

The Sedona Conference WG1

Discovery Sanctions Brainstorming Group

Draft Outline

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**Sedona Conference Working Group 1
Brainstorming Group on Discovery Sanctions
August 2021 Draft Outline**

Table of Contents

I. Introduction: Why Should WG1 Publish on the Topic of Discovery Sanctions?	1
II. Topics Recommended for Publication	3
III. Background on Discovery Sanctions	5
A. Discovery Sanctioning Rules	5
B. Benefits of Sanctions Rules for Litigants, Lawyers, and the Courts	6
C. Challenges Posed by Sanctions Rules to Litigants, Lawyers, and the Courts	7
D. Past Sedona Conference Publications Addressing Discovery Sanctions	7
IV. Analysis of Discovery Sanctions, Other Than Rule 37(e)	9
A. Rule 16(f) – Pretrial Conferences; Scheduling; Management	9
B. Rule 26(g) – Signing Disclosures and Discovery Requests, Responses, and Objections	10
C. Rule 37(a)(5) – Motion for an Order Compelling Disclosure or Discovery: Payment of Expenses: If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing)	12
D. Rule 37(b) – Failure to Comply with a Court Order	19
E. Rule 37(c) – Failure to Disclose, to Supplement, or to Admit	23
F. Rule 37(d) – Failure to Attend Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection	25
G. Rule 37(f) – Failure to Participate in Framing a Discovery Plan	26
H. Inherent Authority of the Court	28
V. Analysis of Rule 37(e) Sanctions	31
A. Purpose of Rule 37(e)	31
B. Conduct that may be subject to Rule 37(e)(1) remedial measures	33
C. Conduct that may be subject to Rule 37(e)(2) sanctions	34
D. Types of sanctions that may be ordered	36
E. Effectiveness of 2015 amendments to Rule 37(e) and guidance	40
F. Whether Rule 37(e) is effectively used to achieve its objectives	40
VI. Potential Publication Topics for WG1 Related to Discovery Sanctions	51

A.	Interplay of Rules Authorizing Sanctions.....	51
B.	Who to Sanction – the Party or the Party’s Attorney.....	54
C.	Other Potential Consequences of Attorney Misconduct.....	58
D.	Interplay between Sanction Rules & Ethical Obligations.....	59
E.	Practice Points for Attorneys to Avoid Discovery Sanctions	60
Appendix A, Sanctions, Other Rules Text.....		63
Appendix B, Brief History of Sanctions Rules		70

I. *Introduction: Why Should WG1 Publish on the Topic of Discovery Sanctions?*

- The Sedona Conference Working Group 1 (“WG1”) has not performed a holistic analysis and provided guidance on the application and effectiveness of discovery-related sanctions available under the Federal Rules of Civil Procedure (“FRCP”). The Brainstorming Group (“BG”) proposes WG1 prepare a paper for publication to identify potential issues with the structure and operation of these rules and to provide a framework to assist the Judicial Conference, courts and litigants more effectively evaluate and avoid discovery-related sanctions.
- A WG1 publication on this topic could achieve the following objectives:
 - Promoting good-faith participation in discovery consistent with the mandate of Rule 1.¹
 - Addressing the need for uniformity and predictability in the application of sanctions rules.
 - Fact-specific nature of sanctions and court’s discretion.
 - Challenges related to the goal of even-handed application of sanctions.
 - Recognition that sanctions should not be issued arbitrarily.
 - Raising awareness of sanctions as a case management tool to facilitate discovery and reduce discovery disputes.
 - Increase awareness of the 2015 amendments to address outdated, boilerplate discovery practices (e.g., discovery requests, objections, sanctions motions, etc.).
 - Informing litigants and courts on how to more effectively leverage discovery-related sanctions.
 - Litigants, in some matters, continue to fail to meet discovery obligations, raising the question of whether sanctions deter misconduct.
 - Courts, in some matters, do not adequately use sanctions to address discovery deficiencies, raising the question of whether courts perceive sanctions motions as creating a litigation sideshow that courts seek to avoid.
 - Discussing circumstances, including specific examples of discovery conduct, that courts have found warrant and do not warrant sanctions under each provision of the FRCP.
 - Recognition that sanctions are not always an appropriate remedy to discovery disputes or issues.
 - Recognition that the body of sanctions caselaw is likely not representative of all sanctions rulings; court orders denying sanctions are likely

¹ Unless otherwise stated, usage of the term “Rule” is in reference to the designated Federal Rule of Civil Procedure.

- underrepresented (including in this outline) since courts may be less likely to issue full opinions (as compared to minute orders) when declining to grant a sanctions motion.²
- Identifying how attorneys and litigants can balance fulfilling their discovery obligations to the court and the opposing party with the duty of zealous advocacy.
 - Evaluating the degree to which the increased complexity of data in modern eDiscovery impacts the appropriate application of sanctions.
 - Discovery has become more complicated by the exponential increase in the volume of data and the variety of data sources that parties generate in the era of modern digital communications. Evaluate what impact these challenges should have on the court's decision to impose discovery sanctions, including the challenge of the increasing complexity to ethical duties of competence.
 - Need for increased focus on whether party/attorney had a reasonable process in place for fulfilling discovery obligations and reasonably engaged in that process.
- In addition, a WG1 publication could help courts by providing a framework for the evaluation of sanctions under commonly-encountered circumstances.
- Specific examples of conduct that courts have found warrant sanctions under each provision of the FRCP.
 - Specific examples of conduct that courts have found would not warrant sanctions under each provision of the FRCP.
 - Interplay between sanctions rules within the FRCP and the court's inherent authority, including how to determine when inherent authority authorizing sanctions should be used when one or more of the Federal Rules could apply.
 - Interplay between sanctions rules, local rules, chambers' rules, and ethical rules.
 - Discussion of the factors that courts consider in determining whether sanctions should be imposed on a party, the attorney, or both, and guidelines for making that determination in a consistent and even-handed manner in light of competing policies and due process requirements when privileged communications with clients are involved, as well as balancing the duty of zealous advocacy with discovery obligations.
- A proposed paper could also help attorneys develop best practices to avoid the circumstances that often give rise to sanctions motions.

² The Brainstorming Group notes that, although we have undertaken to provide significant research material related to the imposition of sanctions under these rules, an area for further development by the Sedona drafting group will be to research caselaw to identify instances where courts declined to issue sanctions under the various Federal Rules and authority analyzed herein.

II. *Topics Recommended for Publication*

Based on the extensive research, analysis, and discussion the BG has engaged in over the course of the past year, we recommend that the WG1 publish a paper relating to discovery-related sanctions.

As demonstrated in the BG's outline, discovery-related sanctions present numerous issues worthy of further discussion and publication. Some of these issues are presented below, categorized as "priority topics" or "other potential topics," based on our collective determination about the importance of the issues to the courts, litigants, and attorneys.

Overall, the paper would seek to evaluate whether sanctions rules are, collectively or individually, being effectively used to achieve their intended purpose, which include deterring misconduct, promoting cooperation, remediating harm, punishing the wrongdoer, ensuring fairness, protecting judicial integrity, and furthering Rule 1's mandate. To the extent they are not, the paper would evaluate whether and how courts and rulemakers should react. More specific topics are set forth below.

Priority Topics

1. Address the effectiveness of the 2015 amendments to Rule 37(e) in achieving the goals of deterrence and remediation for spoliation of ESI.
 - i. Address inconsistency among courts regarding what constitutes prejudice, including guidelines on the information necessary to demonstrate prejudice, and options available to courts when evidence regarding prejudice is unavailable.
 - ii. Discuss the discretion courts possess to apportion the burden of proof.
 - iii. Provide guidance on use of circumstantial evidence to prove intent to deprive.
 - iv. Identify tools available under Rule 37(e)(1) and evaluate whether remedies applied by courts under Rule 37(e)(1) are sufficient to remedy harm from spoliation.
 - v. Address the lack of consistency among courts relating to the quantum of evidence (preponderance vs. clear and convincing).

- vi. Discuss the effectiveness and appropriateness, as a remedial measure or sanction, of submitting evidence of spoliation and the factual questions of intent to the jury.
2. Guidance, by way of specific examples, regarding the level of misconduct and degree of prejudice (if prejudice is a factor to be considered under the Rule or jurisprudence) that courts have found warrant and do not warrant sanctions under each relevant provision of the FRCP.
 - i. Discuss whether Rule 26(g)'s certification requirement has been effective in reducing overbroad discovery requests and boilerplate discovery objections, and address inconsistency among the courts regarding whether the Rule includes a prejudice requirement.
 - ii. Discuss what constitutes compensable expenses under Rule 37(a)(5), and address the effectiveness of sanctions under Rule 37(a)(5) where a motion to compel is granted in part and denied in part.
3. Best practices and/or guidelines for attorneys to avoid the circumstances that often give rise to sanctions motions.
4. Address some courts' and practitioners' continued reliance on pre-2015 amendment caselaw.

Other Potential Topics

5. Discussion of the factors that courts consider in determining whether sanctions should be imposed on a party, the attorney, or both, and guidelines for making that determination in a consistent and even-handed manner in light of competing policies and due process requirements when privileged communications with clients are involved, as well as balancing the duty of zealous advocacy with discovery obligations.
6. Evaluating whether courts, litigants, and/or attorneys perceive sanctions motions as creating unnecessary satellite litigation and whether that view outweighs the usefulness of the deterrence, remediation and compensatory goals which may be achieved.
7. Providing recommendations for the interplay between sanctions rules within the FRCP and the court's inherent authority, including how to determine when inherent authority authorizing sanctions should be used when one or more of the Federal Rules could apply.

8. Evaluate the degree to which the increased complexity of modern eDiscovery impacts the appropriate application of sanctions, and, if so, what impact should these challenges have on the court's decision to impose discovery sanctions, including the challenge of the increasing complexity to ethical duties of competence.

III. *Background on Discovery Sanctions*

A. **Discovery Sanctioning Rules³**

- **Federal Rules of Civil Procedure.** Several FRCP sections provide a basis for courts to impose sanctions for discovery-related misconduct of a party, attorney, or both:
 - o **Rule 16(f)** relates to pre-trial conference and case management issues, and provides the court with broad discretion to issue sanctions on a party, attorney, or both for failure to appear or participate in good faith, being substantially unprepared, or failing to obey a scheduling or other pretrial order.
 - o **Rule 26(g)** provides that a court must impose sanctions on a party, attorney, or both who improperly certifies initial disclosures or discovery responses without substantial justification.
 - o **Rule 37(a)(5)(A)** provides that, where a motion to compel discovery is granted or disclosure or discovery is provided after the filing of such a motion, a court must require the party or attorney whose conduct necessitated the motion, or both, to pay reasonable expenses, including attorney fees, unless the movant did not confer in good faith, the opposing party's conduct was substantially justified, or other circumstances make the award unjust.
 - o **Rule 37(a)(5)(C)** provides that if the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.
 - o **Rule 37(b)** authorizes a variety of sanctions where a party fails to obey a discovery order. Further, instead of or in addition to these sanctions, a court must order the offending party, attorney, or both to pay reasonable expenses, including attorney fees, unless the failure was substantially justified or other circumstances make the award unjust.

³ This outline does not discuss all available bases on which a court may issue sanctions, but focuses instead on sanctions available under the discovery rules of the Federal Rules of Civil Procedure and the court's inherent authority. Specifically, the outline does not include Federal Rule 11, which is broadly aimed at deterring attorney abuse in court proceedings. Although not specific to discovery, Rule 11 may be applicable to discovery misconduct in certain circumstances. In addition, the outline does not analyze 28 U.S.C. § 1927, which provides that a court may impose sanctions on an attorney who "unreasonably and vexatiously" delays the proceedings and would be squarely applicable to an attorney's discovery-related misconduct.

- **Rule 37(c)** states that a court may sanction a party who fails to disclose or supplement discovery unless the failure was substantially justified or is harmless. Sanctions may include prohibiting the party from using the evidence, payment of reasonable expenses, including attorney fees, informing the jury of the failure, and sanctions permitted under Rule 37(b)(2). The court may order a party who improperly fails to admit to a request for admission to pay reasonable expenses, including attorney fees, in making the proof, absent certain conditions.
 - **Rule 37(d)** provides the court with broad discretion to issue sanctions permitted under Rule 37(b)(2), where a party fails to appear for deposition or respond to written discovery requests. The court must require a party, attorney or both to pay reasonable expenses, including attorney fees, unless the failure was substantially justified or other circumstances make an award unjust.
 - **Rule 37(e)** provides for varying levels of sanctions related to spoliation of ESI where a party did not take reasonable steps to preserve the ESI and the lost ESI cannot be restored or replaced. Severity of sanctions imposed depends on whether the court finds the spoliating party acted with intent to deprive the other party of the use of the ESI in litigation. Imposition of sanctions under this Rule is discretionary, not mandatory.
 - **Rule 37(f)** is the means by which a court may impose reasonable expenses, including attorney fees, on a party or attorney for failure to participate in good faith in the development of a proposed discovery plan, as required by Rule 26(f).
- **Inherent authority**
- Federal courts have certain inherent powers and the authority to exercise those powers “to control the conduct of those who appear before them. In invoking the inherent power to punish conduct which abuses the judicial process, a court must exercise discretion in fashioning an appropriate sanction, which may range from dismissal of a lawsuit to an assessment of attorney fees.”⁴
 - The exercise of these powers requires a court to find that a party (or its counsel) “has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”⁵
- B. Benefits of Sanctions Rules for Litigants, Lawyers, and the Courts**
- Sanctions rules promote good-faith participation in discovery, which facilitates the objectives of Rule 1 to ensure the “just, speedy, and inexpensive

⁴ Chambers v. Nasco, Inc., 501 U.S. 32, 33 (1991).

⁵ Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975).

determination of every action and proceeding.”⁶

- Sanctions rules deter discovery misconduct/bad actors, including both specific deterrence and general deterrence, protecting the integrity of the judicial process.⁷
- Certain sanctions rules remediate some or all of the harm or prejudice to a party resulting from another party’s (or non-party’s) misconduct.

C. Challenges Posed by Sanctions Rules to Litigants, Lawyers, and the Courts

- Confusion and uncertainty exists surrounding discovery-related sanctions.
- Need to ensure that sanctions orders are reasonable and even-handed and keep with the goals of discovery.
- Courts perceive that sanctions have been discouraged.
- Litigants perceive that motions for sanctions have been discouraged.
- Given the fact-based nature of sanctions cases and judicial discretion, identifying objective, guiding principles is problematic.
- Filing of sanctions motion or threat of filing sanctions motion may be used for an improper purpose (e.g., gamesmanship).
- Need to address how to navigate the interplay of sanctions rules and other rules, guidelines, and authorities that govern attorney conduct.
- Rapidly changing landscape of eDiscovery in the modern digital era poses real challenges for litigants and attorneys to keep up with discovery obligations as new technologies emerge and business communications tools expand.

D. Past Sedona Conference Publications Addressing Discovery Sanctions

- *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 Sedona Conf. J. 613 (2016) (addressing the interplay between inherent authority

⁶ See *Trs. of the Mosaic and Terrazzo Welfare, Pension, Annuity and Vacation Funds v. Elite Terrazzo Flooring, Inc.*, No. 18-cv-1471, 2020 WL 1172635, at *6 (E.D.N.Y. Feb. 20, 2020); *Johnson v. N.C. Dep’t of Just.*, No. 16-cv-000679-FL, 2018 WL 5831997, at *1, 6, 12 (E.D.N.C. Nov. 7, 2018).

⁷ See *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976); see also *Update Art Inc. v. Modiin Publ’g, Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988).

and Rule 37(e) sanctions).

- No other past Sedona publications directly focus on discovery sanctions as the primary topic. The following WG1 publications address discovery sanctions to some degree.
 - *The (2004) Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 5 Sedona Conf. J. 151 (2004).
 - *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 7 Sedona Conf. J. 1 (2006) (primarily discussing Rule 37(e) sanctions).
 - *Conducting eDiscovery After the Amendments: The Second Wave*, 10 Sedona Conf. J. 215, 226-27 (2009).
 - *The Case for Cooperation*, 10 Sedona Conf. J. 339 (2009).
 - *Preservation Rulemaking after the 2010 Litigation Conference*, 11 Sedona Conf. J. 217, 226-28 (2010).
 - *The Sedona Conference Commentary on Legal Holds: The Trigger & The Process*, 11 Sedona Conf. J. 265 (2010) (some discussion of Rule 37(e) sanctions).
 - *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 Sedona Conf. J. 289 (2010) (reference to sanctions under Rule 26(g)).
 - *The State of Discovery Practice in Civil Cases: Must the Rules be Changed to Reduce Costs and Burden, or Can Significant Improvement be Achieved Within Existing the Rules?*, 12 Sedona Conf. J. 47 (2011) (mentioning sanctions under Rule 26(g) and (f) and Rule 37(f)).
 - *“Defensible” By What Standard?*, 13 Sedona Conf. J. 217 (2012) (brief mention of sanctions under Rules 26(f), 37(f), 16(f), and 37(a)).
 - *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 14 Sedona Conf. J. 155, 161, 164-65 (2013) (brief mention of sanctions under Rule 26(g) and (f)).
 - *The 2015 Civil Rules Package as Transmitted to Congress*, 16 Sedona Conf. J. 1 (2015) (addressing Rule 37(e) sanctions).
 - *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 18 Sedona Conf. J. 141, 161 (2017) (brief mention of sanctions under Rule 26(f)).
 - *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1 (2018).
 - *The Sedona Conference Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests*, 19 Sedona Conf. J. 447, 482-91 (2018) (briefly addressing Rule 26(g) sanctions).

- *The Sedona Conference Primer on Social Media, Second Edition*, 20 Sedona Conf. J. 1, 92 (2019) (refers primarily to Rule 37(e) but also mentions sanctions under Rule 26(g)).
- *The Sedona Conference Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 Sedona Conf. J. 341 (2019) (discussing sanctions under Rule 37(e)).

IV. *Analysis of Discovery Sanctions, Other Than Rule 37(e)*

A. **Rule 16(f) – Pretrial Conferences; Scheduling; Management**

- *Purpose of Rule 16(f)*
 - “The rule was designed to punish lawyers and parties for conduct which unreasonably delays or otherwise interferes with the expeditious management of trial preparation.”⁸
 - “[T]he purpose of Rule 16(f) is to encourage forceful judicial management. . . . [v]iolations of Rule 16 are neither technical nor trivial, but involve a matter most critical to the court itself: management of its docket and the avoidance of unnecessary delays in the administration of its cases.”⁹
 - The Rule requires the court to assess reasonable expenses, including attorney fees, unless (1) “noncompliance [with the rule] was substantially justified” or (2) “other circumstances make an award of expenses unjust.”
- *Examples of conduct that may be subject to Rule 16(f) sanctions*
 - The Rule itself outlines the sanctionable conduct under subsection (f)(1):
 - (A) fails to appear at a scheduling or other pretrial conference;
 - (B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or
 - (C) fails to obey a scheduling or other pretrial order.
 - Conduct need not be intentional, willful, repeated, or in bad faith to be sanctionable.¹⁰
 - All that is required for a violation of Rule 16(f)(1)(C) is an unexcused failure to comply with a court order.¹¹
 - Counsel should review local rules for additional requirements, such as mandatory appearance of the party for conferences (e.g., settlement conference).

⁸ Yaffa v. Weidner, 717 F. App’x 878, 883 (11th Cir. 2017) (internal citations omitted).

⁹ Warr v. Liberatore, 437 F.Supp.3d 259, 283 (W.D.N.Y. 2020), *as amended* (Mar. 30, 2020) (internal citations omitted).

¹⁰ Warr, 437 F.Supp.3d at 283; US Bank NA as Tr. for Truman 2013 SC3 Title Tr. v. First Am. Title Ins. Co., No. 16-CV-00453-GZS, 2019 WL 6120493, at *3 (D. Me. Nov. 18, 2019); Huebner v. Midland Credit Mgmt., Inc., 897 F.3d 42, 53 (2d Cir. 2018).

¹¹ Warr, 437 F.Supp.3d at 283.

- *Whether Rule 16(f) is effectively used to achieve its objectives*
 - o 1983 Advisory Committee Note:
 - “[C]ourts have not hesitated to enforce [Rule 16(f) sanctions] by appropriate measures. To reflect that existing practice, and to obviate dependence upon Rule 41(b) or the court’s inherent power to regulate litigation, Rule 16(f) expressly provides for imposing sanctions on disobedient or recalcitrant parties, their attorneys, or both in four types of situations. Furthermore, explicit reference to sanctions reenforces the rule’s intention to encourage forceful judicial management.” (internal citations omitted).
 - “Among the sanctions authorized by the new subdivision are: preclusion order, striking a pleading, staying the proceeding, default judgment, contempt, and charging a party, his attorney, or both with the expenses, including attorney’s fees, caused by noncompliance. The contempt sanction, however, is only available for a violation of a court order. The references in Rule 16(f) are not exhaustive.”

B. Rule 26(g) – Signing Disclosures and Discovery Requests, Responses, and Objections

- *Purpose of Rule 26(g)*
 - o The primary purposes of Rule 26(g) are to penalize the non-compliant attorney or party and to deter discovery abuse.
 - Rule 26(g) is “designed to curb discovery abuse” by placing an “affirmative duty” on litigants to certify, by way of their signature, that they have responsibly engaged in discovery in a manner that is “consistent with the spirit and purposes of Rules 26 through 37.”¹²
 - “[T]he premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule’s standards will significantly reduce abuse by imposing disadvantages therefor.”¹³
 - Rule 26(g) ensures that the parties “conduct themselves in good faith” during discovery.¹⁴
 - o The certification requirement mirrors that of Rule 11, and is aimed at ensuring compliance with the rule of proportionality in discovery.¹⁵

¹² 1983 Advisory Comm. Note to Rule 26(g); *see also* *Mancia v. Mayflower Textile Serv. Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2008).

¹³ 1983 Advisory Comm. Note to Rule 26(g).

¹⁴ *DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2021 WL 185082, at *66 (N.D. Ill. Jan. 19, 2021) (citing Hon. Paul Grimm, *Good Faith In Discovery*, 46 Litig. 23 (2020)).

¹⁵ *Bottoms v. Liberty Life Assurance Co. of Bos.*, No. 11-cv-01606-PAB-CBS, 2011 WL 6181423, at *4-5 (D. Colo. Dec. 13, 2011).

