, LLC. v. Twin Tiger USA*, No. 15cv9363 (ALC) (DF), 2018 WL 1512055, at \*8 (S.D.N.Y. Mar. 12, 2018).

[3] To the contrary, the Rule has prompted a subtle refocus away from use of potentially case dispositive measures for negligent or grossly negligent failures to preserve to those that authorize the jury to mitigate the prejudice from the irreparable loss of ESI. While case-dispositive measures designed to punish and deter remain available under the Rule, courts are now encouraged to focus on addressing prejudice in the absence of a showing of intent to deprive.

[4] In *Nuvasive v. Madsen Medical*, for example, the court refused to instruct the jury that it could infer that missing evidence was “unfavorable” to the party that lost it since it had not acted with an “intent to deprive.”<sup>6</sup> The court rejected the complaint that the innocent party was left with “no remedy or recourse” and planned to allow both sides to present evidence to the jury regarding the loss of ESI, and to instruct the jury that it may consider the lost ESI evidence, along with all the other evidence in making its decision.<sup>7</sup> This option has been widely used,<sup>8</sup> perhaps to a degree unexpected by the drafters, because it fills the gap between “using serious sanctions and doing nothing.”<sup>9</sup>

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<sup>5</sup> See *The End of Sanctions? Rules Revisions and Growing Expertise Are “De-Risking” Ediscovery*, at 6, LOGIKCULL, <https://www.logikcull.com/public/files/The-End-of-Sanctions.pdf> [<https://perma.cc/FV9G-3CGV>] (“[L]itigants are now more than one third less likely to be sanctioned for spoliation than they were in 2014”).

<sup>6</sup> *Nuvasive, Inc. v. Madsen Med.*, No. 13cv2077 BTM(RBB), 2016 WL 305096, \*2 (S.D. Cal. Jan. 26, 2016).

<sup>7</sup> *Id.* at \*3.

<sup>8</sup> See, e.g., *infra* Appendix (collecting decisions).

<sup>9</sup> NOTES OF CONFERENCE CALL, DISCOVERY SUBCOMMITTEE, ADVISORY COMMITTEE ON CIVIL RULES (Aug. 7, 2012), in ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK, at 175 (Nov. 1–2, 2012), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV2012-10.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV2012-10.pdf) [<https://perma.cc/PGC5-43ZV>].

[5] The Committee Note also observes that courts have discretion to allow the jury to decide if an “intent to deprive” exists and to infer from the loss of information that the information was unfavorable upon such an intent finding.<sup>10</sup> 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.”<sup>11</sup>

[6] Part II summarizes the background of the refocus of emphasis under the Amended Rule and Parts III and IV describe how the Rule subsumes the common law duty to preserve while adding the requirements important to its use in this context. Part V then focuses on the severe measures available when “intent to deprive” exists before turning, in Part VI, to a discussion of the proportional measures available to deal with prejudice in its absence.

[7] Part VII evaluates the unique jury management issues prompted by the Rule. Part VIII concludes with the observation that, while the “intent to deprive” standard has helped to refocus the Rule and to reduce the fear of unjust results, this outcome has not been at the expense of a reduction in preservation compliance.<sup>12</sup> While some had suggested that the new Rule would necessarily lead to less preservation efforts,<sup>13</sup> there is no evidence

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<sup>10</sup> See *Proposed Rules*, *supra* note 2, at 577–578 (acknowledging that a court may “conclude that the intent finding should be made by a jury”).

<sup>11</sup> U.S. Equal Emp’t Opportunity Comm’n v. GMRI, Inc., No. 15-20561-CIV-LENARD/GOODMAN, 2017 WL 5068372, at \*31 (S.D. Fla. Nov. 1, 2017).

<sup>12</sup> A colleague managing compliance at a major corporation has pointed out that while the Rule has been particularly helpful in reducing concerns, the accuracy of preservation efforts has been greatly enhanced by advances in technology.

<sup>13</sup> 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”).

that this is the case.

## II. BACKGROUND

[9] The discovery mechanisms employed in civil litigation are “one of the most significant innovations” of the 1938 Federal Rules of Civil Procedure.<sup>14</sup> Discovery serves to “narrow and clarify the basic issues” and provides a method for ascertaining the facts relative to those issues.<sup>15</sup>

[10] Under Rule 34(a), a party may seek discovery of documents, electronically stored information (“ESI”) or tangible things.<sup>16</sup> ESI includes electronic information which is “stored in any medium from which information can be obtained.”<sup>17</sup>

[11] An essential component of successful discovery, however, is compliance with the “duty to preserve,” the common law offshoot of the spoliation doctrine, which is a body of evidentiary principles of historic lineage.<sup>18</sup> The spoliation doctrine provides measures for “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable

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<sup>14</sup> *Hickman v. Taylor*, 329 U.S. 495, 500 (1947).

<sup>15</sup> *Id.* at 501.

<sup>16</sup> *See* FED. R. CIV. P. 34(a).

<sup>17</sup> FED. R. CIV. P. 34(a)(1)(A).

<sup>18</sup> *See generally* Kenneth J. Withers, *Risk Aversion, Risk Management, and the “Overpreservation” Problem in Electronic Discovery*, 64 S.C. L. REV. 537, 547–49 (2013) (tracing the evolution of judge-made rule to address the impact of missing evidence).

litigation.”<sup>19</sup> Of special concern is the creation of an “unfair evidentiary imbalance,” which may risk interference with a fair result on the merits.<sup>20</sup>

[12] As a result, a frequently sought measure is an instruction to the jury that it may or must presume that the missing contents were unfavorable.<sup>21</sup> However, some Federal Circuits exercising their inherent authority to deal with litigation abuse find that merely negligent or grossly negligent conduct suffices to justify such a presumption,<sup>22</sup> while it is typically available in other Circuits only if the party intentionally destroyed the evidence in bad faith.<sup>23</sup>

[13] As ESI became an increasingly prominent object of discovery, this lack of consistency provided an incentive for compliant parties to engage in costly over-preservation to avoid risks of failures to comply.<sup>24</sup> The

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<sup>19</sup> *West v. Goodyear Tire & Rubber*, 167 F.3d 776, 779 (2d Cir. 1999).

<sup>20</sup> *Green v. McClendon*, 262 F.R.D. 284, 291 (S.D.N.Y. 2009). *See generally* *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (“an adverse inference should serve the function, insofar as possible, of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.”).

<sup>21</sup> *See, e.g., Schmid v. Milwaukee Elec. Tool*, 13 F.3d 76, 78 (3d Cir. 1994).

<sup>22</sup> *See, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (“The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.”).

<sup>23</sup> *See, e.g., Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (“Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.”) (citing *Vick v. Tex. Emp’t Comm’n*, 514 F.2d 734, 737 (5th Cir. 1975)).

<sup>24</sup> *See Proposed Rules, supra* note 2, at 525 (“[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.”).

Author, among others, suggested at the time that this lack of uniformity was unfair and worthy of correction by federal rulemaking.<sup>25</sup>

### A. Rule 37(e)

[14] As part of the 2006 Amendments that identified ESI as a distinct form of discoverable information, a limited safe-harbor from rule-based spoliation sanctions was added as Rule 37(f) and later re-numbered as Rule 37(e).<sup>26</sup> This provision merely provided that rule-based sanctions were not to be employed when ESI was lost as a result of “routine, good-faith operation of an electronic information system.”<sup>27</sup> The provision was little used,<sup>28</sup> however, since “a court could impose whatever sanctions it deemed appropriate” by simply relying on its inherent authority to deal with litigation abuse.<sup>29</sup>

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<sup>25</sup> See Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206, 208, 210 (2001) (explaining that parties proceeding in good faith are unfairly at risk that perfectly appropriate business actions will later be deemed inappropriate in some Circuits).

<sup>26</sup> See Thomas Y. Allman, *Inadvertent Spoliation of ESI After the 2006 Amendments: The Impact of Rule 37(e)*, 3 FED. CT. L. REV. 25, 26 (2009) (discussing the renumbering of Rule 37(e), without change, as part of the 2007 Style Amendments of Apr. 2007, effective Dec. 1, 2007).

<sup>27</sup> *Court Rules: Adoption and Amendments to Civil Rules*, 234 F.R.D. 219, 243 (2006) (“Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system”).

<sup>28</sup> See generally 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2284.2 (Supp. 2019).

<sup>29</sup> *Sec. Alarm Fin. Enters., LP v. Alarm Prot. Tech., Ltd. Liab. Co.*, No. 3:13-cv-00102-SLG, 2016 U.S. Dist. LEXIS 168311, at \*3 (D. Alaska Dec. 6, 2016).

[15] Even when used, the Rule was largely ineffective. Courts effectively read the intended safe harbor out of the rule by concluding that “when the duty to preserve attaches to evidence,” the Rule did not apply “because a party cannot, in good faith, delete this relevant evidence.”<sup>30</sup> As one commentator noted, the rule “did not expressly abrogate the negligence standard” which justified the imposition of harsh measures and inordinately focused on the duty to suspend routine destruction of ESI.<sup>31</sup>

### B. Reassessment/Action

[16] In May 2010, the Members of the E-Discovery Panel at the Duke Litigation Conference, including the Author,<sup>32</sup> recommended replacing Rule 37(e) with a new and more comprehensive rule dealing with the duty to preserve and detail the sanctions available upon its violation.<sup>33</sup> The suggestion was well-received by the Rules Committee and the Standing

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<sup>30</sup> Robert Hardaway, et al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 585 (2011).

<sup>31</sup> Philip J. Favro, *The New ESI Sanctions Framework Under the Proposed Rule 37(e) Amendments*, 21 RICH. J.L. & TECH., at 4–6 (2015).

<sup>32</sup> See *Elements of a Preservation Rule*, USCOURTS.GOV, [https://www.uscourts.gov/sites/default/files/elements\\_of\\_a\\_preservation\\_rule.pdf](https://www.uscourts.gov/sites/default/files/elements_of_a_preservation_rule.pdf) [<https://perma.cc/4EXJ-XP63>] (listing members of the Panel, including the Author, the Hon. Shira Sheindlin, the Hon. John Facciola and Msrs. Garrison, Joseph and Willoughby and suggesting elements for inclusion by the the Advisory Committee on a preservation rule).

<sup>33</sup> See generally, *id.*; see also John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L. J. 537, 544 (2010) (“The panel...reached a consensus that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure”).

Committee, which undertook to address the task.<sup>34</sup>

[17] The Discovery Subcommittee of the Rules Committee (the “Discovery Subcommittee”) was tasked with drafting alternative approaches, one of which, described as a “back-end” approach focused on identifying the measures which might be available for a failure to preserve. It incorporated the common law duty to preserve and made reliance on inherent authority unnecessary, thus addressing one of the key limitations of the initial Rule.<sup>35</sup> After vetting the alternatives at a September 2011 Mini-Conference, the “back end” rule was selected for further development<sup>36</sup> because it would be difficult to create” a good rule adequately outlining preservation obligations.<sup>37</sup>

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<sup>34</sup> See generally Comm. on Rules of Practice and Procedure (“Standing Committee”), Meeting Minutes, at 3, 23 (June 14–15, 2010), [https://www.uscourts.gov/sites/default/files/fr\\_import/ST06-2010-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/ST06-2010-min.pdf) [<https://perma.cc/W8YN-T4EA>] (resolving to take full advantage of what transpired through committee work).

<sup>35</sup> See Civil Rules Advisory Comm., *Preservation/Sanctions Issues*, at 22–25 (Sept. 9, 2011), [https://www.uscourts.gov/sites/default/files/preservation-sanction\\_issues.pdf](https://www.uscourts.gov/sites/default/files/preservation-sanction_issues.pdf) [<https://perma.cc/ZG67-UUML>] (produced for mini-conference on preservation and sanctions by the Judicial Conference Subcommittee on Discovery, Sept. 9, 2011, in Dallas, Texas).

<sup>36</sup> See Civil Rules Advisory Comm., Meeting Minutes, at 16, 19–21 (Mar. 22–23, 2012), <https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-march-2012> [<https://perma.cc/8RBJ-WU8P>] (determining the Subcommittee should focus on sanctions before studying other issues).

<sup>37</sup> *Id.* at 15.

### C. The Initial Proposal

[18] In August 2013, the Rules Committee released a draft of an amended Rule 37(e) (the “Initial Proposal”) as part of a package of proposed Rule Amendments arising from the Duke Conference.<sup>38</sup> The draft outlined the measures available when a party “fail[ed] to preserve discoverable information that should have been preserved” in the anticipation or conduct of litigation.<sup>39</sup>

[19] The proposal famously distinguished between curative measures and sanctions. Curative measures would be available for any failure to preserve.<sup>40</sup> “Sanctions” or “an adverse-inference jury instruction” were to be available only when a party’s actions “caused substantial prejudice” in the litigation and were undertaken either “willful[ly] or in bad faith.”<sup>41</sup> These measures would also be available if a party was “irreparably deprived” of a meaningful opportunity to present or defend claims.<sup>42</sup>

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<sup>38</sup> See Notice of Proposed Amendments and Open Hearings of the Judicial Conference Advisory Committees on Rules of Bankruptcy and Civil Procedure, 78 FED. REG. 49768 (Aug. 15, 2013); Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, at 314–28 (Aug. 2013) [hereinafter *Preliminary Draft*], <http://www.hib.uscourts.gov/news/archives/attach/preliminary-draft-proposed-amendments.pdf> [<https://perma.cc/T4RV-YW2G>].

<sup>39</sup> See *Preliminary Draft*, *supra* note 38, at 260.

<sup>40</sup> See *id.* at 314–15 (proposing a draft for Fed. R. Civ. P. 37(e)(1)(A)).

<sup>41</sup> See *id.* (proposing a draft for Fed. R. Civ. P. 37(e)(1)(B)(i)).

