

Amended Rule 37(e): Case Summaries

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Rule 37(e) was completely rewritten in 2015 to provide a framework for the selection of measures for irreparable losses of ESI which should have been preserved in the anticipation or conduct of litigation. In addition to resolving the Circuit split in authority on when adverse inference jury instructions are appropriate, it was also intended to obviate the need for reliance on inherent authority, a long-time goal of Rule 37.²

This Memorandum summarizes decisions reported in WESTLAW which have applied Rule 37(e). No attempt is made here to list decisions by courts which should have, but did not, rely on the Rule.³

(Last updated as of April 3, 2022)

1. **4DD Holdings v. United States** 153 Fed. Cl. 371, 2021 WL 1560634] (Ct. Claims, April 1, 2021). In awarding a total of \$1.8M in fees and \$2.2 in costs, having previously found that a party's "inexcusably shoddy" efforts to preserve justified such an award under **Rule 37(e)(1)** [143 Fed. Cl. 118, May 10, 2019), the court eschewed reliance on its inherent authority (*5) and found a mandatory duty under **Rule 37(d)** to impose "monetary sanctions" because when the defendants failed to preserve electronic information, as required by **subsection (e)**, they also failed to produce information required by Rule 34, thus mandating a monetary sanction under **37(d)**. (*2) It noted that it was necessary to tie the expert and consulting expenses to the government failure to preserve and produce electronic information.
2. **ACT v. Worldwide Interactive** [2020 WL 4016241] (E.D. Tenn. July 16, 2020). Court denied motion of sanctions under Rule 37(e) and inherent authority because there was no indication beyond speculation based on the volume of emails produced that the party destroyed emails. (*5). ("Speculation is not sufficient to justify spoliation sanctions") It found that it was a disputed about the sufficiency of evidence, not spoliation, which involve arguments that the jury will weigh and consider. (*7).
3. **Abdelgawad v. Mark Mangieri** [2017 65574483} (W.D. Pa. Dec. 22, 2017). In a case involving QuickBook files in digital form and certain documents which resulted in "a spoliation argument as to a combination of paper and electronic documents," the court applied separate standards in assessing the loss of each. It denied relief because the party had not

¹ © 2022 Tom Allman. The Author, a former General Counsel, was a member of the Duke Conference Panel (2010) that recommended adoption of what became amended Rule 37(e).

² *Societe Int'l v. Rogers*, 357 U.S. 197, 207 (1958)(announcing a premature preference that courts should exclusively rely on Rule 37, not inherent powers).

³ Recent examples include *Espinoza v. Hector Chavarria*, 2022 WL 136465 (W.D. Tex., Jan. 14, 2022); *United States v. Thomas*, 2021 WL 6198083 (S.D. Miss. Dec. 30, 2021); *see also* *Fast v. GoDaddy*, __ F.R.D. __, 2022 WL 325708, n. 2 (D. Ariz. Feb. 3, 2022)(noting frustration of former Chair of Advisory Committee that "some lawyers and judges are still unaware of [the] significant change to the law of ESI spoliation").

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

4. **Accurso v. Infra-Red Services** [169 F.Supp.3d 612] (E.D. Pa., March 11, 2016)). In ruling on final pre-trial motions in a dispute with former employee, defendants were denied an adverse inference for destruction of emails without prejudice since no evidence was offered establishing the elements of **Rule 37(e)**. **The court noted they were free to raise** the issue at trial “in light of what is received into evidence,” but cautioned that a witness would not be allowed to testify as to an opinion that the employee intentionally destroyed evidence. The court applied the new rule because it was “procedural in nature” and observed (n. 6) that did not appear to have “substantively altered the moving party’s burden” in the Third Circuit of showing that ESI was destroyed in “bad faith” in requesting an adverse inference. It specifically addresses the applicability of sanctions for spoliation of [ESI].” (618).
5. **Adams v. Klein** [2020 WL 2425715] (D. Del. May 12, 2020). A court noted that a court “may take ‘curative measure’ (including the application of an adverse inference) upon a showing that the other party was prejudiced or sanctions upon a showing that the party acted with intent.” Neither was shown and no adverse inference was justified.
6. **Adcox v. UPS** [2016 WL 6905707] (D. Kan. Nov. 11, 2016). In a thoughtful opinion applying **Rule 37(e)** to potential failures to preserve, the court ordered curative measures, such as additional discovery, without explicitly finding a failure to take reasonable steps, but decided not to issue an adverse inference at trial because it found no ‘bad faith or intentional omission’ on the part of UPS. The court stressed the Committee Note comment that a court should exercise caution to ensure that the remedies “fit the wrong” committed by a non-producing party.
7. **ADM Milling Co. v. Columbia Plateau Producers** [2020 WL 5802344] (E.D. Wash. Sept. 29, 2020). In denying a TRO and a Motion to expedite discovery and Preservation of evidence, the court noted that “District courts also possess inherent authority to impose sanctions against a party that prejudices its opponent through the destruction or spoliation of relevant evidence. See *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); Fed. R. Civ. P. 37(e).” (*8).
8. **Agility Public Whsg. v. DOD**, [2017 WL 1214424] (D.D.C. March 30, 2017). In rejecting the argument that inherent authority, not **Rule 37(e)**, applied to ESI which could not be replaced except by additional discovery, the court stated the rule foreclosed reliance on inherent authority “at least in factual situations to which the rule applies, i.e., where the information cannot be substituted from another source.” The court cited to *Living Colors*, 2016 WL 1105297 at *5 and CAT3, 164 F. Supp.3d 488, 496-98 for the discussion of the meaning of “lost” under **Rule 37(e)**.

9. **Air Products v. Wieseemann** [2017 WL 758417] (D. Del. Feb. 27, 2017). A District Judge refused to sanction Air Products for the wiping of laptops belonging to former employees which came to light only after initial disclosures because the moving party named only one of them as a subject of search terms until after being notified that the wiping had occurred. The court also refused to sanction for lost emails which were available from another source, citing *CAT3 v. Black Lineage*. According to the court “[p]ure speculation is not enough” to find that relevant ESI was destroyed. The court noted that the party had “not met the threshold requirement under Fed. R. Civ. P. 37(e) of showing that ESI [on a server] was actually lost.” The court cited to Rule 37(e) and noted that sanctions are determined under “two different rubrics” depending on the type of evidence.
10. **Alabama Aircraft Industries v. Boeing** [__ F. Appx. __, 2022 WL 433457 (11th Cir. Feb. 14, 2022)]. The Court of Appeals refused to overturn a unanimous jury verdict on the basis that an adverse inference instruction in favor of the plaintiff was an abuse of discretion. The broad instruction allowed the jury to infer the missing ESI was unfavorable if it first found that intent to deprive had motivated the loss, since it “correctly stated the law and did not mislead the jury.” (*16). The trial court had earlier (and appropriately) (found that Boeing acted with intent to deprive under **Rule 37(e)(2)** based on the evidence of bad faith (*15)[see also trial court opinion at 319 F.R.D 730] (N. D. Ala. March 9, 2017), *request for certification for interlocutory appeal denied*, 2017 WL 4572484 (N.D. Ala. April 3, 2017)] but, at Boeing’s request, the jury was permitted to hear the evidence and “decide what happened and why it happened. The Appellate court noted that the Committee Note permitted the trial court to impose an “even harsher sanction,” namely that it could “simply draw the adverse inference.” (*16, and see also n. 19, observing it was not bound by the Note, but could give it great weight). [The lower court had originally stated that if the case goes to trial, the jury will be instructed that it may presume that the lost information was unfavorable to Boeing and had also awarded reasonable attorney’s fees and costs to the movant in prosecuting the motion against Boeing, but the issue was not before the Appellate court].
11. **Alasadi v. Intel Corporation** [2020 WL 4035169] (D. Ariz. July 17, 2020). The trial court refused to give a “negative” inference under its inherent authority for a failure to affirmatively collect ESI data. The court rejected the argument that Intel had a duty to create more measurements of the exposure, such as providing a fixed 24/7 system and personal monitoring devices. However, it also held that it “does not preclude” the party from “presenting admissible evidence concerning Intel’s alleged failure” to collect data of hazardous emission levels. (*5) It found no evidence that Intel had lost data intentionally to preclude the party from using the data in litigation and denied a negative inference under **Rule 37(e)(2)**. (*4) It noted that since it is a bench trial, the court “finds no risk of unfair prejudice or confusion” to be involved by permitted Intel to present its evidence. (*5).
12. **Ali v. Dainese USA** [__ F. Supp. 3d. __, 2021 WL 5999203] (S.D.N.Y. Dec. 17, 2021). The District Judge in a lengthy and somewhat confusing opinion in a single plaintiff constructive employment discharge case decided to allow the Defendants “to present evidence at trial that Plaintiff deleted” the certain emails under **Rule 37(e)(1)** [at *15, 17 & *18]. The plaintiff had not “alerted” the defendants or the court of the deletion until her

deposition but had produced others. “These circumstances do not evidence an intent to deprive Defendants or the Court of relevant evidence.” (*17) Allowing the jury to hear evidence that she deleted the notices would “address the prejudice to Defendants and deter Plaintiff from committing similar misconduct in the future.” (*18). The court held that “given that this less severe sanction is sufficient to serve the purposes of both the spoliation doctrine and Rule 37, the Court declines to preclude Plaintiff from pursuing her back or front pay claims.” (*18) Precluding claims would “risk providing Defendants with an “unjust windfall,” citing *Fashion Esc. V. Hybrid*, 2019 WL 6838672, at *6 (S.D.N.Y. Dec. 16, 2019). Separately the court sanctioned the party for violating **Rule 16(f)** scheduling orders and **Rule 37(b)** by failing to disclose the lack of production of emails and texts until after deadlines had passed. (*9) It applied a mandatory requirement that the plaintiff reimburse Defendants for reasonable expenses, including fees and costs (*14), citing **Rule 16(f)(2)** (*15) and reopened discovery to deal with the untimely disclosures issues. (*14) It also found that dismissal would be excessive as would the precluding of seeking front and back pay (*16).

13. **Al-Sabah v. Agbodjogbe** [2019 WL 4447235] (D. Md. Sept. 17, 2019). The court refused to issue any measures under Rule 37(b)(1) based on the deletion of the electronic copies of 4 photos of an executed agreement which existed in pdf and the lack of which did not prejudice the party. (*5) (citing *Victor Stanley v. Creative Pipe*, 269 F.R.D. 497, 522-23 (D. Md. 2010).
14. [State Case] **American Honda v. Thygesen** [2018 WL 830321, 2018 OK 14, __ P3d __] (S.Ct. Okla. Feb. 13, 2018). Applying the 2006 version of Rule 37(e), as adopted verbatim in Oklahoma, the Supreme Court ordered the lower court to not enforce a sanction for destruction of design ESI long before the auto accident suit was filed or foreseeable, since the deletion was “the result of the routine operation of Honda’s information-retention” stems. There was no indication it was operating the retention policy in bad faith. Quoting Steve Gensler it noted that this “safe harbor” did not protect a party who failed to implement a sufficient litigation hold once a lawsuit is filed or becomes likely and since there was no duty to preserve data for as long as one of the cars was on the road – antithetical to the design of the Oklahoma rule – and there was no “exceptional circumstance” – the lower court order was not authorized.
15. **Anderson v. Armour**, __ Fed. Appx. __, 2021 WL 5985014, *1 and n. 1 (9th Cir. Dec. 16, 2021). After a jury trial exonerating a police officer, the Ninth Circuit found no abuse of discretion in the denial of an adverse inference instruction under **Rule 37(e)** at trial where the plaintiff failed to demonstrate the police officer had a duty to preserve the photos he took of her in his police car following the stop. (*1) In footnote 1, the court observed that these arguments “failed on the merits” [the lower court had held that the common law duty arguments had been waived] because “a common law spoliation analysis mirrors our analysis under FRCP 37(e),” citing *Ryans v. Editions Ltd West*, 786 F.3d 754, 766 (9th Cir. 2015). It noted that the only evidence before the court was testimony that the cell phone was broken and no longer worked. [A lower court decision in the case at 2021 WL 4950344 (Oct 25, 2021) makes no mention of the adverse inference instruction issue].

16. **Andra Group v. JDA Software** [2015 WL 12731762] (N.D. Tex. Dec. 9, 2015). The court refused to find that **Rule 37(e)** applied to non-party subject to subpoena even if there was a common law duty to preserve as to that party (*16).
17. **Ann Rivera v. Sam's Club** [2018 WL 4705915] (D. Puerto Rico Sept. 28, 2018). In a tragic case where a defective swing on exhibit at a retail establishment led to the death of a customer, the court sanctions Wal-Mart - and lists the "track record" of Wal-Mart for having spoliation sanctions imposed on it for "strikingly similar circumstances" (*14) - for failure to preserve surveillance videos. Rule 37(e) is mentioned only in passing (n. 13) as part of rejecting the Wal-Mart argument that it is "inapplicable because that rule applies exclusively" to ESI. The court responds that it may use its inherent power as well, citing *Chambers v. NASCO*.
18. **A.O.A. v. Rennert** [2018 WL 11251827, at *3 (E.D. Miss. March 12, 2018)] Refusing sanctions under **Rule 37(e)** because "nothing before me indicates [that the] process of changing computer systems was unreasonable" and the evidence indicates that the failure to preserve was not an attempt to suppress the truth, and circumstantial evidence "demonstrating undue delay in responding to requests" is "insufficient to show intent to suppress relevant evidence," citing *Hallmark Cards v. Murely*, 703 F.3d 456, 462 (8th Cir. 2013) as well as, at *2, *Applebaum v. Target Corp.*, 831 F.3d 740, 745 (6th Cir. 2016)("a showing of negligence or even gross negligence will not do the trick").
19. **AOT Holding AG v. Archer Daniel Midland Company** [2021 WL 6118175] (C.D. Ill. Sept. 3, 2021). In ruling on a motion to compel "discovery on discovery," the Magistrate Judge provide a thoughtful interpretation of the impact of Sedona Conference Principle 6 and hold that while "it might be a little steep" it does show the need for "an adequate factual basis for an inquiry." (*4). It speaks to the issue of Skype chat usage before and after imposition of litigation holds and (curiously) cites the 2006 Committee Note to **Rule 37(f)** for the proposition that the duty to preserve may arise from many sources "including common law, statutes, regulations or a court order in the case." The court is aware of the 2015 amendments and cites amended Rule 26(b)(1), but does not mention the new rule, perhaps because while the onset of the duty to preserve is crucial to the discussion, the motion does not seek sanctions(yet)' the point of the motion is to secure the information about the policies before the duty to preserve attached which may have allowed destruction of ESI.
20. **Apex v. Chemworld** [2018 WL 4853500] (N.D. Ind. Oct. 5, 2018). In a rambling and disjointed opinion which disclaims reliance on **Rule 37(e)** because the court had earlier disqualified an expert, the court orders a default judgment because it has "stepped back" and considered conduct as a whole in a case where over 400 docket entries deal with discovery disputes. Curiously, no citations to inherent authority is made; the authority asserted in under Rule 37(b), it concludes that a sanction of default judgment is appropriate and proportionate to the egregious nature of the Defendant's conduct. (*13).
21. **Applebaum v. Target** [831 F.3d 740] (6th Cir. Aug. 2, 2016). Sixth Circuit affirmed refusal of trial court to instruct a jury that the failure to produce any repair history records warranted an adverse inference (2015 WL 13050013). The court had instructed the jury that if it found that the defendant had disposed of the bike and had not shown a reasonable excuse for doing

so, it could infer that the brakes had not been repaired. The Sixth Circuit (Sutton, J.) found no error in refusing to give an additional adverse inference instruction as to records and noted that she had offered no evidence that some of the records even existed, much less that Target had control over them and destroyed them with a culpable state of mind. Moreover, **under amended Rule 37(e)**, to the extent she sought an adverse inference for spoliation of electronic information, the rule required her to show an intent to deprive her of its use, since “a showing of negligence or even gross negligence will not do the trick,” citing to the Committee Note.

22. **Aquavit Pharmaceuticals v. U-Bio Med** [2021 WL 4312579] (S.D.N.Y. July 16, 2021), *R&R adopted and modified in part*, 2021 WL 3862054 (S.D.N.Y. Aug. 30, 2021). An intentional deletion of an Instagram account “an act of both spoliation and contempt” - during ongoing litigation in the face of an injunction requiring preservation did not lead to a recommendation for sanctions under *either Rule 37(e)(1) or (e)(2)* because the party did not act in bad faith and the movant was not prejudiced by the deletion. (*10) However, it recommended that an award of civil contempt of compensatory measures of 75% of the reasonable fees and costs in investigating and seeking sanctions to compensate for losses and deter similar conduct in the future. (*10)
23. **Aramark Management v. Borguist** [2021 WL 864067] (C.D. Cal. Jan. 27, 2021), *recommendations adopted*, 2021 WL 863746 (C.D. Cal. March 8, 2021) In a brief, but decisive opinion after a de novo review of challenged portions of the R&R, District Judge Staton accepted the findings, conclusions, and recommendations of Magistrate Judge Scott, and summarized the instructions which would be given at trial. (2021 WL 863746, at *1). The Magistrate Judge had found measures under **Rule 37(e)** to be justified against former employees now in competition since, *inter alia*, the former employees had failed to meet their burden to “show that the loss of ESI was *not* prejudicial” (*13) since the missing ESI “might have contained” files relating to the plans to leave the former employer. (*17). The same logic was applied laptops and iPhones, as the parties had “done enough” to show the laptop “contained relevant information.” (*18). Because it was “not reasonable” to trade in an iPhone without consulting counsel, the court recommended that the jury be informed of the spoliation, conceding that, while suspicious on its face, the “jury might find” the party’s explanation to be credible. (*19) It also awarded an adverse inference instruction; recommended that the jury be allowed to decide if the party acted with an intent to deprive Plaintiff of the use of the ESI in the litigation [citing the Committee Note, at *16]; should bear the cost of having a replacement iPhone examined forensically; and that “defendants, the law firm of current defense counsel, and the law firm of former defense counsel” to be found to be “jointly and severally liable to Plaintiffs” under Rule 37(e) for the “reasonable expenses they incurred in bringing the instant motion, including attorneys fees.” (*2-3). In finding fees available under **Rule 37(e)(1)** to authorize fees, the court cited **Spencer v. Lunada Bay Boys**, 2018 WL 839862, at *1 (C.D. Cal. Feb. 12, 2018, *aff’d* 806 F. App’x 564, 568 (9th Cir. 2020) as well as **Colonies Partners** and **Matthew Enterprises**. (*22). It explained that the liability should be joint and several among the party and counsel as “necessary to cure the prejudice [the former employer] suffered to the ESI spoliation.” (*23).