- Rule 26(g)'s certification requirement applies both to discovery requests as well as responses or objections to discovery requests. It is intended to be “a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection.”¹⁶
- *Examples of conduct that may be subject to Rule 26(g)*
 - Rule 26(g)(1) states that by signing a discovery request or response, an attorney or unrepresented party is certifying “to the best of [their] knowledge, information and belief formed after a reasonable inquiry” that:
 - Any disclosure is “complete and correct as of the time it is made”
 - Any request, response, or objection is
 - Consistent with the rules and warranted by existing law or a non-frivolous argument for modifying the law
 - Not “interposed for any improper purpose”
 - Not “unreasonable or unduly burdensome or expensive”
 - Where an attorney violates Rule 26(g) without substantial justification, sanctions are warranted, although the court has discretion in determining the nature of the sanctions imposed.¹⁷
 - Although the imposition of sanctions appears mandatory, some courts have read the rule to include a prejudice requirement, such that sanctions are not appropriate where a party has not been harmed.¹⁸
 - The “reasonable inquiry” standard is an objective one that is satisfied where an attorney or party undertakes an investigation and draws conclusions therefrom that are reasonable under the circumstances.
 - An attorney may rely on assertions by the client where that reliance is appropriate under the circumstances. “Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.”¹⁹
 - An attorney is not expected to certify to the “truthfulness” of a client’s factual statements in response to a discovery request. Rather, the Rule is satisfied where the attorney “has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand.”²⁰

¹⁶ 1983 Advisory Comm. Note to Rule 26(g); *see also* Bottoms, 2011 WL 6181423, at *4 (Rule 26(g) “obligates each attorney to ‘stop and think’” about discovery obligations).

¹⁷ *See* Rojas v. Town of Cicero, 775 F.3d 906, 909 (7th Cir. 2015).

¹⁸ *See* State v. U.S. Dep’t of Commerce, 461 F.Supp.3d 80, 88 (S.D.N.Y. 2020) (collecting cases).

¹⁹ 1983 Advisory Comm. Note to Rule 26(g).

²⁰ *Id.*

- Imposition of sanctions does not require the moving party to mitigate costs or to have previously filed for a protective order.²¹
- Where a party fails to sign a discovery request, response, or objection, the court should strike it unless the party cures the deficiency promptly upon being notified of the omission.²²
- *Whether Rule 26(g) is effectively used to achieve its objectives*
 - Although courts seem willing to impose sanctions under Rule 26(g) where the substantive provisions of the rule have been met, there is at least some commentary suggesting that Rule 26(g) is not fully leveraged to achieve its deterrent effect.²³
 - Many courts have noted the mandatory nature of sanctions under this provision.²⁴
- C. Rule 37(a)(5) – Motion for an Order Compelling Disclosure or Discovery: Payment of Expenses: If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).**
- *Purpose of Rule 37(a)(5)*
 - Rule 37(a)(5) sanctions are intended to compensate aggrieved parties, deter discovery misconduct, and promote cooperation in discovery.²⁵

²¹ *Effyis, Inc. v. Kelly*, No. 18-13391, 2020 WL 4915559, at *2-3 (E.D. Mich. Aug. 21, 2020) (sanctions warranted for excessively broad discovery requests, but moving party's earlier failure to file for protective order may be considered in calculation of reasonable sanctions award).

²² *Fed. R. Civ. P. 26(g)(2)*; *see also Osei v. Staples, Inc.*, No. 20-cv-00040, 2021 WL 1516036, at *4 (D. Md. Apr. 15, 2021) (striking plaintiff's answers to defendant's discovery requests because they did not include counsel's signature/certification and were not corrected even after defendant's motion specifically pointed out this deficiency).

²³ *See Mancina*, 253 F.R.D. at 357 ("One of the most important, but apparently least understood or followed, of the discovery rules is Fed. R. Civ. P. 26(g), enacted in 1983."); Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 559 (2009) ("For twenty years, judges and lawyers alike paid little attention to Rule 26(g)."); *see also Blackmon v. Bracken Constr. Co. Inc.*, No. 18-142, 2020 WL 6731113, at *23 (M.D. La. Nov. 16, 2020) (giving a warning but not imposing sanctions: "Plaintiffs have demonstrated a habit of redundant and excessive discovery requests and the Court cautions all parties to this action that Rule 26(g) sanctions may be imposed going forward if the parties continue to propound knee-jerk discovery requests or responses.").

²⁴ *See, e.g., Annapolis Citizens Class Overcharged for Water-Sewer v. Stantec, Inc.*, No. 20-2603, 2021 WL 75766, at *9 (D.D.C. Jan. 8, 2021) (noting Rule 26(g) sanctions are mandatory rather than discretionary).

²⁵ *See, e.g., 1970 Advisory Comm. Note to Rule 37(a)(4)* (discussing objective to deter abusive resort to the judiciary); *In re Gilman*, No. 11-ap-01389, 2019 WL 3074607, at *11 (B.A.P. 9th Cir. July 12, 2019) (noting that "purposes are aimed at motivating the parties to cooperate in the discovery process, to act reasonably, and to minimize court intervention"); *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 193 (E.D. Pa. 2008) (compensatory purpose to make the party whole); *SJ Berwin & Co. v. Evergreen Entm't Grp., Inc.*, No. 92 CIV. 6209, 1994 WL 501753, at *2 (S.D.N.Y. Sept. 14, 1994)

- The 1970 amendment flipped the presumption to such that an award of fees and costs is mandatory under Rule 37(a)(5)(A) *unless* the losing party shows its conduct in resisting the requested discovery or disclosure or in filing the motion was substantially justified. 1970 Advisory Comm. Note to then-Rule 37(a)(4). “The change in language [was] intended to encourage judges to be more alert to abuses occurring in the discovery process.” *Id.*
- Substantial justification exception protects parties who file reasonably justified motions or oppositions.
 - In other contexts, the U.S. Supreme Court has interpreted the statutory language of “substantially justified” as “not ‘justified to a high degree,’ but rather ‘justified in substance or in the main’—that is, justified to a degree that could satisfy a reasonable person.”²⁶
 - In referring to the term “substantially justified” as used in Rules 37(a) and 37(b), the Court wrote: “To our knowledge, that has never been described as meaning ‘justified to a high degree,’ but rather has been said to be satisfied if there is a ‘genuine dispute,’ or ‘if reasonable people could differ as to [the appropriateness of the contested action] . . .’”²⁷
 - The court further clarified: “To be ‘substantially justified’ means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.”²⁸
- Good faith is not a factor in evaluating “substantial justification.”
 - “Misunderstanding the law does not make an action ‘substantially justified.’”²⁹
 - Prejudice is not required for a finding that sanctions are warranted.³⁰ But prejudice may be a factor in determining whether a particular sanction is unjust.³¹
- Sanctions should meet both compensatory and deterrence goals.

(Francis, M.J.) (monetary sanctions intended to “deter discovery abuses” and “compensate the prevailing party”).

²⁶ *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

²⁷ *Id.* (internal citations omitted).

²⁸ *Id.* at 566.

²⁹ *DR Distributors*, 2021 WL 185082 at *77; *Underdog Trucking, L.L.C. v. Verizon Servs. Corp.*, 273 F.R.D. 372, 377 (S.D.N.Y. 2011) (“Whether a party was substantially justified in resisting discovery is determined by “an objective standard of reasonableness and does not require that the party have acted in good faith.”).

³⁰ *Weaver v. Stringer*, No. 18-cv-52, 2019 WL 1495279, at *3 (S.D. Ala. Apr. 4, 2019) (“Prejudice to the merits of the party’s cause is not required to be entitled to Rule 37(a)(5) expenses. Indeed, forcing parties to resort to the courts to resolve discovery disputes, and forcing courts to do so, are their own “prejudices” that Rule 37(a)(5) sought to deter.”) (quotations omitted).

³¹ *DR Distributors*, 2021 WL 185082 at *78.

- Courts can better achieve these goals by awarding attorney fees under all subparts, maximizing apportionment under subsection (a)(5)(C) at 100% where conduct is particularly egregious, and *sua sponte* ordering parties to show cause why sanctions should not be imposed.³²
 - Question whether deterrence and compensation are achieved when courts impose only *de minimis* awards, fail to admonish the parties to seek reasonable resolution of discovery disputes under threat of potential sanctions prior to motion practice, fail to award sanctions where a party's actions are clearly not substantially justified, or actively discourage sanctions motions.
 - Perception that courts view sanctions motions as "litigation sideshows" may frustrate the Rule's objectives.
- *Examples of conduct that may be subject to Rule 37(a)(5) sanctions*
- An award of reasonable expenses, including attorney fees, is mandatory (unless an enumerated exception applies) when a motion to compel discovery or disclosure is granted or denied entirely, or where sought-after discovery is produced after the motion is filed.
 - If the motion is denied, the court may issue a protective order.
 - If sought-after discovery is voluntarily produced after the motion is filed but before a ruling, sanctions must still be imposed even if doing so moots the motion.³³
 - When a motion to compel discovery or disclosure is granted in part and denied in part, sanctions may be apportioned at the court's discretion.
 - Most courts find that attorney fees are recoverable as expenses under subsection (a)(5)(C), subject to the enumerated exceptions of subsection (a)(5)(A).³⁴
 - A finding that "reasonable expenses" under 37(a)(5)(C) does not include attorney fees,³⁵ is the minority view.³⁶

³² See, e.g., *Hastings v. Ford Motor Company*, No. 19-cv-2217, 2021 WL 1238870, at *4 (S.D. Cal. Apr. 2, 2021) (plaintiff and counsel ordered to submit brief showing cause why "they" should not be required to pay costs and expenses).

³³ See, e.g., *DL v. D.C.*, 251 F.R.D. 38, 49 (D.D.C. 2008).

³⁴ See, e.g., *S.E.C. v. Yorkville Advisors, LLC*, No. 12 Civ. 7728, 2015 WL 855796, at *6 (S.D.N.Y. Feb. 27, 2015).

³⁵ See *EEOC v. Bardon, Inc.*, No. RWT-08-1883, 2010 WL 989051, at *3 (D. Md. Mar. 12, 2010).

³⁶ See *All. Indus., Inc. v. Longyear Holding, Inc.*, No. 08CV490S, 2010 WL 3991636, at *5 (W.D.N.Y. Oct. 12, 2010) (citing cases).

- Under Rule 37(a)(5), the presumption is that sanctions will be imposed, and the losing party bears the burden of showing that an enumerated exception applies to avoid sanctions.³⁷
- An award must not be granted if one of three conditions exist: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust. Fed. R. Civ. P. 37(a)(5)(A)(i)-(iii).

Courts have issued sanctions in ruling on motions to compel pursuant to Rule 37(a)(5), particularly in the context of the following ESI-related discovery issues:

- Failure to substantiate burden objections with evidence.³⁸
- Failure to fulfill multiple discovery obligations, forcing opposing counsel to file a motion to compel.³⁹
- If motion to compel is denied, movant failing to show the motion was substantially justified.⁴⁰
- Over-designation of privileged documents where *in camera* review identifies myriad documents improperly withheld.⁴¹

While Rule 37(a)(5) facially applies only to motions to compel discovery or disclosure, Rule 26(c) expressly incorporates Rule 37(a)(5) by reference for the

³⁷ See, e.g., *Wager v. G4S Secure Integration, LLC*, No. 19-cv-3547, 2021 WL 293076, at *4 (S.D.N.Y. Jan. 28, 2021) (citing cases, including *Rickels v. City of South Bend*, 33 F.3d 785, 787 (7th Cir. 1994)).

³⁸ *Zimmer, Inc. v. Beamalloy Reconstructive Med. Prod., LLC*, No. 16-cv-00355, 2019 WL 2635944, at *1-2 (N.D. Ind. June 27, 2019) (finding defendant “failed to substantiate its proportionality argument” which was “entirely without merit”).

³⁹ *DR Distributors, LLC*, 2021 WL 185082, at *74 (failure of party to search or produce ESI from relevant email accounts); *Rosehoff, Ltd. v. Truscott Terrace Holdings LLC*, No. 14-cv-277S, 2016 WL 2640351, at *4-6 (W.D.N.Y. May 10, 2016) (repeated refusals by defendant and counsel to identify source of responsive documents or provide responsive e-mails was not substantially justified); *Bown v. Reinke*, No. 12-cv-00262, 2016 WL 107926, at *3-7 (D. Idaho Jan. 8, 2016) (counsel refused to discuss scope of electronic search, failed to file a privilege log, made “legal arguments to the Court that were both frivolous and directly contrary to well-established law,” made false statements, produced few emails, and “rendered discovery a miserable slog” thus forcing Plaintiff to file its motion to compel).

⁴⁰ *SiteLock LLC v. GoDaddy.com LLC*, No. CV-19-02746, 2020 WL 6135189, at *1, 15 (D. Ariz. Oct. 19, 2020) (sanctioning party that prematurely moved to compel document production before substantial completion deadline based on speculation after “delug[ing] the Court with voluminous filings related to discovery disputes”).

⁴¹ *New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, No. 12-cv-00526, 2017 WL 3535293, at *12 (D.N.M. Aug. 16, 2017); *Acosta v. Target Corp.*, 281 F.R.D. 314, 325 (N.D. Ill. 2012) (apportionment of expenses, including reasonable attorney fees, in bringing the motion to compel appropriate because “in many instances . . . Target’s claim of privilege was not supported or was unfounded”).

awarding of expenses to a party who seeks and obtains a protective order (i.e., an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense).

- Most courts conclude that Rule 37(a)(5) permits courts to impose sanctions for successful or unsuccessful motions for a protective order because Rule 26(c)(3) expressly directs resolution of fee and costs under Rule 37(a)(5).⁴²
 - Some courts have reached the opposite conclusion without considering the intersection with Rule 26(c)(3).⁴³
 - There is no first-filer advantage in this context. Rather, a withholding party moving for a protective order could not preclude the requesting party opposing it from obtaining sanctions because the opposing party could file a motion to compel at the same time it filed its opposition to the protective order. Generally, both motions would be decided simultaneously.
- *Whether Rule 37(a)(5) is effectively used to achieve its objectives*
- Rule 37(a)(5)(A) sanctions are mandatory absent one of the enumerated exceptions, i.e., if the motion to compel is granted the opposing party shows the moving party filed before attempting to meet and confer; or, if the motion to compel is granted or the motion is denied, the losing party's motion or opposition to the motion was substantially justified, or the award would be unjust.
 - *Proactive courts:* Courts may consider taking a proactive approach to reduce the need for motions to compel or protective orders along with the attendant awards for attorney fees and expenses incurred.
 - Reminding parties, as appropriate, of the risk of Rule 37(a)(5) sanctions to encourage cooperation, communication, and transparency.⁴⁴
 - Explaining that legitimate discovery disputes are not discouraged, but counsel should “stop and think” about whether a position is

⁴² See, e.g., *Pegoraro v. Marrero*, No. 10 Civ. 00051, 2012 WL 5964395, at *1 (S.D.N.Y. Nov. 28, 2012) (discussing the intersection of the rules); *Guttormson v. ManorCare of Minot ND, LLC*, No. 14-cv-36, 2016 WL 3853738, at *2 (D.N.D. Mar. 30, 2016) (same); *Universal Engraving, Inc. v. Duarte*, No. 07-2427, 2008 WL 1884057, at *1 (D. Kan. Apr. 28, 2008) (same).

⁴³ See *Noble v. Wells Fargo Bank, N.A.*, No. 14-cv-01963, 2017 WL 531883, at *6 (E.D. Cal. Feb. 8, 2017) (declining to find that Rule 37(a)(5) applies to protective orders).

⁴⁴ See, e.g., *Smith v. Bradley Pizza, Inc.*, No. 17-cv-2032, 2018 WL 5920626, at *1 (D. Minn. Nov. 13, 2018), *objections overruled*, 2019 WL 2448575 (D. Minn. June 12, 2019), *aff'd*, 821 F. App'x 656 (8th Cir. 2020) (instructing counsel that it would “seriously consider” Rule 37(a)(5) sanctions if they were unable to resolve matters without motions); *Petro-Hunt, L.L.C. v. United States*, 113 Fed. Cl. 80, 83 (2013) (awarding sanctions for failed motion for protective order where parties had been warned that Rule 37(a)(5) would be enforced).

truly “substantially justified” under the applicable law before involving the court.⁴⁵

- Cautioning parties that they equally share the responsibility to cooperate in seeking a resolution prior to resorting to motion practice.⁴⁶
- *Privilege*: Courts may use Rule 37(a)(5) sanctions to disincentivize over-designation of documents as privileged in logs.⁴⁷
- *Moot motions*: Courts have imposed sanctions even if the requested discovery is voluntarily produced after the motion is filed, mooted the motion.⁴⁸
 - The Rule requires sanctions even if subsequently produced discovery moots the motion. “If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed— . . .” Rule 37(a)(5)(A).
 - Voluntary production post-filing does not compensate the moving party for its costs in bringing the motion or deter the abusive practice of forcing the requesting party to proceed with drafting and filing the motion.
- *Motions granted in part*: Courts award and apportion expenses even where a motion to compel or motion protective order is granted in part and denied in part.

⁴⁵ 8B Fed. Prac. & Proc. Civ. § 2288 (3d ed.) (citation omitted).

⁴⁶ Smith v. Ergo Sols., LLC, No. 14-cv-382, 2018 WL 5810836, at *4 (D.D.C. Nov. 6, 2018); Petro-Hunt, 113 Fed. Cl. 80 at 83; cf. Olson v. City of Bainbridge Island, No. C08-5513RJB, 2009 WL 1770132, at *10 (W.D. Wash. June 18, 2009) (declining to apportion costs where the issues “could have, and should have, been resolved by counsel without court involvement.”).

⁴⁷ See, e.g., Mechel Bluestone, Inc. v. James C. Justice Cos., C.A. No. 9218, 2014 WL 7011195, at *8-11 (Del. Chancery Dec. 12, 2014) (awarding fees and costs where counsel “tried to outsource their obligation to produce an adequate log” to opposing counsel, produced repeatedly deficient logs, improperly designated and re-designated documents, and misapplied redactions); New Mexico Oncology, 2017 WL 3535293, at *9 (awarding fees and costs where it was “clear that Defendants over-designated . . . and that even their re-reviews were insufficient to fix their own errors [requiring plaintiff] to repeatedly assert objections until the Special Master ultimately resolved the issue”); W. Mortg. & Realty Co. v. KeyBank Nat’l Ass’n, No. 13-cv-00216, 2016 WL 11643651, at *1 (D. Idaho Jan. 4, 2016) (finding lack of substantial justification where many of the documents withheld “were not of the sort that reasonable people could differ on”); Isilon Sys., Inc. v. Twin City Fire Ins. Co., No. C10-1392, 2012 WL 503852, at *4 (W.D. Wash. Feb. 15, 2012) (ordering sanctions briefing after finding party “engaged in a worrisome pattern of forcing [plaintiff] to raise questions about [defendant’s] production, only to have [defendant] respond by providing ‘updated’ logs or finding documents which had been inadvertently withheld”); Brown v. Barnes & Noble, Inc., No. 16-cv-07333, 2019 WL 7168146, at *8, *10 (S.D.N.Y. Dec. 23, 2019) (“vast majority” of withheld documents reviewed by court “do not seek or convey legal advice” and were thus improperly withheld, although not in bad faith); Sullivan v. Alcatel-Lucent USA, Inc., No. 12 C 7528, 2013 WL 2637936, at *4-7, *10 (N.D. Ill. June 12, 2013) (finding opposition not substantially justified where defendants claimed the documents revealed or sought legal advice when they did not).

⁴⁸ See, e.g., DL, 251 F.R.D. at 49.

- Motions that are granted overwhelmingly, even if not entirely, may demonstrate that the opposition was not substantially justified.⁴⁹
- Apportionment may be appropriate even if the moving party prevailed on only a small part. Further, a sanctions award does not have to be proportionate to the percentage of the motion granted, if the opposing party's conduct was deleterious or egregious.⁵⁰
- *Attorney fees if motion is granted in part*: Courts should interpret subsection (a)(5)(C), where a motion is granted only in part, to permit reimbursement of attorney fees.
 - Rule 37(a)(5)(A) expressly addresses attorneys' fees as part of a movant's "reasonable expenses incurred in making the motion..." but it is not expressly included in Rule 37(a)(5)(C).
 - Majority view is that fees are included under Rule 37(a)(5)(C) because it incorporates the substantive standards of (a)(5)(A).⁵¹
 - One viewpoint is failure to grant attorneys' fees would eliminate the deterrence purposes of Rule 37(a)(5) because non-fee "expenses" associated with a motion to compel (or opposition to it) are generally *de minimis*.
- *Sanctioning attorneys vs. clients*: Courts should consider whether it is appropriate to issue sanctions on attorneys when misconduct is clearly attorney-driven rather than client-driven.⁵²
 - The Rule expressly permits courts to sanction either or both the party and its attorneys, which may encourage attorneys to "weigh carefully considerations of relevancy and privilege, and to advise in accordance with their best judgment." 8B Fed. Prac. & Proc. Civ. § 2288 (3d ed.) (quotation and citation omitted).
- *Compensable Expenses*: Courts differ in what fees and costs are compensable under the Rule.

⁴⁹ See DL, 251 F.R.D. at 49-50 (finding party's near total success was evidence that opposition lacked substantial justification).

⁵⁰ See, e.g., *AAIpharma Inc. v. Kremers Urban Dev. Co.*, No. 02 Civ. 9628, 2006 WL 3096026, at *4 (S.D.N.Y. Oct. 31, 2006) (award of expenses warranted when party caused "substantial delay to the litigation and cost unnecessary time and expense by failing to reduce the number of documents withheld before two *in camera* reviews and numerous court orders were required."); *New Mexico Oncology*, 2017 WL 10606787, at *13 (apportioning 75% of expenses though moving party prevailed on only a small fraction of its challenge).

⁵¹ See, e.g., *All. Indus., Inc. v. Longyear Holding, Inc.*, No. 08-cv-490, 2010 WL 3991636, at *5 (W.D.N.Y. Oct. 12, 2010).