<sup>42</sup> See *id.* at 314–15, 322–24 (explaining the exception was intended to preserve the distinction in *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001), where a dismissal was ordered without heightened culpable conduct because the “prejudice to the [party was] extraordinary, denying it the ability to adequately defend its case.”).

[20] The Committee Note suggested that “curative measures [could] include permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information.”<sup>43</sup>

#### D. Public Comments

[21] The Rules Committee conducted three well-attended public hearings and received several thousand written comments on the full Rules Package, including the Initial Proposal for Rule 37(e).<sup>44</sup> Much of the discussion at the hearings and in the comments dealt with the requirement that harsh spoliation measures were not available unless the party’s failure to preserve “caused substantial prejudice in the litigation and were willful or in bad faith.” In addition, it was noted that a preliminary finding of

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<sup>43</sup> *Id.* at 321. After the Ann Arbor meeting giving the direction to the Subcommittee to focus on sanctions, the issue of the admission of evidence of destruction or failure to preserve, absent bad faith or prejudice, was raised in the Subcommittee discussions. *See* ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 9. It was argued that a curative measure short of an adverse inference was needed so that the court would not be left with a choice between using serious sanctions and doing nothing. *See* Civil Rules Advisory Comm., *Notes of Discovery Subcommittee Conference Call* (Aug. 7, 2012), reprinted in ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK, at 175 (Nov. 1–2, 2012), <https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-november-2012> [<https://perma.cc/PGC5-43ZV>]. Not until the following year, however, did that suggestion make its way into the draft Committee Note under consideration. *See* Civil Rules Advisory Comm., Meeting Minutes, at 22 (Apr. 11–12, 2013), <https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2013> [<https://perma.cc/N3TU-X57B>] (noting that the text of the rule was changed to support curative actions beyond adverse-inference instructions, which could include admitting evidence of spoliation “to level the playing field”).

<sup>44</sup> *See* Civil Rules Advisory Comm., *Report to the Standing Committee* 3 (May 2, 2014), <https://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2014> [<https://perma.cc/HB9J-BU5K>].

prejudice should be required to justify use of curative measures. Although little attention was paid to the suggestion in the draft Committee Note that a court could admit testimony and argument about spoliation to the jury as a curative measure, one commenter suggested that the Committee Note should also acknowledge the ability of courts to instruct the jury on its use.<sup>45</sup>

[22] Testimony by large producers of ESI was equivocal on whether the proposed rule changes would actually address excessive preservation costs.<sup>46</sup> The Discovery Subcommittee ultimately concluded that while reducing the incentives for over-preservation remained a worthwhile goal, the likelihood of significant benefits in that regard were too uncertain to justify seriously limiting trial court discretion.<sup>47</sup>

### III. AMENDED RULE 37(E)

[23] A revised version of the Initial Proposal, was adopted by the Rules Committee at its Meeting in Portland, Oregon on April 10–11, 2014 (the “Portland Meeting”) after last-minute revisions.<sup>48</sup> After slight stylistic

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<sup>45</sup> See Civil Rules Advisory Comm., *Report to the Standing Committee: Summary of Rule 37(e) Comments* 50 (May 2, 2014), <https://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2014> [<https://perma.cc/NDD8-J9PN>] (“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].”).

<sup>46</sup> See Civil Rules Advisory Comm., Meeting Minutes, at 18 (Apr. 10–11, 2014), <https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2014> [<https://perma.cc/ZK84-L6F6>].

<sup>47</sup> See *id.* at 25–26.

<sup>48</sup> See Thomas Y. Allman, *Rule 37(e): The Report from Portland*, LAWYERS FOR CIVIL JUSTICE, at 2 (Apr. 14, 2014), [http://www.lfcj.com/uploads/3/8/0/5/38050985/allman\\_rule\\_37e\\_the\\_report\\_from\\_portland\\_4.14.14.pdf](http://www.lfcj.com/uploads/3/8/0/5/38050985/allman_rule_37e_the_report_from_portland_4.14.14.pdf) [<https://perma.cc/PK4N->

changes, the Rule became effective in the following form as of December 1, 2015:

Failure to ~~Produce~~ Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (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.<sup>49</sup>

The Amended Rule and the revised Committee Note came into effect after review and approval by the Standing Committee, the Judicial Conference, and the Supreme Court<sup>50</sup> and, implicitly, Congress, by its inaction.

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R2KW]; *see also* Ariana J. Tadler & Henry J. Kelston, *What You Need to Know About the New Rule 37(e)*, 52 TRIAL 20, 22 (Jan. 2016) (the subcommittee "made substantial revisions between Apr. 10 and Apr. 11 and distributed by hand the new version" to the Committee and observers minutes before the Committee convened).

<sup>49</sup> *Proposed Rules*, *supra* note 2, at 567–68.

<sup>50</sup> *See id.* at 458.

### A. The Important Changes

[24] Among the key changes in Amended Rule was that its scope was confined to failures to preserve ESI and conditioned on a showing that a failure to take “reasonable steps” had caused a loss of ESI which could not be restored or replaced.<sup>51</sup> In addition, severe measures under subdivision (e)(2) such as adverse presumption instructions to the jury were made available only “upon a finding that the party acted with the intent to deprive another party of the information’s use in the litigation.”<sup>52</sup> Finally, curative measures under subdivision (e)(1) were available only if “no greater than necessary to cure the prejudice [caused by the failure to preserve].”<sup>53</sup> In the absence of “intent to deprive” or “prejudice,” no measures are available.<sup>54</sup>

[25] The revised Committee Note, drafted after the Portland Meeting, discussed the forms of the jury instructions available for use under subdivision (e)(1) when evidence and argument about spoliation were admitted to the jury, acknowledged the possible use of the jury to assess whether “intent to deprive” exists, and provided forms of instructions for that eventuality.<sup>55</sup>

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<sup>51</sup> FED. R. CIV. P. 37(e).

<sup>52</sup> FED. R. CIV. P. 37(e)(2).

<sup>53</sup> FED. R. CIV. P. 37(e)(1).

<sup>54</sup> *Romero v. Regions Financial, Corp.*, No. 18-22126-CV-WILLIAMS/TORRES, 2019 WL 2866498, at \*4 (S.D. Fla. July 3, 2019).

<sup>55</sup> *See Proposed Rules*, *supra* note 2, at 575.

## B. Scope

[26] As noted, the Rule applies only to irreparable losses of ESI resulting from actions by *parties* to the litigation.<sup>56</sup> In addition, while the Committee acknowledged that there was “much to be said” for having the Rule cover all forms of discoverable information, the Rule was confined to losses of ESI.<sup>57</sup>

[27] As a result, courts must engage in separate legal analyses when both ESI and other forms of information are lost. A suggestion by the Author that the loss should be assessed under the Rule 37(e) standard when both are lost in the same case was rejected in *EPAC Technologies v. HarperCollins*.<sup>58</sup> While the Committee has reserved the option to expand the scope based on the success of the rule,<sup>59</sup> no such effort has been made.

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<sup>56</sup> See Jeffrey A. Parness, *Lost ESI Under the Federal Rules of Civil Procedure*, 20 SMU SCI. & TECH. L. REV. 25, 36 (2017) (indicating that the absence of recognition of sanctioning authority for lost or irreplaceable ESI by a non-party is “troublesome, though curable via inherent powers”).

<sup>57</sup> See Civil Rules Advisory Comm., Meeting Minutes, at 22–23 (Apr. 10–11, 2014), <https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2014> [<https://perma.cc/26EM-7AME>].

<sup>58</sup> See *EPAC Technologies, Inc. v. HarperCollins Christian Publishing, Inc. f/k/a Thomas Nelson, Inc.*, No. 3:12-cv-00463, 2018 WL 1542040, at \*14 (M.D. Tenn. May 14, 2018); see also *Abdelgawad v. Mangieri*, No. 14-1641, 2017 WL 6557483, at \*1 (W.D. Pa. Dec. 12, 2017) (agreeing that a court should not expand its interpretation of Rule 37(e) to lost physical evidence).

<sup>59</sup> See Civil Rules Advisory Comm., Meeting Minutes, at 31 (Apr. 10–11, 2014), <https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2014> [<https://perma.cc/26EM-7AME>].

### C. Foreclosure of Inherent Powers

[28] According to the Committee Note, the Amended Rule “forecloses” reliance on inherent authority or state law to determine when “certain measures” should be used.<sup>60</sup> In practical terms, the Rule 37(e) “supplants” use of inherent authority when it is applicable.<sup>61</sup> While a Federal Rule does not divest a court of its inherent powers, “the court ordinarily should rely on the Rules rather than the inherent power” when the Rules are “up to the task.”<sup>62</sup>

[29] The availability of other Rules has varied when both arguably are available. Civil contempt measures have been sought under 37(b) for violation of interlocutory orders by parties engaging in spoliation.<sup>63</sup> In *Matthew Enterprise v. Chrysler*, however, the court refused to deal with the deletion of emails under Rule 37(b) because the issue “is spoliation and not compliance with” an order on motion to compel their production.<sup>64</sup>

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<sup>60</sup> It does not affect the validity of an independent tort claim for spoliation if state law applies in the case and authorizes the claim. However, there is no federal “free-standing tort claim for spoliation under federal common law.” *See* *Cummerlander v. Patriot Preparatory Academy*, No. 13-cv-0329, 2013 WL 5969727, at \*2 (S.D. Ohio Nov. 8, 2013); *see, e.g.*, *BASF Corporation v. Man Diesel & Turbo North America, Inc.*, No. 13-42-JWD-RLB, 2014 U.S. Dist. LEXIS 85384, at \*1 (M.D. La. Nov. 5, 2015).

<sup>61</sup> *See* WRIGHT, MILLER & MARCUS., *supra* note 28; *see, e.g.*, *Borum v. Brentwood Village, LLC*, No. 16-1723 (RC), 2019 WL 3239243, at \*4 (D.C. July 18, 2019).

<sup>62</sup> *Chambers v. Nasco, Inc.*, 501 U.S. 32, 50 (1991).

<sup>63</sup> *See Showcoat Solutions, LLC v. Butler*, No. 1:18cv789-ALB-SMD, 2019 WL 3332617, at \*5 (M.D. Ala. June 7, 2019).

<sup>64</sup> *See Matthew Enterprise, Inc. v. Chrysler Group LLC*, No. 13-cv-04236-BLF, 2016 WL 2957133, at \*3 n.47 (N.D. Cal. May 23, 2016).

A similar result occurred with respect to conduct subject to Rule 37(c).<sup>65</sup>

[28] Some courts have asserted that they retain inherent authority to address the loss of ESI and others have simply ignored the Rule in cases where it clearly applies.<sup>66</sup> The Amended Rule does not bar use of inherent authority in those situations where a party is not clearly subject to Rule 37(e).<sup>67</sup>

#### IV. THRESHOLD CONDITIONS

[29] 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 through additional discovery.”<sup>68</sup> No measures are available unless *each* of the threshold conditions is satisfied, making each of them crucial.<sup>69</sup>

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<sup>65</sup> See *Marquette Transportation Company Gulf Island, LLC v. Chembulk Westport M/V*, No. 13-6216, 2016 WL 930946, at \*3 (E.D. La. Mar. 11, 2016); cf. *Flores v. AT&T Corp.*, No. EP-17-CV-00318-DB, 2019 WL 2746774, at \*2 (W.D. Tex. Mar. 27, 2019) (applying Rule 37(c) because party failed to comply with Rule 26(a) or (e)).

<sup>66</sup> See, e.g., *Goines v. Lee Memorial Health System*, No. 2:17-CV-656-FtM-29NPM, 2019 WL 4016147, at \*6 (M.D. Fla. Aug. 26, 2019) (dealing with allegations of spoliation of Facebook postings under inherent authority without mention of Rule 37(e)).

<sup>67</sup> See *Lawrence v. City of New York*, No. 15cv8947, 2018 WL 3611963, at \*1, \*6 (S.D. N.Y. July 27, 2018) (sanctions imposed for creating fraudulent digital photograph not for failing to preserve it).

<sup>68</sup> FED. R. CIV. P. 37(e).

<sup>69</sup> See Hon. Iain D. Johnston & Thomas Y. Allman, *What Are the Consequences for Failing to Preserve ESI: My Friend Wants to Know*, CIRCUIT RIDER 57–58 (2019)

### A. ESI that “Should have Been Preserved”

[30] “According to the Committee Note, Rule 37(e) is based on [the] common-law duty; it does not attempt to create a new duty to preserve.”<sup>70</sup> A party has the same duty to preserve evidence for use in litigation as before the amendments.<sup>71</sup> However, “only parties with possession, custody, or control over the evidence may be sanctioned for their failure to preserve [it].”<sup>72</sup> This can result in complexities in cases where only the employer, and no other employees who committed the spoliation, is joined as parties.<sup>73</sup>

[31] It is accepted that the duty to preserve arises “not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.”<sup>74</sup> As the Committee Note observes, many decisions hold that a party has a duty to preserve when it knew or should have known that

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(incorporating annotated flow chart illustrating the impact of the success or failure in satisfying the threshold elements).

<sup>70</sup> *Proposed Rules*, *supra* note 2, at 569.

<sup>71</sup> *See Security Alarm Financing L.P. v. Alarm Protection, LLC*, No. 3:13-cv-00102-SLG, 2016 WL 7115911, at \*3 (D. Alaska Dec. 6, 2016).

<sup>72</sup> *Wooden v. Barringer*, No. 3:16-CV-446-MCR-GRJ, 2017 WL 5140518, at \*7 (N.D. Fla. Nov. 6, 2017).

<sup>73</sup> *See Harvey v. Hall*, No. 7:17-CV-00113, 2019 WL 1767568, at \*6 (W.D. Va. Apr. 22, 2019) (refusing to penalize individual defendants for “their colleagues’ oversights”).