24. **Arana v. Temple University** [776 Fed. Appx. 66, 2019 WL 2375181, at *2-3] (3rd Cir. June 5, 2019). The Third Circuit found that there was no basis for a presumption at summary judgment or at trial because the moving party had not shown that the party acted with the requisite intent to deprive under Rule 37(e)(2)(A) or (B).
25. **Aronstein v. Thompson Creek Metals** [2017 WL 1519390, at *2] (D. Colo. April 27, 2017). The court denied a motion under **Rule 37(e)** regarding alleged missing documents and ESI from a computer and shared drive because affidavits establish that all documents on laptop were transferred to another folder and have been maintained. The court also refused to allow an amendment to add tort claims for spoliation because of a failure to “plausibly allege that any evidence was spoiled in this case.”
26. **Arrowhead Capital Finance v. Seven Arts** [2016 WL 4991623, at *20 (S.D.N.Y. Sept. 16, 2016)]. In a complex cases involving attempts to enforce a judgment against a deadbeat party moving assets around to avoid it, the court in assessing egregious discovery conduct noted that a failure to move or copy ESI on server “could be seen as reckless,” citing the **Rule 37(e)** requirement that a party take reasonable steps to preserve discoverable electronic information.
27. **Arya Risk Mgt. v. Dufosset** [2019 WL 6840395] (S.D. Tex. Aug. 22, 2019). The Magistrate Judge recommended that some, but not all, claims deserved a “Rule 37 death penalty sanction” (entries of default) and recommending an adverse inference instruction against the Plaintiffs on some others. (*8-9).
28. **Ascentium Capital v. Littell** [2021 WL 6095550] (W.D. Mo. Dec. 22, 2021). In imposing sanctions on Littell in a manner reminiscent of **Chambers v. NASCO**, 501 U.S. 32-44045 (1991) the court conceded it could have considered sanctions under Rule 26(g), 37(b) and 37(e) [ftn. 1] Instead, it entered a default judgment and required payment of all reasonable fees expended because of his misconduct. The court that the only sanction severe enough to deter future misconduct was a default and that it had inherent authority to sanction a party “if it finds by a clear and convince(citing evidence that the party acted in bad faith.” (*8) [citing *Martin v. DaimlerChrysler*, 251 F.3d 691, 694-95 (8th Cir. 2001) and [earlier] **Chambers** (inherent authority exists “to fashion an appropriate sanction for conduct which abuses the judicial process”) and *Shepherd v. Am Broad. Companies*, 62 F.3d 1469, 1472 (D.C. Dir. 1995)(must find by clear and convincing evidence and lesser sanctions not sufficient punishment. (*2).
29. **Aspen American Insur. v. Tasai** [2021 WL 1053177] (Feb. 2, 2021). In a disputed insurance claim over a wrecked boat, where footage of surveillance cameras may or may not have been lost, the court refused an adverse inference under **Rule 37(e)** because there was no persuasive evidence that the party failed to take reasonable steps to preserve or intended to deprive the other party of it. (*7)
30. **Atta v. Cisco Systems** [2020 WL 7022450] (N.D. Ga. Nov. 30, 2020). After a review, the District Court adopted the recommendation [under **Rule 37(e)(1)**] that the parties be “allow to present evidence and argument at trial regarding defendants failure to preserve the organization design documents and budget and guidelines for the SPM Group during the 2016 Restructuring, and the jury will be instructed that it may consider that evidence along with all

of the other evidence in the case in making its decision.” (*3) The court acted because the party had been prejudiced by the failure to preserve these items which were “directly relevant” to the restructuring leading to termination of plaintiff’s employment. The plaintiff was “prejudiced in her ability to fully address” the assertions that the position was eliminated in the restructuring and not “sales as a result” of an assessment of her. (*2) *Bistran v. Levi*, 448 F. Supp.3d 454, 477 n.90 (E.D. Pa. 2020) rejects suggestions that **Rule 37(e)(1)** requires a showing of bad faith to establish prejudice, and “carelessness or negligence by the spoliator is sufficient, when coupled with prejudice, to warrant the imposition of sanctions, citing *Storey v. Effingham Ctey.*, 2017 WL 2623775, at *4-5 (S.D. Ga. June 16, 2017). (*2). Finally, the recommended sanctions “are no greater than necessary to cure the prejudice.”

31. **Auer v. City of Minot** 896 F.3d. 854 (8th Cir. July 19, 2018). The Circuit court affirmed the entry of summary judgment in an employment discrimination case involving the termination of a probationary employee. While the District Court had “held that the grant of summary judgment on the merits mooted” a motion for sanctions, the Court of Appeals noted that it “put the cart before the horse” to do so since if she was “entitled to the presumption” [that the lost evidence proved her allegations] “it was premature to grant” summary judgement without “evaluating whether the presumption itself could create a genuine dispute of material fact on at least some of Auer’s claims.” (857) [“Precisely because deciding a case on hypothesized evidence is strong medicine” **Rule 37(e)(2)** requires intent to deprive and *Greyhound*, 485 F.3d 1032, 1035 (8th Cir. 2007) requires “intentional destruction of evidence indicating a desire to suppress the truth.”] It described as Auer as failing to present “sufficient evidence of this serious and specific sort of culpability” listing allegations “which would at most prove negligence” as insufficient to prove “intent to deprive” since it was not the sort of intentional bad-faith misconduct “required to grant an adverse presumption.” (858) It conceded that intent could be proven indirectly and that a “smoking gun” was not necessary, but, cited *Morris v. Union Pacific*, 373 F.3d 896, 901-02 (8th Cir. 2004) for the proposition that it was improper to instruct a jury that it could assume that missing evidence was unfavorable to a party when the record in this case would not support “an inference that the party “consciously permitted” its destruction.
32. **Axis Insurance v. Terry** [2018 WL 9943825] (N.D. Ala. April 23, 2018). In a case involving failure to take reasonable steps to retain certain audio recordings (held by a brother who deleted them out of fear of being charged for wiretapping) relating to a fire claim, the court concluded that sanctions were available **only under Rule 37(e)(1)** since the prejudice is not great. “Ms. Terry will not be permitted to offer evidence that her version of events is corroborated by any recording made by her or by [her brother]” which were not produced to the insurance carrier. (*9).
33. **Bagley v. Yale** [318 F.R.D. 234 (D. Conn. Dec. 22, 2016). In a follow-up to its earlier decision [315 F.R.D. 131, 153] (D. Conn. June 14, 2016) ordering production of lists of individuals to whom litigation hold were delivered the court ordered production of the litigation hold notices (and survey results from recipients) over objections based on attorney client privilege and an inadequate predicate showing of possible spoliation. The court noted that they were issued in batches and implied that the delays in doing so might be deemed culpable “or even negligent” and noted that a District Judge has stated that the Second Circuit had “left open” the issue of

“whether a sufficiently indefensible failure to issue a litigation hold could justify an adverse inference on its own.” (Citing to *Stimson v. City of New York*, 2016 WL 54684 at *6) (S.D.N.Y. Jan. 5, 2016). (241) The court also noted that amended **Rule 37(e)** provides that “an adverse inference is warranted only when the court finds that a spoliating party” had acted with the intent to deprive and the Advisory Committee Note rejects cases such as Residential Funding that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence. (237) Similarly, the court asserted that inherent power existed to impose sanctions from “two possible source.” (236).

34. **Baker v. Ferris State University** [2021 WL 5501323] (W.D. Mich. Sept. 8, 2021). The District Judge denied a motion of sanctions based on allegations that the plaintiff had failed to produce information from a website dealing with job searches where no evidence was presented of actual losses due to failure to preserve. The court observed that since counsel had offered to allow access to view the “Indeed” account, that suggests it must have been preserved, but was not examined. “Rule 37(e) only addresses the failure to preserve” not the failure to turn it over.
35. **Balancecxi v. Int’l Consulting** [2020 WL 6886258] (W.D. Tex. Nov. 24, 2020). A Magistrate Judge recommended, after a two-day **zoom evidentiary hearing**, that the court enter a default judgment on liability against two former employees on certain claims (but not all) under **Rule 37(e)**. The court described the former employees as having engaged in “serial” spoliation and had intentionally destroyed ESI for the purpose of depriving their former employer of its use in the litigation. (*14). It held that “lesser sanctions of Rule 37(e)(A) and (B) [presumptions by court and adverse inference instructions to jury]” would not be sufficient to “address the conduct” nor “the harm they caused” would have less of a deterrent effect and would not punish the Defendants in a manner proportionate to the severity of their actions.” (*14). It awarded “fees and expenses” for the costs directly attributable to the spoliation of evidence (*16) as well as fees under Rule 37(a) relating to the earlier motion to compel (*16). noting that courts “routinely award attorney’s fees and expenses under Rule 37(e), to cover the time and effort necessary to bring the issue of spoliation before the court.” [collecting cases at *15 and at n. 13, while observing that the Rule was silent on the issue but citing Thomas Y. Allman, “*Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures*,” 26 Rich. J.L. & Tech. 1, 92 (2020) for the statement that “[d]espite the silence, the weight of the authority is that fees are awardable as part of a Rule 37(e) sanction.” Magistrate Judge Austin also noted Steven Baicker-McKee, in *Mountain or Molehill?* 55 Duq. L. Rev. 307, 321 (2017)(the silence “seems like an oversight”) and Snider v. Danfoss, No. 15-CV-4748, at *5 (N.D.Ill. July 12, 2017)(“the Advisory Committee Notes are shockingly silent on the issue as well”)] [It also noted that even if a lesser sanction had been used, it “is not clear that a lesser sanction would lead to a materially different result than a default judgment” since if the jury were instructed to assume that the destroyed evidence was source code and trade secrets, it is “difficult to see how a jury could not find the Defendants liable.” (n. 11) (emphasis in original)].
36. **Ball v. George Washington** [2018 WL 4637008] (D.D.C. Sept. 27, 2018), *aff’d* 798 F. Appx. 654 (D.C. Cir. 2020). After reviewing the factual findings by the district court, it conclude there was no error in concluding that no duty to preserve existed because the “surveillance

footage [that] was recorded on network video recorders” was automatically deleted before a duty to preserve arose under **Rule 37(e)**.

37. **BankDirect v. Capital Premium Financing** [2018 WL 1616725] (N.D. Ill. April 4, 2018). The Magistrate Judge recommended that the intent to deprive issue under **Rule 37(e)(2)** involved in the deletion of emails or the failure to stop their automatic deletion be resolved by a jury, citing *Cahill v. Dart*, 2016 WL 7034139, at *4 (N.D. Ill. 2016), and the Committee Note. (*11-12) It recommended that the court allow “the appropriate evidence to be presented to the jury, which under proper instructions, will determine the reasons for the non-production and the impact, if any, the non-production of the challenged emails has on the merits of the parties claims.” “Alternatively, if the court is not included to let the matter go to the jury, it is recommended that the court give a permissive spoliation instruction to the jury informing them of the destruction of the requested emails and that they *could* consider the deletion” in considering the claim and counterclaim. (*12) (emphasis in original)(paraphrasing from *In re Text Messaging Antitrust Litg.*, 782 F.3d 867, 870 (7th Cir. 2015). As of January 2021, it is unclear what, if anything, ultimately transpired in regard to the recommendation. However, in November, 2018, the Magistrate Judge indicated that it was pending before Judge Lee after objections. See 2018 WL 6694904 (N.D. Ill. Nov. 8, 2018).
38. **Barbera v. Pearson Education** [906 F.3d. 621] (7th Cir. Oct. 12, 2018). A Panel of the Seventh Circuit found that there was no abuse of discretion in the district court declining to find under **Rule 37 (e)** that Pearson or anyone acting for it had “intended to deprive her of her of the emails.” The party had not identified nor had the district court found an evidence of bad faith or intent to deprive. (627) The Seventh Circuit panel found the “cure granted” under **Rule 37(e)(1)** – taking as true six proposed facts concerning the email exchange that was not preserved - was enough to cure the prejudice and that the movant “seems” to acknowledge the lower courts cured the prejudice by taking proposed stipulations as true. The district court was “not unreasonable in declining to find Pearson intended to deprive her of the emails, and, even it if had, “relief was discretionary.” “The cure was enough” (628). Moreover, even accepting the version of the facts as true, they do not provide a reason to deny summary judgment. The facts “contains neither a fabled smoking gun, nor a shard of colored glass” nor any other reason to deny summary judgement. (628-31).
39. **Barcroft Media v. Coed Media** [2017 WL 4334138] (S.D.N.Y. Sept. 28, 2017). Measures are not available under Rule 37(e) where website screenshots were preserved and are in possession of plaintiff, who listed them as trial exhibits, since they are not “lost” and several remain on the websites and the party retains screen shots. The Motion for sanctions borders on frivolous and, moreover, there is no evidence they acted with intent to deprive or that any prejudice has occurred and the non-moving party does not deny the authenticity of the screenshots nor that they hosted them.
40. **Barnett v. Deere & Company** [2016 WL 4544052] (S.D. Miss. Aug. 31, 2016). In an initial spoliation decision in a product defects case involving lawn mower design, a court denied motion for sanctions because of lost documents and ESI because of destruction of electronic records was pursuant to retention policy as applicable under Circuit law and there was no showing that duty to preserve had attached at the time, since more than the mere possibility of

litigation is required. The court did not apply **Rule 37(e)** because it was not timely raised by plaintiff and **because the Fifth Circuit “has not clarified” whether its prior spoliation jurisprudence has been abrogated or amended by the Rule.** The court noted that it would not have granted the motion even if **Rule 37(e)** had applied, but noted that at trial the party could cross-examine witnesses about the circumstances. Subsequently, the Court affirmed its position that the absence of a showing of bad faith barred sanctions where the destruction occurred “under a routine document retention policy,” and also noted that the requested sanctions “were greater than necessary to cure the [purported] prejudice,” **citing Rule 37(e)(1).** [2016 WL 6694827, at *3].

41. **Barry v. Big M Transportation** [2017 WL 3980549] (N.D. Ala. Sept. 11, 2017). The court refused to impose a default judgment on the owner of tractor-trailer in a diversity action after an accident, because it was “not convinced” that the party had acted “with the intent to deprive” under **Rule 37(e)(2)**. It exonerated the trainee driver as well because it “would be manifestly unjust to enter a default judgment on Shaffer’s negligence liability or to enter an order judicially establishing the speed at which [he] was driving . . . based on Big M’s conduct in failing to preserve the ECM data. (*7-8) However, “as an alternative sanction,” the court intended to “tell the jury that the ECM data was not preserved and will allow the parties to present evidence and argument at trial regarding that failure and will allow the parties to present evidence and argument at trial regarding Big M’s failure to preserve the data.” (*8). The court noted that “Alabama state law supports the imposition of a lesser sanction” than requested, and in analyzing a request for spoliation sanctions, a court may look to state law for guidance to the extent that state law is consistent with federal law, citing *Flury v. Daimler Chrysler*, 427 F.3d 939, at 944 (11th Cir. 2005). (*8). It cited *Flury* for the proposition that sanctions are intended to “prevent unfair prejudice to litigants and to insure [sic] the integrity of the discovery process” and that federal law governs the imposition of sanctions, citing **Rule 37(e)**. (*6) While **Rule 37(e)(1) was not cited** for that result, by its emphasis on dealing proportionally with the prejudice in its result, it is consistent with and was apparently considered by the court. As of January 2020, no other courts have cited the decision.
42. **Bartlett v. South Carolina Department of Corrections** [2020 WL 5627141] (Sept. 21, 2020). The District Judge adopted the recommendation of the Magistrate that the motion for sanctions under **Rule 37(e)** should be denied because the no specific prejudice was suffered by the loss of ESI nor was there “any reasonable basis” to find that the party acted with an intent to deprive it of the information’s use in the litigation.
43. **Belanus v. Dutton** [2017 WL 1102727] (D. Mont. March 23, 2017). In prisoner case seeking sanctions on multiple grounds, the court refused to enter an adverse interference under **Rule 37(e)(2)** because the moving party “cannot establish the intent to deprive” because a surveillance video was automatically overwritten before the defendants had notice of lawsuit and they were not provided with timely notice that preservation was requested.
44. **Bellamy v. Wal-Mart Stores** [2019 WL 3936992] (W.D. Texas Aug. 19, 2019). In a slip and fall case where Wal-Mart failed to take reasonable steps to preserve a surveillance video and that the failure resulted in prejudice, Judge Rodriguez found that the “appropriate curative measure” under **Rule 37(e)(1)** was to “disallow” the party from “asserting or arguing any

comparative negligence” in this case (*6), including “arguing that the danger was open and obvious.” (*7) It also observed that “reasonable and proportionate preservation obligations” were required once Wal-Mart was on notice of the likelihood of litigation.