⁵² See, e.g., *Stewart v. City of Porterville*, No. 10-CV-00199, 2011 WL 3799690, at *2 (E.D. Cal. Aug. 25, 2011) (rule authorizes sanctions on attorneys where attorney advised the conduct); *AAIpharma Inc.*, 2006 WL 3096026, at *6 (imposing fees on counsel is appropriate where misconduct was the result of coordinated effort between client and counsel or both are equally at fault); *Bown*, 2016 WL 107926, at *6 (imposing sanctions on counsel where counsel's conduct made discovery "a miserable slog").

- Some courts hold that only costs directly associated with briefing and arguing the motion are compensable. Other courts permit fees and costs for all tasks for which the discovery conduct was the but-for cause or for all costs that “flow” from the sanctioned conduct.⁵³
- Special master fees may be allocated to the losing party when specially appointed to address the dispute at issue per Rule 53(h), but apportionment of fees is less clear when the master was appointed at the outset of the case to manage discovery disputes.
- Where courts have appointed a special master at the outset of discovery, but not as a result of any particular dispute, and have apportioned payment of the master’s fees across the parties as a matter of case management, consider whether fees may be shifted where motions are brought or opposed without substantial justification.

D. Rule 37(b) – Failure to Comply with a Court Order

- *Purpose of Rule 37(b)*
 - Sanctions under Rule 37(b) are meant “to penalize a party who violates a discovery order and to deter future violations of discovery orders.”⁵⁴
- *Examples of conduct that may be subject to Rule 37(b)*
 - Failure to comply with a court order. “The definition of “order” in Rule 37(b) has been read broadly. But Rule 37(b)(2)’s requirement that there be

⁵³ See, e.g., *Beck v. Test Masters Educ. Servs., Inc.*, 289 F.R.D. 374, 385 (D.D.C. 2013) (preparation of status report, letters, and research related to filing procedures); *Guantanamo Cigar Co. v. Corporacion Habanos, S.A.*, 263 F.R.D. 1, 12 (D.D.C. 2009) (good faith efforts to obtain compliance or resolve the dispute and fees associated with preparing a joint protective order that party demanded be filed prior to producing documents); *Covad Commc’ns Co. v. Revonet, Inc.*, 267 F.R.D. 14, 30 (D.D.C. 2010) (Facciola, J.) (time spent chasing down deficient or delinquent discovery and time spent comparing deficiencies and working to correct them may be reasonable as “preliminary work that is useful and ordinarily necessary in preparation for the motion to compel”); *New Mexico Oncology*, 2017 WL 3535293, at *12 (time spent preparing and reviewing and asserting objections to privilege designations); *Mechel Bluestone, Inc.*, 2014 WL 7011195 at *11 (under comparable state rule, review of privilege logs, efforts to meet and confer over the privilege logs, preparation of the motion to compel, proceedings before the discovery master, and discovery master fees).

⁵⁴ *Pugh v. Community Health Sys., Inc.*, No. 20-cv-00630, 2021 WL 75805, at *1 (E.D. Pa. Jan. 8, 2021) (quoting *Toner v. Wilson*, 102 F.R.D. 275, 276 (M.D. Pa. 1984) (internal quotations omitted)); *Lyons v. O’Quinn*, No. 16-17069, 2018 WL 4031032, at *2 (11th Cir. Aug. 23, 2018) (“[Dismissal] must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.”) (quoting *Nat’l Hockey League*, 427 U.S. at 643); *Burress v. Mr. G&G Trucking, LLC*, No. 19-cv-791, 2020 WL 4381947, at *1 (W.D. Wis. July 31, 2020) (“Rule 37 authorizes such sanctions ‘to penalize balky litigants and to deter others who might otherwise ignore discovery orders.’”) (quoting *Philips Med. Sys. Int’l, B.V. v. Bruetman*, 982 F.2d 211, 214 (7th Cir. 1992)).

some form of court order that has been disobeyed has not been read out of existence; Rule 37(b)(2) has never been read to authorize sanctions for more general discovery abuse.”⁵⁵

Specific examples of conduct that may be subject to Rule 37(b) include:

- Failure to comply with an order compelling discovery responses.⁵⁶
- Failure to comply with a preservation order.⁵⁷
- Failure to comply with a scheduling order.⁵⁸
- Failure to comply with an order designed to facilitate discovery.⁵⁹
- Failure to comply with an ESI protocol.⁶⁰
- Failure to comply with a protective order.⁶¹
- Failure to appear for examination.⁶²

Specific examples of conduct where courts have declined to order sanctions under Rule 37(b) include:

- Failure to produce documents in a particular format where the document requests and court order do not specify a certain format.⁶³
- Actions of nonparties.⁶⁴

⁵⁵ *Youngevity Int'l Corp. v. Smith*, No. 16-cv-00704-BTM, 2017 WL 6541106, at *6 (S.D. Cal. Dec. 21, 2017) (quoting *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992)).

⁵⁶ *See, e.g., Lyons*, 2018 WL 4031032, at *1–*3; *Pugh*, 2021 WL 75805, at *1–*3; *Mgmt. Registry, Inc. v. A.W. Cos.*, No. 17-5009, 2020 WL 4915832, at *1–*4 (D. Minn. Aug. 27, 2020); *Burruss*, 2020 WL 4381947, at *1–*3; *Johnson v. Italian Shoemakers, Inc.*, No. 17-cv-00740, 2018 WL 5266853, at *1–*3 (W.D.N.C. Oct. 23, 2018).

⁵⁷ *See, e.g., Carrington v. Graden*, No. 18 Civ. 4609, 2020 WL 5758916, at *5 (S.D.N.Y. Sept. 28, 2020); *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226, 237 (D. Minn. 2019); *WeRide Corp. v. Huang*, No. 18-cv-07233, 2020 WL 1967209, at *10–*12, *14–*16 (N.D. Cal. Apr. 24, 2020); *Small v. Univ. Med. Ctr.*, No. 13-cv-0298, 2018 WL 3795238, at *64 (D. Nev. Aug. 9, 2018).

⁵⁸ *See, e.g., CrossFit, Inc. v. Nat'l Strength & Conditioning Assoc.*, No. 14-CV-1191, 2019 WL 6527951, at *16–*17 (S.D. Cal. Dec. 4, 2019).

⁵⁹ *See, e.g., In re Taxotere (Docetaxel) Prods. Liab. Litig.*, No. 16-cv-15283, 2018 WL 6697113, at *2 (E.D. La. Dec. 20, 2018).

⁶⁰ *See, e.g., Hernandez v. City of Houston*, No. 16-CV-3577, 2018 WL 4140684, at *1–*2, *6 (S.D. Tex. Aug. 30, 2018).

⁶¹ *See, e.g., Youngevity Int'l Corp.*, 2017 WL 6541106, at *11–*12.

⁶² *See, e.g., Anderson v. W.V. Division of Corrections*, No. 15cv156, 2017 WL 7513298, at *2–*3 (N.D. W. Va. Sept. 18, 2017); *Akey v. Placer Cnty.*, No. 14-cv-2402, 2017 WL 1831944, at *13–*14 (E.D. Cal. May 8, 2017).

⁶³ *See, e.g., Faulkner v. Aero Fulfillment Servs.*, No. 19-cv-268, 2020 WL 3048177, at *4 (S.D. Ohio June 8, 2020); *Smith v. TFI Family Servs., Inc.*, No. 17-022355-, 2019 WL 4194046, at *10–*11 (D. Kan. Sept. 4, 2019); *but see Johnson*, 2018 WL 5266853, at *3 (sanctioning plaintiffs under Rule 37(b) for producing emails in PDF form when court had ordered production in a reasonably usable form).

⁶⁴ *See, e.g., Smith*, 2019 WL 4194046, at *11 (citing *Warkins v. Piercy*, No. 16-MC-216, 2016 WL 7188284, at *3 (D. Kan. Dec. 12, 2016); *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840-KHV, 2010 WL 11431875, at *6 and n.41 (D. Kan. July 7, 2010)).

- *When sanctions should be issued under Rule 37(b)*
 - In deciding whether and to what extent to impose sanctions, courts consider the following elements: (1) the prejudice to the moving party, (2) the ability to cure the prejudice, (3) the extent to which the evidence would disrupt the orderly and efficient trial of the case or other cases in the court, and (4) the offending party's bad faith or willfulness in violating the court's order.⁶⁵
 - A finding of bad faith is not a prerequisite to an imposition of sanctions under Rule 37(b).⁶⁶
 - But courts have qualified that case-terminating sanctions are appropriate "against a party who has shown 'bad faith, willfulness, or fault.'"⁶⁷
 - "In this context, 'fault' is 'objectively unreasonably [sic] behavior'—more than "a mere mistake or slight error in judgment."⁶⁸
 - "District courts should consider '(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.'"⁶⁹ "While the district court need not make explicit findings regarding each of these factors, a finding of willfulness, fault, or bad faith is required for dismissal to be proper."⁷⁰
 - Courts generally warn parties before granting case-terminating sanctions against them.⁷¹
 - A failure to comply with a court order is not "substantially justified" where the offending party has long been aware of its failure to comply with the order and yet has still not complied.⁷²

⁶⁵ Pugh, 2021 WL 75805, at *1 (citing *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 105 (D. N.J. 2006)).

⁶⁶ *See id.*, at *3 (citing *Wachtel*, 239 F.R.D. at 103).

⁶⁷ *Burress*, 2020 WL 4381947, at *2 (quoting *Domanus v. Lewicki*, 288 F.R.D. 416, 419–20 (N.D. Ill. 2013) (quoting *Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003), *overruled on other grounds by Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772 (7th Cir. 2016)).

⁶⁸ *Burress*, 2020 WL 4381947, at *2 (quoting *Long v. Steepro*, 213 F.3d 983, 987 (7th Cir. 2000)).

⁶⁹ *WeRide Corp.*, 2020 WL 1967209, at *8 (quoting *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006)); *Small*, 2018 WL 3795238, at *64 (same) (citing *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007)).

⁷⁰ *WeRide Corp.*, 2020 WL 1967209, at *8 (quoting *Leon*, 464 F.3d at 958); *CrossFit, Inc.*, 2019 WL 6527951, at *13 ("[W]here the drastic sanctions of dismissal or default are imposed, . . . the losing party's noncompliance must be due to willfulness, fault, or bad faith.") (quoting *Computer Task Grp., Inc. v. Brothby*, 364 F.3d 1112, 1115 (9th Cir. 2004) (quoting *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997)).

⁷¹ *See Lyons*, 2018 WL 4031032, at *3; *Burress*, 2020 WL 4381947, at *3 (citing *Brown v. Columbia Sussex Corp.*, 664 F.3d 182, 192 (7th Cir. 2011)).

⁷² *See, e.g., Johnson*, 2018 WL 5266853, at *3.

- Courts are not required to select the least drastic sanction available.⁷³
 - But the sanction imposed must be proportionate and related to the party's specific discovery violation.⁷⁴
- Rule 37(b) does not provide courts with “carte blanche” to impose any type of sanctions whatsoever. Rather, “any sanction must be “just” [and] *specifically related* to the particular “claim” which was at issue in the order to provide discovery.”⁷⁵
- *Whether Rule 37(b) is effectively used to achieve its objectives*
 - Parties are pursuing Rule 37(b) sanctions—often in conjunction with sanctions pursuant to other rules, statutes, or authorities—and courts are imposing Rule 37(b) sanctions.
 - Courts have imposed Rule 37(b) sanctions in a number of contexts.⁷⁶

⁷³ Burress, 2020 WL 4381947, at *1 (citing *Newman v. Metro. Pier & Exposition Auth.*, 962 F.2d 589, 591 (7th Cir. 1992)).

⁷⁴ Burress, 2020 WL 4381947, at *1 (citing *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382 (7th Cir. 1993)).

⁷⁵ *Clientron Corp. v. Devon IT, Inc.*, 894 F.3d 568, 580 (3d Cir. 2018) (quoting *Harris v. City of Phila.*, 47 F.3d 1311, 1330 (3d Cir. 1995) (emphasis in original) (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites*, 456 U.S. 694, 707 (1982))).

⁷⁶ *See, e.g.*, *Lyons*, 2018 WL 4031032 (Eleventh Circuit affirmed dismissal of plaintiff's suit with prejudice for failure to comply with court's order compelling discovery); *Pugh*, 2021 WL 75805 (plaintiffs' allegations deemed established and defendants ordered to pay costs where failure to preserve and produce documents after court granted motion to compel resulted in severe prejudice that lacked a cure); *Carrington*, 2020 WL 5758916 (court dismissed plaintiff's claims with prejudice and awarded defendants attorney fees and costs where, one month after court's order to preserve relevant communications, plaintiff closed and deleted relevant email account); *Mgmt. Registry, Inc.*, 2020 WL 4915832 (attorney fees and adverse-inference instruction warranted where defendants and counsel disregarded repeated orders to provide discovery responses); *Burress*, 2020 WL 4381947 (defendants' failure to respond to discovery after court granted motion to compel warranted default judgment, but court gave defendants 14 additional days to respond); *WeRide Corp.*, 2020 WL 1967209, at *14, 16 (court entered default judgement where defendants' discovery misconduct violated court's order, causing prejudice so great the case could no longer be resolved “on the merits”; further awarded reasonable fees and costs on sanctions motion, all discovery related to spoliation, and other discovery motion practice); *CrossFit, Inc.*, 2019 WL 6527951 (court granted terminating sanctions and awarded attorney fees where defendant failed to comply with multiple discovery orders that obfuscated discovery for years); *Paisley Park Enters., Inc.*, 330 F.R.D. 226 (destruction of text messages sanctionable under Rules 37(b) and 37(e) for violating court's pretrial scheduling orders, all of which directed them to preserve ESI; court ordered defendants to pay reasonable expenses, including attorney fees and costs, and deferred consideration of adverse-inference instruction until closer to trial); *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 2018 WL 6697113 (court denied plaintiff's motion for reconsideration of sanctions and awarded defendant's expenses where plaintiff repeatedly omitted information from plaintiff fact sheet in violation of court's pretrial order); *Johnson*, 2018 WL 5266853 (court awarded defendants reasonable expenses, including attorney fees, relating to the motion to compel, sanctions motion, and any ongoing attorney fees related to discovery, where plaintiff failed to comply with court's order to produce responsive documents in a usable form); *Hernandez*, 2018 WL 4140684 (court ordered an adverse inference, establishing certain contested facts as true, where defendant violated the court's ESI order in several

E. Rule 37(c) – Failure to Disclose, to Supplement, or to Admit

- Purpose of Rule 37(c)

- The purpose of Rule 37(c) is to deter failures to comply with Rules 26(a) and (e) related to initial disclosures, and Rule 36 related to requests for admission.⁷⁷
- Rule 37(c) serves important purpose of facilitating the discovery process.
 - “Underpinning Rule 37(c)—and, by proxy, Rule 26(a) and (e)—is the critically important need for timely and complete disclosure of certain relevant information during the course of litigation.”⁷⁸
- Rule 37(c) is intended to prevent prejudice to the opposing party.
 - “The opposing party’s entitlement to, for instance, initial and expert disclosures is not a formality; to the contrary, a party’s legal position and strategy depends on timely receipt of such information.”⁷⁹
 - “By failing to comply with the Rules of Civil Procedure that govern initial and expert disclosures, as well as court-ordered deadlines, a party both prejudices its opponent and hampers the litigation as a whole.”⁸⁰
- Rule 37(c) provides a “self-executing sanction” preventing a party from using any evidence it failed to disclose under Rule 26(a) or 26(e) without substantial justification, unless the failure was harmless.⁸¹
 - Automatic sanction “provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56.”⁸²

ways); Small, 2018 WL 3795238, at *71 (magistrate judge declined to order default judgment for defendants’ failure to comply with preservation order because any prejudice from the loss did not threaten “the rightful decision of the case on its merits”; ordered an adverse-inference instruction and monetary sanctions); Anderson, 2017 WL 7513298 (court recommended that plaintiff’s complaint be dismissed with prejudice as a result of plaintiff’s failure to appear for deposition); Akey, 2017 WL 1831944 (District judge upheld magistrate judge’s ruling ordering plaintiffs to compensate defendants for plaintiff’s failure to appear for a mental-health examination).

⁷⁷ 1970 Advisory Comm. Notes to Rule 37 (“the sanction provided in Rule 37(c) should deter all unjustified failures to admit”).

⁷⁸ Edwards v. Junior State of America Found., No. 19-CV-140, 2021 WL 1600282, at *6 (E.D. Tex. Apr. 23, 2021) (failure to comply “hampers the litigation as a whole”).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 1993 Advisory Comm. Notes to Rule 37.

⁸² *Id.*

- “[T]he presumptive sanction under Rule 37(c) for failing to comply with Rule 26(a) or Rule 26(e) is the exclusion of the information’ in question.”⁸³
- Court has authority to impose additional sanctions upon a motion and after a hearing.
 - For example, although not subject to the automatic sanction, a party’s unjustified failure to disclose information harmful to its case may be addressed by ordering that the jury may be informed of the fact of the nondisclosure. 1993 Advisory Comm. Notes to Rule 37.
- *Examples of conduct that may be subject to Rule 37(c)*
 - Rule 37(c)(1) applies where a party fails to make initial disclosures or to supplement initial disclosures under Rules 26(a) and (e) without substantial justification and where failure is not harmless.
 - Automatic sanction applies to prevent party from affirmatively using such evidence.⁸⁴
 - Court has discretion to issue appropriate sanctions for violations where party seeks to conceal (by not disclosing) evidence harmful to its case.
 - Sanctions do not apply if the failure to disclose was harmless.
 - “When evaluating whether a violation of Rule 26 is harmless, the Court looks to four factors: (1) the explanation for the failure to identify the witness; (2) the importance of the testimony; (3) potential prejudice in allowing the testimony; and (4) the availability of a continuance to cure such prejudice.”⁸⁵
 - Rule 37(c)(2) applies where a party fails to admit what is requested under Rule 36 and the moving party later proves a document to be genuine or fact to be true, unless:
 - The request was objectionable under Rule 36(a);
 - The requested admission was not of “substantial importance”;
 - There was “a reasonable ground to believe” that the party failing to admit might prevail on the matter; or
 - There was “other good reason” for the failure to admit
- *Whether Rule 37(c) is effectively used to achieve its objectives*

⁸³ Edwards, 2021 WL 1600282, at *5 (quoting Flores v. AT&T Corp., No. EP-17-CV-00318-DB, 2019 WL 2746774, at *9 (W.D. Tex. Mar. 27, 2019)).

⁸⁴ Flores v. AT&T, 2019 WL 2746774, at *3–*5 (sanctions imposed under Rule 37(c)’s self-executing provision based on defendant’s failure to disclose identities of relevant witnesses and failure to supplement production of relevant documents); Edwards, 2021 WL 1600282, at *6 (sanctions imposed under Rule 37(c)’s self-executing provision where plaintiff failed to disclose identity of expert witnesses and expert affidavits that were in his possession four years earlier, resulting in prejudice to defendant, including defendant’s ability to take expert depositions).

⁸⁵ Flores v. AT&T, 2019 WL 2746774, at *3.

- Particularly in light of the automatic nature of the sanctions under Rule 37(c), courts seem willing to impose automatic sanctions and/or to impose additional discretionary sanctions under this Rule.⁸⁶

F. Rule 37(d) – Failure to Attend Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection

- *Purpose of Rule 37(d)*
 - The sanctions available under Rule 37(d) are intended to address the fact that complete noncompliance with discovery obligations can cause “severe inconvenience or hardship on the discovering party and substantially delay the discovery process.”⁸⁷
- *Examples of conduct that may be subject to Rule 37(d)*
 - Under Rule 37(d), a court may sanction a party that fails to appear for their deposition, or that fails to serve responses to discovery requests under Rule 33 and Rule 34.
 - “Rule 37(d) allows the imposition of sanctions against a party for especially serious disregard of the obligations imposed by the discovery rules even though it has not violated any court order.”⁸⁸
 - There is some disagreement among the courts as to whether there must be a total failure to respond to discovery for sanctions to apply under Rule 37(d) or whether sanctions may issue where a party provides evasive or misleading answers.⁸⁹
 - The failure to appear for a deposition or respond to discovery “is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).” Fed. R. Civ. P. 37(d)(2).

⁸⁶ See, e.g., *Id.*; Edwards, 2021 WL 1600282, at *6.

⁸⁷ 1970 Advisory Comm. Note to Rule 37.

⁸⁸ 8B Fed. Prac. & Proc. Civ. § 2291 (3d ed.).

⁸⁹ Compare *Eller v. Prince George’s County Public Schools*, No. TDC-18-3649, 2020 WL 7336730, at *13 (D. Md. Dec. 14, 2020) (sanctions available under Rule 37(d) only where a party fails to serve any response to interrogatories or document production requests), with *Hathcock v. Navistar Int’l Transp. Corp.*, 53 F.3d 36, 40 (4th Cir. 1995) (stating that the court has upheld “imposition of sanctions [under Rule 37(d)] for a misleading answer to an interrogatory regarding the identity of a defendant’s expert witness” but acknowledging other authority establishing that Rule 37(d) is inapplicable in the absence of a “serious or total failure to respond to interrogatories”). See also *DR Distributors*, 2021 WL 185082, at *74 (“Plaintiff correctly did not invoke Rule 37(d) because Defendants did not totally fail to respond to a discovery request.”); *Konczal v. Zim Tim LLC*, No. 19-12275, 2021 WL 1424495, at *5 (E.D. Mich. Apr. 15, 2021) (“In the context of Rule 37(d), to warrant sanctions, a party must have not responded to discovery requests and defaulted on its obligations entirely, or performed such an inadequate job that its responses amount to no responses at all.”).

- Sanctions will not be awarded if the failure was “substantially justified” or the award would be unjust.
 - But courts have held that “[n]o showing of willfulness or bad faith or fault is required.”⁹⁰
- “If a [c]ourt grants a motion made under Rule 37(d), it has broad discretion to impose sanctions it considers just.’”⁹¹
- “[A] good faith attempt to meet and confer is required before a motion for sanctions will be considered, [but] futility is recognized as an exception to the meet and confer requirement.”⁹²

G. Rule 37(f) – Failure to Participate in Framing a Discovery Plan

- *Examples of conduct that may be subject to Rule 37(f)*
 - Rule 37(f) is the express means by which a court may sanction discovery conduct that violates Rule 26(f).
 - Rule 37(f) allows for sanctions if “a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f).”
 - Pursuant to 26(f)(1), parties “must confer as soon as practicable” and develop a proposed discovery plan; sanctions for failure to meet and confer are authorized under Rule 37(f).
 - Pursuant to 26(f)(2), “[i]n conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; *make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan.*” (emphasis added).
 - The discovery plan “must” include, in part, “what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a)”, “when discovery should be completed,” and “any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced.”
 - Initial disclosure obligations require the parties to identify custodians and sources of data relevant to ESI, including preservation, collection, and timing of production.