<sup>74</sup> *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)).

litigation was reasonably foreseeable.<sup>75</sup>

[32] A variety of events, including pre-litigation demands, may trigger the duty to preserve.<sup>76</sup> Courts typically find that a party reasonably anticipates litigation “after it has a certain type of negative interaction with its potential adversary.”<sup>77</sup> However, the onset of a duty must be “predicated on something more than an equivocal statement.”<sup>78</sup>

[33] In *Storey v. Effingham County*, a party held to be “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.<sup>79</sup> “The Court [could not] fathom a reasonable defendant who would look at [the] facts and not catch the strong whiff of impending litigation on the breeze.”<sup>80</sup> A duty to preserve may also exist because of a

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<sup>75</sup> See 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) (indicating that there is no duty to preserve until suit filed or imminent).

<sup>76</sup> See *Small v. Univ. Med. Ctr.*, No. 2:13-CV-0298-APG-PAL, 2018 WL 3795238, at \*59 (D. Nev. Aug. 9, 2018) (noting that the duty was triggered as of the date plaintiffs’ counsel sent the preservation letter to its CEO).

<sup>77</sup> *Philmar Dairy, LLC v. Armstrong Farms*, No. 18-CV-0530 SMV/KRS, 2019 WL 3037875, at \*3 (D. N.M. July 11, 2019) (noting that is “possible, though uncommon, for an event to trigger the duty to preserve evidence event without an interaction with a potential adversary”).

<sup>78</sup> *Cache La Poudre Feeds LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007).

<sup>79</sup> *Storey v. Effingham Cty.*, No. 2:13- CV-0298-APG-PAL, 2017 WL 2623775, at \*3 (S.D. Ga. June 16, 2017).

<sup>80</sup> *Id.*

failure to meet governmental record-keeping obligations.<sup>81</sup>

[34] Deciding *what* ESI must be preserved is intensely case-specific. 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.”<sup>82</sup> Only “relevant” ESI must be preserved, since only the loss of relevant ESI can prejudice the judicial process.<sup>83</sup> “No matter how inadequate a party’s efforts at preservation may be,” judicial action is not justified “if no relevant information is lost.”<sup>84</sup>

[35] Typically, only a “very slight showing” of relevance or prejudicial impact is required for these purposes.<sup>85</sup> Relevance and prejudice are assumed to exist when the failure to preserve is particularly egregious,<sup>86</sup> and the Committee Note confirms that a finding of an “intent to deprive”

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<sup>81</sup> See *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 108–09 (2d Cir. 2001) (noting that only a party within the class of persons sought to be advantaged by the regulation may claim its benefit).

<sup>82</sup> *WM. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F.Supp. 1443, 1455 (C.D. Cal. 1984).

<sup>83</sup> See *Snider v. Danfoss LLC*, 15 CV 4748, 2017 WL 2973464 at \*5 (N.D. Ill. July 12, 2017) (noting that 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).

<sup>84</sup> *Orbit One Commc’ns Inc. v. Numerex Corp.*, 271 F.R.D. 429, 431, 441 (S.D.N.Y. 2010).

<sup>85</sup> *Nunnally v. D.C.*, 243 F.Supp.3d 55, 74 (D. D.C. 2017) (noting that the trier of fact may draw an inference of relevance where document destruction has made it more difficult to prove relevance).

<sup>86</sup> See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 219–220 (S.D.N.Y. 2003) (when evidence is destroyed in bad faith that fact alone is enough to demonstrate relevance).

supports “an inference that the opposing party was prejudiced by the loss of information that would have favored its position.”<sup>87</sup>

[36] However, mere speculation about the relevance of the missing content is insufficient. In *Oracle America v. Hewlett Packard*, for example, defendants failed to “at least show that categories of irreplaceable relevant documents were likely lost.”<sup>88</sup> The proper focus 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 . . . .”<sup>89</sup>

### **B. Failure to Take Reasonable Steps**

[37] 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 discovery.”<sup>90</sup> The test is whether the conduct at issue “falls below the standard of what a reasonably prudent person would do under similar circumstances.”<sup>91</sup>

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<sup>87</sup> See *Proposed Rules*, *supra* note 2, at 577–78.

<sup>88</sup> *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 328 F.R.D. 543, 553 (N.D. Cal. 2018) (rejecting argument that it did not have to show that specific documents were missing because of the difficulties caused by their deletion).

<sup>89</sup> See *Proposed Rules*, *supra* note 2, at 570 (“[i]t is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed”).

<sup>90</sup> *Leidig v. BuzzFeed, Inc.*, No. 16 Civ. 542 (VM) (GWG), 2017 WL 6512353, at \*7 (S.D.N.Y. Dec. 19, 2017).

<sup>91</sup> See *id.* at \*10 (quoting *Fed. Hous. Fin. Agency for Fed. Nat’l Mortg. Ass’n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 129 (2d Cir. 2017)).

[38] In *Alabama Aircraft Industries v. Boeing*, unexplained, blatantly irresponsible behavior led the court to conclude that defendants had acted with an “intent to deprive.”<sup>92</sup> The court found that “[w]ithout question, the . . . ESI was intentionally destroyed,” and thus the Rule applied.<sup>93</sup> In *CAT3 v. Black Lineage*, the manipulation of email addresses with an “intent to deprive” was “not consistent with taking ‘reasonable steps’ to preserve the evidence.”<sup>94</sup>

[39] However, in order to be subject to the Rule, the conduct at issue must, as a minimum, involve negligence, not mere inadvertence.<sup>95</sup> “[R]easonable steps” to preserve suffice; the Rule does not call for perfection.<sup>96</sup> It does not invoke a strict liability standard. It must be “neither unreasonable nor disproportionate to expect” the responding party to undertake the expense and effort necessary to preserve.<sup>97</sup>

[40] A failure to utilize a “litigation hold” consistent with the teaching of *Zubulake v. UBS Warburg* is often decisive.<sup>98</sup> In *BankDirect Capital*

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<sup>92</sup> See *Ala. Aircraft Indus. v. Boeing Co.*, 319 F.R.D. 730, 746 (N.D. Ala. 2017).

<sup>93</sup> See *id.* at 742.

<sup>94</sup> See *Cat3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 500 (S.D.N.Y. 2016).

<sup>95</sup> See *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 328 F.R.D. 543, 549 (N.D. Cal. 2018).

<sup>96</sup> See *Proposed Rules*, *supra* note 2, at 527.

<sup>97</sup> See, e.g., *Quetel Corp. v. Abbas*, No. 1:17cv0471, 2017 WL 11380134, at \*5 (E.D. Va. Oct. 27, 2017)(finding “[i]t was neither unreasonable nor disproportionate to expect defendants to abstain from destroying a computer which could have easily been stored or otherwise preserved even if a newer one was being used in its place.”).

<sup>98</sup> See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 427 (S.D.N.Y. 2004).

*Finance v. Capital Premium*, for example, the party did “not take reasonable (and quite easy) steps to preserve” by failing to stop the “automatic deletion of . . . emails.”<sup>99</sup> 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.<sup>100</sup>

[41] However, “not every case requires a legal hold” if a party is able to capture the requisite ESI by other preservation methods.<sup>101</sup> In *Bouchard v. U.S. Tennis Ass’n*, 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.<sup>102</sup> Courts have also rejected the suggestion in *Zubulake* that counsel must take possession and safeguard all potentially relevant backup tapes.<sup>103</sup>

[42] Proportionality is important. “[I]t is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant [ESI].”<sup>104</sup> In *ML Healthcare Services v. Publix*, the

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<sup>99</sup> See *Bankdirect Capital Fin., LLC v. Capital Premium Fin., Inc.*, No. 15 C 10340, 2018 WL 1616725 at \*4, \*9 (N.D. Ill. Apr. 4, 2018).

<sup>100</sup> *EPAC Techs., Inc., v. HarperCollins Christian Publ’g, Inc.*, No. 3:12-cv-00463, 2018 WL 1542040, at \*22 (M.D. Tenn. Mar. 29, 2018).

<sup>101</sup> *Radiologix v. Radiology and Nuclear Med., LLC*, No. 15-4927-DDC-KGS, 2019 WL 354972, at \*10, \*10 n. 6 (D. Kan. Jan. 29, 2019).

<sup>102</sup> See *Bouchard v. U.S. Tennis Ass’n*, No. 15 Civ. 5920 (AMD) (LB), 2017 WL 3868801 (E.D.N.Y. Sept. 5, 2017).

<sup>103</sup> See *Itron Inc., v. Johnston*, No. 3:15CV330TSL-RHW, 2017 WL 11372353, at \*3 (S.D. Miss. Oct. 26, 2017).

<sup>104</sup> *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 93, 93 (2018).

Eighth Circuit agreed that the failure to retain all of a videotape could have resulted from the party having “reasonably, and in good faith [] concluded that it did not have to comply with such a . . . request.”<sup>105</sup>

[43] Compliance with pre-existing corporate policies is also a relevant factor.<sup>106</sup> “[A] party is not required to hold on to information in perpetuity on the chance it becomes relevant. . . .”<sup>107</sup> In *Marten Transport v. Plattform Advertising*, the absence of notice of the future relevance of the ESI was sufficient to justify the failure to preserve.<sup>108</sup> In *Monolithic Power Systems v. Intersil Corp.*, the court refused to sanction deletion of WeChat messages which were deleted “in the ordinary course – and consistent with apparent industry practice – to conserve limited space on employees’ phones.”<sup>109</sup>

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<sup>105</sup> See *ML Healthcare Servs., LLC v. Publix Super Mkts., Inc.*, 881 F.3d 1293, 1308 (11th Cir. 2018); see Ronald J. Hedges, *What Might be ‘Reasonable Steps’ to Avoid Loss of Electronically Stored Information?*, 18 *Digital Discovery & e-Evidence* 143 (Mar. 1, 2018), <https://ahima.wpengine.com/wp-content/uploads/2018/10/Hedges-Bloomberg-Law-Article-Reprint.pdf> [<https://perma.cc/C4GH-MVYB>] (examining what might constitute “reasonable steps”).

<sup>106</sup> See *Butzer v. Corecivic, Inc.*, No. 5:17-cv-360-Oc-30PRL, 2018 WL 7144285, at \*3 (M.D. Fla. Sept. 12, 2018).

<sup>107</sup> *Bouchard v. U.S. Tennis Ass’n*, No. 15 Civ. 5920 (AMD) (LB), 2017 WL 10180425, at \*6 (E.D.N.Y. Aug. 10, 2017), *aff’d*, *Bouchard v. U.S. Tennis Ass’n*, No. 15 Civ. 5920 (AMD) (LB), 2017 WL 3868801 (E.D.N.Y. Sept. 5, 2017).

<sup>108</sup> See *Marten Transp., Ltd. v. Plattform Advert., Inc.*, No. 14-cv-02464-JWL-TJJ, 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).

<sup>109</sup> *Monolithic Power Sys. v. Intersil Corp.*, C.A. No. 16-1125-LPS, 2018 WL 6075046, at \*1–2 (D. Del. Nov. 19, 2018).

[44] The Committee Note admonishes that individuals may be “less familiar with preservation obligations. . . .”<sup>110</sup> In *Zamora v. Stellar Mgt.*, the court indicated that it was more sympathetic to a single plaintiff deleting a Facebook message than to a corporation deleting emails subject to a formal litigation hold.<sup>111</sup>

### C. “Lost” Because it cannot be Restored or Replaced

[45] 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.”<sup>112</sup> 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.<sup>113</sup>

[46] The Committee Note explains that “[b]ecause [ESI] often exists in multiple locations, loss from one source may be harmless when substitute information can be found elsewhere.”<sup>114</sup> In *Greer v. Mehiel*, no measures

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<sup>110</sup> See *Proposed Rules*, *supra* note 2, at 572.

<sup>111</sup> See *Zamora v. Stellar Mgmt. Grp.*, No. 3:16-05028-CV-RK, 2017 WL 1362688, at \*3 (W.D. Mo. Apr. 11, 2017).

<sup>112</sup> See, e.g., *Envy Haw. LLC v. Volvo Car USA LLC*, No. 17-00040 HG-RT, 2019 WL 1292288, at \*2 (D. Haw. Mar. 20, 2019) (illustrating how the 2015 amendment to Fed. R. Civ. P. 37(e) changed the rule’s application).

<sup>113</sup> *Small v. Univ. Med. Ctr.*, No. 2:13-cv-0298-APG-PAL, 2018 WL 3795238, at \*69 (D. Nev. Aug. 9, 2018).

<sup>114</sup> *Living Color Enter. v. New Era Aquaculture, Ltd.*, No. 14-cv-62216, 2016 WL 1105297, at \*5 (S.D. Fla. Mar. 22, 2016) (quoting *Proposed Rules*, *supra* note 2, at 569) (“the great majority of . . . [the] text messages were provided . . . by [a third party,] . . . [they] were not ‘lost,’ and sanctions under Rule 37(e) are simply not available . . . .”); see also *Flores v. AT&T Corp.*, No. EP-17-CV-00318-DB, 2019 WL 2746774, at \*10 (W.D.

were available under the Rule because copies of the deleted email were located.<sup>115</sup> 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.<sup>116</sup> No measures were imposed.<sup>117</sup>

[47] Moving parties must make proportional efforts to recover the information from other sources before the Rule applies.<sup>118</sup> 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 its system or hard drive.<sup>119</sup> In *Steves and Sons v. JELD-WEN*, relief was denied because the moving party failed to seek a forensic review to secure the substitute information.<sup>120</sup>

[48] Courts may order a party losing replaceable information to bear the expense required for its “resurrection.”<sup>121</sup> The Committee Note observes

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Tex. Mar. 27, 2019) (“Because no information appears to have been lost . . . , the Court finds that granting sanctions on this basis would be inappropriate.”).