45. **Belew-Nyquist v. Quincy School District** [2020 WL 6845934] (E.D. Wash. Nov. 11, 2020). District Judge refused to find that **Rule 37(e)** applied to case where there was no factual basis for showing that third party school districts had communicated with the defendant about the plaintiff’s job qualifications or otherwise interfered with her job search. The party has “failed to demonstrate spoliation of ESI evidence” and did not produce direct testimony of prospective employers to show that additional discovery cannot restore or replace the ESI. (*11) Summary judgment was granted in favor of defendant and the court declined to award fees or costs to either party. (*12)
46. **Below v. Yokohama Tire** [2017 WL 764824] (W.D. Wisc. Feb. 27, 2017). A Plaintiff failed to preserve tires from the pickup truck in which he had been injured as well as possible electronic evidence “that must be preserved under Fed. R. Civ. P. Rule 37(e).” In ruling on a motion in *limine*, the court found that the failure to do so “falls somewhere between negligence and gross negligence, but perhaps short of bad faith or intentional conduct requiring an adverse inference instruction. It ordered, however, that plaintiffs could not argue that defendants had failed to explore or prove something if prevented from doing so by plaintiffs’ negligence in preserving evidence.” It reserved the right to address the issue further, including a request for a spoliation instruction.
47. **Belvins v. San Bernardino** [2021 WL 1375155] (C.D. Cal. March 7, 2021). In a pro se prisoner case under 42 USC 1983, the prisoner sought sanctions for failure to preserve additional video. The Magistrate Judge recommended denial of the motion because “nothing” in the record “reasonably would have altered officials” of the need to retain video “apart from that which was retained and record plaintiffs fight with his cellmate was relevant.” (*4)
48. **Benedict v. Hankook Tire** [2018 WL 738903, at *15 (E.D. Va. Feb. 6, 2018)]. A District Court made it clear that under Rule 37(e), however, it is the role of Rule 37(e) to provide the legal standards for the inferences to be drawn from missing evidence, and barred an expert from expressing his inferences. It held that he may discuss the absence of documents to the extent he is explaining he has received no information on the topic, but is not authorized to imply that the party should have kept the documents or would have done so had they adopted certain practices.
49. **Best Payphones v. City of New York** [2016 WL 792396] (E.D.N.Y., Feb. 26, 2016), *result affirmed* 409 F.Supp.3d 130 (E.D. N.Y. July 27, 2018). In an action by provider of pay telephones challenging regulatory impact, the court refused to impose evidence preclusion or an adverse inference under Circuit law and **Rule 37(e)** for the negligent failure to retain and produce documents and emails. The court applied “separate legal analyses” but found that the failure to pursue the availability of evidence from third parties other sources negated any finding of prejudice and barred relief under both Circuit law and **Rule 37(e)**. (at *6) The court found that the party had not “acted unreasonably as is required” under **Rule 37(e)** given the flux in email preservation standards at the time. Attorney fees were initially awarded

under Rule 37(a)(5)(A) by the Magistrate Judge, on the basis that “when a party provides discovery in response to a motion made pursuant to Rule 37. [It added that it had authority to award attorneys’ fees and costs to punish and deter egregious conduct, citing *Richard Green v. McClendon*, 262 F.R.D. 284, 292 (S.D.N.Y. 2009), also *Matteo v. Kohl’s Dept Stored*, 533 F. Appx 1, 3 (2nd Cir 2013)(awarding \$11K “in connection with a spoliation motion”) and other cases.] It explained it was permitted to award fees under **Rule 37(a)(5)(A)** because in response to the spoliation motion, the party “turned over documents that should have been provided” when “initially requested.” (*8) On appeal to the District Judge, the spoliator argued that fees should not have been awarded under **Rule 37(a)** since it permits an award of fess “only where one party is forced to seek judicial intervention to compel discovery and does not permit the award of fees related to a motion for spoliation.” The District Judge agreed that the moving party never moved to compel, but the Magistrate Judge premised her award “at least in part” on a finding that “clearly demonstrates that Plaintiffs ere forced to seek judicial intervention. 409 F. Supp. At 135. Moreover, while Rule 37(a) was not “applicable” to the motion, the court “possessed authority to impose monetary sanctions under Rule 37(b), since she had ordered discovery closed by a date certain which had not been met. Accordingly, the award of “reasonable attorneys’ fees and costs incurred in connection with their motion for sanctions” was affirmed. 409 F. Supp. 3d at 136. The court noted that the “mildest” sanction under Rule 37(b) is an order to reimburse the opposing party and that “monetary sanctions are the norm, not the exception, when a party is required to engage in motion practice to obtain the discovery to which it is entitled. *Id.*, 135-36. (citing *Joint Stock*, 2017 WL 3671036, at *20 (S.D.N.Y. July 18, 2017)(citing case quoting *Cine 42nd St. Theatre v. Allied Artists*, 602 F2d 1062, 1066 (2nd Cir 1979).

50. **Best Value Auto Parts v. Quality Collision Parts** [2021 WL 220170] (E.D. Mich. May 31, 2021). In a case alleging misappropriation of trade secrets by a former employee, the employer sought access to the contents of the employee’s iphone 6 that was replaced when it could not hold a charge. When the former employee turned it over for a forensic examination, he could not furnish a password, and an expert ultimately concluded it could not be accessed. Citing **Rule 37(e)**, the court found the data could not be restored, and that receipt of a preservation letter had triggered his duty to preserve before the phone lost its charge, and while the issue was “tricky,” “it might have been considered reasonable’ for him to at least write down his password. (*3). The Magistrate Judge concluded that rather than a mandatory or permissive jury instruction, “[l]et the jury decide.” (*4) It relied on the Committee Note to Rule 37(e) since the moving party had not “shown beyond speculation” that he intentionally failed to preserve ESI.
51. **Bhattacharya v. Murray** [2022 WL 875032] (W.D. Va. Mar. 23, 2022). In a pro se suit against UVA it was alleged that the University had failed to adequately preserve emails and video footage. The court determined that in deciding whether to allow discovery into the preservation efforts, it would review in camera the contents of the preservation notices that the Office of the General Counsel had sent.
52. **Bird v. Wells Fargo Bank** [2017 WL 1213425, at *7 (March 3, 2017)] A court granted “leave to file a motion for sanctions under [Rule 37(e)]” to the extent the defendant was unable to restore or replace a terminated employee’s email box. The court stepped in and

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

53. **Birren v. Royal Caribbean Cruises** [2022 WL 92332] (S.D. Fla. Jan. 10, 2022). A District Judge overruled objections to an R&R seeking sanctions for failure to preserve all of a surveillance video under Rule 37(e). The court rejected the argument that the defendant had a "legal duty to preserve enough video to establish constructive notice in anticipation of litigation." It noted that the courts "did not establish the minimum temporal threshold to establish such notice merely by determining that 10 to 15 minutes were sufficient in certain cases. It concluded that here, the defendant provided sufficient footage, did not act in bad faith, and "took reasonable steps to preserve the necessary footage." (*3).
54. **Bistrrian v. Levi** [448 F. Supp.3d 454] (E.D. Pa. March 24, 2020). In a bench trial of a FTCA "failure to protect" action by former prisoner against the US the court applied sanctions under **Rule 37(e)(1)** by announcing it would consider the spoliation as one of the factors in fact-finding at trial. (477). It noted that when "the amended rule applies, it provides the exclusive remedy for the spoliation" by "foreclosing reliance on the court's inherent authority." (464). However, Rule 37(e) 'merely codified existing law on adverse inferences in this circuit, which already required a finding of bad faith and [therefore] spoliation cases from this Circuit that predate the 2015 amendment are still applicable as "Rule 37(e) merely moves the bad faith element from the spoliation inquiry to the sanctions inquiry." (Ftn. 78)." According to Ftn. 14, "Rule 37(e) exclusively governs the spoliation inquiry, while both Rule 37(e) and the Third Circuit's own three-factor test govern the sanctions inquiry," citing GN Netcom, 930 F.3d 76, 82 (3rd Cir. 2019). The Third Circuit has "recently clarified" that the three factors are still applicable to motions governed by the 2015 amendment to Rule 37(e)." (466 & ftn. 24) Because the Federal Rules "do not address sanctions for spoliation of tangible items" and non-ESI the "analysis established" in the Third Circuit spoliation precedent "still governs" there. (464). The spoliation of "non-electronic evidence" requires a showing that the evidence was in the party's control; the evidence was relevant to the claims or defenses in the cases; there 'has been actual suppression or withhold of evidence;" and the duty to preserve the evidence was reasonable foreseeable to the party." (479) It refused to award attorney's fees for spoliations of some non-electronic items because bad faith and spoliation did not occur. (493). Bad faith requires a showing that evidence was knowingly and intentionally withheld for the purpose of preventing its use" in the case (493) and Bull v. UPS, 665 F.3d 68, 79 (3rd Cir. 2012) clarifies that the "actual suppression or withholding" refers to a "party's intent to deprive an adversary of information in litigation that is, bad faith."
55. **Black v. Costco Wholesale Corporation** [__ F. Supp. 3d ___, 2021 WL 2258322 (M.D. Tenn. June 2, 2021). Chief Judge Crenshaw found that "some evidentiary sanctions would be appropriate" for the failure to retain all of video of the area around a slip and fall pursuant to an internal policy since "if the video was important for Costco to provide to its claims manager to protect its own interests, surely it was subject to preservation under **Rule 37(e).**" However, since the record did not support a finding of intent to deprive, the parties were

ordered to file “supplemental” briefing on “appropriate lesser sanctions” under Rule **37(e)(1)**. The Court noted that it may permit the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument. [NOTE: Judge Crenshaw provided over and crafted the jury instructions used in **EPAC Technologies v. HarperCollins Christian Publishing**, which resulted in a multi-million dollar jury verdict. The Rule 37(e)(1) instruction used is found at 2018 WL 332305, at *3 (M.D. Tenn. May 14, 2018)(correcting a Magistrate Judge proposed jury instruction to read that the missing data “may have shown” a key fact, as opposed to the recommendation that “such data, now lost, would have shown” certain key facts); after the jury verdict, the court refused to consider the impact of the instruction on the jury verdict at 398 F. Supp. 3d 258, 280 (M.D. Tenn. July 1, 2019)(because the instruction was permissive, “the Court cannot divine that the jury did or did not make” the inferences). The Sixth Circuit found no abuse of discretion because “the instructions [were] merely permissible, telling the jury what they ‘may’ infer.” 810 Fed. Appx. 389, 403 (6th Cir. April 15, 2020)].

56. **Bland v. Sam’s East** [2019 WL 407406] (M.D. Ga. Jan. 31, 2019). The failure to retain a video of an altercation with a supervisor and a written statement by a witness was sanctioned by an adverse inference since both could “easily” been saved and the employee lost corroborating evidence of his testimony. The court stated it would instruct the jury that Sam’s “had a duty to preserve evidence, but that the evidence has been destroyed. In considering this evidence, you may conclude that the evidence would have been unfavorable to Sam’s, but you are not required to do so.” (*4) The court cited *Mt. Healthcare Servs.*, 881 F.3d 1293, 1308 (11th Cir. 2018) as holding that the 11th Cir. “has not decided whether Rule 37(e) displaces the traditional sanctions analysis” but it would have found an adverse inference appropriate under Rule 37(e) for the same reasons. (n.2)
57. **Blasi v. United Debt Services** [2017 WL 680496] (S.D. Ohio Feb. 21, 2017), the court refused to enter a default judgment, despite evidence of intentional destruction of SI in violation of the Rule, in deference to additional discovery to see if some or all of the prejudice could be cured by lesser sanctions. The court spoke of violating obligations under the Federal Rules and it is unclear if it referred to Rule 37(e), Rule 37(b) or both.
58. **Blazer v. Gall** [2019 WL 3494785, at *5] (D. South Dakota Aug. 1, 2019) After finding an intent to deprive, the court decided to permit the jury to presume missing content was adverse to parties under **Rule 37(e)** but allowed “reasonable rebuttal,” citing *Stevenson v. Union Pacific*, 354 F.3d 379, 750 (8th Cir. 2004).
59. **Blumenthal Distributing v. Herman Miller** [2016 WL 6609208] (C.D. Cal. July 12, 2016); . In a long and repetitive R&R [whose findings and recommendations were adopted by the District Judge at 2016 WL 6901696 (C.D. Cal. Sept. 2, 2016)], a Magistrate Judge recommended use of an adverse inference under Rule 37(b) with respect to the withholding or spoliation of evidence. It “additionally” recommended an award of monetary sanctions in the form of attorney’s fees and expenses under Rule 37(e) related to a forensic analysis and the taking of depositions to determine the “cause underlying” the inability to export emails from an EMC email archive as well as the lack of ESI produced, while noting that the rule was intended to foreclose reliance on inherent authority. However, the Magistrate Judge also noted

that due to the “willful actions” that taken together “amount to more than gross negligence,” the monetary sanctions are “also available under the court’s inherent powers,” citing, *inter alia*, Chambers. The District Judge imposed the reasonable costs and attorney’s fees “for the reasons stated in the R&R” at “52-56.” However, in assessing the deletion of emails, the Magistrate Judge ignored the “intent to deprive” requirement and relied upon Residential Funding and Zubulake in recommending that the jury should be instructed to presume the missing emails were adverse because the party acted with a “conscious disregard” of its obligations, “but not necessarily deliberate intent.” The District Judge merely stated that it would include an adverse inference instruction at trial “[a]s proposed in the R&R at 49.

60. **BMG Rights Management v. Cox Communications** [199 F. Supp. 3d 958] (E.D. Va. August 8, 2016), *rev’d on different grds*, 881 F3d 293 (4th Cir 2018). The District Court described and justified the jury instruction it had utilized which gave what amounted to a permissive spoliation instruction and allowed the defendant to “identify” the spoliation issue in its opening stated. It held that the Magistrate Judge had made of finding of “spoliation” and of “intentionality” [apparently considering that equivalent to an “intent to deprive” under (e)(2)] but concluded that lesser remedies under (e)(1) sufficed “to redress the loss” citing the Committee Note as supporting permitting the party to present evidence and argument regarding the loss. The court gave an instruction alerting the jury to the “fact” of spoliation, identified the missing evidence and permitted the jury to consider the fact in their deliberations (*19), which served the [Silvestri list of] prophylactic, punitive, and remedial rationales underlying the spoliation doctrine. The District Court also held that the Magistrate Judge had properly rejected preclusion of evidence as the “equivalent of dismissal.”
61. **Boccio v Costco** [2022 WL 970745, at *7] (E.D.N.Y. Mar. 3, 2022). In a slip and fall within a Costco involving alleged spoliation of video which was not shown to have existed or been spoliated, the court analyzed the issues under both **Rule 37(e)** and inherent power, concluding that neither supported the motion. It applied *Zubulake* and *Residential Funding* to conclude that the moving party failed to demonstrate “a culpable state of mind” when Costco discarded the video in good faith and pursuant to its normal business practices. (*6) It held that if sanctions are not warranted under **Rule 37(e)** it could “nonetheless fashion an appropriate relief under its inherent power, citing *CAT3 v. Black Lineage*, provided the challenged conduct was without a colorable basis and in bad faith, for which it had offered no proof.
62. **Boone v. Everett** [751 Fed. Appx. 400] (4th Cir. Feb. 7, 2019). After a jury verdict in favor of the defendant in an excessive force prison case, the Fourth Circuit affirmed the refusal to give sanctions for the overwriting of a video surveillance tape which captured the altercation between the prisoner and officer because there was no evidence in the record that the defendant did not himself nor did anyone acting for him, take “any active steps to erase the video. (402). He testified in a deposition that he did not know the video would be erased and believed it had been preserved. The court had permitted the defendant to testify what he saw on the video but had instructed the jury that it “was not permitted to draw any inference for or against either party from the fact that the video was not in evidence.” (401) The Circuit court affirmed the order denying the motion for sanctions since the factual findings by the court established that the movant had not established that the party committed “an act or omission that led to spoliation of video evidence and was either willful or done with the intent to deprive Boone of

the use of the evidence.” (402) The Fourth Circuit noted in footnote 3 that it need not decide if amended **Rule 37(e)**, which came into effect while the case was pending in the district court governed, since the “district court did not abuse its discretion under either standard.”