⁹⁰ Joe Hand Promotions, Inc. v. Bowers, No. 18-CV-3859, 2020 WL 4557072, at *2 (N.D. Ga. Feb. 25, 2020) (quoting Betancourt v. Gen. Servs. of VA, Inc., No. 14-cv-01219-T-17, 2015 WL 13792037, at *2 (M.D. Fla. May 22, 2015)).

⁹¹ Flores v. Entergy Nuclear Operations, Inc., 313 F. Supp. 3d 511, 521 (S.D.N.Y. 2018) (quoting Handwerker v. AT & T Corp., 211 F.R.D. 203, 208 (S.D.N.Y. 2002).

⁹² O’Neal v. Las Vegas Metro. Police Dep’t, No. 17-cv-02765, 2020 WL 8617648, at *2 (D. Nev. Aug. 10, 2020).

- It is not uncommon that initial disclosures only include statements such as “unknown Company representatives” or “documents produced in discovery.”
 - To the extent a party cannot make the required disclosures in compliance with Rule 26(a), this should be discussed at the Rule 26(f) conference and factored into the discovery plan. Failure to do so subjects the party to sanctions under Rule 37(f).
 - Imposing sanctions will deter “hide-the-ball” behavior that occurs at the outset of discovery.
 - Having meaningful discussions early about the individuals with likely discoverable information (i.e., custodians) and the location of ESI, will aid the parties and Court in developing a discovery plan that furthers the just, speedy, and inexpensive determination of the action; aids in drafting discovery requests; aids in preserving and collecting relevant information; and avoids delay.
 - “Good faith efforts to identify the sources and custodians of relevant ESI early in discovery and communication of that information to opposing counsel may help to not only avoid subsequent duplicative and costly searches, but also may rebut inferences of bad faith in discovery planning or intentional suppression of information if additional relevant sources are later identified.” *The Case for Cooperation*, 10 Sedona Conf. J. 339, 343 (2009).
 - Courts have found that counsel participating in a Rule 26(f) conference should have “a reasonable understanding of ESI and the law relating to identifying, preserving, collecting, and producing ESI, in addition to good faith compliance by the parties and counsel.”⁹³
- *Whether Rule 37(f) is effectively used to achieve its objectives*
- Rule 37(f) appears to be a “sleeper sanction.”

⁹³ DR Distributors, 2021 WL 185082, at *6 (citing Jonathan Redgrave *et al.*, *Expectations of Conduct by Counsel*, The Federal Judges’ Guide to Discovery 25 (2d ed. 2015) (“Courts can and should expect attorneys appearing before them on e-discovery matters to demonstrate that they are prepared and competent, are behaving reasonably and are willing to cooperate with opposing counsel.”); Ronni Solomon & Andrew Walcoff, *The Role of Rules 26(f) and 16(b) in Active Judicial Management of Discovery Challenges*, in The Federal Judges’ Guide to Discovery 55 (2d ed. 2015) (“It is entirely appropriate for judges to expect attorneys appearing before them to be educated and prepared to address a variety of subjects related to e-discovery at the Rule 26(f) conference.”)); see Rebekah Bailey, *et al.*, *Brick-by-Brick: The Case for Foundational Discovery*, 68 Fed. Lawyer 34, 37 (2021) (discussing guidelines from Northern District of California that encourages the parties to discuss the “sources, scope, and type of ESI that has been and will be preserved and may include date ranges, identity, and number of potential custodians”).

- When parties request sanctions under Rule 37(f) for “obstructionist tactics”, courts frequently turn to Rule 37(b).⁹⁴

H. Inherent Authority of the Court

- *Purpose of the Court’s inherent authority*

- Courts have certain “inherent powers” that cannot be dispensed with, including, “[t]o fine for contempt—imprison for contumacy—enforce the observance of an order, &c.”.⁹⁵
- “Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.”⁹⁶
- The inherent authority of the court to punish contempt is “essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.”⁹⁷
- “Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties.”⁹⁸
- The inherent powers of the federal courts are “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”⁹⁹
- “These other mechanisms [Rule 11 and § 1927], taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the

⁹⁴ See, e.g., *Trs. of Mosaic & Terrazzo Welfare, Pension, Annuity, & Vacation Funds v. Elite Terrazzo Flooring, Inc.*, No. 18 CV 1471, 2020 WL 1172635, at *7–*8, *14 (E.D.N.Y. Feb. 20, 2020), *report and recommendation adopted*, 2020 WL 1166616 (E.D.N.Y. Mar. 11, 2020) (awarding attorney fees under Rule 37(b)(2)(C)); *Miller v. Thompson-Walk*, No. CV 15-1605, 2019 WL 2150660, at *10 (W.D. Pa. May 17, 2019) (finding that failure to disclose destruction of documents and computers in parties’ Rule 26(f) report and court’s initial case management conference—which forced opposing party and the court “to waste time and resources on multiple motions to obtain discovery” and forced the opposing party to engage in a “wild goose chase, knowing that [the opposing party] would come up empty-handed”—supported sanctions under Rule 37(f), but declining to impose “any additional sanctions on this basis”).

⁹⁵ *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

⁹⁶ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821).

⁹⁷ *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873).

⁹⁸ *In re Peterson*, 253 U.S. 300, 312 (1920).

⁹⁹ *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962).

interstices.”¹⁰⁰

- *Sanctions pursuant to the Court’s inherent authority*
 - o Assessment of attorney fees.¹⁰¹
 - o Costs of litigation.¹⁰²
- *When the court may invoke its inherent authority*
 - o Where there is a finding of culpability for discovery-related conduct but no sanctions rules are applicable to the facts, the court should have the option of invoking inherent authority to issue sanctions. This is where the use of inherent authority is most important to protect the court.
 - “The policy underlying this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.”¹⁰³
 - Finding of bad faith or willful misconduct, including a violation of a court order, is required to issue monetary sanctions pursuant to a Federal Court’s inherent authority.¹⁰⁴
 - A vexatious litigant, Chambers, was found to have repeatedly abused the judicial process, attempted to deprive the court of its jurisdiction through a fraudulent transfer, and violated court orders. The court wrote: “[t]he wielding of that inherent power is particularly appropriate when the offending parties have practiced a fraud upon the court.”¹⁰⁵
 - “There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney’s fees as a sanction for bad-faith conduct. *This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent*

¹⁰⁰ Chambers, 501 U.S. at 46.

¹⁰¹ Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-65 (1980) (“In narrowly defined circumstances federal courts have inherent power to assess attorney fees against counsel.” However, “[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.”) (emphasis added).

¹⁰² Chambers, 501 U.S. at 42 (“[t]he wielding of that inherent power is particularly appropriate when the offending parties have practiced a fraud upon the court”) (internal quotation omitted).

¹⁰³ Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001); accord Pension Committee of Univ. of Montreal Pension Plan v. Banc of America Sec., 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 517-18 (D. Md. 2010).

¹⁰⁴ Roadway Express, 447 U.S. at 752 (1980).

¹⁰⁵ Chambers, 501 U.S. at 42 (internal quotation omitted).

power simply because that conduct could also be sanctioned under the statute or the rules.”¹⁰⁶

- “Where exercise of inherent power is necessary to remedy abuse of the judicial process, it matters not whether there might be another source of authority that could address the same issue. . . . A party’s falsification of evidence and attempted destruction of authentic, competing information threatens the integrity of judicial proceedings even if the authentic evidence is not successfully deleted.”¹⁰⁷
- Hon. James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 Sedona Conf. J. 613, 647-48 (2016): “[I]nherent powers are those ‘which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.’¹⁰⁸ The Supreme Court has found these powers to include the authority to admit and discipline attorneys,¹⁰⁹ to punish contempt,¹¹⁰ to vacate a judgment upon proof of fraud on the court,¹¹¹ to bar a disruptive criminal defendant from the courtroom,¹¹² to dismiss a lawsuit for failure to prosecute,¹¹³ and to impose attorney’s fees as a sanction for bad faith litigation.”¹¹⁴

- *Whether inherent authority is effectively used to achieve its objectives*

- Examples of how courts are using inherent authority to address eDiscovery abuses
 - Attempted Spoliation: Inherent authority can be used where a party attempted but failed to spoliage evidence.¹¹⁵
 - Falsification of Evidence: Inherent authority can be used to address a party’s intentional creation of false evidence, as opposed to the destruction of evidence, as there is nothing in the Rules that *per se* prohibits the falsification of evidence.¹¹⁶

¹⁰⁶ *Id.* at 50 (emphasis added).

¹⁰⁷ CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 498 (S.D.N.Y. Jan. 12, 2016).

¹⁰⁸ Hudson, 11 U.S. at 34 (1812).

¹⁰⁹ Ex parte Burr, 22 U.S. (9 Wheat.) 529, 531 (1824).

¹¹⁰ Ex parte Robinson, 86 U.S. at 510.

¹¹¹ Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244-50 (1944).

¹¹² Illinois v. Allen, 397 U.S. 337, 343 (1970).

¹¹³ Link, 370 U.S. at 630-31.

¹¹⁴ Chambers, 501 U.S. at 45-46.

¹¹⁵ Victor Stanley, 269 F.R.D. at 517-18; *The Sedona Principles, Third Edition*, 19 Sedona Conf. J. at 39 *et seq.* (Principle 14)).

¹¹⁶ CAT3, 164 F. Supp. 3d at 498.

V. *Analysis of Rule 37(e) Sanctions*

A. **Purpose of Rule 37(e)**

- The purposes of Rule 37(e) are fairness, deterrence, punishment, and to protect the integrity of the judicial process.¹¹⁷
- Rule 37(e) was amended in 2015. Prior Rule 37(e), adopted in 2006, provided that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”
- The Federal Rules Committee found that the 2006 provision did not adequately address the “serious problems resulting from the continued exponential growth in the volume” of ESI, causing litigants to “expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.”¹¹⁸
- The rationale for the amendments to Rule 37(e) was based on the risks that “[e]lectronic information may be automatically purged without human cause” through routine deletion and “[e]lectronic information may also exist identically in multiple locations and formats.”¹¹⁹
- Additionally, the prior version of the Rule was an example of a defeasible rule: Courts could not issue sanctions for routine loss of ESI *unless* the moving party showed extraordinary circumstances. The rule was sometimes narrowly and inconsistently applied by the courts. The new Rule 37(e) identifies standards for determining when sanctions are proper and attempts to identify which sanctions are proper when measuring the

¹¹⁷ See, e.g., *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 327 F.R.D. 96, 103 (E.D. Va. 2018) (noting purposes of spoliation sanctions of “(1) deter[ring] parties from engaging in spoliation; (2) plac[ing] the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restor[ing] the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party”) (quotations omitted) (alteration in original).

¹¹⁸ Rule 37(e) 2015 Adv. Comm. note; see also *EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc.*, No. 12-cv-00463, 2018 WL 1542040, at *11 (M.D. Tenn. Mar. 29, 2018) (finding that “because Rule 37(e) is crafted to address the unique traits of electronic information, its reasoning only applies to the loss of evidence in electronic form” and noting that unlike ESI, “[p]hysical evidence is not often duplicated across multiple locations. If it is lost in one format, it generally cannot be restored and replaced from another. And it is only in rare circumstances that physical evidence will be subject to the ‘routine alteration and deletion of information that attends ordinary use’ that is the reason for Rule 37(e)’s focus on intent.”).

¹¹⁹ *EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc.*, No. 12-cv-00463, 2018 WL 1542040, at *11 (M.D. Tenn. Mar. 29, 2018).

conduct of the non-responsive party and/or the impact of the missing information on the requesting party.

- The amended rule does not apply to spoliation of physical evidence. Courts thus distinguish the standards applied to physical evidence and ESI.¹²⁰
- Inherent Authority - Although the advisory committee note to the 2015 amendments suggest the amended rule forecloses the reliance on inherent authority to determine whether sanctions should be imposed, the Rule does not expressly preclude reliance on inherent authority.¹²¹
 - As discussed herein, however, many courts continue to apply prior case law on inherent authority.
 - Where the duty to preserve arises from an obligation other than common law, some courts rely on inherent authority, finding Rule 37(e) inapplicable.¹²²
 - Courts have found Rule 37(e) inapplicable where the evidence was destroyed *not* “because a party failed to take reasonable steps to preserve it,” but instead because of intentional destruction. That is, some courts understand the rule to address the issues with excessive costs of preservation and thus that it only applies where the destruction was the result of failure to take reasonable steps to preserve not from active destruction; active or intentional destruction does not implicate the purposes of the amendments to Rule 37 to mitigate excessive preservation costs.¹²³

¹²⁰ See, e.g., *EPAC Techs., Inc.*, 2018 WL 1542040, at *14; *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 327 F.R.D. 96, 104 (E.D. Va. 2018) (“[B]y its plain terms, Rule 37(e) does not apply to every situation where spoliation occurs, including where the evidence lost or destroyed is not ESI. In those situations, a court must determine the sanctions available under its inherent authority.”); *CIGNEX Datamatics, Inc. v. Lam Rsch. Corp.*, No. 17-cv-320, 2019 WL 1118099, at *2 (D. Del. Mar. 11, 2019) (“By its terms, Rule 37(e) applies only to electronically stored information. When other forms of information are at issue (e.g., physical evidence, paper documents, etc.), the spoliation analysis follows the framework [for spoliation sanctions under inherent authority].”).

¹²¹ See *Hon. James C. Francis IV & Eric P. Mandel, Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 Sedona Conf. J. 613, 643-647 (2016). Compare *NuVasive, Inc. v. Kormanis*, No. 18-cv-282, 2019 WL 1171486, at *2 n.4 (M.D.N.C. Mar. 13, 2019) (“[C]onstruing the 2015 Amendment to Rule 37(e) as “[r]emoving inherent authority from a federal court's quiver . . . ESI makes sense [because] [t]he purpose of that amendment was to address the ‘significantly different standards’ that the various federal courts were using.”) with *AXIS Ins. Co. v. Terry*, No. 16-cv-01021, 2018 WL 9943825, at *11 (N.D. Ala. Apr. 23, 2018) (analyzing sanctions motion for spoliation of ESI under both 37(e) and inherent authority).

¹²² See, e.g., *United States ex rel. Scutellaro v. Capitol Supply, Inc.*, No. 10-cv-1094, 2017 WL 1422364, at *10 (D.D.C. Apr. 19, 2017) (imposing adverse inference under inherent authority where duty to preserve arose under regulatory and contractual obligations).

¹²³ See *Malone v. Weiss*, No. 17-cv-1694, 2018 WL 3656482, at *1 (E.D. Pa. Aug. 2, 2018) (“The Rule, by its very terms, only applies when a party has “failed to take reasonable steps to preserve”

B. Conduct that may be subject to Rule 37(e)(1) remedial measures

Examples of conduct resulting in sanctions under Rule 37(e)(1) include:

- Inadvertent spoliation due to routine destruction policy or other routine procedure or software despite reasonable anticipation of litigation, after a specific or implied request to preserve, or after litigation commenced.¹²⁴

electronically stored information and “it cannot be restored.” The facts of this case are much more serious. We deal, here, with the intentional manipulation of emails and contracts in order to gain an advantage in litigation. Thus, the Court’s inherent power to sanction is a more appropriate rubric to analyze this matter.”); *Hsueh v. New York State Dep’t of Fin. Servs.*, No. 15-cv-3401, 2017 WL 1194706, at *4 (S.D.N.Y. Mar. 31, 2017) (explaining that the amendments were “meant to address ‘the serious problems resulting from the continued exponential growth in the volume of ESI as well as ‘excessive effort and money’ that litigants have had to expend to avoid potential sanctions for failure to preserve ESI” which were not applicable where destruction did not occur because party had improper systems in place to prevent the loss” but instead “because she took specific action to delete it”) (internal citation omitted). *But see* *CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 501 (S.D.N.Y. 2016) (analyzing sanctions under Rule 37(e)(2) sanctions where emails were intentionally altered).

¹²⁴ *See, e.g.*, *J.S.T. Corp. v. Robert Bosch*, 2019 WL 2324488 (E.D. Mich. May 30, 2019) ((e)(1) sanction imposed where party destroyed custodians email after departure from company pursuant to a purported policy of doing so (but without evidence of such a policy) after litigation was reasonably anticipated and party took no steps to preserve custodians documents); *Jenkins v. Woody*, 2017 WL 362475 (E.D. Va. Jan. 21, 2017) ((e)(1) sanction imposed where FOIA request for video of incident was transmitted after incident and before destruction but video was overwritten before staff responded to the request where the video would have provided evidence of what transpired); *Kologik Capital, LLC v. In Force Technology LLC*, 2020 WL 1169403 (D. Mass. Mar. 11, 2020) ((e)(1) sanction imposed in breach of contract case where information was spoliated after receipt of letter asserting breach); *Sinclair v. Cambria Cty.*, 2018 WL 4689111 (W.D. Pa. Sept. 28, 2018) ((e)(1) sanction imposed where party deleted text messages due to autodelete function without evidence regarding the phone or autodelete setting and some texts were produced); *Johns v. Gwinn*, 2020 WL 7138635 (W.D. Va. Nov. 30, 2020) ((e)(1) sanction imposed where video footage was destroyed after grievance was filed about the incident and the after the footage was reviewed by prison officials where policy of preserving video only if it provided evidence in support the grievance was unreasonable); *Drivetime Car Sales, LLC v. Pettigrew*, 2019 WL 1746730 (S.D. Ohio Apr. 18, 2019) ((e)(1) sanction imposed for failure to preserve texts despite notice to do so); *See, e.g.*, *Feist v. Paxfire*, 2016 WL 4540830 (S.D. N.Y. Aug. 29, 2016) ((e)(1) sanction imposed where plaintiff used cleaner program to clear cache/search history in case alleging defendant intercepted internet searches); *Storey v. Effingham County*, 2017 WL 2623775 (S.D. Ga. June 16, 2017) ((e)(1) sanction imposed where jail failed to suspend a routine video-destruction policy to preserve that video footage of decedent who was injured in custody and later died from his injuries); *Estate of Esquivel v. Brownsville Ind. Sch. Dist.*, Case No. 1:16-cv-0040, 2018 WL 7050211 (S.D. Tex. Nov. 20, 2018) ((e)(1) sanctions imposed where video footage was requested shortly after incident, defendant had policy of preserving footage after any incident, footage was downloaded but corrupted, hard drive containing original video file was returned to seller, and footage may have been overwritten in the two weeks before it was known video file was corrupt, where footage was highly relevant to the claim) (For additional factual background, *see* 2018 WL 10150655, at *26); *Gaina v. Northridge Hosp. Med. Ctr.*,

- Inadvertent spoliation after receipt of litigation hold letter.¹²⁵
- Spoliation in contravention of party's retention policy.¹²⁶
- Failure to preserve email by migrating to a new email system after litigation was anticipated.¹²⁷
- Delayed issuance of litigation hold.¹²⁸
- Failure to issue, or issuing an inadequate, litigation hold.¹²⁹

C. Conduct that may be subject to Rule 37(e)(2) sanctions

Examples of conduct resulting in sanctions under Rule 37(e)(2) include:

- Active deletion after notice that the information or device was sought for preservation or discovery.¹³⁰

2018 WL 6258895 (C.D. Cal. Nov. 21, 2018) ((e)(1) sanctions imposed where party sold mobile phone during litigation).

¹²⁵ See, e.g., *HLV, LLC v. Page & Stewart*, No. 13-cv-1366, 2018 WL 2197730, at *3 (W.D. Mich. Mar. 2, 2018) ((e)(1) sanction imposed where cell phone was disposed of despite express requirement to preserve it in litigation hold letter); *Schmalz v. Vill. of N. Riverside*, No. 13-cv-8012, 2018 WL 1704109, at *3 (N.D. Ill. Mar. 23, 2018) (failure to take any steps to preserve phones containing text messages after litigation hold imposed where defendants admitted the texts pertained to the claims at issue); *Cahill v. Dart*, No. 13-CV-361, 2016 WL 7034139, at *2 (N.D. Ill. Dec. 2, 2016) ((e)(1) sanctions imposed where video was destroyed after internal request for its preservation); *Fishman v. Tiger Nat. Gas, Inc.*, No. 17-cv-05351, 2018 WL 6068295, at *4 (N.D. Cal. Nov. 20, 2018) ((e)(1) sanctions imposed where party failed to direct agent to preserve recordings until more than a year after request for preservation).

¹²⁶ See, e.g., *Freidig v. Target Corp.*, 329 F.R.D. 199, 209 (W.D. Wis. 2018) ((e)(1) sanctions imposed for spoliation of video where spoliation was contrary to internal retention policy).

¹²⁷ See, e.g., *Integrated Comm'n's & Tech. v. HP Financial Svcs. Co.*, 2020 WL 4698535 (D. Mass Aug. 13, 2020).

¹²⁸ See, e.g., *Integrated Comm'n's & Tech. v. HP Financial Svcs. Co.*, 2020 WL 4698535 (D. Mass Aug. 13, 2020); *Fishman v. Tiger Nat. Gas, Inc.*, No. 17-cv-05351, 2018 WL 6068295, at *4 (N.D. Cal. Nov. 20, 2018) ((e)(1) sanctions imposed where party failed to direct agent to preserve recordings).

¹²⁹ See, e.g., *Integrated Comm'n's & Tech. v. HP Financial Svcs. Co.*, 2020 WL 4698535 (D. Mass Aug. 13, 2020) ((e)(1) sanction imposed where only a verbal hold was issued to a single custodian where information destroyed likely pertained to core issues in the case); *Czur v. G-StarSe*, 2019 WL 4805765 (Sept. 20, 2019) ((e)(1) sanction imposed for negligent failure to implement appropriate hold); *Virtual Studios, Inc. v. Stanton Carpet Corp.*, 2016 WL 5339601 (N.D. Ga. June 23, 2016) ((e)(1) sanction imposed where plaintiff did not instruct employees to preserve emails, did not preserve accessibility of five servers, and repurposed computers storing emails); *AXIS Insurance v. Terry*, 2018 WL 9943825 (N.D. Ala. Apr. 23, 2018) (((e)(1) sanction imposed where party did not instruct non-party to preserve audio recordings despite obvious risk of destruction).