<sup>115</sup> See *Greer v. Mehiel*, No. 15-cv-6119 (AJN), 2018 WL 1626345, at \*8 (S.D.N.Y. Mar. 29, 2018).

<sup>116</sup> See *Marquette Transp. Co. Gulf Island, LLC v. Chembulk Westport M/V*, No. 13-6216 c/w 14-2071, 2016 WL 930946, at \*1, \*3 (E.D. La. Mar. 11, 2016).

<sup>117</sup> See *id.* at \*3.

<sup>118</sup> See *Proposed Rules*, *supra* note 2, at 573.

<sup>119</sup> See *Stovall v. Brykan Legends, LLC*, No. 17-2412-JWL, 2019 WL 480559, at \*3 (D. Kan. Feb. 7, 2019).

<sup>120</sup> See *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 327 F.R.D. 96, 108 (E.D. Va. 2018).

<sup>121</sup> See Jeffrey A. Parness, *supra* note 56, at 30.

that “[n]othing in the rule limits the court’s power under Rules 16 and 26 to authorize additional discovery.”<sup>122</sup> In *Marsulex Environmental Technologies v. Selip*, the court ordered a forensic examination to determine to what extent a party had deleted evidence relevant to the moving party’s claims.<sup>123</sup>

[49] The cases are split on whether oral testimony is a sufficient 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.<sup>124</sup> In *Freidig v. Target*, eyewitness testimony was also insufficient.<sup>125</sup> On the other hand, in *Eshelman v. Puma Biotech*, the court concluded that under some circumstances the use of deposition testimony would suffice.<sup>126</sup>

## V. SEVERE MEASURES

[50] 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

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<sup>122</sup> See *Proposed Rules*, *supra* note 2, at 573.

<sup>123</sup> See *Marsulex Env'tl. Techs. v. Selip S.P.A.*, No. 1:15-CV-00269, 2019 WL 2184873, at \*12–13 (M.D. Pa. May 21, 2019).

<sup>124</sup> See *Schmalz v. Vill. of N. Riverside*, No. 13 C 8012, 2018 WL 1704109, at \*4 (N.D. Ill. Mar. 23, 2018).

<sup>125</sup> See *Freidig v. Target Corp.*, 329 F.R.D. 199, 204, 209 (W.D. Wis. 2018).

<sup>126</sup> See *Eshelman v. Puma Biotechnology, Inc.*, No. 7:16-CV-18-D, 2017 WL 2483800, at \*5 (E.D. N.C. June 7, 2017).

judgment.”<sup>127</sup> In addition to these measures, the Committee Note alludes to others which require a showing of intent because they have the same effect.<sup>128</sup>

### A. What is Intent to Deprive?

[51] The Committee Note explains that the “intent to deprive” requirement was adopted “to provide a uniform standard in federal court”<sup>129</sup> in response to public comments critical of the confusing standard proposed in the Initial Proposal.<sup>130</sup> It is not fair to conclude that conduct indicates “conscious[ness] of guilt” unless the party specifically intends to ignore preservation obligations.<sup>131</sup> The Note explains that “[a]dverse-inference instructions were developed on the premise that a party’s intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence.”<sup>132</sup>

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<sup>127</sup> FED. R. CIV. P. 37(e)(2).

<sup>128</sup> See *Proposed Rules*, *supra* note 2, at 575 (“An example . . . might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case.”).

<sup>129</sup> *Proposed Rules*, *supra* note 2, at 576

<sup>130</sup> See *id.* at 576–77 (explaining that 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.”).

<sup>131</sup> EDWARD W. CLEARY ET AL., *MCCORMICK ON EVIDENCE* § 273, at 808–9 (3rd ed. 1984) (explaining “[m]ere negligence is not enough, for it does not sustain the inference of consciousness of a weak case.”).

<sup>132</sup> *Proposed Rules*, *supra* note 2, at 576.

[52] However, “[i]nformation lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have.”<sup>133</sup> Accordingly, the Rule “rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.”<sup>134</sup>

[53] In assessing intent, the focus is on the conduct of the individual party or the entity to which its conduct is attributed. In *GN Netcom v. Plantronics*, an executive deliberately deleted an unknown number of emails and urged others to do so; witnesses, including the CEO, were not truthful, and the company failed to adequately assess the damage.<sup>135</sup>

[54] There is, however, no “need to find a smoking gun.”<sup>136</sup> Circumstantial evidence and the “totality of the record” often suffice to support an inference of such intent.<sup>137</sup> Such a conclusion may result from “irresponsible behavior that lacks any other explanation than intent to deprive.”<sup>138</sup> In *Alabama Aircraft Industries v. Boeing*, the trial court cited the “unexplained, blatantly irresponsible [preservation] behavior” in the

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See *GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76, 79, 83 (3d Cir. 2019) (holding that the District Court reasonably concluded that [the party] had acted in bad faith).

<sup>136</sup> See *Auer v. City of Minot*, 896 F.3d 854, 858 (8th Cir. 2018) (“[I]ntent can be proved indirectly and [the moving party] did not need to find a smoking gun.”).

<sup>137</sup> See *GN Netcom, Inc. v. Plantronics, Inc.*, No. 12-1318-LPS, 2016 WL 3792833, at \*7 (D. Del. July 12, 2016).

<sup>138</sup> See *4DD Holdings, LLC v. United States*, 143 Fed. Cl. 118, 133 (Ct. Cl. 2019).

case.<sup>139</sup> In *Moody v. CSX Transportation*, the court cited the fact that the party engaged in “stunningly derelict” conduct,<sup>140</sup> and in *O’Berry v. Turner*, intent was found to exist because of “irresponsible and shiftless behavior.”<sup>141</sup>

[55] However, courts routinely refuse to find an “intent to deprive” when merely negligent or grossly negligent conduct is involved.<sup>142</sup> In *Auer v. City of Minot*, for example, the allegations would at most prove negligence in the handling of electronic information.<sup>143</sup> Neither negligent nor grossly negligent conduct “do[es] the trick.”<sup>144</sup>

[56] It is not enough that a party intended the results of its conduct, since the conduct 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 been grossly negligent. But that does not equate to an intent to deprive.”<sup>145</sup> The standard bears a close relationship to the “bad faith” requirement in use in some Circuits

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<sup>139</sup> See *Ala. Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 746 (N.D. Ala. 2017).

<sup>140</sup> See *Moody v. CSX Transp., Inc.*, 271 F.Supp.3d 410, 432 (S.D.N.Y. 2017).

<sup>141</sup> See *O’Berry v. Turner*, No. 7:15-CV-00064-HL, 2016 WL 1700403, at \*4 (M.D. Ga. Apr. 27, 2016).

<sup>142</sup> See, e.g., *Adox v. UPS*, No. 15-9258-JWL-GEB, 2016 WL 6905707 (D. Kan. Nov. 11, 2016); *Auer v. City of Minot*, 896 F.3d 854 (8th Cir. July 19, 2018).

<sup>143</sup> See *Auer v. City of Minot*, 896 F.3d 854, 858 (8th Cir. 2018).

<sup>144</sup> See *Applebaum v. Target Corp.*, 831 F.3d 740, 745 (6th Cir. 2016).

<sup>145</sup> *Williford v. Carnival Corp.*, No. 17-21992, 2019 WL 2269155, at \*12 (S.D. Fla. May 28, 2019).

“but is defined even more precisely.”<sup>146</sup>

### B. Role for Jury

[57] The Committee Note acknowledges the possibility that the court may conclude that the intent finding should be made by a jury.<sup>147</sup> A substantial number of courts have done so<sup>148</sup> after determining that a sufficient evidentiary basis exists for the jury to act.<sup>149</sup> In *Gipson v. Management & Training 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 evidence supporting it.”<sup>150</sup> A similar approach was recommended by the Magistrate Judge in

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<sup>146</sup> See REP. OF THE JUD. CONF., Comm. on R. of Prac. & Proc., at B-17 (Sept. 2014), [https://www.uscourts.gov/sites/default/files/fr\\_import/ST09-2014.pdf](https://www.uscourts.gov/sites/default/files/fr_import/ST09-2014.pdf) [<https://perma.cc/M33S-9TDF>].

<sup>147</sup> See *Proposed Rules*, *supra* note 2, at 577–78. See Gregory P. Joseph, *Rule 37(e): The New Law of Electronic Spoliation*, 99 JUDICATURE 35, 40 (2015) (“[n]owhere does the Advisory Committee indicate why or when the issue appropriately left to the jury.”).

<sup>148</sup> See, e.g., *Cahill v. Dart*, No. 13-CV-361, 2016 WL 7034139, at \*4 (N.D. Ill. Dec. 2, 2016); *Coan v. Dunne*, 602 B.R. 429, at \*442 (D. Conn. Apr. 16, 2019).

<sup>149</sup> See Joseph, *supra* note 147, 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).

<sup>150</sup> See *Gipson v. Mgmt. & Training Corp.*, No. 3:16-CV-624-DPJ-FKB, 2018 WL 736265, at \*7 (S.D. Miss., Feb. 6, 2018) (noting in footnote 4 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”).

*Franklin v. Howard Brown Health Center*.<sup>151</sup> 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] internet to deprive.”<sup>152</sup> “If the jury does not make [the requisite] finding, it may not infer from the loss that the information was unfavorable to the party that lost it.”<sup>153</sup>

### 1. Case Dispositive Measures

[58] Rule 37(e)(2)(C) authorizes a court to issue terminating sanctions such as a dismissal or a default judgment upon a showing of “intent to deprive.”<sup>154</sup> Although these remedies are frequently sought, courts typically employ them only “after consideration of alternative, less drastic sanctions,” such as adverse inference jury instructions.<sup>155</sup> In *GN Netcom v. Plantronics*, the appellate court approved a District Court refusal to enter a default judgment on motion.<sup>156</sup> It noted that the lower court had

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<sup>151</sup> See *Franklin v. Howard Brown Health Ctr.*, No. 17 C 8376, 2018 WL 4784668, at \*7 (N.D. Ill. Oct. 4, 2018) (noting “as the trial unfolds” the jury may be allowed, “properly instructed” to determine if the defendant acted intentionally).

<sup>152</sup> See *U.S. Equal Emp’t Opportunity Comm’n v. GMRI, Inc.*, No. 15-20561-CIV-LENARD/GOODMAN, 2017 WL 5068372, at \*31 (S.D. Fla. Nov. 1, 2017).

<sup>153</sup> See *Proposed Rules*, *supra* note 2, at 578; see also discussion *infra* Part VII(a) (discussing if the jury is unable to find “intent to deprive,” but prejudice is shown to exist, it may “consider that evidence, along with all other evidence in the case, in making its decision).

<sup>154</sup> See FED. R. CIV. P. 37(e)(2)(C).

<sup>155</sup> See *Cruz v. G-Star Inc.*, No. 17-CV-7685 (PGG) (OTW), 2019 WL 2521299, at \*14 (S.D.N.Y. June 19, 2019).

<sup>156</sup> See *GN Netcom, Inc. v. Plantronics, Inc.*, No. C.A. No. 12–1318–LPS, 2018 WL 273649, at \*1 (D. Del. Jan. 3, 2018).

“determined that a lesser sanction than default judgment could avoid substantial unfairness while also deterring misconduct by future litigants.”<sup>157</sup>

[59] On the other hand, in *Roadrunner Transportation v. Tarwater*, the Ninth Circuit affirmed dismissal of an action because a less drastic sanction could not have adequately redressed the prejudice.<sup>158</sup> Similarly, 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.<sup>159</sup>

[60] As the Supreme Court explained in *National Hockey League v. Metropolitan*, “[this] most severe in the spectrum of sanctions” must be available “not merely to penalize those whose conduct . . . warrant[s] such a sanction, but to deter those who might be tempted to such conduct.”<sup>160</sup> Under those circumstances, the “policy favoring adjudication on the merits [must] yield to the need to preserve the integrity of the court.”<sup>161</sup>

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<sup>157</sup> See *GN Netcom v. Plantronics*, 930 F. 3d 76, 83 (3<sup>rd</sup> Cir. July 10, 2019) (“[t]he court thoroughly examined alternatives to default judgment and provided due consideration to their fairness and deterrent value, and it committed no error of law or assessment of fact in the process”).

<sup>158</sup> See *Roadrunner Transp., Serv. v. Tarwater*, 642 Fed. App’x. 759, 759–60 & n. 1 (9<sup>th</sup> Cir. Mar. 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).

<sup>159</sup> See *Global Material Tech. v. Dazheng Metal Fibre*, No. 12 CV 1851, 2016 WL 4765689, at \*9–10 (N.D. Ill. Sept. 13, 2016).

<sup>160</sup> *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976).

<sup>161</sup> *Lawrence v. City of N.Y.*, No. 15cv8947, 2018 WL 3611963, at \*8 (S.D.N.Y. July 27, 2018).

[61] In *Auer v. Minot*, the Eighth Circuit required a showing of “intent to deprive” before permitting an evidentiary presumption about the existence of facts under Rule 37(e) in connection with assessing use of a summary judgment since “deciding a case on hypothesized evidence is strong medicine.”<sup>162</sup>

## 2. Adverse Presumptions (Inferences)

[62] Rule 37(e)(2)(A) and (B) authorize the use of adverse inference presumptions in both bench and jury trials, and has been widely used when “intent to deprive” exists.<sup>163</sup> Under the Rule, the jury is to be informed that it may or must *presume* that the missing ESI was unfavorable to the party that lost it or favorable to the moving party.<sup>164</sup> The mental act for the jury is one of drawing inferences from that presumption, “not the rebuttable presumption of evidence law.”<sup>165</sup> An adverse inference is subject to reasonable rebuttal,<sup>166</sup> and the jury may also receive evidence about the circumstances by way of instruction or

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<sup>162</sup> *Auer v. City of Minot*, 896 F.3d. 854, 858 (8<sup>th</sup> Cir. July 19, 2018).