63. **Borum v. Brentwood Village** [332 F.R.D. 38] (D.D.C. July 18, 2019, supplemented in 2020 by 2020 WL 529182 (D.D.C. Sept. 4, 2020)(awarding fees authorized by 2019 opinion). In a case where a community organizer failed to preserve emails after her employer joined a putative class action, the trial court concluded that it could not infer that her employer lacked the requisite “intent to deprive” to justify a dismissal under Rule 37(e)(2) since, in contrast with GN Netcom [at 2016 WL 3792833, at *7}, she did so for personal reasons, not to protect the party. (48) “Defendants have established the gross negligence” of the party, but “they have not pointed to anything beyond that.” However, the court decided to “cure” the prejudice caused by the expenditure of “additional time and effort” incurred in litigating the spoliation issue by imposing monetary sanctions in the form of attorneys’ fees and costs under Rule 37(e)(1), citing Karsch v. Blink Health, 2019 WL 2708125, at *13 (S.D.N.Y. June 20, 2019) and ordering the party to reimburse the “reasonable fees and costs” for conducting two depositions and litigating the motion for sanctions. (50).
64. **Bouchard v. U.S. Tennis Association** [2017 WL 3868801] (S.D.N.Y. Sept. 5, 2017), adopting in its entirety, 2017 WL 10180425 (S.D.N.Y. Aug. 10, 2017). In dismissing a motion for sanctions under Rule 37(e), the court held that the absence of a use of a litigation hold was not dispositive where the party had “fully complied” with its preservation obligations in regard to the videotapes at issue, noting that the failure to adopt good preservation practices is only “one factor in the determination,” citing *Chin v. Port Auth. Of New York & New Jersey*, 658 F.3d 135, 162 (2nd Cir. 2012). The court found it “reasonable” that the party saved only the footage immediately outside the locker room where the slip and fall at the U.S. Open occurred, not the footage of the fitness center, simply because the footage “might” become relevant.
65. **Boudreau v. Shaw’s Supermarkets** [955 F.3d 225] (1st Cir. April 10, 2020). The Court of Appeals found no abuse of discretion in the refusal to grant a “permissive negative inference” to bar a summary judgment based on the missing contents of store video. The district court had cited **Rule 37(e)** and the Committee Note to subdivision (e)(1) in finding that it was doubtful that there was any prejudice because at most it would have shown conduct that it was prepared to assume was consistent with other testimony, thus curing any prejudice. Moreover, even if the missing video showed what was alleged, summary judgment was appropriate since the incidents at issue did not make the attack on the customer foreseeable, even if they had been observed by Shaw employees.
66. **Boudreau v. Smith** [2020 WL 1532277] (D. Conn. March 31, 2010). The court refused to find that wiping of text messages was done for the purpose of depriving the moving party of the messages, since it was done pursuant to a department wide instruction to wipe cell phones in preparation for migration to a new carrier. (*11). The court declined to impose a “lesser sanction” under Rule 37(e)(1) such as costs because while they might have been relevant, “it is not clear that they were, and so Boudreau was not clearly prejudiced by not having them. (*12).

67. **Brackett v. Stellar Recovery** [2016 WL 1321415] (E.D. Tenn. Feb. 24, 2016). The court refused to issue an adverse inference jury instruction regarding the contents of an audio recording after the party was able to find another copy, citing the fact that **Rule 37(e)** instructs a court to examine whether ESI is lost “*and it cannot be restored or replaced.*” (emphasis in original.) It also denied sanctions as to missing call logs because the defendant was not acting in bad faith when its third party routinely destroyed it (and the recording), nor was it prejudiced by the destruction.
68. **Bragg v. Southwest Health System** [2020 WL 3963714] (D. Colo. July 13, 2020). After an evidentiary hearing, the Magistrate Judge dismissed a motion for sanctions under Rule 37(e) because it found “by a preponderance of the evidence” that the party had acted appropriately and in conformance with its legal obligations in issuing a litigation hold and taking appropriate steps to ensure that relevant information, including ESI was preserved. “I do not find that SHS failed to take reasonable steps to preserve relevant ESI. I do not find that Plaintiff has been prejudiced in any way from the loss of ESI. And I do not find that SHS acted with the intent to deprive Plaintiff of the use of any ESI in the litigation.” (*7).
69. **Brewer v. BNSF** [2018 WL 2047581] (D. Mont. May 2, 2018). The District Judge adopted the findings and recommendations of the Magistrate Judge (at 2018 WL 3079499 (Feb. 27, 2018)) that the failure to show how any ESI was lost and, even if it were, how it prejudiced him by preventing him from going to trial or interfering with the rightful outcome of the case. The court also noted that for the default sanction sought the failure to preserve must be intentional and requires more than gross negligence, which has not been shown. The court reserved the right “to impose a lesser sanction after evaluating how the parties present the evidence at trial.”
70. **Brewer v. Leprino Foods Company** [2019 WL 356657] (E.D. Cal. Jan. 29, 2019). A Senior District Judge found grounds to sanction a party whose text messages in a cell phone were lost when she left her Galaxy S3 on the hood of her car and drove away. The court found the “overwhelming objective evidence” suggested that she intentionally spoliated the evidence and acted with an intent to deprive under **Rule 37(e)(2)**. She failed to take any reasonable steps to preserve the messages prior to that time when she had a duty to do so and they could not be restored or replaced because she would not identify the persons with whom she texted nor remember the phone number of the phone itself. (*1)). The court awarded monetary damages in the form of fees and costs associated with the motion for sanction to be determined at the conclusion of the trial. It refused to dismiss the case but stated it might provide “an adverse inference instruction at trial regarding” the intentional spoliation of evidence. (In footnote 7, the court noted that the spoliation gives rise to the “best evidence rule” Fed. R. Evid. (FRE) 1002).
71. **Brittney Gobble Photography v. Sinclair Broadcast Group**, 2020 WL 1809191 (D. Md. April 9, 2020). Based on depositions, interrogatories and the submissions, but without an evidentiary hearing, a Magistrate Judge refused to find the routine deletion of emails to be subject to **Rule 37(e)(2)** measures because the moving party had not been shown by clear and convincing evidence or even by a preponderance of evidence that the other party had any reason to believe that relevant evidence existed on the emails or that the failure to institute a litigation hold was because the party “wanted its emails to be deleted” so the other party could

not use them in the litigation. (*9) It also refused “lesser sanctions” under Rule 37(e)(1) because it had not “demonstrated that it could not obtain evidence from others on the topic, thus it had not shown “prejudice.” (*10). The court relied on *Simone v. VSL Pharm*, 2018 WL 1365848, at *7 (D. Md. March 16, 2018) and *Cognate BioServices v. Smith*, 2015 WL 5158732, at *8, *9 (D. Md. Aug. 31 2015)(prejudice would be largely cured if could obtain emails from another source).

72. [State Supreme Court] **Brookshire Brothers v. Aldridge** [57 Tex. Sup. Ct. J. 947, 438 S.W. 3d 9 (S.C. Tex. July 3, 2014)]. The Court reversed a verdict and remanded for a new trial because of abuse of discretion in use of a jury instruction that permitted the jury to consider the missing video was unfavorable if it concluded that the party knew or should have known that the missing video held relevant evidence and its non-production was not satisfactorily explained. (at 28) (instruction reproduced at 16 and at n. 5 to dissent). The court held that the trial court, not the jury, must determine if a party spoliated evidence and determine the appropriate remedy. A party must “intentionally spoliates evidence in order for a spoliation instruction to constitute an appropriate remedy.” (23) It must also determine that “a lesser remedy would be insufficient to ameliorate the prejudice” before it is within discretion to submit an instruction. (25) Evidence of circumstances of spoliation is inadmissible to the extent that it is “unrelated to the merits but serves only to highlight the operator’s culpability” may be central to the trial court’s rulings, “it has no bearing on the issues to be resolved by the jury.” (26-27) The tendency of “such evidence to skew the focus of the trial from the merits” makes it inadmissible at trial. (26) However, parties may present “indirect evidence to attempt to prove the contents of missing evidence” that is relevant to a party’s claim (26) and “nonspeculative testimony relating to what the missing video would have shown, such as the testimony about the cleanup, was not problematic.” (28). Also, “some degree of questioning about the creation of the video was reasonably pursued as background for its introduction to the jury.” (28-29). The court mentioned the 2006 version of Rule 37(e) in the body of text, explaining that it had not been adopted in Texas (17) and noted that it is in the process of being amended, citing the May 2, 2014 Committee Report and the Allman summary of the approval by the Standing Committee. (n. 3). Federal Judge Xavier Rodriguez noted in *Brookshire Bros: Cleanup on Aisle 9. The Current Messy State of Spoliation Law*, 46 St. Mary’s L.J. 447, 478 (2015) that although the court “does not explicitly state” it was trying to mirror Proposed Rule 37, that “appears to be the attempt.” However, Judge Rodriguez notes that it “will not produce similar results, since the Committee Note to subdivision (e)(1) provides, in regard to negligent spoliation cases, that the juries “are allowed to hear evidence and argument” regarding the loss and may receive instructions other than (e)(2) instructions to assist in the evaluation of the evidence or argument. (citing the May 29-20, 2014 [sic] Report at 325 speaking of directives to weigh in calibrating a response).
73. **Brown v. Dept. of Corrections** [2021 WL 1923421] (M.D. Pa. May 13, 2021). *Pro se* Plaintiff in prisoner case of long duration that agreed to a bench trial will, citing **Rule 37(e)**, be permitted, despite having shown no violation of the Rule, “to elicit any testimony regarding intentional spoliation of evidence from the witnesses and may argue such adverse inferences that this trial testimony permits.”

74. **Brown v. Duke Energy** [2019 WL 1439402] (S.D. Ohio March 31, 2019). The court, citing **Rule 37(e)** granted a summary judgment on the merits of the employment claim despite allegations that destruction of IMs and Documents created an issue of material fact. (*5 & *8) It quoted from *Benefield v. MStreet*, 197 F.Supp. 3d 990, 1000 (M.D. Tenn. 2016) [quoting *Kronish*, 150 F.2d 112, 128 (2nd Cir. 1998) and *Byrnie*, 243 F.3d at 107] to the effect that while destruction of evidence is not enough to permit a party which has not produced evidence to survive a summary judgment, “an inference of spoliation, in common with some (not insubstantial) evidence” can allow plaintiff to survive summary judgment. The court found that the party had not proven the missing IMs were relevant and there was no “circumstantial evidence” which would suggest their contents. (*6). It also refused to draw a rebuttable presumption from the failure to retain document under 29 C.F.R. § 160214 because the documents were not relevant and, in any event, there was no showing the defendant acted with intent to deprive, as required under Rule 37(e)(2) and *Applebaum v. Target*, 831 F.3d 740, 745 (6th Cir. 2016) (*7-8).
75. **Brown Jordan v. Carmicle** [2016 WL 815827](S.D. Fla., March 2, 2016), *aff’d* 846 F3d 1167 (11th Cir. 2017). As part of a **bench trial** regarding termination of a former executive (which it upheld), the court also ruled on motions for sanctions which it had deferred to determine if the missing evidence had been crucial to the entity’s case, applying **Rule 37(e)** (*35). The court found that the executive should have preserved ESI, that it was lost because of a failure to take reasonable steps and that it could not be restored or replaced. The court also found that since the executive had acted with intent to deprive it presumed “the lost information was unfavorable” despite also finding that “the missing evidence was not critical” to the moving parties “ability to prove their claims.”(explaining, at n. 40, that it was making the presumption not because the evidence lost was insignificant, but because the remaining evidence in support “is overwhelming”). It also would have drawn inferences adverse to the executive under its inherent power, since “deliberate deletion and destruction of evidence and lack of candor” constitutes bad-faith litigation conduct even though the loss of ESI did not prejudice the entity. (*37). Separately, the court awarded judgment under CFAA the SCA and ordered payment of fees an award which was deemed to be non-dischargeable in bankruptcy. 2018 WL 3583054, at *10 (W.D. Ky. July 24, 2018).
76. **Brown v. SSAS Atlantic** [2021 WL 1015891] (S.D. Ga. March 16, 2021). A court ordered production of the contents of a series of Facebook accounts after concluding that the mere “deactivation” of an account, as opposed to its deletion, did not implicate **Rule 37(e)**, citing **Bruner v. City of Phoenix**, 2020 WL 554387, at *3 (D. Ariz. Feb. 4, 2020). (*3). It also entered a show cause order to counsel that signed the discovery responses and the Plaintiff under **Rule 26(g)** since the responses did not reveal the existence of “publicly viewable Facebook accounts.” It described its obligation to sanction as mandatory, although conceding that “substantial justification” under the Rule might exist. (*5)
77. **Bry v. City of Frontenac** [2015 WL 9275661] (E.D. Miss. Dec. 18, 2015). A failure to retain relevant dash camera data, even if it did exist, was not sanctionable because it would not have captured the issues and because of qualified police immunity since if deletion occurred, it was the result of following standard procedures. The court also stated that remedies under **Rule 37(e)** would not have been available since there was also no evidence of intent to deprive.

78. **Bryant v. County of Los Angeles** [2021 WL 6104412] (C.D. Cal. Nov. 30, 2021). The Magistrate Judge assigned to the Kobe Bryant accident photos case refused to rule on a motion by defendants seeking preclusion of evidence about the contents and distribution of the photos at the summary judgment or trial stage given that the rulings could hamstring the District Judge in ruling on the motions and conducting any subsequent jury trial. “The District Judge, not the Magistrate Judge, should control the course of the trial, the evidence to be presented therein, and the instructions to be given to the jury.” (*1). It pointed out that the court may conclude, as recognized in the Advisory Committee Notes, that the intent finding under Rule 37(e) should be made by a jury.” (*1). It thus denied the Motion without prejudice to presenting the issues to the District Judge in the context of the “summary judgment, motions in limine, the pretrial conference and/or the trial.” (*2) (collecting examples).
79. **Bruner v. American Honda** [2016 WL 2757401] (S.D. Ala. May 12, 2016). The court ordered a (belated) use of a litigation hold because “a party has a duty to preserve ESI if that party “reasonable anticipates litigation,” **citing Rule 37(e)**.
80. **Burris v. JPMorgan Chase** [2021 WL 4627312] (D. Ariz. Oct. 7 2021). An employment action by a former employee was dismissed under Rule 37(e)(2) because the “sheer number of obfuscatory actions” undertaken “evinced an unusually clear level of intent to deprive.” (*15). The destruction involved deletions from cell phones, laptops and USB devices as well as failure to preserve text messages and purging of an email account. While the party sought sanctions under both **Rule 37(b)** and **(e)**, the court relied on **(e)(2)** because it specifically related to ESI. (*10)) It found it was “the appropriate finder of fact on a Rule 37(e) motion, citing Mannion v. Ameri-Can Freight, 2020 WL , *4 (D. Ariz. 2020). (*11) It relied on United States v. Kitsap Physicians, 314 F.3d 995, 1001 (9th Cir. 2002) for the proposition that parties engage in spoliation as a matter of law only if they had some notice that the documents were potentially relevant, an objective standard.” (*12)
81. **Bursztein v. Best Buy Stores** [2021 WL 1961745] (S.D.N.Y. May 17, 2021). The Magistrate Judge found defendants had “thwarted and disrupted” discovery throughout the life of the case, noted that use of “baseless boilerplate objections” to production of surveillance video in a slip and fall and documents were a “paradigm of discovery abuse.” (*6). It noted that **Rule 37(b)** empowered it to impose sanctions for violation of a “**Rule 26(f) scheduling order [sic].**” (*5). Citing **DR Distributors**, the court found that **Rule 37(e)(1)** was applicable, because relevant ESI was lost which should have been preserved and was prejudicial because it was the “primary evidence” to show notice of a dangerous condition and the negligence in failing to address it. It found that plaintiff should be permitted “to present evidence at an eventual trial” regarding spoliation of ESI and “of course” be permitted to submit evidence concerning the conflicting testimony of a Best Buy witness regarding the loss of surveillance footage, including its likely existence. It also awarded “monetary sanctions” in the form of fees and costs” citing “**Rule 37**” to “compensate” the party “for the time and resources spent because of Defendant’s dilatory conduct. (*9). Because the movant had not met its burden to prove intent to deprive by clear and convincing evidence, the court found that Rule 37(e)(2) sanctions were “inappropriate at this time.” (*8). [**Residential Funding** was indirectly quoted as providing that when faced with a “breach of a discovery obligation [that] is the non-production of evidence, a District Court has broad discretion in fashioning an appropriate sanction.”

Residential Funding was cited as “superseded by statute on other grounds as stated in **CAT3, LLC v. Black Lineage, Inc.**, 164 F. Supp. 3d 488, 495 (S.D.N.Y. 2016.” The court was speaking only of sanctions under Rule 37,” not inherent authority. (*3) [as appearing under heading “Rule 37(b)(2)”]].