¹³⁰ See, e.g., *Postle v. SilkRoad Tech., Inc.*, No. 18-CV-224-JL, 2019 WL 692944, at *6 (D.N.H. Feb. 19, 2019) ((e)(2) sanctions imposed where party deleted content on laptop and initiated factory reset following request by defendant for its return); *TLS Mgmt. & Mktg. Servs. LLC v. Rodriguez-Toledo* (D.P.R. Mar. 27, 2017) ((e)(2) sanctions imposed where defendant discarded laptop after preservation request without any attempt to preserve its contents); *Edelson v. Cheung*, 2017 WL 150241 (D.N.J. Jan. 12, 2017) ((e)(2) sanctions imposed where emails were deleted from personal account after requesting party learned of their existence during third party deposition); *Alabama Aircraft*

- Failure to preserve despite court order to do so.¹³¹
- Giving instructions to delete relevant evidence after litigation hold issued¹³²
- Alteration of evidence.¹³³
- “Double deletion” of email after litigation and production commenced.¹³⁴
- Affirmative use of technology to destroy data and/or use of technology to remove evidence of deletion of documents.¹³⁵
- Failure to preserve in combination with obstructive discovery tactics.¹³⁶

Industries v. Boeing, 319 F.R.D. 730 (N.D. Ala. 2017) ((e)(2) sanctions imposed where, after parties entered into preservation agreement, files were deliberately deleted from computer with knowledge that the files should be copied and sent to legal department and CDs were lost with no explanation of why they were removed); *WeRide Corp. v. Kun Huang*, 2020 WL 1967209 (N.D. Cal. Apr. 24, 2020) (((e)(2) sanctions imposed in case involving theft of source code, defendants deleted large swaths of emails, source code, and email accounts after litigation commenced and despite a preliminary injunction prohibiting deletion); *Schnider v. Providence Health & Servs.*, No. 15-CV-00038, 2018 WL 1558554, at *1 (D. Alaska Mar. 9, 2018) ((e)(2) sanctions imposed where defendant deleted Facebook page after contacting attorneys and shortly after conduct giving rise to the claims).

¹³¹ *Wilmoth v. Murphy*, 2019 WL 3728280 (W.D. Ark. August 7, 2019) ((e)(2) sanctions imposed where party failed to preserve evidence specifically identified in prior court order following hearing on discovery motion).

¹³² *See, e.g., GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76, 80 (3d Cir. 2019) (court did not err in ordering (e)(2) sanctions imposed where SVP instructed deletion of relevant emails because of “ongoing legal issues” and deleted 40% of his own email after hold was issued).

¹³³ *See, e.g., CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 501 (S.D.N.Y. 2016) ((e)(2) sanctions imposed where emails were intentionally altered); *Miller v. Thompson-Walk*, No. CV 15-1605, 2019 WL 2150660, at *13 (W.D. Pa. May 17, 2019) ((e)(2) sanctions imposed where *inter alia* evidence had been altered and fabricated); *Folino v. Hines*, No. 17-cv-1584, 2018 WL 5982448 (W.D. Pa. Nov. 14, 2018) ((e)(2) sanctions imposed where party wiped devices and “only an intentional action could have reset the iPads and wiped the computer, and the destruction of the data occurred at a point in time where [party] was acutely aware of its importance to Plaintiff”).

¹³⁴ *See, e.g., DVComm, LLC v. Hotwire Commc'ns, LLC*, No. 14-cv-5543, 2016 WL 6246824 (E.D. Pa. Feb. 3, 2016) ((e)(2) sanctions imposed where party-employee double-deleted responsive email without credible explanation for doing so).

¹³⁵ *See, e.g., Int'l Fin. Co., LLC v. Jabali-Jeter*, No. 18-CV-2120, 2019 WL 2268961, at *14 (E.D. Pa. May 28, 2019) ((e)(2) sanctions imposed where evidence revealed party used six USB drives to download files but failed to produce any and that party manually deleted “file system events” file on her laptop that would have tracked all activity on the laptop); *Lexpath v. Welch*, 2016 WL 4544344 (D.N.J. Aug. 30, 2016) ((e)(2) sanctions imposed where party used anti-forensic tool to wipe computer and the extent and timing of the destruction indicated intent); *TLS Mgmt. & Mktg. Svcs., LLC v. Mardis Fin. Svcs.*, 2018 WL 3673090 (S.D. Miss. Jan. 29, 2018) ((e)(2) sanctions imposed where defendants manually deleted data and used CCleaner on their corporate computers, with one custodian running CCleaner seven times after the court ordered a forensic examination); *Williams v. Am. College of Educ.*, 2019 WL 4412801 (N.D. Ill. Sept. 16, 2019) ((e)(2) sanctions imposed where evidence indicated plaintiff deleted files after informing defendants of intent to sue but before returning computer and intentionally reinstalled the operating system to overwrite the deleted files rendering them unrecoverable); *Brown Jordan Int'l, Inc. v. Carmicle*, 2016 WL 815827 (S.D. Fla. Mar. 2, 2016) ((e)(2) sanctions imposed where defendant wiped and reset computers, among other conduct).

¹³⁶ *See, e.g., Miller v. Thompson-Walk*, No. 15-cv-1605, 2019 WL 2150660, at *13 (W.D. Pa. May 17, 2019) ((e)(2) sanctions imposed where party engaged in a series of obstructive and delay tactics,

D. Types of sanctions that may be ordered

- Additional discovery such as forensic examination of storage media, depositions related to the spoliation with costs borne by the spoliating party, and evidentiary hearings.¹³⁷
- Ordering spoliating party to pay costs of recovering spoliated information.¹³⁸
- Spoliating party waives objections to authenticity and business record status for evidence recovered from third parties.¹³⁹
- Courts sitting as fact finder will consider the spoliating conduct or give little weight to testimony of spoliating party.¹⁴⁰
- Evidence and argument preclusion.¹⁴¹

including failure to disclose missing computers and documents voluntarily forcing plaintiff “to engage in a wild goose chase,” alteration and fabrication of evidence, allowing service agreement to lapse which resulted in destruction of ESI, donation or destruction of devices); *Quetel Corp. v. Abbas*, 819 Fed. App’x. 154 (4th Cir. 2020) ((e)(2) sanctions imposed where party destroyed computer and key data after receiving cease-and-desist letter and after producing forensic image of drive and party exhibited lack of candor regarding destruction of computer and data and failure to make other disclosures).

¹³⁷ See, e.g., *Nuvasive, Inc. v. Kormanis*, 2019 WL 1171486 (M.D.N.C. Mar. 29, 2019) (ordering additional deposition); *Ballard v. Wal-Mart Stores, East, LP*, 2018 WL 4964361 (S.D. W.Va. Oc. 15, 2018); *Brown Jordan Int’l, Inc. v. Carmicle*, 2016 WL 815827 (S.D. Fla. Mar. 2, 2016) (court held an evidentiary hearing prior and ordered forensic examination of defendant’s accounts and devices to assess allegations of violations of the Stored Communications Act and the Computer Fraud and Abuse Act, and spoliation allegations); *EEOC v. GMRI*, 2017 WL 5068372 (S.D. Fla. Nov. 1, 2017) (holding two evidentiary hearings concerning the spoliation allegations); *Brewer v. Leprino Foods Co., Inc.*, 2019 WL 356657 (E.D. Cal. Jan. 29, 2019) (additional deposition); *Spencer v. Lunada Bay Boys*, 2017 WL 10518023 (C.D. Cal. Dec. 13, 2017) (re-deposition of spoliating defendant); *Pals v. Wkly.*, No. 17-CV-175, 2019 WL 7482263, at *3 (D. Neb. June 28, 2019) (permitting additional deposition and ordering independent forensic investigation of servers at spoliating party’s cost).

¹³⁸ See, e.g., *Kologik Capital, LLC v. In Force Technology, LLC*, 2020 WL 1169403 (D. Mass Mar. 11, 2020) (imposing costs incurred to recover emails from non-parties); *Chinitz v. Intero Real Estate Servs.*, 2020 WL 7389417 (N.D. Cal. May 13, 2020) (ordering defendant to pay costs of subpoena to Facebook and assist in obtaining data from Facebook).

¹³⁹ **Specific examples to come**

¹⁴⁰ See, e.g., *Johns v. Gwinn*, 2020 WL 7138635 (W.D. Va. Nov. 30, 2020) (at bench trial, court would give little weight to correctional officers’ testimony where video that may have aided plaintiffs’ case was destroyed); *Bistrian v. Levi*, 448 F. Supp. 3d 454 (E.D. Pa. 2020) (court, sitting as fact finder, would consider the destruction of the tape when determining whether conduct spoliating party asserted in its defense occurred).

¹⁴¹ See, e.g., *Pelino v. Gilmore*, 2020 WL 2572361 (W.D. Pa. May 21, 2020) (precluding evidence at summary judgment and trial to support defense regarding conduct on the day of the missing recording); *Ayala v. Your Favorite Auto Repair & Diagnostic Ctr., Inc.*, No. 14-CV-5269, 2016 U.S. Dist. LEXIS 127425, at *72 (E.D.N.Y. Sep. 16, 2016) (defendant precluded from relying on paper

- Some courts preclude the spoliating party from relying on the destroyed records or offering other evidence to prove their contents.¹⁴²
 - There is some question whether this mitigates the prejudice suffered by the moving party but instead merely prevents the spoliating party from benefitting from its spoliation.
 - Some courts appear to provide for this measure where they are reluctant to find prejudice necessary for curative measures.¹⁴³
 - Other courts have found, however, that argument and evidence preclusion may not be ordered as a remedy under Rule 37(e)(1).¹⁴⁴
- Accepting as true at summary judgment the moving party's description of the spoliated document.¹⁴⁵
- Fees and costs.¹⁴⁶

time records which did not appear accurate where computer with electronic time records was “stolen” around the time that plaintiff sought to examine it and defendant failed to cooperate with the police regarding the alleged theft); *Wilmoth v. Murphy*, 2019 WL 3728280 (W.D. Ark. August 7, 2019) (barring officers who “lost” cell phone photos of plaintiff-detainee’s injuries following alleged assault, from testifying at trial under (e)(2)(B), finding spoliation willful).

¹⁴² *See, e.g., Jenkins v. Woody*, 2017 WL 362475 (E.D. Va. Jan. 21, 2017) (precluding spoliating party from preventing evidence suggesting the spoliated video would have corroborated that party’s account of events).

¹⁴³ *Botey v. Green*, 2016 WL 1337665 (M.D. Pa. Apr. 4, 2016) (where plaintiff alleged that trucking company spoliated driving records that may have proved advanced knowledge of employee’s incompetence to drive but plaintiff had not proven prejudice—despite other evidence or testimony suggesting such incompetence—defendant trucking company was precluded from offering evidence of what those records would have shown).

¹⁴⁴ *See, e.g., EPAC Technologies v. HarperCollins*, 2018 WL 1542040 (M.D. Tenn. Mar. 29, 2018) (rejecting R&R recommending sanction of prohibiting presentation of evidence or testimony that key facts alleged were not true).

¹⁴⁵ *See Barbera v. Pearson Educ., Inc.*, 906 F.3d 621 (7th Cir. 2018) (district court did not err by accepting as true plaintiff’s description of spoliated document as only discovery sanction for spoliation under 37(e)(1)); *Freidig v. Target Corp.*, 329 F.R.D. 199, 209 (W.D. Wis. 2018) (accepting testimony as true at summary judgment where spoliated video that could have corroborated that testimony).

¹⁴⁶ *See, e.g., Arrowhead Capital Finance v. Seven Arts*, 2016 WL 4991623 (S.D.N.Y. Sept. 16, 2016) (attorneys’ fees); *Charleston Capital Advisors v. Acero Junction*, 337 F.R.D. 47 (S.D.N.Y. Sept. 30, 2020) (fees for time related to litigation over the misconduct); *Mfg. Automation & Software Sys., Inc. v. Hughes*, 2018 WL 591423 (C.D. Cal. Aug. 20, 2018) (fees/costs in bringing motion); *Youngevity Int’l v. Smith*, 2020 WL 7048687 (S.D. Cal. Jul. 28, 2020) (fees and costs for bringing motion, taking spoliation depositions, and forensic examination); *GN Netcom, Inc. v. Plantronics, Inc.*, No. 12-cv-1318, 2016 WL 3792833, at *13 (D. Del. July 12, 2016) (imposing fees and costs related to months-

- Some courts recognize, however, that a sanction in the form of fees and costs will “likely to pale in comparison to the potential windfall that would-be spoliators could otherwise receive.”¹⁴⁷
- Monetary sanctions.¹⁴⁸
- Presentation of evidence of spoliation at trial.¹⁴⁹
 - This may include instructing the jury not only about the spoliation but also that the spoliated evidence would have shown *whether or not* key facts alleged were true.¹⁵⁰

long efforts to uncover spoliation); *Cat3, Ltd. Liab. Co. v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 502 (S.D.N.Y. 2016) (Francis, M.J.) (movant’s fees and costs for investigating the spoliation issue and bringing the motion).

¹⁴⁷ *GN Netcom, Inc. v. Plantronics, Inc.*, No. 12-cv-1318, 2016 WL 3792833, at *13 (D. Del. July 12, 2016).

¹⁴⁸ *Id.* at *13 (D. Del. July 12, 2016) (imposing \$3 million in sanctions where intent was found, defendant created “difficulties . . . in getting to the bottom of the deletion story and was unwilling to acknowledge wrongdoing).

¹⁴⁹ *See, e.g.*, *Butler v. Kroger Ltd. P’ship I*, 2020 WL 7483447 (E.D. Va. Nov. 30, 2020) (ordering that the jury be advised “that the evidentiary hole exists and to permit the parties to proffer evidence and argument as to how that occurred”); *Jenkins v. Woody*, 2017 WL 362475 (E.D. Va. Jan. 21, 2017) (ordering jury be informed that video was not preserved and evidence of destruction/failure to preserve); *Muhammad v. Mathena*, 2016 WL 8116155 (W.D. Va. Dec. 12, 2016) (ordering jury instruction that a recording of the event at issue was made, its preservation had been requested, the recording was lost through no fault of requesting party, and the jury should not assume that the lack of corroborating objective evidence undermines the requesting party’s version of events); *Ballard v. Wal-Mart Stores, East, LP*, 2018 WL 4964361 (S.D. W.Va. Oc. 15, 2018) (permitting evidence of spoliation to be presented to the jury to explain the lack of documentary evidence); *Drivetime Car Sales, LLC v. Pettigrew*, 2019 WL 1746730 (S.D. Ohio, Apr. 18, 2019) (under Rule 37(e)(1), permitting moving party to present evidence of failure to preserve texts and to argue for whatever inference it chose, but permitting non-moving party to rebut any proposed inference); *DiStefano v. Law Offices of Barbara H. Katsos, PC*, No. 11-cv-2893, 2017 U.S. Dist. LEXIS 72137, at *85-86 (E.D.N.Y. May 10, 2017) (moving party may explore the loss of a computer at trial without an adverse inference where defendant’s conduct in failing to preserve the computer was found by the Court to be somewhere between negligent and grossly negligent); *Franklin v. Howard Brown Health Center*, 2018 U.S. Dist. LEXIS 171609, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018) (permitting presentation to jury of failure to preserve texts and emails and jury may consider that failure in reaching its verdict).

¹⁵⁰ *See, e.g.*, *EPAC Technologies v. HarperCollins, Christian Publ’g*, 2018 WL 1542040 (M.D. Tenn. Mar. 29, 2018) (ordering that jury be instructed that spoliating party breached its duty to preserve data and may have shown whether or not key facts alleged in the case were true) *aff’d* 810 Fed. Appx. 389 (6th Cir. 2020) (finding no abuse of discretion where instructions were permissive, not mandatory and were no greater than necessary to cure the prejudice).

- Courts occasionally submit the question of the fact of spoliation or intent to deprive to the jury.¹⁵¹ The Advisory Committee Notes to amended Rule 37(e) make clear that courts do not lose their discretion to submit that question of fact to the jury. *See* Rule 37(e)(2) Advisory Comm. Note (recognizing that courts may “conclude that the intent finding should be made by a jury”).
 - A court may decide that submitting the question of intent to the jury is appropriate when the facts of spoliation are tied up with the merits or other factual questions in the case.¹⁵²
- Permissive adverse inference.
 - Some courts apply a permissive adverse inference under Rule 37(e)(1).¹⁵³
 - Other courts find adverse inference unavailable.¹⁵⁴

¹⁵¹ *See, e.g.*, *Legacy Data Access, LLC v. Mediquant, Inc.*, 2017 WL 6001637 (W.D.N.C. Dec. 4, 2017) (jury permitted to determine whether spoliation occurred where “sanction of spoliation instruction was necessary to level the evidentiary playing field where spoliating party used the absence of documents and data to its advantage at and before trial”); *Nuvasive, Inc. v. Kormanis*, 2019 WL 1171486 (M.D.N.C. Mar. 29, 2019) (ordering jury question on question of spoliators intent); *Spencer v. Lunada Bay Boys*, 2017 WL 10518023 (C.D. Cal. Dec. 13, 2017) (recommending moving party be permitted to introduce evidence of intent at trial); *Stevens v. Brigham Young Univ. – Idaho*, 2019 WL 6499098 (D. Idaho, Dec. 3, 2019) (jury to determine intent in spoliating phone); *Phan v. Costco Wholesale Corp.*, 2020 WL 5074349 (N.D. Cal. Aug. 24, 2020) (ordering instruction that jury may “consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party”); *Pals v. Interstate Hwy. Construction*, 2019 WL 7482263 (D. Neb. June 28, 2019) (finding court was unable to determine intent and submitting that question to the jury).

¹⁵² *Cahill v. Dart*, No. 13-CV-361, 2016 WL 7034139, at *4 (N.D. Ill. Dec. 2, 2016) (where question of intent was a “close one,” question would be submitted to the jury where spoliation was “closely tied to . . . malicious prosecution claim”).

¹⁵³ *See, e.g.*, *EPAC Technologies v. HarperCollins, Christian Publ’g*, 810 Fed. Appx. 389 (6th Cir. 2020) (permissive adverse inference permissible because jury is not required to draw the inference); *HLV, LLC v. Page & Stewart*, No. 13-CV-1366, 2018 WL 2197730, at *4 (W.D. Mich. Mar. 2, 2018) (permitting moving party to present evidence of spoliation at trial and argue for whatever inference it chooses, which spoliating party may rebut); *Pelino v. Gilmore*, 2020 WL 2572361 (W.D. Pa. May 21, 2020) (permissive adverse inference re failure to preserve video); *Phan v. Costco Wholesale Corp.*, 2020 WL 5074349 (N.D. Cal. Aug. 24, 2020) (ordering instruction that jury may “consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party”); *Stinson v. City of N.Y.*, 2016 U.S. Dist. LEXIS 868, at *22-23 (S.D.N.Y. Jan. 2, 2016) (granting a permissive adverse inference where defendant did not act in bad faith and there was a “relatively limited showing of relevance”). *But see* *Bry v. City of Frontenac*, No. 14-CV-1501, 2015 WL 9275661, at *11 (E.D. Mo. Dec. 18, 2015) (declining to order adverse inference because it is not available under (e)(1) and declining to order other sanctions under (e)(1) because none “would affect the outcome of this claim”).

¹⁵⁴ *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 2018 WL 5786206 (D. Or. Nov. 5, 2018) (under (e)(1), allowing plaintiffs to inform the jury of the destruction and to argue the implications, but refusing to instruct that the jury could find that the evidence was prejudicial).

- Mandatory adverse inference (rarely).¹⁵⁵
- Terminating sanctions (rarely).¹⁵⁶

E. Effectiveness of 2015 amendments to Rule 37(e) and guidance

- Discussion of whether the 2015 amendments have set effective guidelines regarding the scope of preservation that is required under Rule 37(e) and, specifically, whether over-preservation based on fear of sanctions has been adequately addressed.

F. Whether Rule 37(e) is effectively used to achieve its objectives

- In general, despite adoption of the amendment, courts do not apply Rule 37(e) uniformly, imposing varying standards for prejudice, intent, and burden.
- Some courts, even if acknowledging the amendment to Rule 37(e), continue to rely on pre-amendment case law and, in some cases, impose greater burdens than Rule 37(e) imposes, such as requiring a finding of bad faith or intent, though intent is not a factor for (e)(1) sanctions, or considering evidence of lack of prejudice even where intent is found, though prejudice is presumed when intent is present.¹⁵⁷

¹⁵⁵ *Culhane v. Wal-Mart*, 364 F. Supp. 3d 768 (E.D. Mich. 2019); *Nationwide Life Ins. Co. v. Betzer*, No. 5:18-CV-39, 2019 WL 5700288, at *14 (M.D. Fla. Oct. 28, 2019).

¹⁵⁶ *Folino v. Michael Hines*, 2018 WL 5982448 (W.D. Pa. Nov. 14, 2018) (default where evidence was altered); *Quetel Corp. v. Abbas*, 819 Fed. Appx. 154 (4th Cir. 2020) (default on two counts); *TLS Mgmt. & Mktg. Svcs., LLC v. Mardis Fin. Svcs.*, 2018 WL 3673090 (S.D. Miss. Jan. 29, 2018); *Systems Spray-Cooled v. FCH*, 2017 WL 10154221 (W.D. Ark. Feb. 22, 2017) (in misappropriation of trade secrets case in which defendants, after request for production, destroyed hard drives and used CCleaner to erase information from the replacement hard drives, denying terminating sanctions but imposing adverse inference instruction that the missing relevant evidence would be unfavorable to the defendant per 37(e)(2)); *Global Material Techs., Inc. v. Dazheng Metal Fibre CO.*, 2016 U.S. Dist. LEXIS 123780, 2016 WL 4765689 (N.D. Ill. Sep. 12, 2016) (entering default judgment where defendant intentionally sold computers containing relevant ESI and failed to search Yahoo! email accounts before the service was discontinued in China).