<sup>163</sup> *See, e.g., Alabama Aircraft v. Boeing*, 319 F.R.D. 730 (N.D. Ala. Mar. 9, 2017); *Moody v. CSX*, 271 F. Supp.3d 410 (W.D.N.Y. Sept. 21, 2017).

<sup>164</sup> *See* Fed. R. Civ. P. 37(e)(2).

<sup>165</sup> *See* Civil Rules Advisory Comm., Meeting Minutes, at 24 (Apr. 10–11, 2014), <https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2014> [<https://perma.cc/26EM-7AME>]; *see also* *White v. U.S.*, No. 4:15CV1252 SNLJ, 2018 WL 2238592, at \*4 (E.D. Mo. May 16, 2018) (emphasizing distinction).

<sup>166</sup> *See, e.g., Blazer v. Gall*, No. 1:16-CV-01046-KES, 2019 WL 3494785, at \*5 (D.S.D. Aug. 1, 2019) (referencing the instruction permitting jury to presume missing content was adverse to parties subject to “reasonable rebuttal”).

testimony.<sup>167</sup>

### a. Examples

[63] In *Experience Hendrix v. Pitsicalis*, the court decided to “instruct the finder of fact that it may draw an adverse inference from . . . failure adequately to preserve and produce . . . “the devices in question [computers, iPhones and a desktop computer]” because they “contained evidence of conduct . . . in breach of [defendants’] legal duties to plaintiffs in connection with the sale and marketing of Jim Hendrix-related materials.”<sup>168</sup>

[64] In *GN Netcom v. Plantronics*, 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.<sup>169</sup> At the outset of the trial, the jury was read a series of “stipulated facts,” and at the trial’s conclusion, it was told that its “role [was] to determine whether [defendant’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.”<sup>170</sup> On appeal, however, the Court of Appeals found an abuse of discretion in not also allowing an expert to provide testimony on the scope of the spoliation.<sup>171</sup> The Court concluded that the potential for

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<sup>167</sup> See JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE, §2.4 (1997).

<sup>168</sup> *Experience Hendrix, L.L.C. v. Pitsicalis*, No. 17 Civ. 1927 (PAE), 2018 WL 6191039, at \*10 (S.D.N.Y. Nov. 28, 2018).

<sup>169</sup> See *GN Netcom, Inc. v. Plantronics, Inc.*, No. 12-1318-LPS, 2016 WL 3792833, at \*14 (D. Del. July 12, 2016).

<sup>170</sup> *GN Netcom, Inc. v. Plantronics, Inc.*, No. 12-1318-LPS, 2017 WL 4417810, at \*3 (D. Del. Oct. 5, 2017).

<sup>171</sup> See *GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76, 89 (3rd Cir. 2019).

prejudice from the testimony did “not outweigh, much less substantially outweigh, the evidence’s high probative value.”<sup>172</sup>

[65] In *Wilmoth v. Murphy*, the court noted that it would instruct the jury that it may, but was not required to, presume that the missing photographs would have supported the claimed injuries and also precluded a witness who had observed the photographs prior to their loss from testifying on the topic.<sup>173</sup>

### **b. Discretion In Absence of Intent**

[66] The Committee Note observes that, absent an “intent to deprive,” a court 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.”<sup>174</sup> This option requires a showing of prejudice under Rule 37(e)(1),<sup>175</sup> and is discussed in more detail in Part VI below.

## **3. Equivalent Measures**

[67] Measures which have the same effect as those listed in subdivision

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<sup>172</sup> See *id.* at 88–89 (reversing for new trial because excluded testimony on the extent of the spoliation “could have shaped the jury’s verdict and the error in its exclusion was not harmless”).

<sup>173</sup> See *Wilmoth v. Murphy*, No. 5:16-CV-5244, 2019 WL 3728280, at \*5 (W.D. Ark. Aug. 7, 2019).

<sup>174</sup> See *Proposed Rules*, *supra* note 2, at 575.

<sup>175</sup> See *id.* at 574.

(e)(2) also require a showing of “intent to deprive.”<sup>176</sup> This includes the “striking 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.”<sup>177</sup> In one case, 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).<sup>178</sup>

[68] Monetary sanctions typically require proof of “intent to deprive” when they are imposed to punish. In *GN Netcom v. Plantronics*, supra, 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.”<sup>179</sup> The Third Circuit approved the use of monetary sanctions as part of a “package of sanctions in lieu of default judgment” after finding bad faith and intent to deprive.<sup>180</sup> In *Paisley Park Enterprises v. Boxill*, a party was ordered to pay a fine of \$10,000 to the court under Rule 37(e)(2).<sup>181</sup> In *Manufacturing Automation and Software Systems v. Hughes*, the court required payment of \$4,500 by counsel and party for a lack of professionalism under Rule 37(b) as well as

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<sup>176</sup> *Id.* at 575.

<sup>177</sup> *Id.*

<sup>178</sup> See *Bennett v. Ethicon, Inc. (In re Ethicon, Inc.)*, No. 2:12-cv-00497, 2016 U.S. Dist. LEXIS 138883, at \*10 (S.D. W. Va. Oct. 6, 2016).

<sup>179</sup> *GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76, 84 (3d Cir. 2019).

<sup>180</sup> *Id.*

<sup>181</sup> See *Paisley Park Enters. v. Boxill*, 330 F.R.D. 226, 238 (D. Minn. 2019) (ordering a fine for violating a pretrial scheduling order); see, e.g., *Passlogix, Inc. v. 2FA Tech., LLC*, 708 F. Supp. 2d 378, 422–23 (S.D.N.Y. 2010) (ordering a \$10,000 fine for failing to preserve relevant documents, which led to the spoliation of evidence).

fees and expenses under Rule 37(e)(1).<sup>182</sup>

[69] However, the Supreme Court emphasized in *Goodyear Tire & Rubber v. Haeger* that monetary penalties for spoliation must be compensatory in nature.<sup>183</sup> It has been observed that “[s]ince *Goodyear*, . . . courts are generally leery of imposing non-compensatory financial penalties as civil sanctions.”<sup>184</sup>

## VI. Addressing Prejudice

[70] 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.”<sup>185</sup> Curative measures are available as an alternative to or supplement for harsh measures when prejudice exists.<sup>186</sup> A broad range of measures are available, and “[t]here is no “all-purpose hierarchy of the severity” of the measures; “[m]uch is entrusted to the court’s discretion.”<sup>187</sup>

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<sup>182</sup> See *Mfg. Automation & Software Sys. v. Hughes*, No. CV 16-8962-CAS (KSx), 2018 U.S. Dist. LEXIS 227206, at \*31–32, 34 (C.D. Cal. Aug. 20, 2018).

<sup>183</sup> See *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017).

<sup>184</sup> GREGORY P. JOSEPH, 1 SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 28(B)(1) (5th ed. 2018) (1989).

<sup>185</sup> Fed. R. Civ. P. 37(e)(1).

<sup>186</sup> See *CIGNEX Datamatics, Inc. v. Lam Research Corp.*, No. 17-320 (MN), 2019 U.S. Dist. LEXIS 38092, at \*6 (D. Del. Mar. 11, 2019).

<sup>187</sup> See *Proposed Rules*, *supra* note 2, at 574–75.

### A. What is Prejudice?

[71] The Rule does not define prejudice.<sup>188</sup> However, the Committee Note explains that assessing prejudice “necessarily includes an evaluation of the information’s importance in the litigation.”<sup>189</sup> 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.”<sup>190</sup>

[72] Some courts require a showing that the missing ESI would support a claim or defense in the litigation.<sup>191</sup> 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 to trial or threatened to interfere with the rightful decision of the case.”<sup>192</sup> In *Storz Management v. Carey*, the court refused to impose measures because the

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<sup>188</sup> Letter from John K. Rabiej to Advisory Comm. on the Civ. Rules (Sept. 11, 2013) (commenting on proposed amendments to Rule 37(e), stating that “the proposed amendments helpfully carve out ‘curative measures’ from what have been sanctions, but in so doing, they fail to retain a showing of prejudice as a prerequisite before imposing the curative measure . . . but [since they may] have consequences comparable to the severest sanctions, omitting the prerequisite prejudice showing may cause problems”) (copy on file with Author).

<sup>189</sup> See *Proposed Rules*, *supra* note 2, at 574.

<sup>190</sup> See *id.* (“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”).

<sup>191</sup> See *Ungar v. City of N.Y.*, 329 F.R.D. 8, 12 (E.D.N.Y. Nov. 2, 2018).

<sup>192</sup> *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9<sup>th</sup> Cir. Sept. 20, 2006) (finding prejudice because the deletion threatened to distort the resolution of the case).

movant was “unable to articulate how defendants’ action impaired a claim or defense.”<sup>193</sup>

[73] In *Jenkins v. Woody*, however, the prejudice was obvious because the loss of the surveillance video involved the “best and most compelling evidence” of the events at issue.<sup>194</sup> In *4DD Holdings v. United States*, “inexcusably shoddy” efforts to preserve created prejudice because the party had to “cobble [] together secondary evidence” because of the gaps created by the loss.<sup>195</sup>

[74] 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.”<sup>196</sup> Similarly, in *Creative Movement & Dance v. Pure Performance*, the party failed to “demonstrate that it will suffer more than a minimal amount of prejudice, if any.”<sup>197</sup>

[75] On the other hand, in *Sinclair v. Cambria County*, a “plausible,

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<sup>193</sup> *Storz Mgmt. Co. v. Carey*, No. 2:18-cv-0068, 2019 WL 2615755, at \*11 (E.D. Cal. June 26, 2019).

<sup>194</sup> *Jenkins v. Woody*, No. 3:15cv3355, 2017 WL 362475, at \*45 (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).

<sup>195</sup> *4DD Holdings, LLC v. U.S.*, 143 Fed. Cl. 118, 132 (Cl. Ct. 2019).

<sup>196</sup> *ML Healthcare Serv.’s, LLC v. Publix Super Markets, Inc.*, 881 F.3d 1293, 1309 (11<sup>th</sup> Cir. Feb. 7, 2018).

<sup>197</sup> *See Creative Movement & Dance v. Pure Performance*, No. 1:16-CV-3285-MHC, 2017 WL 4998649, at \*16 (N.D. Ga. Atlanta Div. July 24, 2017).

good-faith explanation” of what missing text messages may have included sufficed to demonstrate prejudice.<sup>198</sup> In *Matthew Enterprise v. Chrysler*, the court found that the lost emails could have contained information which would have permitted Chrysler to present anecdotal evidence to undercut statistical evidence.<sup>199</sup>

[76] Courts sometimes place the burden of proof on the non-moving party. In *DriveTime 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.<sup>200</sup> When a party acts in bad faith, courts are prepared to place the burden on that party to show a lack of prejudice based on a presumption as to its presence.<sup>201</sup>

[77] The Committee 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.<sup>202</sup> In *Holguin v. AT&T*, the party failed to explain why the available discovery was “insufficient to meet his needs.”<sup>203</sup> In *Snider v. Danfoss*, prejudice was lacking since some emails

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<sup>198</sup> See *Sinclair v. Cambria County*, No. 3:17-CV-149, 2018 WL 4689111, at \*2 (W.D. Pa. Sept. 28, 2018).

<sup>199</sup> See *Matthew Enterprise v. Chrysler Group LLC*, No. 13-CV-04236-BLF, 2016 WL 2957133, at \*4 (N.D. Cal. May 23, 2016).

<sup>200</sup> See *DriveTime Car Sales Co. v. Pettigrew*, No. 2:17-CV-371, 2019 WL 1746730, at \*5 (S.D. Ohio Apr. 18, 2019).

<sup>201</sup> See, e.g., *Micron Tech. v. Rambus, Inc.*, 645 F.3d 1311, 1328 (Fed. Cir. 2011) (stating that 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”).

<sup>202</sup> See *Proposed Rules*, *supra* note 2, at 574.

<sup>203</sup> See *Holguin v. AT&T Corp.*, No. EP-18-CV-00122-PRM, 2018 WL 6843711, at \*7–8 (W.D. Tex. Nov. 8, 2018).

were recovered from other recipients and the plaintiff could testify as to the contents of others.<sup>204</sup> 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.<sup>205</sup>

### 1. Admission of Spoliation Evidence

[78] According to the Committee Note, “in an appropriate case,” a court may seek “to cure prejudice” by “permitting 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.”<sup>206</sup> This option has been heavily utilized in the absence of a finding of intent to deprive.<sup>207</sup>

#### a. Examples

[79] In *Leidig v. BuzzFeed*, where the court observed that the moving party might have obtained a harsh sanction prior to the Rule, it was unable to do so because of a lack of intent to deprive.<sup>208</sup> However, the court

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<sup>204</sup> See *Snider v. Danfoss, LLC*, No. 15-CV-4748, 2017 WL 2973464, at \*7 (N.D. Ill. July 12, 2017), *report and recommendation adopted*, 2017 WL 3268891 (N. D. Ill. Aug. 1, 2017).

<sup>205</sup> See *Borum v. Brentwood Village, LLC*, 332 F.R.D. 38, 49–50 (D.D.C. 2019); *see also infra* Part VI(3).

<sup>206</sup> See *Proposed Rules*, *supra* note 2, at 575.

<sup>207</sup> See, e.g., *infra* Appendix (listing of cases allowing presentation of loss of ESI evidence to jury under subdivision (e)(1)).