82. **Builders Insulation of Tennessee v. Southern Energy Solution** [2019 WL 3779537, at n. 3] (W.D. Tenn. May 22, 2019). In a case denying an adverse inference under Rule 37(e) for a variety of reasons, including a lack of showing of “intent to deprive,” given that at most the party acted negligently in converting from one email account to another after the duty to preserve arise, it was noted that “[c]ourts disagree as to whether an adverse inference [is] appropriate in a bench trial setting.” The court also found that the emails had been restored and replaced and the moving party had not provided sufficient evidence that there was more emails than what had been produced. (*7).
83. **Bush v. Bowling** [2020 WL 5423986, at *7] (N.D. Okla. Sept. 10, 2020). In a case involving lost surveillance video of a County Jail book area, the court acknowledged the “somewhat limited probative value” of the missing video, but since she was deprived of “video relevant to her claims,” she had satisfied her burden to establish she was prejudiced. It awarded attorney’s fees pursuant to Rule 37(e)(1) and reserved for later determination the sanctions that are ‘sufficient, but no greater than necessary, to cure the prejudice.’ The party requested a mandatory adverse inference instruction that the destroyed images were damaging to the position at trial and other relief. The court noted that government defendants should reasonably anticipate litigation when a person dies while in government custody. It appeared that the video was automatically “written over” and cannot be restored or replaced. The plaintiff did not satisfy the burden of showing the parties had acted with the intent to deprive her of the video in the litigation.
84. **Butler v. Kroger** [2020 WL 7483447] (E.D. Va. Nov. 30, 2020). The Magistrate Judge found that Kroger had failed to take reasonable steps but were not intended to deprive the other party of the use of video. Accordingly, it recommended under **Rule 37(e)(1)** that “there was video of [the slip and fall] but Kroger lost it, and both parties should be permitted to present evidence and argument regarding Kroger’s failure to preserve the video evidence.” (*21) Other recommendations were that Kroger’s summary judgment motions be denied regarding certain defenses and that a witness be precluded from testifying that the video did not show the slip and fall.
85. **Butzer v. Corecivic** [2018 WL 7144285] (M.D. Fla. Sept. 12, 2018). In a failure to preserve surveillance video in a privately run prison case, the court acknowledged that the corporate policies required reviewing of tapes and retaining them and that **Rule 37(e)** applied to losses of ESI “like the video at issue here.” It refused to strike the defendants pleadings or enter a default judgment and a “mandatory adverse inference instruction at trial.” (*1). The court acknowledged that under *ML Healthcare*, 881 F.3d 1293 (11th Cir. 2018) it was not yet clear if the multi-factor *Flury* test was still applicable, under which bad faith was required for an adverse inference instruction. (*2). However, there was neither bad faith nor an intent to deprive since **the party did not take any affirmative steps to “destroy, rather it was overwritten automatically” by the system “in the normal course of operations** “which is

not sufficient either because negligence is not sufficient for intent to deprive (Wooden v. Barringer, 2017 WL 5140518, at *10 (N.D. Fla. 2017) or because spoliation is lacking if documents are destroyed as part of regular business practices and a party “is unaware of their potential relevance to litigation.” (Wilson v. Wal-Mart, 2008 WL 4642596, at *2 (M.D. Fla. 2008) (*3) The court distinguished a Tennessee case decided under Sixth Circuit law “which has a different standard for spoliation than the Eleventh Circuit.” (n. 4)

86. **CAE Integrated v. Novak** [2021 WL 3008296] (W.D. Tex. June 7, 2021). In a dispute over commissions and possible violation of employment agreements re business information, the court refused a sanction on spoliation based on contentions of the moving party that an employee had failed to account for all emails it had forwarded to its Yahoo account because of concerns it might need evidence for litigation. The employee provided an affidavit attesting to the lack of material change from forwarding copies to its counsel. While the court cited **Rule 37(e)**, it relied upon and repeatedly cited **Rimkus** as its source of guidance since “[w]hen spoliation occurs before a case is filed, or in a manner not addressed by the current rules or statute, a court has inherent authority to sanction the conduct apart from **Rule 37(e)**.” (*3) It asserted that the “Rimkus factors” govern the standards for spoliation sanctions and that a court must find “bad faith” before it can give a spoliation instruction.” (*6) “Absent any evidence to the contrary, CAT’s theory of spoliation is mere speculation,” and the moving party did not meet its burden of demonstrating that sanctions are warranted.” (*9)
87. **Cahill v. Dart** [2016 WL 7034139] (N.D. Ill. Dec. 2, 2016). A District Judge adopted a modified version of a Magistrate Judge’s Report (2016 WL 7093434), relying on **Rule 37(e)**. It decided that because the moving party been greatly prejudiced by the loss of the video which would have shown determined the possession or non-possession of illegal drugs, the jury should “at the very least” be informed that the video is missing “because the Defendant’s failed to fulfill their duty to preserve it.” [clearly invoking **Rule 37(e)(1)**]. It was a “close call” as to whether there was evidence of intent to deprive, the court would ordinarily resolve the question before the trial but it is closely tied to the malicious prosecution claim. If it was destroyed intentionally, it could be part of the plot to “frame” the moving party. As a result. “the best course is for the jury to decide the question of intent.” (*4) . However, the moving party is “not required to argue to the jury that” they had intentionally destroyed the video. If he chooses not to do so, he will still benefit from the jury being told the video is missing because they failed in their duty to preserve. But if he chooses to make the argument at trial, the jurors will be instructed the jury that “if they are persuaded that the destruction was intended to deprive Cahill of the evidence, they **must presume** that the lost evidence would have been unfavorable” to the prison authorities (*4) [quoting the Committee Note to **Rule 37(e)(2)**] In fn. 2, the court emphasized that “the video’s destruction is obviously quite relevant to Cahill’s malicious prosecution claim.” Attorneys fees were granted under **Rule 37(a)**.
88. **Cameron v. Arab City Board** [2018 WL 4615850] (N.D. Ala. Sept. 26, 2018). Court refused to sanction Board of Education under **Rule 37(e)** – and perhaps inherent authority - by denying motion for summary judgment otherwise available for alleged spoliation of video and audio evidence when the it was not shown that relevant video or audio ever existed or that the Board had control of it.

89. **Canady v. Bostic** [2022 WL 541783] (W.D. Va. Feb. 23, 2022). A court refused to find that deletion of prison videotape was covered by Rule 37(e) because there was no evidence that “prison officials reasonably should have foreseen footage” would be “relevant to a future lawsuit about a use of force incident. (*3).
90. **Capricorn Management Systems v. Government Employees Insurance**, [2020 WL 1242616 (E.D.N.Y March 16, 2020). In a case adopting a R&R, the District Court agreed that the motion for sanctions was properly denied since “Defendants were unable to show that any lost information was important or how they were prejudiced.” (*7). It agreed that it was “fair to infer” that the party acted with an intent to deprive when a party failed to institute a litigation hold until two years after the action was instituted, resulting in emails from a key employees account as well as 12 other custodians. However, the Magistrate Judge had concluded [2019 WL 5694256] (E.D. N.Y. July 22, 2019)] that although the predicate findings of Rule 37(e) were met, “a finding of prejudice cannot be grounded on the basis that *some* evidence no longer exists.” (emphasis in original). The Magistrate Judge cited on **Lokai Holdings v. Twin Tiger**, 2018 WL 151055 (S.D.N.Y. Mar. 12, 2018) and **Ungar**, 329 F.R.D. 8 (E.D.N.Y) Nov. 2, 2018) as well as **Zubulake**, 229 F.R.D. 422 (S.D.N.Y. 2004).
91. **Carolina v. JPMorgan Chase Bank NA** [2021 WL 5396066] (D. Arizona Nov. 17, 2021). In a single plaintiff employment action, the Court refused to consider allegations of spoliation of ESI in connection with a summary judgment motion because it was not appropriate to seek “affirmative relief of an adverse inference instruction” without a motion to that effect under **Rule 37(e)**. If the allegation was that it was destroyed, as compared to being not produced, the plaintiff would have been required to make a series of required showings which were not addressed, including that it cannot be restored or replaced through additional discovery (*9). The court noted that there was no effort to establish a violation of a court order or that she had ever propounded a request, which would be required under **Rule 37(b)(2)(A)** nor that the defendant was required to produce the recording under Rule 26(a) or (e), as would be required by **Rule 37(c)(1)**. (*10). There are “sound reasons to require a party seeking spoliation sanctions in federal court to file a pretrial motion for sanctions [Mannion v. Ameri-Can, 2020 WL 417492, *4 (D. Ariz. 2020)]” (*9) and “a request for an adverse-inference sanction is different from a request for application of traditional summary judgement standards.” (*10).
92. **Carpenter v. All American Games** [2017 WL 4517081, at n. 4] (D. Ariz. Oct. 10, 2017)(Campbell, J.). The court found that a party had not shown he was entitled to an adverse inference instruction for failing to preserve the ability to access the contents of a website because the party “failed to address [Rule 37(e)] controlling law.”
93. **CAT3 v. Black Lineage** [164 F.Supp.3d 488](S.D. N.Y. Jan. 12, 2016)(Francis, M.J.)[*Case dismissed & Motion withdrawn with prejudice, each party to bear their own costs and attorneys fees*, 2016 WL 1584011]. Given the failure to take reasonable steps and the inability to restore challenged ESI, Plaintiffs were precluded **under Rule 37(e)(1)** from relying on their altered version of lost email which caused legal prejudice by “obfuscate[ing]” the record by placing authenticity of both original and subsequently produced email at issue. Attorneys’ fees were also awarded because of the economic prejudice of “ferreting out” the malfeasance and seeking relief. The measures were “no more severe than necessary” under **(e)(1)** to cure

prejudice. While **Rule 37 (e)(2)** also applied because the party “acted with intent to deprive,” drastic measures are not mandatory under **(e)(2)** or inherent powers. However, the Committee Note clarifies that the rule forecloses reliance on inherent power with respect to certain measures which means that “a court could not rely” on it as a source of authority “to dismiss a case as a sanction for merely negligent destruction of evidence, as would have been the case under Residential Funding, 306 F.3d at 108. (497) However, “sanctions would be available under the court’s authority even if Rule 37(e) did not apply.” (498). The court could have imposed sanctions because of “bad faith” conduct pursuant to inherent power. The court also described the rule as more lenient with respect to sanctions and found it just and practicable to apply it. It suggested, further, that clear and convincing evidence standard should be applied to ascertaining if “intent to deprive” exists. (498)

94. **CBF Industria de Gusa S/A v. AMCI Holdings, Inc.**, [2021 WL 4190628, at *20-*21] (S.D. N.Y. Aug. 18, 2021). In a very long, detailed opinion, relying almost exclusively on SDNY precedent, the court found that the failure to preserve email was subject to **Rule 37(e)**, but that movants had “failed to directly or circumstantially” establish that the deletions occurred “out of the desire to deprive” the moving party of the emails for use in the litigation. It held that **Rule 37(e)** “authorizes an award of attorney’s fees and costs to the moving party to the extent reasonably necessary to address and prejudice,” ultimately relying on CAT3, 164 F. Rupp.3d at 502, since if the party had complied “with even the bare minimum” of their obligations and issued a litigation hold, the motion and the related discovery leading to it “might well not have been required.” (*20). It precluded the party from offering evidence or testimony as to any deleted emails and planned to permit the jury to receive “evidence and argument” concerning the “intentional destruction of the lost emails,” which it could consider along with all the other evidence in the case. (*21). In a footnote (n. 22), the court refused to consider “punitive monetary sanctions” because the moving party had provided no reasons for doing so nor any authority in support of such relief and the record did not support the imposition of punitive monetary sanctions.

95. **Centennial Bank v. ServisFirstBank** [2021 WL 662229] (M.D. Fla. Feb. 20, 2021). In a complex discussion of ongoing discovery disputes between a former employer and two executives and their successor employer, Magistrate Judge Tuite refused to grant sanctions under **Rule 37(e)** relating to ESI production pursuant to an ESI protocol. While there was considerable concern about deletions from various forms of ESI devices and accounts, the court held the **Rule 37(e)** threshold requirements were not met, primarily because “the arguments on this matter” are “too speculative” and have failed “to adequately identify any undisclosed information that would materially further its defense.” (*11) Thus, “[t]he issue of whether Centennial has been prejudiced under **subsection (e)(1)** of Rule 37 need not be addressed.” (*11) It also found the request for “harsher measures” under **Rule 37(e)(2)** was “similarly deficient.” (*11) The Court also denied the request that it rely on its inherent authority, citing **Purchasing Power**, 851 F.3d 1218, 1223 (11th Cir. 2017) (requires “bad faith”) and Comm. Note (Rule 37(e) “forecloses reliance on inherent authority” in the spoliation context.). (at *12 and n. 17). The Court also noted – and rejected – allegations that the former executives had “perpetrated a fraud on the court,” which involved claims of a “wholly different magnitude.” (*15)

96. **Charlestown Capital Advisors v. Acero Junction**, 337 FRD 47 (S.D.N.Y. Sept. 30, 2020), as supplemented (fees), 2021 April 20, 2021 (S.D.N.Y. April 20, 2021). In a lawsuit alleging breach of a merger agreement purportedly signed by defendant's co-counsel, the plaintiff sought sanctions for failing to preserve the co-president's email. The court concluded the party had failed to take reasonable steps, noting the standard was "roughly a negligence standard" and that once the duty to preserve attaches, any destruction is, at a minimum, negligent," citing *Zubulake*. The court refused to find the emails had been restored or replaced because "gaps" remained and there was no "assurance" that all the meaningful emails had been secured, given confusion over the de-duplication efforts managed by counsel. The loss was prejudicial because it could have resolved significant factual disputes (65) and the party was required to expend time and money to discover the truth. However, "intent to deprive" under **Rule 37(e)(2)** was not shown by clear and convincing evidence.) The court awarded attorney's fees under **Rule 37(e)(1)** (67-68) and offered to consider apportioning the monetary sanctions with outside counsel, if sought. (ftn. 19) [Subsequently, it awarded \$55K payable by the parties as "joint and several" liability. [2021 WL 1549916 (S.D. N.Y. April 20, 2021)] It also permitted the party to "present evidence to the trier of fact at trial regarding the loss" of the ESI and – in the event the case is tried to the jury – "to seek an appropriate jury instruction, at the discretion of the trial judge, allowing the jury to consider that loss of that evidence, and the circumstances of its loss, in evaluating witness credibility and otherwise making its deliberations." (68-69). It held that "sanctions of this nature ensure that the finder of fact will have the full context for the evidentiary imbalance that will become apparent at trial," which it found to be relevant evidence going to credibility and other issues, citing *Karsch*, 2019 WL 2708125, at *27.
97. **Chinitz v. Intero Real Estate** [2020 WL 7389417] (N.D. Cal. May 13, 2020). In a putative class action involving TCPA calls, the District Judge refused to make harsh measures under Rule 37(e) available for taking Facebook pages private, and removing certain videos, thereby losing Posts about the videos. The party retained some, but not all the videos, but the court found it was more of a discovery dispute, since the moving party was seeking to subpoena the posts from Facebook. The court was not convinced in any event that the case warranted the "mandatory adverse inference" sought since the court was not persuaded that the plaintiff had put forth "any evidence" that Intero intended to destroy the Facebook" material "and deprive Plaintiff or their use." (*3) It also found that "FRCP 37(e), not inherent authority, supplies the controlling legal standard," citing **Waymo v. Uber**, 2018 WL 646701, at *14 *N.D. Cal. Jan. 30, 2018). However, it awarded monetary sanctions under **Rule 37(e)(1)** in the form of the requiring the party to "bear the reasonable costs of subpoenaing Facebook for the Facebook videos and Posts." [citing **Colonies Partners**, 2020 WL 1496444 (C.D. Cal. Feb. 27, 2020), R & R adopted 2020 WL 1491339 (C.D. Cal. March 27, 2020).
98. **Christoffersen v. Malhi** [2017 WL 2653055] (D. Ariz. June 20, 2017). The court, perhaps failing to understand that **Rule 37(e)** had been amended, applied Rule 37(e) in a case involving the destruction of documents relating to a trucking business after a duty to preserve attached by citing Judge Campbell's opinion in *Surowiec v. Capital Title Agency*, 790 F. Supp.2d 997, 1005 (D. Ariz. 2011). The cited pagination does not support the conclusion in Christoffersen that Rule 37(e) has been applied to all records, not just electronic records. *Surowiec* is a much cited case for, among other holdings, its statement that the failure to implement a litigation

hold is an important factor in determining culpability, “but not per evidence of culpable conduct giving rise to a presumption of relevance and prejudice.” (noting disagreement with *Pension Comm. v. Banc of Amer. Sec.*, 685 F. Supp.2d 456, 465 (S.D. N.Y. 2010).

99. **Cianci and Cianci v. Phoenixville Area School District** [2022 WL 824026] (E.D. Pa. March 18, 2022). Judge Pratter, a member of the Rules Committee at the time of the adoption of **Rule 37(e)**, rejected allegations of spoliation of “Q-Global electronic data and shredding of physical paper protocols” after an evidentiary hearing because of a failure to meet the requirements of **Rule 37(e)** as to the former (*6-*9) and the requirements of the Third Circuit under *Bull v. United Parcel*, 665 F.3d 68, 79 (3rd Cir. 2012) as to the latter. (*9). She quoted with approval [from *Bistran*, 448 F. Supp.3d 454 at 466] the observation that “whereas some lesser sanctions may be warranted under **Rule 37(e)** for the unintentional but prejudicial loss of ESI, conduct that is no worse than negligent is not spoliation where nonelectronic evidence is concerned.” To show “spoliation of physical evidence, the movant must show bad faith” as to which there was “no relevant evidence.” (*9)
100. **Cignex Datamatics v. Lam Research** [2019 WL 1118099] (D. Del. March 11, 2019). In a breach of contract action, a party sought sanctions for failures to preserve emails of former employees that had worked on the project when they left employment, when they stopped paying (optional) for future storage. The court refused to strike and dismiss claims or give a “adverse-inference” because, although the party failed to take reasonable steps to preserve, there the lost emails could not be restored or replaced, there are no facts supporting a finding of intent to deprive, leaving only **Rule 37(e)(1)** measures. The court acknowledged that the Rule does not put the burden of proof on either party, “rather the court is to use its discretion to assess whether prejudice exists for the loss of ESI (including which party should bear the burden” citing the Committee Note. (*4). However, the court did not find that there was sufficient evidence of prejudice, including an evaluation of the information’s importance in the litigation, citing *Monolithic Power*. The suggestion as to the potential contents of the lost emails “appears to be speculation.” (*5). Moreover, even if the analysis were to proceed under inherent authority, the court would decline to impose sanctions because Third Circuit law requires a showing of bad faith, and there has been no showing that the failure to preserve was willful, intentional or otherwise done in bad faith. (*5). **In footnote 6, the court said there appears to be a question about whether the court may deviate from Rule 37(e).** While the Committee Note states that the Rule **forecloses** reliance on inherent authority, the Supreme Court in *Chambers* said it can be invoked even if “**procedural rules exist** which sanction the same conduct.”
101. **Citibank v. Super Sayin’ Publishing** [2017 WL 946348](S.D.N.Y. March 1, 2017). A District Judge affirmed a prior ruling by the Magistrate Judge [2017 WL 462601] (S.D.N.Y. Jan. 17, 2017) under Rule 72(a) and held that it was just and practicable to apply **Rule 37(e)** in a case where the conduct relevant to the motion took place two years before the rule took effect, citing *CAT3 v. Black Lineage*, 164 F. Supp. 3d 488, 495-96 (S.D.N.Y. 2016). The Magistrate Judge refused to apply **Rule 37(e)** or exercise its inherent authority over a motion seeking ‘monetary and evidentiary sanctions’ on both procedural and “substantive” grounds, since the motion did not discuss prejudice and also failed to discuss or show the defendants acted with an “intent to deprive” and failed to establish Rule 37(e) prerequisites. The

Magistrate Judge also noted that imposition of sanctions under a court's inherent powers requires a bad faith finding [citing to *Wolters Kluwer Fin. Srev. V. Scivantage*, 564 F.3d 110, 114 (2nd Cir. 2009)] and that the adverse inference standard announced in *Residential Funding* had been interpreted as overruled in several lower court opinions and that the Second Circuit in *Mazzei v. The Money Store* had stated that the principle had been "superseded in part."