¹⁵⁷ *See, e.g., Monolithic Power Systems v. Intersil Corp.*, 2018 WL 6075046 (D. Del. Nov. 11, 2018) (applying pre-amendment case law that defines spoliation as “actual suppression or withholding of evidence” and permits a spoliating party to evade sanctions by proving lack of prejudice even where intent was shown); *Archer v. York City School District*, 710 Fed. Appx. 94, (3d Cir. 2017) (applying pre-amendment case that requires evidence of actual suppression of evidence and finding destruction resulting from routine operation of systems insufficient for a spoliation finding); *Alabama Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 744 (N.D. Ala. 2017) (finding bad faith, but permitting spoliating party to attempt to rebut prejudice, citing pre-amendment case law); *Cameron v. Arab City Board*, 2018 WL 4615850 (N.D. Ala. Sep. 26, 2018) (applying pre-amendment case law); *Wal-Mart Stores, Inc. v. Cuker Interactive, LLC*, No. 5:14-CV-5262, 2017 WL 239341, at *1 (W.D. Ark. Jan. 19, 2017) (evaluating Rule 37(e) but applying pre-amendment case law that requires both intent

- In the majority of cases involving spoliation sanctions, the federal district courts in the 5th Circuit relied on pre-2015 amendment case law – including requiring proof of “bad faith” – and/or did not mention Rule 37(e) in analyzing allegations of ESI spoliation. In less than half of all spoliation cases, courts applied post-2015 amendment case law. In the overwhelming majority of cases, the courts found there was no spoliation.
 - The Advisory Committee Note to (e)(2) explains that (e)(2) does not require any further finding of prejudice “[b]ecause the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position”.
- Some courts in the 10th Circuit continue to rely on the 2007 decision in *Burlington Northern v. Grant*, 505 F.3d 1013 (10th Cir. 2007), to deny 37(e) sanctions for spoliation.¹⁵⁸ The *Burlington* court held that the proper standard for assessing the need to preserve was “imminent litigation.” Thus, if litigation is not “imminent,” there is no duty to preserve, and 37(e) is not triggered. The courts continuing to rely on *Burlington* cite the commentary to Rule 37(e) which provides that: “In applying the rule, a court may need to decide whether and when a duty to preserve arose” and “Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. Accordingly, even with the standards imposed by the 2015 amendments, the applicability of Rule 37(e) varies by district.

and prejudice for an adverse inference and holding that because moving party did not prove prejudice the court need not address intent); *Finger v. Jacobson*, No. 17-cv-2893, 2019 WL 7557821, at *3 (E.D. La. May 10, 2019) (spoliation sanctions require intentional destruction/culpable state of mind); *Edwards v. 4JLJ, LCC*, 976 F.3d 463 (5th Cir. 2020) (acknowledging the applicability of Rule 37 but nevertheless applying inherent authority and the 5th Circuit “culpability” standard in analyzing plaintiff’s ESI spoliation claims); *Wright v. National Interstate Insurance Co.*, No. 16-16214, 2017 WL 4011206 (E.D. La. Sep. 12, 2017) (without mentioning Rule 37(e), where accident footage was deleted, concluding speculation was not enough to satisfy high burden of demonstrating “bad faith”); *Orchestrate HR, Inc. v. Trombetta*, 178 F. Supp. 3d 476 (N.D. Tex. Apr. 18, 2016) (without addressing applicability of (e)(1) as to email spoliation, finding sanctions unwarranted where plaintiffs failed to show that defendant acted in bad faith or with intent to deprive); *Itron, Inc. v. Johnston*, 15-CV-330, 2017 WL 11372353 (S.D. Miss. Oct. 26, 2017) (rejecting sanctions where spoliation was negligent not intentional without assessing prejudice under (e)(1)).

¹⁵⁸ See *Russell v. Nebo Sch. Dist.*, 2018 WL 4627699 (D. Utah Sept. 26, 2018).

- Some courts continue to rely on inherent authority rather than Rule 37(e).¹⁵⁹
- Courts may conduct the analysis under both inherent authority and Rule 37(e) because of uncertainty about whether Rule 37(e) displaces inherent authority.¹⁶⁰
- Courts, even when relying on Rule 37(e), sometimes conflate the requirements of Rule 37(e), for example, by evaluating bad faith under both e(1) and (e)(2) or evaluating prejudice after finding bad faith.¹⁶¹
- Courts infrequently consider the information asymmetry that a moving party may face in order to prove spoliation based on missing information, and appear to rarely order additional discovery before finding the moving party has failed to present evidence of actual spoliation.¹⁶²
- Courts have, in some cases, placed the burden on the moving party to seek third-party discovery to replace the missing documents even where there is

¹⁵⁹ See, e.g., *Barry v. Big M Transportation*, 2017 WL 39890549 (N.D. Ala. Sep. 11, 2017) (referencing inherent authority under *Flury v. Daimler Chrysler*, 427 F.3d 939 (11th Cir. 2005) and Rule 37(e) in concluding defendant Big M was "guilty of spoliation"); *Willis v. Cost Plus, Inc.*, No. 16-639, 2018 WL 1319194 (W.D. La. Mar. 12, 2018); *Beck v. Access E Forms, LP*, Civil Action No. 4:16-CV-00985, 2018 WL 3752842 (E.D. Tex. Aug. 8, 2018) (despite deletion of thousands of work emails, chats, and files from her work laptop after plaintiff spoke to multiple attorneys about her overtime claims, not addressing Rule 37(e) and finding no spoliation where there was no proof of bad faith, i.e., no evidence of purposeful or targeted deletions); *Wright v. National Interstate Insurance Co.*, No. 16-16214, 2017 WL 4011206 (E.D. La. Sep. 12, 2017) (without mentioning Rule 37(e), where accident footage was deleted, concluding speculation was not enough to satisfy high burden of demonstrating "bad faith").

¹⁶⁰ See, e.g., *Bland v. Sam's East*, 2019 WL 407406 (M.D. Ga. Jan. 31, 2019) (noting the 11th Circuit has not decided whether Rule 37(e) displaces traditional sanctions analysis, and concluding that the degree of culpability must be weighed against prejudice, citing pre-amendment law); *Barnett v. Deere & Co.*, No. 15-CV-2, 2016 WL 4544052 (S.D. Miss. Aug. 31, 2016) (explaining that the Fifth Circuit "has not clarified" whether its prior spoliation jurisprudence has been abrogated or amended by the amended Rule 37(e)).

¹⁶¹ See, e.g., *Alabama Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 744 (N.D. Ala. 2017) (conducting a bad faith analysis under (e)(1) and prejudice analysis under (e)(2); *GN Netcom, Inc. v. Plantronics, Inc.*, 2016 WL 3792833, at *5-6 (D. Del. July 12, 2016) (applying Rule 37(e) but relying on prior case law in concluding that "prejudice turns largely on whether a spoliating party destroyed evidence in bad faith" and permitting spoliator to attempt to rebut prejudice after finding intent to deprive); *Zamora v. Stellar Mgmt.*, 2017 WL 1372688 (W.D. Mo. April 11, 2017) (finding adverse inference instruction requires both intent and prejudice).

¹⁶² Compare **[Specific examples where no discovery ordered]** with *WeRide Corp. v. Kun Huang*, 2020 WL 1967209 (N.D. Cal. Apr. 24, 2020) (appointing independent consultant to review the extent of defendants' spoliation and the ability to recover any ESI); *RealPage, Inc. v. Enterprise Risk Control, LLC*, No. 16-CV-00737, 2017 WL 3313729 (E.D. Tex. Aug. 3, 2017) (ordering forensic examination of computers and storage devices due to gaps in production prior to ordering adverse inference).

no evidence they exist and consider depositions regarding the content of the missing information a sufficient replacement for the documentary evidence in assessing whether information is lost or whether prejudice occurred.¹⁶³ This approach may reward the spoliator and prejudice the moving party because testimony, particularly of an adverse party, may not substitute for documentary evidence that can be used to challenge a witness's characterizations of a missing document and testimony.

- Rather than deny sanctions entirely where a moving party has not subpoenaed a third party, some courts will require the spoliating party to pay the costs of any further third-party discovery sought to replace the spoliated documents.¹⁶⁴
- Courts infrequently order sanctions or remedial measures under Rule 37(e) and appear reluctant to impose them, reducing the deterrent and remedial purposes of Rule 37(e), often finding that there was insufficient proof that evidence was destroyed, there was no duty to preserve, or preservation steps taken were reasonable.¹⁶⁵
- For example, in Fifth Circuit courts, our research identified only a one case since the 2015 amendment in which Rule 37(e)(1) remedies were ordered.

¹⁶³ See, e.g., *Monolithic Power Sys., Inc. v. Intersil Corp.*, No. 16-cv-1125, 2018 WL 6075046, at *3 (D. Del. Nov. 19, 2018) (denying sanctions where moving party did not show evidence could not be replaced because it did not serve a third-party subpoena “by which it could have accessed a copy of the WeChat text message if it remained in Microsoft's possession” or depose fact witnesses despite moving party’s claim that such testimony would provide “self-serving accounts of the communications at issue [which] would have been no substitute for the communications themselves,” and that it “is under no obligation to subpoena”); *Trading Places Int'l. v. Summerwinds*, 2017 WL 6383983 (W.D. Mo. May 12, 2017) (finding spoliated email was not relevant where information was available through testimony).

¹⁶⁴ See, e.g., *Chinitz v. Intero Real Estate Servs.*, 2020 WL 738941 (N.D. Cal. May 13, 2020).

¹⁶⁵ See, e.g., *Dotson v. Edmonson*, No. 16-cv-15371, 2018 WL 501511 (E.D. La. Jan. 22, 2018) (denying request for an adverse inference because the plaintiff did not establish that the trooper defendants had a duty to preserve cell phone records or intent to deprive even defendants traded in their cell phones one month after the plaintiff filed suit and ordering only testimony regarding loss of data and of preservation policies). Cf. *Wellington v. Lake Health Sys.*, 2019 WL 4918686 (N.D. Ohio Oct. 4, 2019) (finding both plaintiff and defendant equally responsible for the failure to preserve evidence that each was in a position to control despite finding plaintiff’s explanations regarding her cell phone—that she returned it to defendant—unbelievable and that any claimed prejudice was not fatal the defense). **Additional specific representative examples to come.**

- Among cases where sanctions are imposed, Rule 37(e)(1) remedial measures are far more likely to be imposed than Rule 37(e)(2) sanctions.¹⁶⁶
- When issuing Rule 37(e)(2) sanctions, courts rarely impose a mandatory adverse inference or default judgment and do so only in the most egregious cases.¹⁶⁷
- Some courts rely on evidence of negligence as a reason to deny sanctions or curative measures, such that negligent conduct may evade Rule 37(e) sanctions even in the face of evidence of intent or apparently prejudicial destruction.¹⁶⁸

¹⁶⁶ See, e.g., *Dotson v. Edmonson*, No. 16-cv-15371, 2018 WL 501511 (E.D. La. Jan. 22, 2018) (denying request for an adverse inference and ordering only testimony regarding loss of data and of preservation policies). **Additional specific examples in which (e)(2) sanctions were sought but (e)(1) sanctions were ordered.**

¹⁶⁷ Compare e.g., *GN Netcom, Inc. v. Plantronics, Inc.*, 2016 WL 3792833, at *5-6 (D. Del. July 12, 2016) (ordering fees and costs, punitive monetary award, possible evidentiary sanctions if later requested and warranted, and permissive adverse inference where executive instructed employees to delete email regarding competitive issues because of “on-going legal issues” after antitrust case was filed and legal hold was issued, and deleted 40% of his email, finding those sanctions were sufficient to deter conduct and remedy prejudice) and *HP Tuners, LLC v. Sykes-Bonnett*, 2019 WL 5069088 (W.D. Wash. Sept. 16, 2019) (only permissive inference ordered where defendant that was accused of appropriating and unlawfully selling software belonging to plaintiff, destroyed, with a hammer and during the pendency of the litigation, a flash drive he had been mailed with plaintiff’s proprietary information); *Cat3, Ltd. Liab. Co. v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 501-02 (S.D.N.Y. 2016) (Francis, M.J.) (finding clear and convincing evidence of intentional alteration, finding “[t]he remedy should fit the wrong, and the severe measures should not be used when the information [is] relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.”) with e.g., *Timms v. LZM, L.L.C.*, 657 Fed. Appx. 228 (5th Cir. 2016) (default judgment where plaintiff reset cell phone 3 days before court-ordered forensic examination); *TLS Mgmt. & Mktg. Svcs., LLC v. Mardis Fin. Svcs.*, No. 3:14-CV-00881, 2018 WL 3673090 (S.D. Miss. Jan. 29, 2018) (default judgment where defendants knew they had relevant data, spent years resisting discovery, systematically destroyed data, and took extraordinary steps to disguise that destruction, including lying under oath and permanently erasing data); *Conner v. Rubin-Asch*, 793 Fed. Appx. 427 (7th Cir. 2019) (in a cursory analysis court simply found no intent and denied all sanctions without addressing prejudice).

¹⁶⁸ *Creative Movement v. Pure Performance*, 2017 WL 4998649 (N.D. Ga. Jul. 24, 2017): (where defendants failed to preserve and/or destroyed evidence by failing to obtain a forensic grade image of a laptop, overwrote the contents of the laptop, and deleted the contents of flash drives, attributing defendants’ actions to “confusion and ineptitude”); *Coward v. Forestar Realty*, 2017 WL 8948347 (N.D. Ga. Nov. 30, 2017) (finding no intent where plaintiffs put up cameras after filing claim to film water flow on property relevant to action against realtor but removed them and did not preserve password to access them because conduct amounted to negligence); *Itron, Inc. v. Johnston*, 15-CV-330, 2017 WL 11372353 (S.D. Miss. Oct. 26, 2017) (without considering curative measures under (e)(1), finding under Rule 37(e) intent cannot be inferred from negligence).

- Court's place a heavy burden on moving parties to put forth extensive evidence of intent to deprive and rarely find the evidence is sufficient even where there is considerable evidence of culpable conduct.¹⁶⁹
 - Generally, for a finding of "intent to deprive" courts have required egregious conduct and direct evidence, such as use of technology to wipe ESI or disguise or eliminate evidence of the spoliation.¹⁷⁰
 - Intent to deprive is generally not found when the spoliation was the result of failure to suspend routine retention/destruction policy though the relevant inquiry includes whether in "fail[ing] to take reasonable steps" acted with intent to deprive. Evidence of loss as the result of failure to suspend is sometimes viewed as evidence precluding a finding of intent.¹⁷¹

¹⁶⁹ *Jenkins v. Woody*, 2017 WL 362475 (E.D. Va. Jan. 21, 2017) (in prisoner fatality case, finding insufficient evidence of intent to destroy video despite delay in producing files, failure to follow preservation policy of maintaining tapes, evidence that the spoliated tape had been reviewed before it was destroyed, and suspicious memory lapses); *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, 327 F.R.D. 96 (E.D. Va. May 1, 2018) (finding no intent to deprive despite email comm'n's advising that emails regarding conduct should be deleted because of anticipated claim despite party's failure to reveal his own document deletion policy, which should "should give the court significant pause," because there was no corroborating evidence that the intent was carried out and "the connection between that policy and [the party's intent] to harm [the opposing party] in some future litigation is too hard to draw"); *Zamora v. Stellar Mgmt.*, 2017 WL 1372688 (W.D. Mo. April 11, 2017) (finding request for sanctions "premature" despite court order to produce cell phone data and Facebook posts and evidence that defendant actively placed cell phone back to factory settings and erased relevant Facebook posts).

¹⁷⁰ *See, e.g.,* *TLS Mgmt. & Mktg. Servs. LLC v. Rodriguez-Toledo*, No. 14-CV-00881 (D.P.R. Mar. 27, 2017) ((e)(2) terminating sanctions imposed where defendants destroyed hundreds of computer files, computer user profiles, and hard drives, lied about the destruction, manually deleted data, used CCleaner on their corporate computers, finding extraordinary steps to disguise that destruction).

¹⁷¹ *Grant v. Gusman*, No. 17-cv-2797, 2020 WL 1864857 (E.D. La. Apr. 13, 2020) (the court observed that defendant's data deletions were "a negligent continuation of its routine policy" and, therefore, plaintiff could not prove intent to deprive under Rule 37(e)(2)); *Holguin v. AT&T Corp.*, No. 18-CV-00122, 2018 WL 6843711 (W.D. Tex. Nov. 8, 2018) (the court was unable to make a intent to deprive finding because plaintiff did not produce any direct evidence of intent and AT&T's failure to preserve was a negligent continuation of its routine destruction policy); *Bry v. City of Frontenac*, No. 14-cv-1501, 2015 WL 9275661 (E.D. Miss. Dec. 18, 2015) (finding no evidence that defendants acted with the intent to deprive but, rather, that any recordings in existence were taped over pursuant to standard operating procedure); *Bryant v. Wal-Mart La., L.L.C.*, 729 Fed. App'x. 369 (5th Cir. 2018) (affirming finding that Wal-Mart did not act in bad faith in deleting irrelevant videos and because all deletions occurred pursuant to a standardized retention policy).

- Rule 37(e)(2) does not, however, prohibit an inference of intent by the degree of negligence, and some courts find that intent may be inferred from failure to preserve.¹⁷²
 - Courts may rely on the efforts of the spoliating party to assist in recovering spoliated data as evidence of lack of intent, sometimes in the face of evidence of intent.¹⁷³ Relying on post-hoc conduct after the spoliation is discovered may reduce the deterrent effect of the Rule.
 - Even where intent to deprive is found, courts only rarely issue orders for a mandatory adverse inference instruction. Only a handful of mandatory inferences were identified in our research.
- Rule 37(e) does not apportion burden of proving the elements of for sanctions or set the quantum of evidence.
 - The burden of proof is unsettled in some courts.¹⁷⁴
 - Nevertheless, courts rarely assess which party should bear the burden of each element under the circumstances of the case¹⁷⁵ though, under some circumstances, shifting the burden to the party with more information may be appropriate.¹⁷⁶
 - Most courts presume without analysis or affirmatively state that the moving party bears the burden of proving some or all elements.¹⁷⁷

¹⁷² See *Colonies Partners, L.P. v. Cty. of San Bernardino*, No. 18-CV-420, 2020 WL 1496444, at *9 (C.D. Cal. Feb. 27, 2020) (holding that “[i]ntent may be inferred if a party is on notice that documents were potentially relevant and fails to take measures to preserve relevant evidence, or otherwise seeks to “keep incriminating facts out of evidence” and finding that timing and nature of destruction was sufficient to infer intent).

¹⁷³ [*3rd Cir. example to come.*]

¹⁷⁴ *Wellington v. Lake Health Sys., Inc.*, No. 19-CV-0938, 2019 WL 4918686, at *4 (N.D. Ohio Oct. 4, 2019) (finding question unsettled but imposing clear and convincing standard where terminating sanctions were sought).

¹⁷⁵ *Schmalz v. Village of North Riverside*, 2018 U.S. Dist. LEXIS 216011, 2018 WL 1704109 (N.D. Ill. Mar. 23, 2018) (not addressing burden of proof).

¹⁷⁶ [*Specific examples to come.*]

¹⁷⁷ See, e.g., *Courser v. Mich. House of Reps.*, 831 Fed. App’x 161, 188 (6th Cir. 2020) (without discussion of the burden of proof of most elements, the court noted that the moving party “had to show that” the opposing party intended to deprive him of the spoliated information’s use); *Bland v. Sam’s East*, 2019 WL 407406 (M.D. Ga. Jan. 31, 2019); *Cameron v. Arab City Board*, 2018 WL 4615850 (N.D. Ala. Sep. 26, 2018); *Creative Movement v. Pure Performance*, 2017 WL 4998649 (N.D. Ga. Jul. 24, 2017); *Best Payphones, Inc. v. City of N.Y.*, No. 1-CV-3934, 2016 U.S. Dist. LEXIS 25655,

- This is particularly true of prejudice, despite the Advisory Committee Note that makes clear who should bear the burden of proving prejudice depends on the circumstances:

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 be fairly evident, the information may appear to be unimportant, or the abundance of preserved 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. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

- Some courts find a potential unfairness of requiring the non-spoliating party to prove prejudice from loss of information or place the burden of disproving prejudice on the non-moving party.¹⁷⁸

at *10 (E.D.N.Y. Feb. 26, 2016) (finding that the party seeking sanctions must establish each of the elements justifying the imposition of sanctions).

¹⁷⁸ See, e.g., *Drivetime Car Sales, LLC v. Pettigrew*, 2019 WL 1746730 (S.D. Ohio, Apr. 18, 2019) (noting “[i]t would be unjust to place the burden of proving prejudice on [movant] under these circumstances” and assigning burden to neither party); *Freidig v Target Corp.*, 329 F.R.D. 199 (W.D. Wisc. 2018) (imposing burden of disproving prejudice on non-moving party and burden to show intent on the moving party); *Mfg. Automation & Software Sys., Inc. v. Hughes*, 2018 WL 5914238 (C.D. Ca. Aug. 20, 2018) (“When, as here, spoliation is shown, the burden shifts to the guilty party to demonstrate that no prejudice resulted from the spoliation”); *Youngevity Int’l v. Smith*, 2020 WL 7048687 (S.D. Cal. July 28, 2020) (same); *Sinclair v. Cambria Cty.*, 2018 WL 4689111 (W.D. Pa. Sept. 28, 2018) (finding it would be unfair to put the burden on the moving party to demonstrate what the deleted content was) (citing 2015 adv. comm. note); *HLV, LLC v. Page & Stewart*, No. 13-cv-1366, 2018 WL 2197730, at *3 (W.D. Mich. Mar. 2, 2018) (finding it was not appropriate to require plaintiff to prove prejudice from lost cell phone even if many of the texts and calls could be recovered from other sources “determining the contents of a lost cell phone is an exceptionally difficult task”) (citing *Christou v. Beatport LLC*, 2013 WL 248058 (D. Colo. January 23, 2013); *Coward v. Forestar Realty, Inc.*, No. 15-cv-245, 2017 WL 8948347, at *8 (N.D. Ga. Nov. 30, 2017)) “[C]ourts have concluded that the party accused of spoliating evidence, not the party moving for spoliation sanctions, bears the burden of showing the lack of prejudice.