<sup>208</sup> See, *Leidig v. BuzzFeed*, No. 16 Civ. 542 (VM) (GWG), 2017 WL 6512353, at \*11 (S.D.N.Y. Dec. 19, 2017) (displaying the movant has shown only an intent to perform an act that destroys ESI).

authorized the moving party to present evidence and arguments about the spoliation to the jury.<sup>209</sup>

[80] In *EPAC Technologies v. Thomas Nelson*,<sup>210</sup> where no intent to deprive was found, the court permitted the moving party “to present evidence and argument to the jury regarding the loss” of certain data.<sup>211</sup> The jury was told that the party had negligently failed to preserve data, now lost, which “may have shown” information about sales, returns, customer complaints and other information.<sup>212</sup> The jury was also told that “[y]ou may give this whatever weight you deem appropriate as you consider all the evidence presented at trial.”<sup>213</sup>

[81] In *BMG Rights Management v. Cox Communication*, the court “alerted the jury to the fact of spoliation, identified the missing evidence,

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<sup>209</sup> See *id.* at \*12–14 (leaving open the question of also securing a permissive instruction at the time).

<sup>210</sup> *EPAC Technologies v. Thomas Nelson*, No. 3:12-CV-00463, 2018 WL 3322305, at \*3 (M.D. Tenn. May 14, 2018).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* 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). *EPAC Technologies v. HarperCollins Christian Publishing, Inc.*, No. 3:12-CV-00463, 2018 WL 1542040, at \*26 (M.D. Tenn. March 29, 2018). After a verdict in favor of the moving party, the court refused to consider objections to adverse inferences used. *EPAC Technologies v. HarperCollins Christian Publishing, Inc.*, 398 F. Supp. 3d 258, 280 (M.D. Tenn. July 1, 2019), *aff’d*, 2020 WL 1877690 (6<sup>th</sup> Cir. Apr. 15, 2020) (only mandatory adverse inference instructions require a culpable state of mind and the permissive instructions for negligent conduct were no greater than necessary under the circumstances).

and permitted them to consider that fact in their deliberations.”<sup>214</sup> It also gave the party “leave to identify the spoliation issue in its opening statement”<sup>215</sup> and at the close of trial told the jury that “they may, but are not required to, consider the absence” of the missing evidence.<sup>216</sup>

[82] In *Manufacturing Automation v. Hughes*, while the jury was not to be informed of an earlier monetary sanction for spoliation, the court held that this would not preclude the moving party from “identifying for the jury any missing documents that may pertain to plaintiffs claim.”<sup>217</sup> The court allowed both parties to inquire at trial how each party handles document retention policies, as this evidence was “relevant to the merits and burden of persuasion.”<sup>218</sup>

[83] In *Goines v. Lee Memorial*, the court refused to sanction the deletion of Facebook postings under its inherent authority because bad faith was not demonstrated.<sup>219</sup> However, without mentioning Rule 37(e) or the Committee Note, the court stated that the moving party was not precluded from introducing into evidence the facts concerning the failure

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<sup>214</sup> *BMG Rights Mgmt. v. Cox Commc’n*, 199 F.Supp.3d 958, 986 (E.D. Va. Aug. 8, 2016).

<sup>215</sup> *Id.* at 985.

<sup>216</sup> *Id.*

<sup>217</sup> *Mfg. Automation & Software Sys. v. Hughes*, No. 2:16-CV-08962-CAS-KSx, 2019 U.S. Dist. LEXIS 9343, at \*15 (C.D. Cal. Jan. 15, 2019).

<sup>218</sup> *See id.*

<sup>219</sup> *See Goines v. Lee Memorial Health System*, No: 2:17-CV-656-FtM-29NPM, 2019 WL 4016147, at \*6–7 (M.D. Fla. Aug. 26, 2019).

to preserve.<sup>220</sup>

[84] According to the Committee Note, the court may also instruct the jury that it “may consider that evidence [concerning the loss and likely relevance of information], along with all the other evidence in the case, in making its decision.”<sup>221</sup> However, it may not conclude that the missing ESI was adverse to the party that lost it based on its loss alone.<sup>222</sup> The evidence or testimony is relevant and admissible if it renders any fact material to the merits more or less probable that if not admitted.<sup>223</sup> It must reasonably bear on the merits, such as explaining why the party has been unable to present stronger evidence of the claim or defense, or other appropriate justifications.<sup>224</sup>

[85] Admission of such evidence assists the jury in fulfilling its assigned responsibilities and may be essential to providing a fair trial.<sup>225</sup> However, courts may refuse to admit the evidence and permit argument

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<sup>220</sup> See *id.* at n. 10 (citing *Socas v. The Nw. Mut. Life Ins. Co.*, No. 07-20336-CIV-SIMONTON, 2010 WL 3894142, at \*9 (S.D. Fla. 2010) and *Wandner v. American Airlines*, 79 F. Supp.3d 1285, at 1300 (S.D. Fla. 2009)).

<sup>221</sup> See *Proposed Rules*, *supra* note 2, at 577.

<sup>222</sup> See *id.* at 577–578.

<sup>223</sup> See FED. R. EVID. 401, 402.

<sup>224</sup> See, e.g., *Waymo v. Uber Technologies*, No. C 17-00939 WHA, 2018 WL 646701, at \* 18, \*23 (N.D. Cal. Jan. 30, 2018); see also *Karsch v. Blink Health*, No. 17-CV-3880 (VM) (BCM), 2019 WL 2708125, at \*27 (S.D.N.Y. June 20, 2019) (rectifying the evidentiary imbalance, allowing context, and assisting in credibility assessment).

<sup>225</sup> See *Issa v. Del. State Univ.*, No. 14-168-LPS, 2019 WL 1883768, at \*1 (D. Del. Apr. 26, 2019).

where undue prejudice or jury confusion may be involved.<sup>226</sup>

## 2. Preclusion

[86] Courts frequently address the prejudice resulting from lost ESI by orders of preclusion, such as barring the testimony of witnesses or admission of evidence on specific topics or argument in favor or against specific claims or defenses. In *Ericksen v. Kaplan*, for example, a party was barred from offering an email into evidence because of deletion of information contradicting its authenticity.<sup>227</sup> This was done under Rule 37(e)(1) in order to “cure the prejudice” by eliminating any risk that the jury would deem them authentic.<sup>228</sup> In addition, the jury was to be instructed that they might consider the circumstances of the loss along with other evidence at the trial.<sup>229</sup>

[87] In *J.S.T. v. Robert Bosch*, the court adopted the recommendation of an Expert Advisor to prohibit use of certain emails or noting their absence at summary judgment or trial.<sup>230</sup> According to the Committee Note, an order of preclusion under Rule 37(e)<sup>231</sup> is intended to help restore the

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<sup>226</sup> See, e.g., *Duran v. Cty. of Clinton*, No. 4:14-CV-2047, 2019 WL 2867273, at \*5 (M.D. Pa. July 3, 2019) (granting motion *in limine* after citing Rule 37(e)(1); FRE 401, 402 and 403); see also discussion *infra* Part VII(e).

<sup>227</sup> See *Ericksen v. Kaplan Higher Educ.*, No. RDB-14-3106, 2016 WL 695789, at \*2 (D. Md. Feb. 22, 2016).

<sup>228</sup> See *id.*

<sup>229</sup> See *id.* at \*1.

<sup>230</sup> See *J.S.T. Corp. v. Robert Bosch L.L.C.*, No. 15-13842, 2019 WL 2296913, at \*1 (E.D. Mich. May 30, 2019).

<sup>231</sup> Cf. Fed. R. Civ. P. 37(c).

evidentiary balance and does not necessarily require a showing of intent to deprive.<sup>232</sup>

[88] 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.<sup>233</sup> In *Matthew Enterprise v. Chrysler Group*, the court 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.<sup>234</sup>

[89] In *Bellamy v. Wal-Mart*, a prohibition on “asserting or arguing any comparative negligence” was ordered under subdivision (e)(1) to alleviate prejudice in a case where the defendant had failed to preserve a video of the accident scene.<sup>235</sup> However, the Committee Note stresses that a finding of intent to deprive is required to preclude “a party from offering any evidence in support of, the central or only claim or defense in the case.”<sup>236</sup>

[90] In *CAT3 v. Black Lineage*, a party was precluded from relying on

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<sup>232</sup> See *Proposed Rules*, *supra* note 2, at 528–30. In *Estate of Esquivel v. Brownsville Indep. Sch. Dist.*, No. 1:16-CV-40, 2018 WL 7050211 at \*6 (S.D. Tex. Nov. 20, 2018), the magistrate refused to preclude a party from introducing alternative causation evidence which would eliminate a central defense.

<sup>233</sup> See *Leidig v. BuzzFeed, Inc.*, No. 16 Civ. 542 (VM) (GWG), 2017 WL 6512353 at \*8, \*14 (S.D.N.Y. Dec. 19, 2017).

<sup>234</sup> See *Matthew Enterprise v. Chrysler Grp.*, No. 13-CV-04236-BLF, 2016 WL 2957133, at \*4 (N.D. Cal. May 23, 2016).

<sup>235</sup> *Bellamy v. Wal-Mart Stores, Texas, L.L.C.*, No. SA-18-CV-60-XR, 2019 WL 3936992 at \*5–6 (W.D. Tex. Aug. 19, 2019).

<sup>236</sup> See *Proposed Rules*, *supra* note 2, at 575.

an altered version of lost emails which “obfuscate[d] the record” by placing authenticity of both original and subsequently produced emails at issue.<sup>237</sup> This measure was ordered as an alternative to ordering dismissal or an adverse inference instruction because it adequately protected the defendants from legal prejudice resulting from the plaintiff’s conduct.<sup>238</sup>

### 3. Monetary Sanctions

[91] Courts routinely award monetary sanctions under Rule 37(e)(1) consisting of attorney’s fees and expenses. This permits recovery of the expenditure of time and effort necessary to bring the issue of spoliation before the court,<sup>239</sup> as was the case in *Experience Hendrix v. Pitsicalis*.<sup>240</sup> In *Adriann Borum v. Brentwood Village*, the court imposed monetary sanctions in the form of fees and costs without ordering any other form of relief.<sup>241</sup>

[92] Neither the text of the Rule nor the Committee Note describing Rule 37(e) allude to authority to impose attorneys’ fees.<sup>242</sup> In *Snider v.*

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<sup>237</sup> See *CAT3, L.L.C. v. Black Lineage, Inc.*, 164 F. Supp. 3d. 488, 497, 501–02 (S.D.N.Y. 2016).

<sup>238</sup> See *id.* at 502 (harsher alternatives “would unnecessarily hamper the [non-moving parties] in advancing what might, in fact, be legitimate claims”).

<sup>239</sup> See *id.* (addressing “economic prejudice”).

<sup>240</sup> See *Experience Hendrix, L.L.C. v. Pitsicalis*, No. 17 Civ. 1927 (PAE), 2018 WL 6191039 at \*11 (S.D.N.Y. Nov. 27, 2018).

<sup>241</sup> See *Borum v. Brentwood Village, L.L.C.*, No. 16-1723 (RC), 2019 WL 3239243, at \*9–10 (D.D.C. July 18, 2019).

<sup>242</sup> See Steven Baicker-McKee, *Mountain or Molehill?*, 55 DUQ. L. REV. 307, 321 (2017) (“This . . . seems like an oversight. . .”).

*Danfoss*, 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.”<sup>243</sup> However, the requirement under the American Rule<sup>244</sup> of specific authority is undoubtedly satisfied here. The Discovery Subcommittee, for example, acknowledged the award as a curative measure when including it in the Initial Proposal.<sup>245</sup>

[93] This is not the only example of authority existing for fee shifting under the Federal Rules of Civil Procedure, which do not explicitly cite the relief.<sup>246</sup> Other courts have cited Rule 37(a) as authority for awards of fees and costs.<sup>247</sup> In *Ottoson v. SMBC Leasing*, the court interpreted that rule to apply “when[ever] a discovery motion is granted pursuant to Rule 37.”<sup>248</sup> However, Rule 37(a) is clearly inapplicable.<sup>249</sup> As explained in

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<sup>243</sup> *Snider v. Danfoss, L.L.C.*, No. 15 CV 4748, at \*5 (N.D. Ill. July 12, 2017) (“And the Advisory Committee Notes are shockingly silent on the issue as well.”).

<sup>244</sup> *See Baker Botts L.L.P. v. ASARCO L.L.C.*, 135 S. Ct. 2158, 2164 (2015) (only Congress may authorize courts to shift the costs of adversarial litigation).

<sup>245</sup> *See, e.g.*, Notes of Discovery Subcommittee Conference Call (Mar. 4, 2014), in ADVISORY COMM. ON CIVIL RULES, Agenda Book, at 440 (Apr. 10–11, 2014).

<sup>246</sup> *See Horowitz v. 148 South Emerson Assocs.*, 888 F.3d 13, 24–25 (2d Cir. 2018) (interpreting Rule 41(d) to permit fee shifting despite absence of express authority in the Rule).

<sup>247</sup> *See Fed. R. Civ. P. 37(a)(5)(A).*

<sup>248</sup> *Ottoson v. SMBC Leasing & Finance*, 268 F. Supp. 3d 570, 584–85 (S.D.N.Y. Jul. 13, 2017).

<sup>249</sup> *See, e.g.*, *Best Payphones, Inc. v. Dobrin*, No. 01-CV-3934 (LDH) (ST), 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).

*Wal-Mart Stores v. Cuker Industries*, the rule “pertains [only] to denials of motions to compel disclosure or discovery.”<sup>250</sup> Nor is Rule 37(c) applicable.<sup>251</sup>

[94] Other courts have relied on their inherent authority, as was frequently the case prior to the Rule.<sup>252</sup> In *Klipsch Group v. EPRO E-Commerce*, for example, the Second Circuit approved an award of \$2.7 million of fees and expenses based on inherent authority where it found bad faith to exist.<sup>253</sup> It rejected the argument that this was a “punitive measure[] that violate[d] [the party’s] due process right[s],” since it merely reimbursed the moving party for the legal expenditures occasioned by litigation abuse.<sup>254</sup>

## VII. JURY MANAGEMENT

[95] The acknowledgement of court discretion for use of the jury in assessing pre-litigation spoliation has raised several noteworthy issues.