102. **Citrix Systems v. Workspot** [2020 WL 5884970] (D. Del. Sept. 25, 2020). In response to requests for sanctions, the court imposed monetary sanctions and struck certain equitable defenses in a patent case because of conduct involving a false declaration by the co-founder of Workspot. That individual had deleted information from a MacBook hard drive after denying that he had sent threatening emails to Citrix personnel. After it became clear that the declaration was false, the court awarded monetary sanctions in the amount of \$271K and ordered further discovery undertaken, leading to an order to pay additional fees and costs. However because there was no proof that the action had caused prejudice to Citrix or that Workspot had acted with intent to deprive under **Rule 37**, no further sanctions (such as a "curative jury instruction" (*1)) were issued because Citrix has "failed to prove that Workspot committed spoliation." (*13).
103. **Clientron Corp. v. Devon IT** [894 F.3d. 568] (3rd Cir. July 5, 2018). The court vacated a judgment in favor of a party in a breach of contract action and remanded it to the court to impose a new discovery sanction under **Rule 37** to address the prejudice suffered by Clientron. (582-83) It noted that an adverse inference and/or the preclusion of evidence "are potential options." It noted generally that by allowing "the consideration of the discovery misconduct within the merits analysis, such measures would ensure that the requisite nexus existed between the sanction imposed and the particular claims at issue." (583). The court cautioned that its preference was to avoid use of **inherent authority** when **Rule 37** provides an "adequate basis" for sanctions (n.4) and acknowledging that "**Rule 37(e)** is of potential relevance in this case." (n. 5).
104. **Classic Soft Trim v. Albert I** [2021 WL 720435] (M.D. Fla. Feb. 10, 2021). In an action against former employees with lots of devices and complex concerns about compliance with a Forensic Search Order, the Magistrate Judge recommended allowing the party, under **Rule 37e(1)** to "introduce evidence concerning the loss of the iPhone 6 and, consequently, the loss" of work text messages. The party would also be ordered [without citing, but apparently intending Rule 37(e)(1)] "to pay [the moving party's] fees for this motion." Separately, as the iPad subject to the order, the court noted that failing to comply with the imaging requirement "may" result in additional sanctions up to and including entry of dismissal, and that the party must pay fees under **Rule 37(b)(2)(C)**.
105. **Classic Soft Trim v. Albert II** [2021 WL 724974] (M.D. Fla. Feb. 10, 2021). In an action against the new employer of certain former employees, the court found that the new employer "did not engage in destruction and concealment" of ESI under **Rule 37(e)**, and criticized the "largely unsupported motion containing serious allegation of misconduct" for which the movant failed to meet its burden of proof "save on instance." It observed that the "unrelentingly contentious and combative" lawyer conduct had been seen as well as their tendency to jump to conclusions at every turn." (*9). The court found the new employer and

its counsel had willfully violated a Subpoena Order by redacting documents produced at a deposition, and ordered that the unredacted copy be produced promptly. Counsel was ordered to pay “a monetary sanction of \$500 [not clear to whom it was to be paid], since a lesser “sanction such as admonishment or reprimand” would not be sufficient, but denied a request for attorneys fees under Rule 37(b)(2)(C). (*9 & n. 15).

106. **Coale v. Metro-North Railroad** [2016 WL 1441790] (D. Conn. April 11, 2016). In an FELA case involving the impact of missing substances in a slip and fall case, the court noted that **Rule 37(e)** applies only to ESI and does not impact the court’s inherent sanctioning authority when spoliation of tangible evidence is at issue. Accordingly, the court applied *Residential Funding* in a case involving loss of substances. While a “self-imposed obligation to preserve evidence” for internal purposes does not create an automatic duty to preserve that evidence for litigation, the court concluded that it was on notice that it that the fruits of its investigation may be relevant to future litigation and should have been preserved.
107. **Coan v. Dunne** [602 R.R. 429, D. Conn. April 16, 2019). The Court refused to give the sweeping inference requested for the negligent spoliation of email accounts which had prejudiced the Trustee because it would effectively direct judgment in the moving parties favor. (442) However, it concluded the Trustee was “entitled to the benefit of a *permissive* adverse inference instruction at trial.” (442) (emphasis in original). Thus, “if the Trustee chooses to present evidence at trial” concerning the failure to preserve emails, the court would be prepared to instruct the jury that the party was under an obligation to have preserved the emails, that he failed to do so, and “if the jury concludes on the basis of all the trial evidence and testimony” that [the party] with an intent to deprive, then the “jury may conclude that this intent is evidence of his intent to defraud with respect to the transactions at issue in this litigation.” (442) (citing the Committee Note regarding use of the jury in regard to (e)(2)) and also citing *Mali* 720 F.3d at 391-93)(affirming permissive adverse inference instruction) and *Cahill v. Dart*, 2016 WL 7034139, at *4 (N.D. Ill. 2016)(“jury may determine inference to be drawn from lost law enforcement video to evaluate malicious prosecution claim).
108. **Cody v. City of St. Louis** [2021 WL 2454215] (E.D. Mo. June 16, 2021). The court refused to sanction the shredding of certain paper records, applying a five year retention policy to others, failing to notify plaintiff of a flood affecting preservation of other records or allowing an attempt to salvage them and “failing to back up” a defective flash drive. The court considered **Rule 37(e)** and its **inherent power** and found that “Plaintiffs have shown neither prejudice nor an intent to deprive.” Nothing in the records suggests that the documents were “especially critical to the litigation or contained information unavailable from other sources,” nor have they shown that the City “acted in bad faith or with intent to suppress the truth.” The Plaintiffs have offered no evidence, “circumstantial or otherwise, that the allegedly missing records would be anything other than cumulative.” (*8-9). It also refused to impose sanctions under **Rule 26(g)** since the personnel charged with collecting and producing documents “performed their duties diligently.” Although the court “encourage counsel in all cases to supervise the collection of ESI and other documents by relevant custodians, any deficiency on the part of the City in this respect is not severe enough to warrant sanctions.” (*9)

109. **Cohn v. Guaranteed Rate** [318 F.R.D. 350] (N.D. Ill. Dec. 8, 2016). In an action against former employees now in competition, the court described **Rule 37(e)** as describing “some” of the remedies available if ESI is destroyed, and noted that a court also has “broad, inherent power to imposed sanctions” which are “over and above the provisions of the Federal Rules.” (353-54). The court then proceeded to analyze and resolve the spoliation motion entirely relying on pre-rule decisions **without again mentioning Rule 37(e)**. It did not analyze whether “reasonable steps” and implies that it was irrelevant that the missing emails were recovered from other parties. The court found “bad faith” conduct intended to hide adverse information thus implying that the information would have been unfavorable but refused an adverse inference since additional discovery might obviate the need to do so.
110. **Collins v. Tri-State Zoo** [2021 W: 5416533] (D. Md. Nov. 19, 2021). The Magistrate awarded sanctions under **Rule 37(e)** after “litigation was underway” (*2) because plaintiff had likely been deprived to relevant electronic communications despite the fact that the moving party secured many such communications via subpoena. It found the party failed to take reasonable steps and was grossly negligent. It barred the party from offering evidence or testimony about the health or living conditions of the animals other than what had already been produced.(*3). It refused to award attorneys fees and cost associated with filing the motion because, citing Victor Stanley, 269 F.R.D. 497, 537 (D. Md. 2010), “such fees and costs are more typically seen as an alternative sanction.” (*6).
111. **Colonies Partners v. County of San Bernardino** [2020 WL 1496444] (C.D. Cal. Feb. 27, 2020), *R&R affirmed*, 2020 WL 1491339 (C.D. Cal. March 27, 2020). The court recommended an adverse jury instruction [but not terminating sanctions] permitting the jury to presume that the information in the lost text messages deleted from a personal phone and emails from an email account were “unfavorable” to defendants, and awarding attorney’s fees because they were prejudiced by the spoliation. (*13) The court cited **Rule 37(e)(2)** and spoke of inferring “bad intent” from the parties actions because it was the only logical conclusion based on the circumstances and timing involved. (*12). It cited Rule 37(e)(1) as permitting a court to award “costs and [attorneys] fees” association with spoliation as a sanction given a finding of prejudice, citing Spencer v. Lunada Bay Boys, 2018 WL 839862, at *1-2. (*12)[**sub. aff’d** 806 Fed. Appx. 564 (9th Cir. March 27, 2020)] The court noted in footnote 2 that some district courts in the Central District used inherent authority despite Newberry v. County of San Bernardino and provided a substantial collection of cases before noting that “because” it was relying on the authority exclusively under Rule 37, “this order will not address the possibility of relying on the court’s inherent authority.”
112. **Connor v. Rubin-Asch** [793 Fed. Appx. 427] (7th Cir. Nov. 4, 2019). The Seventh Circuit affirmed the denial of sanctions in a prisoner case under **Rule 37(e)** where there was no evidence of bad faith “like destroying evidence to hide adverse information” which is a prerequisite to imposing sanctions for missing video, thus he could not “rebut the defendant’s attestations that the video was written over (pursuant to normal practices) without first have been downloaded and saved.” At most, the party “points to negligence, not bad faith.” (*3) The court cited Trask-Morton v. Motel 6, 534 F.3d 672, 681 (7th Cir. 2008).

113. **Contour Data Solutions v. Gridforce** [2021 WL 5541787] (E.D. Pa. Jan. 19, 2021). In this action by a supplier of IT services against a former client seeking redress for breach of an agreement and appropriation of trade secrets, the plaintiff was unable to prove that ESI was lost (since available on a secure server), but the court granted an emergency TRO preservation order “to ensure no further issues arise during the remainder of fact discovery.” (*4-5).(text at *7). In footnote 31, the Court noted that while some district courts within the Third Circuit (not named) continued to apply the pre-rule test “to determine if spoliation” occurred, and the Third Circuit has not clarified the issue, it appears that “Rule 37(e) exclusively governs the spoliation inquiry, while both Rule 37(e) and the Third Circuit’s own three-factor text governs the sanctions inquiry. See GN Netcom, Inc. v. Plantronics, 930 F.3d 76, 82 (3rd Cir. 2019). After all, Amended Rule 37(e) is intended to provide a uniform standad, and was adopted specifically in response to the different culpability requirements developed by the various Courts of Appeals. See CAT3 v. Black Lineage 164 F. upp.3d 488, 495 (S.D.N.Y. Jan. 12, 2016).”
114. [STATE case] **Cook v. Tarbert Logging** [190 Wash. App. 448, 360 P.3d 855] (C.A. Wash. Oct. 1, 2015). In state court action discussing nature of the duty to preserve, Court of Appeals cited to then-proposed **Rule 37(e)** as transmitted to Congress by the Supreme Court [Proposed Amendments to the FRCP, 305 F.R.D. 457, 467-468 (2015)] to illustrate its point that by acknowledging a federal common law duty, in contrast to state courts, “[t]he federal courts have been able to avoid dealing with state substantive law in making spoliation rulings in diversity cases by viewing such rulings as evidentiary in nature and thereby not subject to the Erie doctrine.”
115. [STATE Case] **Cooper Tire & Rubber v. Koch** [__ S.E.2d __, 2018 WL 1323994] (S.Ct. Ga. March 15, 2018). The Supreme Court of Georgia affirmed by certiorari that the lower courts had appropriately applied a “reasonable foreseeable” test for the duty to preserve, as measured by both actual and constructive knowledge that litigation was forthcoming. In passing, it noted that the loss of the auto and three of the four tires involved was of equal importance to both the plaintiff and the defendant, which “is why fact-finders should not readily presume that lost evidence was favorable to the opposing party absent a showing that the evidence lost intentionally to deprive the other party of its use in litigation.” [citing the 2015 Committee Note to Rule 37(e)](ftn. 6). It also noted that in cases involving “extensive amounts of ESI” that the steps a party reasonably should take to preserve “may be difficult and disputed issues.” (ftn. 5.)
116. **Cooper v. Miller** [2021 WL 579820] (M.D. Pa. Dec. 17, 2021). In a prisoner video request case under **Rule 37(e)**, the court refused to find that the defendants had acted in bad faith and intentionally destroyed the video such that an adverse inference or monetary sanction should be imposed after learning that the video could not have been probative of the allegations at issue. It cited *Brewer v. Quaker State*, 72 F.3d 326, 334 (3rd Cir. 1995) for the proposition that “no unfavorable inference arises when the circumstances indicate that the document or article has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for.” (*4).

117. **Core Laboratories v. Spectrum Tracer Services** [2016 WL 879324] (W.D. Okla. March 7, 2016). In action for damages from appropriation of trade secrets, the failure to preserve emails at the time of switching to a new email service was said to have caused “prejudice” under **Rule 37(e)(1)** because it deprived the party of all information about certain issues in those emails. However, the court ordered an adverse inference jury instruction that the lost email would have been unfavorable without also finding an “intent to deprive.” The court selectively quoted from *Turner v. Public Service*, 563 F.3d 1136, 1149) (10th Cir. 2009) implying that a showing of prejudice is the only factor that is relevant to entitlement of “spoliation sanctions.” The opinion is ambiguous as to whether or not reasonable steps were taken. The case has been cited by Frank Harrison in *Potential Adverse Inference Instruction for Unintended [ESI] May Suggest Limitations of Recently Amended Rule 37(e)*, 65-MAY Fed. Law. 48, 50 (2018) as supporting an understanding “the first part of Rule 37(e) as essentially swallowing the second, so that an adverse inference instruction can be given without a finding of intent when that intent is ‘necessary to cure the prejudice.’”
118. **Cornejo v. EMJB** [2021 WL 4526703] (W.D. Tex. Oct. 4, 2021). In granting a motion for sanctions, the Magistrate Judge, sitting in a diversity action with authority by consent, found that there was an issue of fact regarding the existence of “bad faith” as to the disappearance of cell phones, which it did not assess under **Rule 37(e)**, but under its “inherent power to regulate the litigation process,” citing **Rimkus Consulting v. Cammarata**, 688 F. 2d 598, 611 (S.D. Tex. 2010)(*2) [there is “no rule specifically addressing tangible evidence like the [missing] cell phones and tablets” although **Rule 37(e)** address the spoliation of ESI and “the electronic cell phone records at issue here.” It concluded that the jury should be permitted to hear the evidence “surrounding the loss or theft of the cell phones and if the Court determines a spoliation instruction is warranted, the jury should be permitted do draw adverse inferences against [the party] as to the missing evidence.” (*5) It rejected the argument that the court must “make the determination of bad faith now and is not permitted to allow the evidence” to go to the jury without such a finding. It cited BCE Energis, 148 F. App’x 204, 219 (5th Cir. 2005 as citing with approval a district court which deferred a decision until the close of trial and Rimkus for the “allowing the jury to hear evidence on spoliation to make its own bad-faith determination and to decide whether to ultimately draw an adverse inference that lost information would have been unfavorable to plaintiffs.” If the jury concludes otherwise, it is “still free to weigh the evidence” in evaluating the credibility of the testimony about cell phone use, citing Russell at 234 Fed. App’s at 208.
119. **Courser v. Michigan House of Representatives** [831 Fed. Appx 161, 2020 WL 5909505, at *20] (6th Cir. Oct. 6, 2020). The court held that the lower court [404 F. Supp.3d 1125] did not abuse its discretion in denying a **Rule 37(e)(1)** motion for sanctions when Courser was locked out of his computers, since he had failed to explain on appeal how the deleted messages or modified/deleted/inaccessible files “would have helped him.” This led the Circuit court to “assume that the information was unimportant” and he thus failed to “prove prejudice” **as to subdivision (e)(1)**. As to **(e)(2)**, he had not shown an intent to deprive him of the information’s use since under Applebaum, a showing of negligence or even gross negligence will not do the trick (831 F. 3d 740, 745 (6th Cir. 2016)). The district court had concluded that nothing in the record indicates that the House Defendants intended to deprive him of information relating to the litigation, nor did he explained to the Circuit court how the court below was wrong to

conclude that or how the individual defendants intended to deprive him of any of the information. (*20)