- Courts may impose a lesser burden to show prejudice where the spoliation hampered the moving party's ability to show prejudice.¹⁷⁹
- In the Third Circuit, some courts require the moving party to present a "plausible, good faith suggestion as to what the evidence might have been," even if it is hypothetical. *See, e.g., Sinclair v. Cambria Cty.*, 2018 WL 4689111 (W.D. Pa. Sept. 28, 2018).
 - But even applying that standard, courts may require the "suggestions" be "concrete."¹⁸⁰
- The burden of proving prejudice may lie with the spoliating party where the destruction contravened the party's internal retention policy.¹⁸¹
- Some courts have concluded that neither party bears the burden of proof on prejudice.¹⁸²
- Where the content of the spoliated evidence cannot be known, it is difficult for moving parties to prove prejudice, particularly where an entire data source, such as email, was spoliated.¹⁸³ This is so even where evidence suggests that the spoliated evidence may have been helpful to the moving

¹⁷⁹ *Nunnally v. District of Columbia*, 243 F. Supp. 3d 55 (D.D.C. 2017) (failure to prove the emails were relevant was not a bar to sanctions where the emails "may demonstrate who knew about [pl's] protected activities" noting a lesser showing of relevance is permissible where the destruction hampered ability to show prejudice).

¹⁸⁰ *See, e.g., GN Netcom, Inc. v. Plantronics, Inc.*, No. 12-cv-1318, 2016 WL 3792833, at *9 (D. Del. July 12, 2016) (requiring "concrete suggestions as to what that evidence might have been").

¹⁸¹ *Freidig v. Target Corp.*, 329 F.R.D. 199, 209-10 (W.D. Wis. 2018) (suggesting burden of proving prejudice was Target's where destruction contravened retention policy but burden to prove intent was moving party's).

¹⁸² *See, e.g., Hernandez v. Tulare Cty. Correction Ctr.*, 2018 WL 784287 (E.D. Cal. Feb. 8, 2018) (no party bears the burden); *Small v. Univ. Med. Ctr.*, 2018 WL 3795238 (D. Nev. Aug. 9, 2018) (same).

¹⁸³ *See, e.g., Finger v. Jacobson*, No. 17-cv-2893, 2019 WL 7557821 (E.D. La. May 10, 2019) (declining to impose any sanctions where plaintiff caused all emails older than 7 days to be permanently deleted after he filed his case where "there [was] no evidence . . . that the emails were relevant or proportional to this litigation" though claims alleged plaintiff was fraudulently mislead about divesting assets and defendants asserted that correspondence regarding plaintiff's frame of mind and about the divestiture of his various investments may have been destroyed); *Beck v. Access E Forms, LP*, No. 16-CV-00985, 2018 WL 3752842 (E.D. Tex. Aug. 8, 2018) (where defendant claimed that plaintiff deleted thousands of work emails, chats, and files from her work laptop after the she spoke to multiple attorneys about her overtime claims, relying on 5th Circuit spoliation case law and finding no prejudice where there was "little or no other evidence" that the deleted emails and chats support the defense).

party.¹⁸⁴ Some courts acknowledge this and require the spoliator to disprove prejudice, but only upon a finding of bad faith.¹⁸⁵

- Courts impose different standards for what constitutes “prejudice” under Rule 37(e)(1)
 - Some courts require that the prejudice be so severe that it must affect the outcome of the case,¹⁸⁶ which may reduce the deterrent effect of the Rule.
 - A small number of courts have found a party’s inability to review the evidence destroyed to be sufficient for prejudice.¹⁸⁷
- Clear and Convincing: A minority of courts require the moving party to prove “intent to deprive” (and sometimes other elements) by clear and convincing evidence rather than a preponderance—a burden that may be

¹⁸⁴ *Botey v. Green*, 2016 WL 1337665 (M.D. Pa. Apr. 4, 2016) (finding it “too great a leap” to conclude spoliated electronic driver logs would have provided evidence that employer was on notice of employee’s erratic driving though logs that *were* produced showed odd driving behavior (i.e., odd routes, etc.), there was other evidence of poor driving performance, and driver admitted he got lost in the weeks prior to the accident).

¹⁸⁵ *Alabama Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 743 (N.D. Ala. 2017) (noting that burden usually falls on the party seeking sanctions, finding the moving party “will likely never be able to prove what was contained in the destroyed evidence” and “in such a situation, only the party that engaged in the destruction knows how much prejudice has been caused”).

¹⁸⁶ *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, 327 F.R.D. 96 (E.D. Va. May 1, 2018) (no prejudice where moving party had other evidence to prove its case); *Knight v. Boehringer Ingelheim Pharmaceuticals*, 323 F. Supp. 3d 837 (S.D. W. Va. Jun 19, 2018) (“[P]rejudice arises when a party cannot present evidence essential to its underlying claim.”) (quotations omitted); *Fuhs v. McLachlan Drilling Co.*, 2018 WL 5312760, (W.D. Pa. Oct. 26, 2018) (Moving party did “not provide[] concrete, plausible suggestions as to any relevant ESI that was lost and thereby materially affected their substantial rights, preventing them from defending this case”); *GN Netcom, Inc. v. Plantronics, Inc.*, No. 12-cv-1318, 2016 WL 3792833, at *11 (D. Del. July 12, 2016) (must “‘plausibly be thought likely to affect the outcome of the trial’”); *Holguin v. AT&T Corp.*, No. EP-18-CV-00122-PRM, 2018 WL 6843711, at *7 (W.D. Tex. Nov. 8, 2018) (though finding lost information was relevant to reasons for dismissal in ADA/FMLA case and plaintiff had articulated what the lost evidence would prove or disprove, finding no prejudice but not how the lost ESI affects the presentation of proof nor why other discovery is insufficient to prove his claims).

¹⁸⁷ *Brown v. Certain Underwriters*, 2017 WL 2536419 (E.D. Pa. Jun 12, 2017) (“Defendants were entitled to examine what relevant evidence, if any, the phone contained, and they are prejudiced by their inability to determine whether any relevant text messages existed or not.”); *Muhammad v. Mathena*, 2016 WL 8116155 (W.D. Va. Dec. 12, 2016) (prejudice from spoliated video even if it did not corroborate claims and though plaintiff was not irreparably harmed, the evidence could have enhanced plaintiff’s credibility).

insurmountable in the run of cases with information asymmetry about the conduct.¹⁸⁸

- Where the sanction is remedial rather than punitive, even in courts in which the clear and convincing standard might apply to dispositive sanctions, a preponderance standard is sometimes applied to exclusionary measures and adverse inferences.¹⁸⁹
- Rule 37(e) applies only to parties.¹⁹⁰
- The advisory committee note to amended Rule 37(e) acknowledges that “information may not be in the party’s control” and that courts may “need to assess the extent to which a party knew of and protected against such risks.”
- The gap in the rules can create injustice to the requesting party. Some courts have addressed this gap by imputing the preservation obligation on the party where the non-party has a special relationship with a party. This most frequently arises in the cases involving state correctional facilities where cases ordinarily must be brought against correctional officers rather than the state.¹⁹¹

¹⁸⁸ *Compare, e.g.,* DVComm v. Hotwire Comm’ns, 2016 WL 6246824 (E.D. Pa. Feb. 3, 2016) (rejecting clear and convincing standard, finding that standard inappropriate because moving party is left trying to explain facts it cannot obtain absent the moving party’s admission and allows moving party to benefit from its conduct) *with e.g.,* Jenkins v. Woody, 2017 WL 362475 (E.D. Va. Jan. 21, 2017) (imposing clear and convincing standard); Cat3, Ltd. Liab. Co. v. Black Lineage, Inc., 164 F. Supp. 3d 488, 499 (S.D.N.Y. 2016) (Francis, M.J.) (finding where motion seeks terminating sanctions and the state of mind is at issue, clear and convincing standard is appropriate).

¹⁸⁹ *See, e.g.,* EEOC v. GMRI, 2017 WL 5068372 (S.D. Fla. Nov. 1, 2017) (adverse inferences and orders permitting or excluding the parties from introducing certain types of evidence require proof by a preponderance of the evidence).

¹⁹⁰ *AXIS Insurance v. Terry*, 2018 WL 9943825 (N.D. Ala. Apr. 23, 2018) (holding that there could be no spoliation against the non-party brother under both inherent authority and Rule 37(e)); *In re Corraera* 589 B.R. 76 (Bankr. N.D. Tex. 2018).

¹⁹¹ *See, e.g.,* Johns v. Gwinn, 2020 WL 7138635 (W.D. Va. Nov. 30, 2020) (where defendant did not have the power to preserve or destroy evidence, to prevent injustice, imputing a duty of the employer to preserve the footage because of its “special relationship”); *Muhammad v. Mathena*, 2016 WL 8116155 (W.D. Va. Dec. 12, 2016) (imputing employer’s failure to preserve to defendant to prevent unfair prejudice); *J.S.T. Corp. v. Robert Bosch LLC*, No. 15-13842, 2019 WL 2324488, at *8 (E.D. Mich. May 30, 2019) (noting courts have sanctioned parties for failing to ensure the preservation of information in the possession, custody, or control of a third party where the party had a special relationship with the third party or unique circumstances demanded preservation). *But see* *Void v. Large*, 2018 WL 1474550 (W.D. Va. Mar. 26, 2018) (finding reasonable steps were taken where, *inter alia*, defendant did not have the ability to preserve the video).

- Other courts have relied on inherent authority to impose sanctions where the spoliator was not a party.¹⁹²

VI. *Potential Publication Topics for WG1 Related to Discovery Sanctions*

A. *Interplay of Rules Authorizing Sanctions*

- *The interplay with Local Rules and with Judge/Chambers Rules*
 - The Federal Rules provide black-letter law on sanctions for discovery noncompliance, but are not the only source of relevant rules and guidance.
 - Each court, and indeed each judge, may set forth rules or other guidance binding on the parties (and on the issuing court) that supplement the Federal Rules.
 - Litigants should consider rules regulating discovery in forums not controlled by the Federal Rules – including administrative proceedings, and proceedings controlled by equivalent state court rules or decisions.
 - Source of authority for promulgating local rules
 - 28 U.S.C. § 2071 and Federal Rule 83 authorize a U.S. district court to promulgate local rules.
 - Single-judge standing orders may add definition to the district court's administrative orders, but should be consistent with the district court rules and the Federal Rules.
 - All applicable rules and administrative orders should be maintained by the clerk on the court's website or made available upon request.
 - Single-judge rules
 - Local or single-judge rules often require the parties to consult with one another with the goal of resolving discovery issues before seeking court intervention. *See, e.g.,* W.D. Mich. Local Civ. R. 7.1.¹⁹³
 - Examples of district court guidelines
 - Local or single-judge guidelines may address the expectation that counsel will have the knowledge and skill concerning technology relevant to their practice as part of their duty to provide competent representation to clients.

¹⁹² *In re Correra*, 589 B.R. 76 (Bankr. N.D. Tex. 2018) (imposing sanctions where spoliator was not a party at the time of the destruction but later became a party); *RealPage, Inc. v. Enterprise Risk Control, LLC*, CITE (relying on inherent authority to impute employee's destruction to defendant employer after finding the employee was acting within the scope of his employment).

¹⁹³ This Local Rule requires the moving party to ascertain whether the motion will be opposed; and for all but dispositive motions the parties "shall confer in a good-faith effort to resolve the dispute. All nondispositive motions shall be accompanied by a separately filed certificate setting forth in detail the efforts of the moving party to comply with the obligation created by this rule." W.D. Mich. Local Civ. R. 7.1(d).

- *See, e.g.*, Guidelines published by the U.S. District Court for the District of Maryland (counsel are expected to have read the Federal Rules of Civil Procedure, Local Rules of the Court, the online Guidelines, and, with respect to discovery of ESI, the Principles for the Discovery of Electronically Stored Information in Civil Cases, posted on the Court’s website, www.mdd.uscourts.gov).
- Although not formal rules, the District of Maryland’s website cautions that guidelines “will be considered by the Court in resolving discovery disputes, including whether sanctions should be awarded pursuant to Fed. R. Civ. P. 37, or the Court’s inherent powers.”¹⁹⁴
- In addition, sanctions not immediately available through Rule 37 may be provided for through local rules.
 - *See, e.g.*, District Court for Maryland’s Guidelines, providing that failure to act in good faith in the discovery process, coupled with failure to timely bring noncompliance to the Court’s attention, “may result in a determination by the Court that the dispute must be rejected as untimely.”¹⁹⁵
- Further, once misconduct is identified, the District Court will “apply the Rules of Professional Conduct as they have been adopted by the Maryland Court of Appeals.”¹⁹⁶
- Administrative adjudications
 - Adjudications in forums not controlled by the Federal Rules of Civil Procedure may also have what amount to local or single-judge protocols that provide for sanctions based on discovery abuse.
 - Formal federal agency adjudications operate pursuant to the Administrative Procedure Act, which does not provide (nor prohibit) discovery.¹⁹⁷
 - Proceedings before the U.S. International Trade Commission permit certain forms of discovery, and where an ALJ is the presiding officer, the agency posts each ALJ’s “ground rules” on the agency’s website.¹⁹⁸ The ALJ’s authority to impose sanctions for violations of those rules comes from the

¹⁹⁴ D. Md. Local Rules, Appendix A, Discovery Guidelines of the United States District Court for the District of Maryland, Guideline 1(c).

¹⁹⁵ *Id.* at Guideline 1(f).

¹⁹⁶ *Id.* at Rule 704 (Rules of Professional Conduct).

¹⁹⁷ *See* 5 U.S.C. § 554.

¹⁹⁸ *See* USITC and ALJ Rules, <https://itctla.org/page/Rules> (last visited Jan. 28, 2021).

USITC's Rules of General Applicability.¹⁹⁹ Through those Rules, sanctions based on discovery noncompliance include “directives of a nonmonetary nature, an order to pay a penalty, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney’s fees and other expenses incurred as a direct result of the violation.”²⁰⁰

- Counsel appearing in hearings held pursuant to the Federal Deposit Insurance Act may be suspended or excluded from further participation upon a showing that counsel has engaged in “[d]ilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding.”²⁰¹
 - Even in the absence of uniform published rules, litigants in administrative tribunals may find it in their collective best interests to seek protective orders designed to establish ground rules for discovery. The Administrative Procedure Act authorizes an ALJ to “dispose of procedural requests or similar matters,” provided such action is consistent with the agency’s published rules.²⁰² Such an order – ideally the product of an arms’ length and fully informed negotiation among the litigants – could address the substantive goals and offer the protections afforded under Rule 37, and specify which sanctions are available for noncompliance with agreed-upon ground rules.
- *Applying federal sanctions jurisprudence in state court proceedings*
- While state court civil procedure rules apply to civil cases initiated in state court prior to their removal to federal court, the Federal Rules of Civil Procedure apply and govern procedure in matters removed to federal

¹⁹⁹ See 19 U.S.C. 1333, 1335, and 1337; see also Final Rules for Investigations and Related Proceedings Concerning Unfair Practices in Import Trade, 59 Fed. Reg. 39020, 39039 (Aug. 1, 1994) (“Subpart A—Rules of General Applicability”).

²⁰⁰ 19 C.F.R. § 210.4(d)(2) (written submissions; representations; sanctions).

²⁰¹ See, e.g., 12 C.F.R. § 308.6(b).

²⁰² 5 U.S.C. § 556(c)(9).

court. Fed. R. Civ. P. 81(c)(1) (“These rules apply to a civil action after it is removed from a state court.”).²⁰³

- In actions commenced in state court, the trial court may consider as illustrative constructions appearing in federal court decisions.²⁰⁴
 - Where, for example, California Code of Civil Procedure section 2034, relating to sanctions under that state’s discovery rules, was proposed to the Legislature for the purpose of adopting the Federal Rules and broadening the preexisting California rules to be comparable with federal court proceedings, and where the state statutes are “in substance, exact counterparts of the federal rules[,]” the California appellate court found that “the Legislature must have intended that they should have the same meaning, force and effect as have been given the federal rules by the federal courts.”²⁰⁵ The court held that federal decisions involving the effect of dismissals by way of sanctions under the discovery rules “are therefore most compelling as precedent to be followed here.”²⁰⁶

B. Who to Sanction – the Party or the Party’s Attorney²⁰⁷

- The Supreme Court has explained that imposing sanctions on parties and counsel for violating discovery rules and statutes is based on the need to specifically deter them from repeating that conduct and generally deter others who might be tempted to engage in such conduct.²⁰⁸

²⁰³ Carden v. Wal-Mart Stores, Inc., 574 F. Supp. 2d 582, 587 (S.D. W. Va. 2008) (quoting Eccles v. Nat’l Semiconductor Corp., 10 F.Supp.2d 514, 519 (D. Md. 1998)) (“Rules 4(m) and 81, both as read together and as interpreted by federal courts, establish that state law governing service of process (and all other issues) applies before removal, and that federal law applies after removal.”) (internal quotations omitted).

²⁰⁴ See, e.g., Pippen v. State, 854 N.W.2d 1, 30 (Iowa 2014) (“The bottom line is that the Iowa Civil Rights Act is a source of law independent of the Federal Civil Rights Act. In construing the Act, we may look to federal and state court precedent, none of which are binding, but which may persuade us in the interpretation of the Iowa statute.”).

²⁰⁵ Kahn v. Kahn, 68 Cal.App.3d 372, 384 (Cal. Ct. App. 1977) (citing Rep. of Com. on Admin. of Justice, Discovery (1956) 31 State Bar J. 204—231; Scripps Mem’l Hosp., Inc. v. California Emp. Comm’n, 24 Cal.2d 669 (Cal. 1944); Holmes v. McColgan, 17 Cal.2d 426 (Cal. 9141); Crummer v. Beeler, 185 Cal.App.2d 851, 858 (Cal. Ct. App. 1960); Smith v. Superior Court, 189 Cal.App.2d 6 (Cal. Ct. App. 1961).

²⁰⁶ Kahn, 68 Cal.App.3d at 384 (citing Papilsky v. Berndt, 466 F.2d 251, 254 (2d Cir. 1972)); Stebbins v. State Farm Mutual Auto. Ins. Co., 413 F.2d 1100, 1102 (D.C. Cir. 1969).

²⁰⁷ In addition to the discovery rules of the Federal Rules of Civil Procedure and the court’s inherent authority, courts may invoke 28 U.S.C. § 1927, which expressly authorizes sanctions on attorneys who engage in unreasonable and vexatious conduct, including discovery misconduct.

²⁰⁸ See Nat’l Hockey, 427 U.S. at 643 (dismissing lawsuit for attorney misconduct to ensure that other parties to other lawsuits would not feel free to flout other discovery orders); see also Cine Forty-Second St. Theatre Corp. v. Allied Artists Picture Corp., 602 F.2d 1062, 1067 (2nd Cir. 1979)

- Another objective of sanctions is the need to remediate harm inflicted by discovery misconduct through cost-shifting or reimbursement of attorney fees.²⁰⁹
- A party is responsible for the consequences of the acts or omission of its counsel, whether or not it condoned, participated or encouraged the misconduct. Based on agency principles, this rule reflects the fact that clients control the resources allotted to the compliance efforts and have significant control over the acts of their counsel.²¹⁰
- If the client was misinformed or did not knowingly participate in misconduct, it may be appropriate, in the exercise of discretion, for a court to impose sanctions on counsel rather than penalizing clients for counsel's failures. This may be appropriate when the lawyer is in a superior position to understand the claims and defenses and to assure the client complies with its discovery obligations.²¹¹
- Courts have indicated a preference for assessing responsibility for monetary sanctions in the first instance on the party, leaving to the party the decision of whether to seek an allocation of responsibility to counsel, by appropriate proceedings or by asserting malpractice actions.²¹²

(“[t]he principal objective of the general deterrent policy of National Hockey [is] strict adherence to the ‘responsibilities counsel owe to the Court and their opponents’”).

²⁰⁹ See *Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2nd Cir. 1986) (“sanctions for misconduct and abuse of the legal system” are “inevitably interwoven” with shifting the burden of attorney fees as compensation for damages inflicted by the other party); *Goodyear Tire & Rubber Co. v. Haeger*, 137 S.Ct. 1178, 1186 (2017) (authority to sanction by awarding attorney fees incurred by another party pursuant to civil procedures “must be compensatory rather than punitive in nature” and may not impose “an additional amount as punishment for the sanctioned party’s misbehavior.”).

²¹⁰ See *Link*, 370 U.S. 626, 633-34 (upholding *sua sponte* dismissal based on attorney failure because a party that voluntarily chooses an attorney as his representative cannot avoid the consequences of his acts or omission); *Chambers*, 501 U.S. at 58 (party held entirely responsible for reimbursement of innocent party for all fees and expenses incurred by movant since the onset of its “relentless, repeated fraudulent and brazenly unethical efforts”); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 436-37 (S.D.N.Y. July 20, 2004) (“at the end of the day” the duty to preserve and produce information in discovery rests on the party).

²¹¹ See *Devaney v. Continental Am. Insur. Co.*, 989 F.2d 1154, 1161-62 (11th Cir. 1993) (sanctioning only counsel who was or should have been aware his conduct would result in sanctions); *Exact Software N. Am. v. Infocon, Inc.*, 479 F. Supp. 2d 702, 718 n.25 (N.D. Ohio Dec. 5, 2006), *aff’d sub nom.*, 718 F.3d 535 (6th Cir. June 28, 2013) (party should not be sanctioned where the fault lies with inattentive, inept, or incompetent counsel).

²¹² See *Alden v. Mid-Mesabi Assocs. Ltd. P’ship*, No. 06-954, 2008 WL 2828892, at *18 (D. Minn. July 21, 2008) (sanctioning party since, if counsel is involved, “he and his client can apportion the sanctions amongst themselves, consistent with their respective degrees of culpability”); *CAT3*, 164 F.Supp.3d at 502 n.7 (offering to hold “further proceedings” to “apportion responsibility” if party believes their former attorneys bear all or some responsibility); *Indus. Quick Search, Inc. v. Miller, Rosado & Algois*, No. 13 Civ. 5589, 2018 WL 264111, at *6-7 (S.D.N.Y. Jan. 2, 2018) (party alleged it had been forced to settle a case for \$2.5M after trial court entered default judgment on liability due to malpractice of counsel); Thomas Y. Allman, *Conducting E-Discovery After the [2006] Amendments*, 10 Sedona Conf. J. 215, 218, 227, & n.164 (2009) (clients are in the best position to control their

- The court has discretion to impose responsibility for sanctions jointly or to allocate as appropriate between the party and its counsel.²¹³
- There may be an inherent conflict in the decision of whether to sanction an attorney or the client. Oftentimes, for attorneys to exonerate themselves from wrongdoing, they will be forced to place the blame for the misconduct on the client, which calls into question an attorney's obligation to their client when there is a threat of serious sanctions. How can attorneys defend themselves when the alternative is to sanction their client?