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<sup>250</sup> *Wal-Mart Stores, Inc. v. Cuker Interactive, L.L.C.*, No. 5:14-CV-5262, 2017 WL 239341, at \*2 (W.D. Ark. Jan. 19, 2017).

<sup>251</sup> *Cf. Kramer v. Ford Motor Co.*, No. 12-1149(SRN/FLN), 2016 WL 7163084, at \*2 (D. Minn. Feb. 3, 2016) (awarding fees under Rule 37(c) when Rule 37(e) threshold conditions not met).

<sup>252</sup> *See, e.g., Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 288 (S.D.N.Y. 2009); *In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 299 F.R.D. 502, 511 (S.D.W. Va. 2014).

<sup>253</sup> *See Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620, 623, 632 & n.6, 633–636 (2d Cir. 2018) (noting that it had “no occasion” to determine if the Rule applied since it had found bad faith).

<sup>254</sup> *Id.* at 633 n.7 (citing *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017)).

### A. Intent to Deprive

[96] The Committee Note acknowledges the possible use of the jury to determine whether a failure to preserve ESI was the result of an “intent to deprive.”<sup>255</sup> The Note provides elaborate instructions for courts exercising that authority.<sup>256</sup> Some have argued that the absence of explicit authority in the Rule itself calls the practice into question. In *Sosa v. Carnival*, however, the court held that “assigning the jury with the task of determining the intent to deprive . . . [was] not clearly erroneous or contrary to law,” noting the lack of any authority for the argument.<sup>257</sup> It has also been pointed out that “determining a party’s intent [is] exactly the type of function[] that juries routinely perform.”<sup>258</sup>

[97] According to Greg Joseph, whether the determination of intent is a question for the jury requires a finding of conditional relevance under FRE 104(b).<sup>259</sup> The court may refer the matter to the jury only when it is satisfied that sufficient evidence exists from which intent could be

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<sup>255</sup> See *Proposed Rules*, *supra* note 2, at 577–78.

<sup>256</sup> See *id.* (“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.”).

<sup>257</sup> *Sosa v. Carnival Corp.*, No. 18-20957-CIV-ALTONAGA/GOODMAN, 2019 WL 330865, at \*4 (S.D. Fla. Jan. 25, 2019).

<sup>258</sup> Hon. Shira A. Scheindlin & Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 *FORDHAM L. REV.* 1299, 1309 (2014).

<sup>259</sup> See Joseph, *supra* note 147, at 40.

found.<sup>260</sup> In *Hunting Energy Services v. Kavadas*, invoking the jury to determine intent to deprive was appropriate because it “depends on a credibility analysis and a finding as to the defendants’ mental state,” a prototypical function of a jury.<sup>261</sup> In *Woods v. Scissons*, the court decided to have the jury decide the issue because it “would allow the determination of intent to be made on a more fully developed evidentiary record, and is in harmony with the Advisory Committee Notes to the rule.”<sup>262</sup>

[98] Prior to the Rule, some Commentators argued that jury involvement created an unacceptable risk of undue prejudice and jury confusion.<sup>263</sup> Others argued it was an inappropriate allocation of responsibility as between court and jury.<sup>264</sup> However, in decisions like

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<sup>260</sup> See *id.* (stating that the issue of intent under Rule 37(e)(2) functions as a question of conditional relevance under FRE 104(b)); see also *Franklin v. Howard Brown*, No.17 C 8376, 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.)

<sup>261</sup> *Hunting Energy Servs. V. Kavadas*, No. 3:15-CV-228 JD, 2018 U.S. Dist. LEXIS 161416, at \*33 (N.D. Ind. S. Bend Div. Sept. 20, 2018).

<sup>262</sup> *Woods v. Scissons*, No. CV-17-08038-PCT-GMS, 2019 WL 3816727, at \*7 (D. Ariz. Aug. 14, 2019).

<sup>263</sup> See 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”).

<sup>264</sup> See *Nucor Corp. v. Bell*, 251 F.R.D. 191, 203 (D.S.C. 2018); 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 (2013) (Judge Norton served on the Evidence Advisory Committee and issued the decision in *Nucor Corp. v. Bell*) (“It 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.”).

*Rimkus Consulting v. Cammarata*, courts instructed juries that only if the jury found that there had been bad-faith destruction of evidence could they draw the inference that the lost information would have been unfavorable.<sup>265</sup> 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].”<sup>266</sup>

## B. Evidence of Spoliation

[99] The acknowledgment of authority to admit evidence and argument about spoliation to address prejudice under Rule 37(e) rests on the interpretation of the Rule articulated in the Committee Note.<sup>267</sup> One Commentator described this option as a “small escape hatch based on language in a Note and not in Rule 37.”<sup>268</sup> According to the Chair of the Discovery Subcommittee, however, “[t]here is a proper evidentiary aspect to lost information, something that is not a ‘sanction.’”<sup>269</sup> A prescient

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<sup>265</sup> See *Rimkus Consulting Grp. v. Cammarata*, 688 F. Supp. 2d 598, 620 (S.D. Tex. 2010); cf. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C.*, 685 F. Supp.2d 456, 470, 496 n. 251 (S.D.N.Y. 2010) (suggesting that the jury was “bound by the Court’s determination that certain plaintiffs destroyed documents after the duty to preserve arose”).

<sup>266</sup> *Lexpath Techs. Holdings, Inc. v. Welch*, 744 F. App’x 74, 80 n.3 (3<sup>rd</sup> Cir. July 30, 2018).

<sup>267</sup> See *Proposed Rules*, *supra* note 2, at 528.

<sup>268</sup> Richard Briles Moriarity, *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, 264 n.218 (2015).

<sup>269</sup> See Civil Rules Advisory Comm., Meeting Minutes (Apr. 10–11, 2014), in ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK, at 60 (Oct. 30–31, 2014), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV2014-10.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV2014-10.pdf) [<https://perma.cc/6HUD-LZ94>] (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”).

article on the subject emphasized that reliance on the common sense and experience of the jury in dealing with the ambiguities of spoliation evidence arguably can improve the accuracy of the outcomes.<sup>270</sup> The jury is by far in the best position to resolve the issue of the impact because “contrasting though reasonable inferences may be drawn from almost any piece of [spoliation] evidence.”<sup>271</sup>

[100] Courts have long exercised their discretion in similar circumstances, provided the evidence is relevant and admissible and not barred by FRE 403.<sup>272</sup> For example, once a court has decided to give an adverse inference instruction, the existence of spoliation necessarily becomes an issue for the jury to consider.<sup>273</sup> Moreover, even absent such an instruction, evidence of spoliation may be relevant.<sup>274</sup> In *Waymo v. Uber Technologies*, the court announced that it planned to admit evidence

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<sup>270</sup> See Charles W. Adams, *Spoliation of Electronic Evidence: Sanctions Versus Advocacy*, 18 MICH. TELECOMM. & TECH. L. REV. 1, 6, 56–59 (2011) (describing how “the better remedy for spoliation is attorney advocacy rather than sanctions”).

<sup>271</sup> *GN Netcom, Inc. v. Plantronics, Inc.*, No. 12-1318-LPS, 2016 WL 3792833, at \*14 (D. Del. July 12, 2016) (deciding that the deletion of emails may be viewed by a reasonable jury as part of a massive cover-up), *aff’d in part, rev’d in part, remanded by* 930 F.3d 76 (3d Cir. 2019).

<sup>272</sup> See *Paice L.L.C. v. Hyundai Motor Co.*, No. MJG-12-499, 2015 WL 4984198, at \*3 (D. Md. Aug. 18, 2015) (demonstrating how a 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).

<sup>273</sup> See *GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76, 79, 85, 90 (3d Cir. 2019).

<sup>274</sup> See, e.g., *Dalcour v. City of Lakewood*, 492 F. App’x. 924, 937 (10th Cir. 2012). *But cf. Duran v. County of Clinton*, No. 4:14-CV-2047, 2019 WL 2867273, at \*5 (M.D. Pa. July 3, 2019) (excluding evidence of spoliation because it would not make a fact relevant to the claims more probable than not).

and argument about spoliation when it reasonably bears on the merits.<sup>275</sup> In *Karsch v. Blink*, the court justified the admission of spoliation evidence because it would help rectify the evidentiary imbalance, provide context for the fact-finder, allow a credibility assessment, and help the judge determine the proper scope of the evidence to be admitted and the scope of any instructions.<sup>276</sup> In *Willis v. Cost Plus*, the court explained that in order to address the credibility of the evidence at trial, a party could cross-examine the other party under FRE 607 about the absence of surveillance video and argue for inferences to be drawn from its absence.<sup>277</sup>

### C. Instructions

[101] The Committee Note cautions that a jury in receipt of evidence and argument of spoliation 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.<sup>278</sup> 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.”<sup>279</sup> In one such decision, the

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<sup>275</sup> See *Waymo L.L.C. v. Uber Technologies, Inc.*, No. C 17-00939 WHA, 2018 WL 646701, at \*22–23 (N.D. Cal. Jan. 30, 2018) (holding that “such evidence 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 in character assassination”).

<sup>276</sup> See *Karsch v. Blink Health Ltd.*, No. 17-CV-3880 (VM) (BCM), 2019 WL 2708125, at \*27 (S.D.N.Y. June 20, 2019).

<sup>277</sup> See *Willis v. Cost Plus, Inc.*, No. 16-639, 2018 WL 1319194, at \*5 (W.D. La. March 12, 2018).

<sup>278</sup> *Proposed Rules*, *supra* note 2, at 529 (emphasis added).

<sup>279</sup> See *id.* at 577. (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 evidence presented during the trial—as opposed to inferring from the loss of information alone—whether lost information was

court found prejudice to exist and stated that it would inform the jury of the destruction and allow argument about the implications but that it “[would] not instruct the jury that it must or even may make certain ‘adverse inferences.’”<sup>280</sup>

[102] Nonetheless, despite this careful articulation, there is a risk that juries will default to the functional equivalent of an adverse inference instruction for merely negligent conduct.<sup>281</sup> 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.”<sup>282</sup> A Commentator has noted that “it is uncertain how differently juries will approach [the subject].”<sup>283</sup>

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favorable or unfavorable to positions in the litigation.” REP. OF DISCOVERY SUBCOMM., in ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK, at 379–80 (Apr. 10–11, 2014), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV2014-04.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV2014-04.pdf) [<https://perma.cc/N97J-NUTH>]. The final version of the Committee Note dropped the reference to determining unfavorability).

<sup>280</sup> *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, No. 3:15-md-2633-SI, 2018 WL 5786206, at \*2 (D. Or. Nov. 5, 2018).

<sup>281</sup> See 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, 756–759.

<sup>282</sup> *Mueller v. Swift*, No. 15-cv-1974-WJM-KLM, 2017 WL 3058027, at \*6 (D. Colo. July 19, 2017). See, e.g., TADLER & KELSTON, *supra* note 48, at 23 (“In other words, it is possible that if a party satisfies the preamble and can show prejudice, the jury might make an adverse inference on its own, based on the arguments and evidence presented.”).

<sup>283</sup> See Jeffrey A. Parness, *supra* note 56, at 43 (noting the “real difference between the presumed unfavorability of lost irreplaceable ESI when there is intent to deprive and the need for evidence on the likely favoritism of lost irreplaceable ESI when no such intent exists”).

[103] There is an additional risk of jury confusion when ESI and tangible property are both lost in the same case.<sup>284</sup> In *EPAC Technologies v. HarperCollins*, the court did not give adverse inference presumption since there was no intent to deprive,<sup>285</sup> but admitted evidence of spoliation along with a permissive jury instruction as suggested by the Committee Note.<sup>286</sup> However, the jury was also instructed that had the missing books been preserved, they could infer said books to be “adverse” to the positions taken by the non-moving party.<sup>287</sup> The District Court declined to entertain further challenges to the instructions after the trial because the court “cannot divine that the jury did or did not make those adverse inferences.”<sup>288</sup>

#### D. “Missing Evidence” Jury Instruction

[104] The Committee Note provides that Rule 37(e)(2) “does not limit the discretion of courts to give traditional missing evidence instructions based on a party’s failure to present evidence it has in its possession at the time of the trial.”<sup>289</sup> A missing evidence instruction is available only if the

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<sup>284</sup> See Baicker-McKee, *supra* note 242, at 324 (“the jury might, for example, be instructed to presume that the paper copy contained information harmful to the spoliating party, but not to make the same presumption for the electronic copy”).

<sup>285</sup> See *EPAC Tech’s, Inc. v. HarperCollins Christian Publ’g, Inc.*, No. 3:12-cv-00463, 2018 WL 1542040, at \*12 (M.D. Tenn. Mar. 29, 2018).

<sup>286</sup> See *EPAC Tech’s, Inc. v. Thomas Nelson, Inc.*, No. 3:12-cv-00463, 2018 WL 3322305, at \*3 (M.D. Tenn. May 14, 2018).

<sup>287</sup> See *EPAC Tech’s, Inc.*, 2018 WL 1542040, at \*22.

<sup>288</sup> *EPAC Techs., Inc. v. HarperCollins Christian Publ’g, Inc.*, 398 F. Supp. 3d 258, 280 (M.D. Tenn. July 1, 2019), *aff’d*, 2020 WL 1877690 (6<sup>th</sup> Cir. Apr. 15, 2020).