120. **Covarrubias v. Wendy's Restaurant** [2021 WL 4258701] (N.D. Ill. June 21, 2021). A Magistrate Judge recommended that the District Judge instruct the jury in some detail about the findings of fact under **Rule 37(e)(1)** because they are “unlikely to change with further discovery” and with the recommendation “of record now, the parties can govern themselves accordingly through the remainder of the discovery process, potential settlement discussions, dispositive motion practice, and/or trial preparation.” (*4). The court specifically recommend the court would be justified in instructing the jury that the video tape was review, not preserve, allowed to be re-record, at a time when it could have anticipated litigation and did not take reasonable steps which is presumably lost and not produced. “Each party can argue to the jury the significance of, and the inferences to be draw from, these facts and findings.”
121. **Cox v Swift Transportation** [2019 WL 3573668] (N.D. Okla. Aug. 6, 2019). In a suit between parties to a truck accident, the court refused to sanction the loss of ESI where “non-retention decisions” could be “deemed questionable or negligent,” there was no indication that the parity acted with intent to deprive the other of the EC< or Qualcomm messages “or otherwise engaged in bad-faith conduct.” (*3) Since only an adverse inference was sought, the court did no more than deny the requires for the severe sanction of dismissal. The court also refused an adverse inference sought against the plaintiff for the failure to preserve ECM data “or the Logs,” which it conceded, in footnote 12 “are not ESI and are governed by general Tenth Circuit law on spoliation, rather than Rule 37(e).”
122. **Coyne v. Los Alamos National Security** [2017 U.S. Dist. LEXIS 65758] (D. N.M., May. 21, 2017). Dismissal of case affirmed after de novo review of Magistrate order under Rule 37(e)(2)(c) because the evidence showed that she “willfully” deleted text messages prior to turning an iphone over for forensic imaging. The plaintiff had agreed to the forensic examination, but after an examination of a forensic copy, the examiner found the iphone had been erased and reset shortly before shipment of the phone for examination. The plaintiff “vehemently” denied the assertion but the court found evidence calling into question the veracity of the arguments made.
123. **Coward v. Forestar Realty** [2017 WL 8948347] (N.D. Ga. Nov. 30, 2017). Court sanctioned a party which produced hard drive for storing images of flooded property without a password, claiming they had forgotten it. The court applied Rule 37(e) and found that they had failed to take reasonable steps to preserve, that the loss was prejudicial because the non-moving party failed to prove that it was not, citing *Ala. Aircraft v. Boeing*, 319 F.R.D. 730, 742 (N.D. Ala. 2017) that the burden is on spoliator) (*8). The court found that sanctions were available under Rule 37(e)(1) because of the prejudice involved, but that the moving parties had not shown that “Plaintiffs acted in bad faith or with intent to deprive and, at the most, “the evidence indicates that Plaintiffs were negligent or careless.” (*9) The court declined to draw an adverse inference against the Plaintiffs or “to issue a jury instruction directing the jury that it must presume that the missing videos would be adverse to Plaintiffs or favorable to” defendants. It found that “the appropriate sanction is to allow” the defendants to “introduce

evidence concerning the loss of the videos and to make an argument to the jury concerning the effect of the loss.” (citing Storey, Effingham, 2017 WL 2623775, at *5. (*9)

124. **Creative Movement v. Pure Performance** [2017 WL 4998649] (N.D. Ga. July 24, 2017). In this classic application of Rule 37(e), a court refused to find that the errors of a forensic IT contractor in carrying out transfers of ESI constituted spoliation under the Rule because there was no showing that “either Defendants or their counsel acted” with an “intent to deprive” merely that there was “confusion and ineptitude” (*15). In addition, there was a failure to demonstrate anything other than “a minimal amount of prejudice, if any.” Although the party may “never know” what information is missing, it failed to demonstrate how this would affect the remaining claims. (*16). The District Judge did a superb job of succinctly summarizing the text and Committee Notes (*13-15). In addition, the court refused to find that the moving party had demonstrated by clear and convincing evidence that party and its counsel acted in contempt of the scheduling order which required the production of digital devices and login information because, among other reasons, it would appear that they were produced. (*17). The court reviewed and refused to dismiss a count dealing with a CFAA claim based on damages (“loss”) caused by access to a website by the former licensee which required restoring a server backup, citing *Brown Jordan*, 846 F.3d 1167 (11th Cir. 2017). (*4).
125. **Cretacci v. Hare** [2021 WL 201778] (E.D. Tenn. Jan. 20, 2021). In a pro se prisoner case involving failures to preserve videos, the court determined that the moving party had not met its “stringent standard of proof” under Rule 37(e)(2) of showing a basis for a default judgment since it had not addressed any other form, “no unrequested sanction will be imposed at this time.” (*4). It also noted that, given the dismissal of the governmental defendant, addressed whether any other form of sanction under Rule 37(e)(1) was appropriate, the individual officer defendants argued that they had played no role in or had knowledge of deletion of the videos, and that there should be no reference to the “non-existence” of the video during the trial. However, since neither they nor the plaintiff had addressed that issue, the court would not do so. (n. 3)
126. **Crosby v. Amazon** [2022 WL 522953] (W.D. Wash. Feb. 22, 2022). Parties sought court approval for modifications to the District’s Model Agreement governing production of ESI which noted, among other items, that they acknowledged “a common law obligation, as expressed [in] **Rule 37(e)** to take reasonable and proportional steps to preserve discoverable information. It contained, inter alia, a list of “categories of ESI” that need not be preserved. (*4) Amazon had complained that some of the terms were not proportional to the needs of the and would support a “fishing expedition.” The court made minor adjustments in the number of search terms permitted and the timeframes for proposing additional ones.
127. **CrossFit v. NSCA** [2019 WL 6527951] (S.D. Cal. Dec. 4, 2019). Concluding a long-running discovery dispute, the District Judge entered default judgments in favor of CrossFit (“terminating sanctions”) under Rules 37(b), 37(c) and (e) and the court’s inherent powers as well as evidentiary sanctions as to damages and “additional issue sanctions” related to damages. In the event the parties do not reach agreement on the amount of damages to be paid to CrossFit, a motion for default judgment as to damages must be filed by April, 2021. The court also awarded \$4M in attorney’s fees as monetary sanctions for the various motions

CrossFit had filed leading to the final result, after CrossFit cited Rule 37(b), (c) and 26(g) as well as inherent powers (*21). The Court concluded that “every cost” sought to be recovered was incurred due to bad faith of the defendant and refused to reduce the amount, noting it was the first case that had ever gotten to this point “in twenty-five years on the bench.” (*25). The section on Rule 37(e) (*6-*12) concluded with a finding that termination was appropriate under **Rule 37(e)(2)** because NSCA “intended to and did deprive CrossFit of ESI relevant to this litigation and because the five factors the Ninth Circuit has articulated for considering imposing terminating sanction weigh in favor of termination.” (*12). The court refused to find that proof of intent to deprive must be by clear and convincing evidence, citing *OmniGen Research v. Yongqiang Wang*, 321 F.R.D. 367, 372 (Ore. 2017)(collecting cases), holding that “the preponderance-of-the-evidence standard continues to apply). However, “[w]hatever the applicable standard, however it is clear that CrossFit has met it here.” (*10)

128. **Crow v. Cosmo Specialty Fiber** [2017 WL 1128505] (W.D. Wash. March 24, 2017). In an action regarding injuries due to exposure from a release of hazardous fume or gas, a court refused to sanction the failure to produce an email under **Rule 37(e)** which was later produced after a more careful search indicated it had not been lost or destroyed. The court quoted that Committee Note to the effect that the rule applies only when the ESI is “lost.” There was “meager prejudice” resulting from the delayed production. The moving party conducted depositions which inquired about the topic and there was no showing that the delayed receipt of the email barred questions or that the outcome of the motion would have been different given other evidence independent of the email. The court also denied the motion under its inherent authority “notwithstanding” that the Rule may “limit the court’s otherwise broad authority to govern discovery.” The court noted that “[r]ather than litigating discovery minutiae,” the parties should submit fact issues to the trier of fact.
129. **Cruz v. G-Star** [2019 WL 4805765, (S.D.N.Y. Sept. 30, 2019)]. A District Judge rejected part of an R&R [2019 WL 2521299 (S.D.N.Y. June 9, 2019)] relating to a duty to preserve emails, [“clearly erroneous” (*9)] but agreed it had a duty to preserve SAP account (*11) Defendant did not take reasonable steps to preserve the SAP account and there was “no evidence” that defense counsel familiarized herself with the clients document retention policies and “was not aware of the technology that Plaintiff used every day at work,” citing *Zubulake*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (*12) However, after an extensive discussion of the inadequacies and repeated failures to impose a litigation hold, the District Judge **nonetheless** concluded that Defendants did not act with the intent to deprive Plaintiff of relevant evidence” (*13), having “acted negligently, and not with culpable intent,” because while counsel “appears not to have understood the relevance of SAP data” after learning of the glitch leading to its deletion, “defense counsel and Defendants worked to reproduce the missing data, expending significant resources in doing so.” (*14). While the Magistrate had found the prejudice to be “apparent,” the District court did not agree based on the current record, and remanded the matter for a determination as to whether prejudice existed and, if so, what remedies were appropriate under **Rule 37(e)(1)**. The award of attorney’s fees was also vacated and remanded. (*15) The Magistrate Judge had criticized both outside and inside counsel for failures to institute and follow up on litigation holds and because of the delay in informing the other party and the court about it. [In footnote 7, the District Court found counsel’s conduct “troubling” because of the delay in disclosing deletions to the court or counsel, and the explanation that

defendants might yet find a substitute did not “excuse” the obligation to make a timely disclosure. “Once counsel discovered that relevant information had been destroyed, disclosure should have been made immediately.” Defendants did not disclose that Plaintiff’s email account and SAP had been deleted” The deletions were not disclosed in meetings or conferences with the Magistrate and the District Judge until later (*5- *6)].

130. **CTB v. Hog Slat** [2016 WL 1244998] (E.D. N.C. March 23, 2016). In a trademark infringement case by a manufacturer of poultry feeding machines claiming to apply the 2015 Amendments (n. 3) [but, in fact, not mentioning Rule 37(e) and referring only to case law based on Circuit authority], an adverse inference instruction was recommended solely because of a delayed use of a litigation hold in violation of an internal preservation policy prevented the retention of data from use of Survey Monkey. The court held this was “willful” destruction because of the “manifest relevance of the evidence and the applicability of the duty to preserve.” (*13-14). The court defined willful conduct as not requiring proof of bad faith, which requires proof of “destruction for the purpose of depriving the adversary of the evidence.” (*9) The Magistrate Judge proposed that the trial judge instruct the jury that the CTB had deleted data from its 2013 survey that was adverse to the stated conclusion that the trade dress had acquired distinctiveness and secondary meaning.
131. **CTC Global v. Jason Huang** [2019 WL 6357271] (C.D. Cal. July 3, 2019). In a termination dispute involving work in China and potential misuse of patents, the court decided to “counter the prejudicial effects” of spoliation of various devices by issuing an adverse inference instruction under the authority of Rule 37(e)(B) and inherent authority which “will inform the jury of Defendants’ destruction of USB drives and [a PC] and instruct them that they may presume the data Defendants destroyed was unfavorable to Defendants.” Before trial, the Plaintiff may present further argument about the instruction and related details.
132. **Cuadrado v. TI Communities** [2022 WL 138517] (N.D. Tex. Jan. 14, 2022). The Chief Judge refused to sanction the failure to retain a surveillance video from which still photos were retained for purposes of production under Rule 37(e), since the plaintiff did not show how he was prejudiced from its loss, since to the extent witnesses relied on it, it was on the stills.
133. **Culhane v. Wal-Mart** [364 F. Supp. 3d 768] (E.D. Mich. Jan. 10, 2019). The Magistrate Judge issued a mandatory adverse inference instruction having found an intent to deprive under **Rule 37(e)(2)** to exist where a Wal-Mart employee had saved only the interior, not both the interior and exterior, video of an incident where a garage-type door was lowered on to the head of the plaintiff. No mention was taken of failure to take reasonable steps or not; the court simply concluded that since the defendant “knew or should have known to save the exterior video footage and for whatever reason(s) did not do so, which permitted it to be ‘overwritten’” it was permitted to infer “an intent to deprive from defendants’ actions in this matter” (*5) (citing *Moody v. CSX Transportation*, 271 F. Supp.3d 410, 431 (W.D.N.Y. 2017)).
134. **Cutlass Collieries v. Garrett Myron Jones** [2021 WL 6135152] (S.D. Fla. Dec. 7, 2021). In a pithy opinion by a Magistrate Judge rejecting a motion for sanctions for failure to preserve ESI, the court noted that while the party had failed to turn off his auto-delete function for

emails, the evidence did not establish when they were deleted, when the party learned of the auto-delete capability or what he did about it once he learned. “On this record, Plaintiff has not shown that Defendant failed to take reasonable steps to preserve ESI.” (*3).

135. **Danielson v. Huether** [2021 WL 217706] (D. S.Dak. Jan. 21, 2021). In assessing the adequacy of the showing of prejudice for purposes of **Rule 37(e)(1)**, “[s]ome courts have found prejudice where the missing ESI would have been relevant to the movant’s case [Paisley Park, 330 F.R.D. 226, 236 (D. Minn. 2019)] while others have required proof that the ESI would ‘affirmatively support’ the movant’s claim.” [Ungar v. NY, 329 F.R.D. 199, 209 (E.D.N.Y. 2018); see also [Freidig v. Target, 329 F.R.D. 199, 209 (W.D. Wis. 2018)]. Even if there had been “some” prejudice, the court found, under the circumstances that it would not be enough to strike affidavits at issue, citing Note (court not required to adopt measures to cure every prejudice.). (*5).
136. **Danville Group v. Carmax Business Services** [2021 WL 6332786] (E.D. Va. June 11, 2021). In this provocative decision, the District Judge found it was not persuaded that, as a matter of law, it was error for the Magistrate Judge to have sanctioned a party by ordering the payment of fees and expenses under **Rule 37(e)(1)** for spoliation of ESI without finding that the party had suffered any prejudice. (*2) The court stated that the transcript showed that the Magistrate Judge “intended to leave further determinations, including the issue of prejudice, to the jury at trial.” The Judge had stated that Plaintiff has “the right to testify – to show to the jury that [the ESI] were destroyed by [Defendant] and that I have made the finding that they should have been preserved, without going so far as to saying it was intentionally destroyed to hinder [Plaintiff] ability to bring this claim.” (*2). The Magistrate Judge awarded \$97K in fees to the prevailing party. [2021 WL 2277330, E.D. Va. June 3, 2021](including associates billed at \$600 an hour and an partner at \$820 an hour).
137. **Davis v. Mar-Jac Poultry** [2021 WL 2556012] (N.D. Ala. March 30, 2021). In a disparate impact employment case, a motion for spoliation of data about race was denied without prejudice because the claim “survive[d] summary judgement without curative measures or sanctions. **Rule 37(e)** penalties would serve little purpose at this juncture.” The court gave leave to “renew his Rule 37(e) arguments in a properly filed pretrial motion.” (n. 9).
138. **Dee Dee Atta v. Cisco Systems** [2020 WL 7384689] (N.D. Atl. Aug. 3, 2020). In a case involving materials about a restructuring which were, at some point, in electronic form, the court applied Rule 37(e) and drew from general spoliation law “since the pertinent analyses are essentially the same.” (*5). While the party argued it had promptly issued a litigation hold, the court held it had failed to take reasonable steps because it did not provide details. (*7) It could not find intent to destroy “under subparagraph (e)(1)” [sic] but since the party was prejudiced because the documents “would certainly shed light” (*9) on the issues it allowed sanctions under **Rule 37(e)(1)**. It excluded some testimony, and the plaintiff would be allowed “to introduce evidence” concerning the loss of organizational design documents and “make an argument to the jury “that they may infer that the documents contain information unfavorable to Defendant.” (*9).

139. **Delotta v. South Broward Hospital** [2021 WL 6134784] (S.D. Fla. Jan. 22, 2021). A former employee was unable to produce text or recorded audio messages and had “unfriended” certain individuals on Facebook, resulting in deletion of “significant portions and comments” from her Facebook. The court conceded that while she cannot produce “that which she does not have, fairness requires” that the defendant be given opportunity to learn the act and if can establish spoliation through deposition testimony or forensic analysis, a sanctions motion can be filed “in the future, as necessary. (*3). As to a failed pre-employment drug test with the Cleveland Clinic, the court was unable to find the plaintiff had acted with “the requisite intent to deprive Defendant of the ability to use the information in litigation or acted in bad faith. However, negligence is not enough to order an adverse inference jury instruction at trial “at this juncture and on the facts before the court,” citing **Rule 37(e)** Committee Notes and citing, in n. 7, *Living Color*, 2016 WL 1105297, at *6 (S.D. Fla. Mar. 22, 2016) under which a court declined to impose spoliation sanctions under Rule 37(e) where it had activated a setting that automatically deleted text messages after 30 days. (*4).
140. **Design Basics v. Mitch Harris Building**, [2021 WL 5563981] (E.D. Mich. Nov. 29, 2021). In an action by a copyright owner regarding misuse of housing construction plans, the defendants were unsuccessful in convincing the plaintiff’s loss of documents, servers and computers was sanctionable. The court analyzed the recycling of information on a laptop under **Rule 37(e)** but generally found no duty to preserve was owed to the defendants. [In discussing the “duty to preserve,” the court opined that in assessing future litigation, it did not mean “any possible or hypothetical lawsuit, but only “reasonably foreseeable” *specific* litigation (emphasis in original). It contended that the duty “runs to an identifiable opposing party,” citing a number of cases, all pre-dating Rule 37(e)] (*4) In addition, defendants had provided no evidence that the recycling of the laptop was done with an intent to deprive nor that there was any relevant information on the laptop. (*6) The court acknowledged it had inherent authority to sanction a party for bad faith conduct, but since “Rule 37 offered Defendants an adequate mechanism” to address the purported discovery abuses, it was, as **Chambers** suggested, reluctant to use inherent powers when an available rule or statute was “up to the task.” (*7)
141. **Dickerson v. District of Columbia** [2022 WL 656172] (D.D.C. March 3, 2022). The District Court refused to impose a sanction under **Rule 37(e)** for a failure to preserve annual evaluations [without clarifying that they were in electronic versus hard copy form] since they were irrelevant to the employment decisions at issue and, even if they should have been preserved, they did not cause any prejudice to the plaintiff. (* 7)
142. **DiStefano v. Law Offices** [2017 WL 1968278] (E.D. N.Y. May 11, 2017). The Magistrate Judge refused to find that Rule 37(e) applied since the conduct involved and an evidentiary hearing on the matter preceded the effective date of the Rule, relying on *CAT3 v. Black Lineage*, 164 F. Supp. 488 ((SDNY 2016) and 2015 US Order 0017, 28 USC § 2074(a). Applying the “benchmark three-part test set forth in *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107-112 (2nd Cir. 2001),” the court found insufficient culpability or prejudice to justify issuance of an adverse inference instruction but stated that it would nonetheless allow the movant to “explore” the issue at trial and awarded attorney’s fees. (*27). The single-practitioner defendant had relied on printouts of key documents, and had produced large

volumes of them, and the moving party did not establish the lack of ESI, some of which was available elsewhere, had prejudiced the ability to present the case. However, after concluding that the non-moving party “believed her actions were reasonable and not negligent at the time she undertook them,” (*19), the court nonetheless concluded the actions to be somewhere between negligence and gross negligence, citing Pension Committee for the observation that the fact that she had acted in good faith did not mean the Second Circuit test of culpability was not satisfied. (*21). Accordingly, the court, because her actions or lack of actions required a response, awarded monetary sanctions, citing CAT 3 for the proposition that it ameliorated prejudice and serves as a deterrent. It also “advise[d] Plaintiff’s counsel that he is free to explore at trial the issue of records being discarded without an adverse inference charge.” (*27). In what appears to be dicta, but many not be, the court asserted the authority to craft an appropriate sanction for spoliation even where a discovery failure does not result in prejudice. (*27).