Who is more likely to be deterred?

- The deterrent effect likely depends on the nature of the sanctions.
 - o Many sanctions will affect only the party, such as case-dispositive measures or evidentiary inferences and preclusions at trial. Depending on

counsel and fund the efforts involved and there should be a mild *de facto* presumption against sanctioning counsel for discovery misconduct in the first instance); Willoughby *et al.*, *Sanctions for E-Discovery Violations: By the Numbers*, 60 Duke L.J. 789, 815-18 (2010) (collecting cases supporting empirical conclusion that clients are sanctioned for discovery misconduct more often than lawyers and when sanctioned, clients are typically sanctioned as well).

²¹³ See *In the Matter of Baker*, 744 F.2d 1438, 1440 (10th Cir. 1984) (“The intent is to impose the sanction where the fault lies”); *Nat’l Assn. of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 558-59 (N.D. Cal. 1987) (party and counsel were sanctioned jointly “since responsibility . . . was shared and since culpability could not be accurately apportioned”); *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1541, 1546-47 (11th Cir. Apr. 9, 1993) (finding counsel and party jointly responsible under Rule 26(g) for fees and expenses where counsel allowed the “objectives of the client to override” their duties as officers of the court); *Wade v. Soo Line R.R. Corp.*, 500 F.3d 559, 562 (7th Cir. 2007) (“[S]anctions in the form of attorney fees are analogous to damages in a tort case, so the party that misbehaved should pay for the injury caused by the misconduct.”); *Haeger v. Goodyear Tire and Rubber Co.*, 906 F.Supp.2d 938, 981 (D. Ariz. Nov. 8, 2012) (because one counsel was less culpable than another, who, with the client, was equally culpable, court allocated 20 percent of responsibility for fees and costs on former, but others jointly responsible for 80 percent), *aff’d* 813 F.3d 1233, 1254 (9th Cir. Feb. 16, 2017), *rev’d and remanded on other grounds*, 137 S. Ct. 1178 (2017); *Venator v. Interstate Res., Inc.*, No. CV415-086, 2016 WL 1574090, at *12 (S.D. Ga. Apr. 4, 2016) (requiring defense counsel to pay fees and expenses to moving party and sanctioning party by way of \$500 fine where no intent to mislead and obfuscate requiring *Malautea* level sanctions found); *Metro. Opera Ass’n, Inc. v. Local 100*, No 00 Civ. 3613, 2004 WL 1943099, at *25 (S.D.N.Y. Aug. 27, 2004) (clarifying [earlier opinion at 212 F.R.D 178] so that “defendants are properly sanctioned for the misconduct of their counsel, independently,” and jointly for their participation with counsel in “coordinated, multiple acts of willful misconduct.”); *1100 West, LLC v. Red Spot Paint & Varnish*, No. 05-cv-1670, 2009 WL 1605118, at *35 (S.D. Ind. June 5, 2009) (allocating discovery costs of movant equally between client and counsel); *Syntel Sterling Best Shores Mauritius Ltd. v. Trizetto Grp.*, 328 F.R.D. 100, 124-25 (S.D.N.Y. Sept. 19, 2018) (joint and several liability imposed for failure to comply with orders because of inability to determine if it “stems primarily from the actions of [the party] or its counsel”); *DR Distributors*, 2021 WL 185082, at *4 (reimbursement of fees and costs incurred by defendants shall be paid 50 percent by client and 50 percent by former counsel, with latter allocated 80-20 percent among them).

- the severity of the measures, sanctions may have a significant effect on the party and only an indirect effect on counsel.
- Monetary sanctions, however, may have less deterrent effect on parties when passed on as the cost of doing business or if the advantages derived from the misconduct are perceived to be of greater value than the cost.²¹⁴
 - Sanctions against counsel for misconduct may be effective in light of attorneys' personal interest in avoiding challenges to their professional reputation or monetary incentives to delay resolution.²¹⁵
 - The impact on counsel may be especially pronounced when lawyers are singled out for explicit criticism, referred to disciplinary authorities, and/or subjected to other non-monetary sanctions for inappropriate conduct.²¹⁶
 - Recognizing that sanctions against individual attorneys are likely to have a long-lasting reputational impact on attorneys, courts should endeavor to impose sanctions in a reasoned and consistent manner.

²¹⁴ See *Poole v. Textron*, 192 F.R.D. 494, 507-08 (D. Md. Mar. 30, 2000) (noting that the monetary sanction imposed on the party to deter "future litigation abuse" is obviously more symbolic than retributive "given the wealth and resources of Textron"); *GN Netcom, Inc. v. Plantronics, Inc.*, No. 12-1318, 2018 WL 273649 at *n.2 (D. Del. 2018) (losing party argued that the financial sanctions imposed on the spoliator had been ineffective given that the jury was deprived of evidence which might have changed the verdict, meaning that the "lesson this case teaches future defendants is that it is better to spoliator evidence than to comply with the legal obligation to preserve") (internal quotation omitted); *case reversed and remanded*, 930 F.3d 76, 89 (3rd Cir. 2019).

²¹⁵ See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 413 (1990) ("[M]ost lawyers are wise enough to know that their most precious asset is their professional reputation.") (Stevens, J., concurring); 1983 Advisory Comm. Note to Rule 26(g) (Rule 26(g) is intended to provide a deterrent to both excessive discovery and evasion by mandating sanctions when an attorney fails to make a reasonable inquiry to assure the legitimacy of a discovery request, response or objection without justification).

²¹⁶ See *DR Distributors*, 2021 WL 185082, at *4 (all sanctioned counsel ordered to complete a minimum eight hours of CLE on ESI in less than twelve months); *Qualcomm v. Broadcom*, No. 05cv1958-B, 2008 WL 66932, at *9 (S.D. Cal. Jan 7, 2008) (the party "could not have achieved this goal without some type of assistance or deliberate ignorance from its retained attorneys"); *order vacated after remand and evidentiary hearing*, 2010 WL 1336937, at *6 (S.D. Cal. Apr. 2, 2010) (the inquiry by counsel under Rule 26(g) was reasonable, although flawed, and the attorneys did not act in bad faith); William T. Gallagher, *IP Legal Ethics in Everyday Practice of Law: An Empirical Perspective on Patent Litigators*, 10 J. Marshall Rev. Intell. Prop. L. 309, 311 (2011) ("*Qualcomm*" was especially effective – even though penalties were ultimately vacated – because it "raised the specter of lawyer sanctions for discovery abuse in highly dramatic circumstances"); Hon. Lee Rosenthal and Steven Gensler, *Breaking the Boilerplate Habit in Civil Discovery*, 51 Akron L. Rev. 683, 718 & n.147 (2017) (recommending sanctions be imposed often enough and in a consistent manner to cause lawyers to change their approaches because they come to believe that judges "won't let them get away with it"); Hon. Paul Grimm, *Good Faith in Discovery*, 46 No.2 Litigation 23, 26 (2020) (suggesting courts overcome reluctance to sanction so that counsel will learn they will not profit from their ignorance or noncompliance "and will be deterred from future violations").

C. Other Potential Consequences of Attorney Misconduct

- *Referral to State Bar Association Disciplinary Board.*
 - o Although discovery misconduct is prohibited under the Model Rules of Professional Conduct, and courts and parties are obligated to report it to disciplinary authorities, “federal courts relatively rarely rely on the state disciplinary system to regulate attorney misconduct in their courts.”²¹⁷
 - ABA Model Rule 3.4(a), (c) & (d) (a lawyer shall not unlawfully alter, destroy or conceal material having potential evidentiary value; knowingly disobey an obligation; or, in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request).
- *Sanctions Pursuant to Local Disciplinary Rules*
 - o Federal district courts have authority to deal with conduct of counsel admitted to practice before them and prefer to deal with discovery misconduct under their own procedures, formal or informal.²¹⁸
- *Reprimands and Admonitions*
 - o Non-traditional sanctions are frequently utilized and may be particularly effective at deterring misconduct.²¹⁹

²¹⁷ *McMorrow et al., Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 Hofstra L. Rev. 1425, 1443 (2004) (collecting cases in support of proposition).

²¹⁸ *See* *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D. 120, 142-46 (W.D. La. Jan. 23, 1989) (reprimanding some counsel and declaring others to be disbarred or ineligible to practice in the district), *aff’d and vacated in part* on other grounds, 894 F.2d 696 (5th Cir. 1990), *aff’d sub. nom.* *Chambers v. NASCO, Inc.*, 501 U.S. 32, 58 (1991); *In re Finkelsein*, 901 F.2d 1560, 1563 (11th Cir. May 23, 1990) (“[b]ecause lawyers are officers of the court [to which they are] granted admission, such courts are necessarily vested with the authority, within certain limits, to impose reasonable sanctions for lawyer misconduct”); *KCI USA, Inc. v. Healthcare Essentials, Inc.*, No. 14CV549, 2018 WL 3428711, at *8 (N.D. Ohio July 16, 2018) (attorneys violated Ohio Professional Code of Conduct when they failed to apprise the Court of their clients’ and their own discovery violations); *rev’d and remanded on other grounds*, 797 Fed.Appx. 1002, 1004 (6th Cir. Jan. 16, 2020) (noting that client had prohibited them from disclosing misconduct by invoking its Fifth Amendment right against self-incrimination).

²¹⁹ *See* *Flaherty v. Filardi*, No. 03 Civ. 2167, 2007 WL 2398762, at *8 n.6 (S.D.N.Y. Aug. 15, 2007) (“permanent record of misconduct” of named counsel in reported opinion “will be sufficient to provide” deterrence); *Grider v. Keystone Health Plan Central, Inc.*, 580 F.3d 119, 145-46 (3rd Cir. Sept. 1, 2009) (courts may have “a warm friendly discussion on the record,” offer a “hard-nosed reprimand in open court,” or order “compulsory legal education, monetary sanctions or other measures appropriate to the circumstances.”) (internal quotation omitted); *Heller v. City of Dallas*, 303 F.R.D. 466, 494-95 (N.D. Tex. Nov. 12, 2014) (refusing to sanction counsel but announcing intent to more “rigorously” punish future violations by any counsel in the case and requiring the party to circulate a copy of the opinion to every attorney that represents it); *Haeger v. Goodyear Tire &*

- *Potential Criminal Prosecution*
 - o Federal statutes prohibit obstruction of justice and have been extended to include discovery conduct intended to interfere with agency investigations.²²⁰
- *Potential Malpractice Actions*
 - o Although rarely invoked, clients may assert malpractice actions against current or former counsel for discovery failures when it causes damages.²²¹

D. Interplay between Sanction Rules & Ethical Obligations

- Although counsel has a duty of zealous advocacy to his client, this duty will not excuse a failure to ensure that discovery conduct is well grounded in law and fact. Courts have sanctioned counsel for unethical behavior, even while recognizing a potential chilling effect on advocacy.²²²
- Enforcing attorneys' ethical obligations is not inconsistent with—and, in fact, reinforces—zealous advocacy because it allows both parties to know and address the evidence in the case. But situational factors, such as the partisan role of the adversarial system and the resulting bias, may contribute to unethical behavior, intentional or otherwise.²²³

Rubber, 869 F.3d 707, 710 (9th Cir. June 8, 2017) (“[t]he deceit and dishonorable conduct of [named counsel] in this case were unworthy of members of the bar and their disgrace serves as an admonition to all members of the bar”).

²²⁰ United States v. Stevens, 771 F.Supp.2d 556 (D. Md. 2011) (indictment for violation of 18 U.S.C. § 1519 for attempt to obstruct or influence federal agency investigations quashed because statute requires specific intent, which can be negated if based on advice of counsel); see generally Greta Fails, *The Boundary Between Zealous Advocacy and Obstruction of Justice After Sarbanes-Oxley*, 68 N.Y.U. Ann. Surv. Am. L. 397 (2012).

²²¹ Indus. Quick Search, 2018 WL 264111, at *6 (counsel allegedly responsible for \$2.5M settlement after default judgment on liability by failing to properly advise on law governing document preservation, adequately supervise document production, or offer an adequate defense at spoliation hearing).

²²² Malautea, 987 F.2d at 1541, 1546-47 (ABA Model Rules “underscore the duty to advocate zealously while neglecting the corresponding duty to advocate within the bounds of the law”); McCoo v. Denny’s Inc., 192 F.R.D. 675, 697-98 (D. Kans. Apr. 18, 2000) (although counsel has a duty of zealous advocacy, even if client directs counsel to respond in a certain manner, counsel has obligation to ensure responses are “well grounded” and may be held responsible for monetary sanctions).

²²³ Paula Schaefer, *Attorneys, Document Discovery, and Discipline*, 30 Geo. J. Legal Ethics 1, 28-29 (2017) (“Attorneys engaged in [] misconduct are not being advocates in a dispute. They are playing a part in hiding or withholding documents or misleading . . . which has never been recognized as appropriate advocacy.”) (collecting studies to that effect).

- Attorneys advocating for their clients within the bounds of zealous advocacy are protected from sanctions by the Rules, which generally provide that sanctions should not be imposed where the conduct at issue was “substantially justified” or “harmless” or where “other circumstances make an award of expenses unjust.”²²⁴ Conduct has been deemed substantially justified where an attorney has a reasoned basis in law and fact to present his position to the court.²²⁵

E. Practice Points for Attorneys to Avoid Discovery Sanctions

- If you are required to request or produce electronic evidence, and you are not competent to handle eDiscovery, you have three options: 1) quickly obtain the necessary competence; 2) associate with competent counsel or engage a competent consulting provider; or 3) decline the representation.
- At the Rule 26(f) conference, and after if necessary, be fully prepared to discuss preservation efforts, privilege, sources of e-discovery (e.g. databases, custodians), cost shifting and the use of search terms or analytics.
- Timely enter into comprehensive protective orders and agreements related to privilege and work product protections, if necessary, including FRE 502(d) agreements or state law equivalents.
- Document requests should identify what information is being sought with reasonable precision and specificity.
- Objections to document requests should state the grounds for the objection with reasonable precision and specificity.
- Know the rules of civil procedure and the legal basis for any objections.
 - o For example, know the difference between objections based on Rule 26(b)(1), proportionality and undue cost or burden given the enumerated factors, and Rule 26(b)(2)(B), not reasonably accessible.
- Throughout discovery, utilize the meet and confer process to effectively communicate and attempt to informally address and resolve disputes. This is particularly useful if the meet and confer is conducted telephonically, via Zoom, or in person. *See, e.g., Crotty, J., Individual Practice Rules (U.S.D.J. S.D.N.Y.)*

²²⁴ *See, e.g.,* Fed. R. Civ. P. 37(a)(5)(A)(ii)-(iii); 37(b)(2)(C); 37(c)(1).

²²⁵ *See, e.g.,* Fed. R. Civ. P. 37 advisory committee’s note to 1970 amendment (stating that the substantially justified exception to the imposition of sanctions is met where the “losing party acted justifiably in carrying his point to court.”).

(requiring telephonic or in person meet and confers prior to filing motions related to discovery disputes).

- If you are the responding party and you actually understand a document request but would like further clarity or to limit the scope of the request, rather than responding with form objections and exaggerated arguments that the requests are vague and ambiguous, call opposing counsel and have a professional, courteous discussion.
 - If the responding party claims they do not understand your document requests or asks to redefine the scope of your requests, rather than writing multi-page emails claiming their arguments have no merit and threatening to file a motion to compel, call opposing counsel and have a professional, courteous discussion.
- Prior to filing any motions, seek to resolve any disputes down to the specific item level, such that the only issues brought before the court are based on legal positions that are substantially justified.
- On motions related to claims of proportionality and undue costs or burden, parties should be prepared to present evidence demonstrating or refuting the alleged costs or burden.
 - In filing a motion to compel, the proponent bears the burden of demonstrating that the request is proportional.
 - In filing a motion for protective order, the proponent bears the burden of demonstrating that its objection is proportional.
- Parties should be prepared to provide the court with as much detail as possible on the costs, risks and benefits of a proposed ruling. Conclusory arguments and objections will not be sufficient.
- Carefully document all preservation efforts, including litigation hold, suspension of records retention plan, and key documents from key players.
- Develop a system to properly evaluate, assert and validate claims of privilege and work product prior to production.
- In a timely manner, fully complete and submit accurate privilege logs.
- Act in a professional manner and treat opposing counsel and the court with respect.
- Absent specific proof to the contrary, avoid accusing opposing counsel of acting in an unethical manner.

- If the opposing party challenges your privilege determinations, check your work and fix any errors before responding.

DRAFT

Appendix A, Sanctions, Other Rules Text

Rule 16 – Pretrial Conferences; Scheduling; Management

Rule 16(f)

(f) SANCTIONS.

(1) *In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) *Imposing Fees and Costs.* Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

Rule 26 - Duty to Disclose; General Provisions Governing Discovery

Rule 26(f)

(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) *Expedited Schedule*. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

Rule 26(g)

(g) **SIGNING DISCLOSURES AND DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS.**

(1) *Signature Required; Effect of Signature*. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney fees, caused by the violation.

Rule 37 – Failure to Make Disclosures or Cooperate in Discovery; Sanctions

Rule 37(a)

(a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY.

(1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) *Appropriate Court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) *Specific Motions.*

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

- (i) a deponent fails to answer a question asked under Rule 30 or 31;
- (ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);
- (iii) a party fails to answer an interrogatory submitted under Rule 33; or
- (iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders.*

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney fees. But the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

Rule 37(b)

(b) FAILURE TO COMPLY WITH A COURT ORDER.

(1) *Sanctions Sought in the District Where the Deposition Is Taken.* If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) Sanctions Sought in the District Where the Action Is Pending.

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule

37(b)(2)(A)(i)—(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Rule 37(c)

(c) FAILURE TO DISCLOSE, TO SUPPLEMENT AN EARLIER RESPONSE, OR TO ADMIT.

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

Rule 37(d)

(d) PARTY'S FAILURE TO ATTEND ITS OWN DEPOSITION, SERVE ANSWERS TO INTERROGATORIES, OR RESPOND TO A REQUEST FOR INSPECTION.

(1) *In General.*

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) *Unacceptable Excuse for Failing to Act.* A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) *Types of Sanctions.* Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Rule 37(f)

(f) **FAILURE TO PARTICIPATE IN FRAMING A DISCOVERY PLAN.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

Appendix B, Brief History of Sanctions Rules

Rule 16

- Intent for Rule 16 from Advisory Committee Notes
 - Implemented in 1938 with intent to relieve congested trial calendars
 - Amended in 1983
 - Subdivision (b) mandated written pretrial scheduling order
 - Subdivision (f)
 - Expressly provided for sanctions, which reflected existing practice; intended to encourage forceful judicial management
 - Incorporated as non-exhaustive list, the sanctions available under Rule 37(b)(2)
 - Recognized abuse-of-discretion standard to review judicial discretion
 - Amended in 2015
 - Required simultaneous communication for scheduling conference
 - Subdivision (b) added permitted contents of scheduling order to include: (1) preservation of ESI; (2) protective orders under FRE 502; (3) directive that movant request court conference before filing discovery motion

Rule 26

- Intent for Rule 26 from Advisory Committee Notes
 - Implemented in 1938
 - Amended in 1970 to establish R. 26 as rule governing discovery in general
 - Subdivision (e) stated party does not have duty to supplement discovery responses, with certain exceptions; limited duty to supplement enforced by sanctions
 - Amended in 1980 to include addition of new subdivision (f)
 - Recognized widespread abuse of discovery
 - Counsel may seek assistance from court after unsuccessful discovery meet and confer with opposing counsel
 - Amended in 1983 to include addition of new subsection (g)
 - Imposed duty to responsibly engage in pretrial discovery
 - Designed to curb discovery abuse and encourage more aggressive judicial control and supervision via sanctions
 - Certification duty requires attorney to make a “reasonable inquiry”
 - Amended in 1993
 - Subdivision (e) amended to apply duty to supplement to all disclosures under subdivisions (a)(1)-(3), including interrogatories, requests for production, and requests for admissions, as well as expert opinions

- Subdivision (f) required certification signature on initial disclosures
- Recognized R. 26, not R. 11, applies to discovery sanctions
- Amended in 2000
 - Subdivision (f) amended to remove prior authority to exempt cases by local rule from meet and confer requirement; amended to require only a “conference” rather than a face-to-face “meeting”
- Amended in 2006
 - Subdivision (f) directed that parties discuss ESI at meet and confer
- Amended in 2015
 - Subdivision (f)(3) required discovery plan include discussion of preservation of ESI and protective orders per FRE 502

Rule 37

- Intent for Rule 37 from Advisory Committee Notes
 - Implemented in 1938
 - Amended in 1970
 - Substituted “failure” for “refusal” throughout rule to eliminate courts reading in a “willfulness” requirement
 - Subdivision (a)(4) amended to require expenses be awarded unless losing party’s conduct was substantially justified
 - Subdivision (b)(2) broadened to include any order “to provide or permit discovery” and expressly authorize payment of expenses
 - Subdivision (c) broadened to include failures to admit
 - Subdivision (d) broadened to include requests for inspection; permissible sanctions include such orders “as are just”
 - Amended in 1980
 - Subdivision (b) amended to allow sanctions for violating Rule 26(f) order to the same extent as court’s other discovery orders
 - New subdivision (g) added to award expenses to party who participates in good faith to develop discovery plan where opposing party does not participate in good faith
 - Amended in 1993
 - Subdivision (a) permitted motion to compel initial disclosures and required parties to confer before filing a motion; provided for award of expenses where information is produced after motion is filed but before judicial resolution
 - Subdivision (c) revised to provide self-executing sanction for failure to make initial disclosures by prohibiting use of information not disclosed; limiting automatic sanctions to violations “without substantial justification” coupled with exception for violations that are “harmless” avoids unduly harsh penalties

- Subdivision (d) revised to require discovering party to informally seek responses to interrogatories before filing a motion; pendency of motion for a protective order can be an excuse for violation
- Amended in 2000
 - Subdivision (c) revised to include automatic sanction for failure to supplement prior discovery response under Rule 26(e)(2) when failure was “without substantial justification” and not “harmless”
- Amended in 2006 [to be provided by Rule 37(e) BG]
- Amended in 2015 [to be provided by Rule 37(e) BG]