<sup>289</sup> *Proposed Rules*, *supra* note 2, at 577. See, e.g., *Bell Aerospace Servs., Inc. v. U.S. Aero Servs., Inc.*, No. 1:09-cv-141-MHT, 2010 WL 11425322, at \*3 (M.D. Ala. Feb. 18,

evidence is in a party's possession and the party chooses not to produce it.<sup>290</sup> In *Mali v. Federal Insurance*, 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.<sup>291</sup> The Discovery Subcommittee concluded that this was distinct from the spoliation context because it involved a "curative missing evidence instruction"<sup>292</sup> available only because the missing evidence existed at the time of trial.<sup>293</sup>

[105] *Mali* famously described the permissible instruction used in that case as "no more than an explanation of the jury's fact-finding powers" because it had not been given as a sanction.<sup>294</sup> The instructions available under Rule 37(e)(1) to assist the jury in evaluating evidence and argument about spoliation are also examples of permissive instructions which do not

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2010) (allowing "the jury [to] make its own inference" as to whether the missing evidence would have supported the plaintiff's claims).

<sup>290</sup> See *Proposed Rules*, *supra* note 2, at 575–77.

<sup>291</sup> *Mali v. Federal Ins. Co.*, 720 F.3d 387, 391–92 (2d. Cir. 2013).

<sup>292</sup> Notes of Discovery Subcommittee Meeting (Feb. 8, 2014), in ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK, 405, 406–07 (Apr. 10–11, 2014), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV2014-04.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV2014-04.pdf) [<https://perma.cc/EC9V-4PXP>] ("the district court [in *Mali*] gave a curative missing evidence instruction, leading to a defense verdict").

<sup>293</sup> See *Mali*, 720 F.3d 387, at 391.

<sup>294</sup> *Id.* at 393 ("While 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.").

require a finding of intent to deprive and are not intended as sanctions.<sup>295</sup>

### E. Undue Prejudice and Confusion

[106] Admitting evidence and argument about spoliation in the middle of a trial on the merits can create an unacceptable risk of unfair prejudice and confusion of the jury. An adverse inference may “brand[] one party as a bad actor” in the eyes of the jury and “open[] the door” to inappropriate speculation.<sup>296</sup> Commentators have also noted the “risk of an improper character inference from the bad act of spoliation” being applied by the jury to resolution of issues in the case.<sup>297</sup> Involving the jury may also involve time consuming mini-trials on minimally relevant issues.<sup>298</sup> In *Caprarotta v. Entergy Corporation*, a Court of Appeals 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.<sup>299</sup>

[107] FRE 403 authorizes a court to exclude relevant evidence of spoliation if its probative value is outweighed by unduly prejudicial

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<sup>295</sup> See Sheindlin & Orr, *supra* note 250, at 1307 (the Committee Note “permits a Malientype instruction to guide the jury’s consideration of spoliation evidence without requiring ‘intent to deprive.’”).

<sup>296</sup> *Henning v. Union Pacific R.R.*, 530 F.3d 1206, 1219–20 (10th Cir. 2008).

<sup>297</sup> Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L. J. 1215, 1278 n.297 (2004).

<sup>298</sup> See, e.g., *Borum v. Brentwood Vill.*, 332 F.R.D. 38, 49–50 (D.D.C. 2019) (pointing to “additional time and efforts [a party] incurred in obtaining information relevant to its standing defense, and litigating the spoliation issue”).

<sup>299</sup> *Caparotta v. Entergy Corp.*, 168 F.3d 754, 758 (5th Cir. 1999).

impact or the risk of confusing the jury.<sup>300</sup> Various options are available. As noted in *Issa v. Delaware State Univ.*, “[w]hile admission of this evidence does bring with it a risk of unfair prejudice, confusion of the jury, and 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.<sup>301</sup> In *Boone v. Everett*, for example, “the district court instructed the jury that it was not permitted to draw any inference” from the destruction of a surveillance tape under the circumstances.<sup>302</sup>

### VIII. CONCLUSION

[108] Amended Rule 37(e) fills an important gap in the Federal discovery Rules in at least two important respects. First, through its focus on the satisfaction of threshold conditions, the Rule provides important guidance for preservation conduct both prior to and after the initiation of litigation.<sup>303</sup> Only conduct that meets all of the preconditions is worthy of consideration for the imposition of measures under the Rule. Reasonable preservation conduct suffices; perfection is not required.

[109] Second, the Rule rejects the sufficiency of unintentional conduct to justify an inference/presumption that ESI lost due to a failure to preserve was unfavorable to the party that lost it. However, it also clarifies that when prejudice from the irreparable loss of ESI exists, a broad range of curative measures is available. Absent prejudice, however, no such measures are available.

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<sup>300</sup> FED. R. EVID. 403.

<sup>301</sup> *Issa v. Delaware State Univ.*, No. 14-168-LPS, 2019 WL 1883768, at \*1 (D. Del. Apr. 26, 2019).

<sup>302</sup> *Boone v. Everett*, 751 F. App'x 400, 401 (4th Cir. 2019).

<sup>303</sup> *See* FED. R. CIV. P. 37(e).

[110] Admittedly, this means that in some Circuits, adverse inference instructions based on negligent or grossly negligent conduct are no longer readily available. While this may seem unfair to some, it is more than compensated for the acknowledgment of the court's discretion to remediate prejudice by admitting evidence of spoliation to the jury or by making judicious use of other remedies that do not require a showing of "intent to deprive." This fulfills the prescient suggestion made during the evolution of the Rule that the court "should not be left with a choice between using serious sanctions and doing nothing."<sup>304</sup>

[111] On balance, it is fair to say that the refocus of measures under the Amended Rules has had a positive impact. While the costs associated with preservation of ESI that is never sought or produced remains high since other factors drive preservation and collection strategies,<sup>305</sup> there is a palatable reduction in preservation angst now that a more rational approach to preservation is possible.<sup>306</sup>

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<sup>304</sup> Notes of Discovery Subcommittee Conference Call (Aug. 7, 2012), in ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK, at 175 (Nov. 1–2, 2012), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV2012-10.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV2012-10.pdf) [<https://perma.cc/68BF-7Y7V>].

<sup>305</sup> See Tadler & Kelston, *supra* note 44, at 24 (stating that "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.").

<sup>306</sup> One of the Author's colleagues points out that the clarity of the Rule has "reduced potential disputes" since it diminishes the willingness of parties to invest the time and resources needed to pursue such allegations when its conditions cannot be met. Without the rule, it was like walking into the "Wild West."

## Appendix

### Cases Allowing Presentation of Loss of ESI Evidence to Jury Under Subdivision (e)(1)

Bank APR.Direct v. Capital Premium, No. 15 C 10340, 2018 WL 1616725 (N.D. Ill. Apr. 4, 2018); Barry v. Big M., No. 1:16-cv-00167-JEO, 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, No. 13-cv-361, 2016 WL 7034139 (N.D. Ill. Dec. 2, 2016); Coan v. Dunne, No. 3:15-cv-00050 (JAM), 2019 WL 1620412 (D. Conn. Apr. 16, 2019); Coward v. Forestar Realty, No. 4:15-CV-0245-HLM, 2017 WL 8948347 (N.D. Ga. Nov. 30, 2017); EEOC v. GMRI, 2017 WL 5068372, 2017 WL 5068372 (S.D. Fla. Nov. 1, 2017); Dotson v. Edmonson, No. 16-153712018, WL 501511 (E.D. La. Jan..22, 2018); Drivetime Car Sales v. Pettigrew, No.: 2:17-cv-371, 2019 WL 1746730 (S.D. Ohio Apr. 18, 2019); EPAC Technologies v. HarperCollins, No. 3:12-cv-00463, 2018 WL 3322305 (M.D. Tenn. May 14, 2018); Epicor v. Alt. Technologies, No.: SACV 13-00448-CJC(JCGx), 2015 WL 12734011 (C.D. Fla. Dec. 17, 2015); Ericksen v. Kaplan, No. RDB-14-3106, 2016 WL 695789 (D. Md. Feb. 22, 2016); Estate of Esquivel v. Brownsville, No. 1:16-cv-40, 2018 WL 7050211 (S.D. Tex. Nov. 20, 2018); First Am. Title v. Northwest Title, Case No. 2:15-cv-00229, No. 2:15-cv-00229, 2016 WL 4548398 (D. Utah Aug. 31, 2016); Fishman v. Tiger Natural Gas, No. C 17-05351 WHA, 2018 WL 6068295 (N.D. Cal. Nov. 20, 2018); Franklin v. Howard Brown Center, No. 17 C 8376, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018), Magistrate's Rep. & Rec. *adopted in* 2018 WL 5831995 (N.D. Ill. Nov. 7, 2018); Gipson v. Mngt., No. 3:16-CV-624-DPJ-FKB, 2018 WL 736265 (S.D. Miss. Feb. 6, 2018); Goines v. Lee Memorial, No: 2:17-cv-656-FtM-29NPM, 2019 WL 4016147, at n. 10 (M.D. Fla. Aug. 26, 2019); Goldrich v. City of Jersey City, No. 15-885 (SDW) (LDW), 2018 WL 4489674 (D.N.J. Sept. 19, 2018); Hamilton v. Ogden Weber Technical College, No. 1:16-cv-00048-JNP-DBP, 2017 WL 5633106 (D. Utah Nov. 21, 2017); HLV, LLC v. Page & Stewart, No. 1:13-cv-1366, 2018 WL 2197730 (W.D. Mich. Mar. 2, 2018); Hunting Energy Services

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v. Kavadas, No. 3:15-CV-228 JD, 2018 WL 4539818 (N.D. Ind. Sept. 20, 2018); *In re* Premera Blue Cross, No. 3:15-md-2633-SI, 2018 WL 5786206 (D. Ore. Nov. 5, 2018); Jackson v. E-Z-Go Division of Textron, No. 3:12-CV-00154-TBR, 2018 WL 3575924 (W.D. Ky. July 25, 2018); Jenkins v. Woody, No. 3:15cv355, 2017 WL 362475 (E.D. Va. Jan. 21, 2017); Karsch v. Blink Health, No. 17-CV-3880 (VM) (BCM), 2019 WL 2708125 (S.D.N.Y. June 20, 2019); Leidig v. Buzzfeed, No. 16 Civ. 542 (VM) (GWG), 2017 WL 6512353 (S.D.N.Y. Dec. 19, 2017); Lexpath v. Welch, 744 Fed. Appx. 74 (3<sup>rd</sup> Cir. July 30, 2018); Lokai v. Twin Tiger, No. 15cv9363 (ALC) (DF), 2018 WL 1512055 (S.D.N.Y. Mar. 12, 2018); Mfg. Automation v. Hughes, No. 2:16-cv-08962-CAS-KSx, 2019 WL 266970 (C.D. Cal. Jan. 15, 2019); Matthew Enterprise v. Chrysler, No. 13-cv-04236-BLF, 2016 WL 2957133 (N.D. Cal. May 23, 2016); McQueen v. Aramark, No. 2:15-CV-492-DAK-PMW, 2016 WL 6988820 (D. Utah Nov. 29, 2016); Montgomery v. Iron Rooster-Annapolis, No. RDB-16-3760, 2017 WL 1902699 (D. Md. May 9, 2017); Mueller v. Taylor Swift, No. 15-cv-1974-WJM-KLM, 2017 WL 3058027 (D. Colo. July 19, 2017); Muhammad v. Mathena, No. 7:14CV00529, 2017 WL 395225 (W.D. Va. Jan. 27, 2017); Nuvasive v. Madsen Medical, No.: 13cv2077 BTM(RBB), 2016 WL 305096 (S.D. Cal. Jan. 26, 2016); Oppenheimer v. City of La Habra, No. SACV 16-00018 JVS (DFMx), 2017 WL 1807596 (C. D. Cal. Feb. 17, 2017); Porter v. City and County of SF, No. 16-cv-03771-CW(DMR), 2018 WL 4215602 (N.D. Cal. Sept. 5, 2018); Schmalz v. Vill. of N. Riverside, No. 13 C 8012, 2018 WL 1704109 (N.D. Ill. Mar. 23, 2018); Security Alarm v. Alarm Protection, No. 3:13-cv-00102-SLG, 2016 WL 7115911 (D. Ala. Dec. 6, 2016); SEC v CKB168 Holdings, No. 13-CV-5584 (RRM), 2016 U.S. Dist. LEXIS 16533 (E.D.N.Y. Feb. 2, 2016); Shaffer v. Gaither, No. 5:14-cv-00106-MOC-DSC, 2016 WL 6594126 (W.D. N.C. Sept. 1, 2016); Small v. Univ. Medical, No. 2:13-cv-0298-APG-PAL, 2018 WL 3795238 (D. Nev. Aug. 8, 2018); Sosa v. Carnival Corp., No. 18-20957-CIV-ALTONAGA/GOODMAN, 2018 WL 6335178 (S.D. Fla. Dec. 4, 2018); Storey v. Effingham Co., No. CV415-149, 2017 WL 2623775 (S.D. Ga. June 16, 2017); Virtual Studios v.

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Stanton Carpet, No.: 4:15-CV-0070-HLM, 2016 WL 5339601 (N.D. Ga. June 23, 2016); White v. U.S., No. 4:15CV1252 SNLJ, 2019 WL 2238592 (E.D. Mo. May 16, 2018); Waymo LLC v. Uber Technologies, No. C 17-00939 WHA, 2018 WL 646701 (N.D. Cal. Jan. 30, 2018); Williford v. Carnival Corporation, No. 17-21992-CIV-COOKE/GOODMAN, 2019 WL 2269155 (S.D. Fla. May 28, 2019); Willis v. Cost Plus, No. 16-639, 2018 WL 1319194 (W.D. La. Mar. 12, 2018); Woods v. Scissons, No. CV-17-08038-PCT-GMS, 2019 WL 3816727 (D. Ariz. Aug. 14, 2019).