143. **Doe v. Purdue University** [2021 WL 2767405] (N.D. Ind. July 2, 2021). In a lengthy and confusing opinion centering on deletion of Snapchat information from a cell phone, the Magistrate Judge ultimately ordered, under Rule 37(e)(1) that the jury be informed of the spoliation and instructed along the lines tentatively suggested in the opinion. The court determined not to sanction counsel, but did not “condone the investigation – or lack thereof – that went into responding to Defendant’s discovery request, the parties agreement, or the Court’s orders.” (n. 1).

144. **Doubleline Capital v. Odebrecht Finance** [2021 WL 1191527] (S.D.N.Y. March 30, 2021). In a securities fraud action, Magistrate Judge Barbara Moses, faced with a request for an adverse inference jury instruction during early stages of discovery “before any depositions were conducted” decided that **Rule 37(e)(1)** sanctions, but not “monetary sanctions,” were warranted. (*10) The allegation was that the defendants had destroyed encryption keys required for access to a set of “shadow” books which would evidence a multi-billion dollar bribery scheme to obtain overseas contracts. The Court noted that the movant had not, based on clear and convincing evidence, demonstrated that the spoliating party acted with the intent to deprive in the 2016 destruction, which was admitted, since the suit was not filed until 2017. However, it held that because the missing ESI, which could not be restored or replaced “would be helpful” in establishing several elements of the securities claims at issue, the movants had “in fact” been prejudiced. (*7) The court cited **Lokai Holdings** and **CAT3** in support of the statement that she had discretion to award attorneys’ fees and costs to the moving party but chose not to do so. (*5). However, despite noting that discovery was not complete nor were the issues to be presented to the jury known, the court concluded it was appropriate to allow the plaintiffs to “present evidence and argument to the jury concerning defendant’s intentional destruction” of evidence and that the jury will be permitted to consider that evidence in making its decision. (*9) In a footnote, the court collected and summarized four other examples of Magistrate Judge recommendations that the jury be informed and allowed to evaluate the spoliation evidence. (ftn. 8)].

145. **Dotson v. Edmonson** [2018 WL 501511 (E.D. La. Jan. 22, 2018)]. In a case involving alleged illegal investigatory detention in the French Quarter by LSP officers, the court refused to impose an adverse inference as to missing cell phone records under **Rule 37(e)** because the

Plaintiff had not met his burden of showing a duty to preserve existed at the time the information was destroyed or that the destruction was intentional. (*3). However, the ruling “does not preclude the Plaintiff from eliciting testimony regarding the loss of the cell phone records and text messages prohibit questioning” about the LSP cell phone record preservation policies “as such testimony is relevant and its relevance is not outweighed by the risk of undue prejudice.” “Accordingly, such evidence will be admissible at trial.”(*3). After a four day trial [in January, 2018] resulted in a verdict for the Defendants on all claims but one, with the District Judge ordering nominal damages of \$1000. Upon motion, however, the District Judge granted a new trial because of it had “erred in overruling Plaintiff’s Batson challenge.” 2018 WL 3012274, at *4 (E.D. La. June 15, 2018). No mention appeared in the decision regarding the role of spoliation evidence, if any. Subsequently, the parties engaged in a settlement conference and settled all claims and the action was dismissed on August 13, 2018. 2019 WL 8892582 (E.D. La. May 24, 2019). As of January 2020, no reported decision has cited the underlying spoliation ruling.

146. **DR Distributors v. 21 Century Smoking**, 513 F. Supp. 3d 839, 2020 WL 185082 (N.D. Ill. Jan. 19, 2021). The Court imposed sanctions under **Rule 26(g)** and **Rule 37** to deal with incomplete disclosures and responses after a failure to make reasonable inquiries which were not timely supplemented and involved the loss of ESI. Applying **Rule 37(e)**, the court planned to instruct the jury that it may consider the evidence, along with other evidence, in making its decision and that relevant evidence to the claims were spoliated by the failure to take reasonable steps to preserve emails and chats which cannot be recovered. (*4, *see also* *96). The Court noted that if had not “already imposed attorney fees under several other rules, it might be inclined to reverse its previously stated views on the availability of attorney’s fees under **Rule 37(e)** and impose that purported curative measure under the facts of this case.” (*96) [In note 54, the Court noted that while most courts have held that awards of attorney’s fees are curative measures under the Rule, it was not convinced that was the case]. The court stated it was leaving the issue of “intent to deprive” to the jury to determine since reasonable persons could differ and would not impose sanctions under **Rule 37(e)(2)**. (*95) Citing **Rule 37(c)(1)(B)**, it also planned to inform the jury of the failures of Defendants to make adequate initial disclosures, bar use of any ESI not timely produced and order the party under subdivision (A) to pay reasonable attorneys fees, given the failure to meet its obligations under **Rule 26(a)** and **Rule 26(e)**. (*87) It also awarded attorney’s fees against the party and former counsel under **Rule 37(b)** (*85) and that **Rules 26(g)** justified sanctions (*71-74) for the reasons described in the Opinion. (*79 et seq.) The Court eschewed imposing sanctions ‘under either its inherent power or civil contempt at this time’ because “Rules 26(g) and Rule 37 provide adequate authority.” (*69) and also declined to apply Rule 11, Rule 56 (h) or 28 U.S.C. § 1927 (*70-71).

147. **Drivetime Car Sales v. Pettigrew** [2019 WL 1746730 (S.D. Ohio April 18, 2019). The court refused to issue a “mandatory adverse inference” in regard to missing text messages because the movant did not demonstrate that the party had acted with the requisite intent to deprive, quoting Rule 37(e)(2) and the Committee Note, citing *Culhane v. Wal-Mart*, *Moody*, *Jenkins*, *Yoe* and *EPAC*. However, since the party failed to take reasonable steps to preserve the text messages, despite “being on notice to do so” by a litigation hold letter, “it would be unjust to place the burden of proving prejudice” on the moving party. (*5) Accordingly,

citing Rule 37(e)(1), the court “finds it appropriate” to “order” that the moving party “will be permitted to introduce evidence at trial, if it wishes, of the litigation hold letter and Pauley Motor’s subsequent failure to preserve the text messages.” DriveTime “may argue for whatever inference it hopes the jury will draw.” The nonmoving party will be permitted to “present its own admissible evidence and argue to the jury that they should not draw any inference” from that conduct. (*6), citing HLV, EPAC [2018 WL 3322305] (March 2, 2018). The court also held that in ruling on the motions for summary judgment, it “will not bind itself to any adverse inference at this stage, “since the “negligent failure” to preserve the text messages “must be left to the finder of fact.” (*6)

148. **Duncanson v. Wine and Canvas IP Holdings** [2018 WL 2733457, at *2 (S.D. Ind. March 1, 2018)]. A Magistrate Judge refused to find that a reasonable person in the position of the defendant would have printed out hard copies of changes in an electronic portfolio prior to service of a specific request to do so and described the argument that the party should have done as “ipse dixit” where a cease and desist email did not specifically identify the need to do so, refusing to find a violation of **Rule 37(e)**.

149. **Duran v. County of Clinton** [2019 WL 2867273, at *5] (M.D. Pa. July 3, 2019). The court granted a motion *in limine* to exclude evidence and testimony about a negligent failure to because it could not conclude it would render any fact material to the [party’s claims] in the matter *sub judice* more or less probable,” citing Rule 37(e)(1), FRE 402 and 403. It also found that admitting the evidence was likely to confuse the salient issues result in undue delay at trial). The failure to preserve was at most negligent and that the County did not intentionally destroy or fail to preserve the emails lost during server maintenance.

150. **DVComm v. Hotwire Communications** [2016 WL 6246824] (E.D. Pa. Feb. 3, 2016)(**DVComm#2**). The court ordered a permissive adverse inference jury instruction under **Rule 37(e)(2)** against plaintiff because there was circumstantial evidence that it had destroyed an early draft of a proposed business plan with “intent to deprive,” although a copy was later secured from a third party. [The suit involved a by DVComm to enforce an agreement relating to the defendant’s entry into the Atlanta market (See 2015 WL 2381059) (E.D. Pa. Dec. 23, 2015)(**DVComm#1**)]. The court asserted that its inherent power applied “without limitation” (¶55) and said it would consider “monetary sanctions” later. On February 16, it also ordered payment of \$110K in fees and costs as “monetary sanctions” for “discovery misconduct,” without reference to Rule 37(e) as well as under Rule 37(c)(1) for “reasonable expenses.” (2016 WL 7018554, at ¶31-39, 46)(**DVComm#3**). After a jury trial and a verdict against DVComm, the court refused a new trial based on error in the jury instruction to the jury that it “may infer” that the first rough draft “would have been unfavorable to DVComm’s position that it had created the business plan from its knowledge, and it was not in the public domain and that it “deprived the Court and the jury of the ability to evaluate the rough draft of the business plan.” In n. 23, it observed that it had instructed it “may” infer – not “must presume” and it was “left to the jury to make a determination based on the evidence it heard.” (2016 WL 7018548, at *3 (E.D. Pa. March 31, 2016) (**DVComm#5**). [The court had refused to vacate its earlier orders when the party found the missing business plan because “fulsome discovery” is not “amnesty for failing” to meet discovery obligations “after” findings under Rule 37.” (2016 WL 7228629 (E.D. Pa. March 29, 2016))(**DVComm#4**)]. In May, it

acknowledged that an appeal of denial of a “new trial” was under way. (2016 WL 2858826 (E.D. Pa. May 13, 2016) (**DVComm#6**). There is no indication the appeal resulted in a ruling by the appellate court.

151. **Easterwood v. Carnival Corporation** [2020 WL 6781742] (S.D. Fla. Nov. 18, 2020). In a slip and fall at sea, where video was missing, the court refused sanctions, under **Rule 37(e)**, because “defendant did take reasonable steps” [sic] to preserve (*8) (citing three other Carnival cases on the issues). This ruling is interesting in light of the following comment from the same paragraph: “the loss of the CCTV footage was “not due to Defendant’s failure to take reasonable steps to preserve the video, but rather was due to the “routine, good-faith operation of an electronic information system” that automatically taped over prior footage.”
152. **Edelson v. Cheung** [2017 WL 150241] (D. N.J. Jan. 12, 2017). In determining if there had been “spoliation of electronic evidence” from deletion of emails, the court quoted Rule 37(e), acknowledging it to be a uniform standard, and applied pre-Circuit case law to determine whether to “impose spoliation sanctions under Rule 37.” The court concluded that the conduct was intended to deprive the other party of the information in question but determined that there had not been sufficient prejudice to impose a default judgment. No reference was made to any of the threshold conditions of the Rule, but the court used the fact that the party could subpoena some of the missing emails to justify instructing the jury that “it may presume the information was unfavorable” citing Rule 37(b) rather than entering a default.
153. **Edwards v. Junior State** [2021 WL 1600282] (E.D. Tex. April 23, 2021). A court entered an order precluding use of screenshots of a Facebook page at the core of allegations of racial discrimination in a student organization. The court had ordered that the party produce the message in “native Facebook-message files” in JSON or HTML format (*4), but the party delayed in doing so long after the forensic experts his father had hired to preserve the Facebook material had deleted it pursuant to the service agreement. In addition, the student permanently deleted his Facebook account. During the course of the litigation, the existence of the material was not disclosed and the expert’s retention was also not disclosure. The court considered sanctions under Rules 37 (b)(c) and (e) and found that Rule 37(e)(1) measures sufficed.
154. **Edwards v. Kanode** [2021 WL 1234528] (W.D. Va. March 31, 2021). “Given the plain language” of **Rule 37(e)**, the R&R recommending against finding breach of duty to preserve prison video is affirmed.
155. **EEOC v. GMRI** [2017 WL 5068372] (S.D. Fla. Nov. 1, 2017)]. In a comprehensive survey of Eleventh Circuit spoliation principles and **Rule 37(e)** in a case where there was loss of both ESI and documents, the court determined to allow the moving party to make a presentation of “competing facts and theories” to the jury about missing evidence – “including whether any were missing at all.” (*2-3, *31) No adverse inferences would be permitted, either at the summary judgement or at trial. (*31) As to the ESI, however, since Rule 37(e)(2) permits a jury to reach a finding of prejudice if the party is shown to have acted in bad faith (as defined in the rule), the party may argue that it may reach “an adverse inference about missing ESI if, “but only if” it concluded that Seasons acted in bad faith (“i.e., with the intent

to deprive” the EEOC of the ESI’s use in this lawsuit” “without also obtaining a finding of prejudice to the EEOC.” (*31). (*22). In Eleventh Circuit Survey, Electronic Discovery, 69 Mercer L. Re. 1109, 1113 (2018), the Authors expressed surprise at the result. “The Magistrate Judge . . . determined that it could not find as a matter of law that GMRI acted in bad faith, that the EEOC was prejudiced, or that the emails were deleted with intent to deprive the EEOC of the evidence. Instead, the magistrate judge ordered that the *jury* would be allowed to consider the evidence and ultimately determine whether GMRI had an intent to deprive.” (emphasis in original).

156. **EEOC v. JetStream** [878 F.3d 960] (10th Cir. Dec. 28, 2017). The Tenth Circuit found no abuse of discretion in a refusal to give a spoliation instruction that the jury could assume that parties on a missing list were good workers and should be hired without a prior finding that the party had acted in bad faith. The court cited **Rule 37(e)** logic that the current “bad faith” requirement for such an instruction in “a virtually identical situation” as providing a “common sense” reason to refuse such an instruction, since to do so might tip the balance in ways the lost information never would have done. The court also found that the presumption created under prior precedent that the missing evidence was favorable would be governed by FRE 301 which merely required production of some evidence it was not favorable, which JetStream had done by testimony. (965-67).
157. **EEOC v. MVM** [2020 WL 6482193] (D. Md. Nov. 2, 2020). In a case where the EEOC “successfully demonstrated prejudice,” the District Judge determined that the Magistrate Judge’s sanction of preclusion of a video at trial was a “non-dispositive matter,” and it found no error or reasons to overturn the ruling. It found the party had the practical ability to preserve the evidence at issue and that the sanction was justified. The court noted that the barrier of Rule 72(a) reflects the fact that “it is not the function of objections to discovery rulings to allow the “wholesale re-litigation of issues resolved by the magistrate judge.” (*1).
158. **EEOC v. Performance Food** [2019 WL 1057385] (D. Md. March 6, 2019). In this lengthy, well-written opinion, the Chief Magistrate Judge resolved two separate motions by undertaking two distinct series of analyses, on for a Paper Spoliation Motion and the other for an ESI Spoliation Motion.
159. **Edwards v. 4JLJ, LCC** [976 F. 3d 463] (Sept. 21, 2020). Upon rehearing, the Fifth Circuit dismissed an appeal by Plaintiffs from denial of a new trial after a jury verdict in favor of their employer because of an untimely filing of the appeal. The Court also dismissed the cross-appeal by the employer as to an “order imposing monetary sanctions.” (466). It found no basis to question the reduction in the bill of costs awarded the employer “to offset the monetary sanctions awarded” to the employees. (467). The lower court [2018 WL 2981154 (S.D. Tex. June 14, 2018)] initially, citing Rule 26(g)(3) and its inherent authority, decided to impose an adverse inference as sanction for bad faith abuse of the judicial process which would have instructed the jury that it could determine the evidence electronic data was favorable to the Plaintiffs” in regard to the hours worked and whether the plaintiffs fell within the TCA exemption. (*13) (In a footnote, it had found it just and practicable to apply the “Amendments” of 2015 to the case, which was filed in July, 2015. (n. 10, discussing Rule 34)(b)(2)(C) (at *9)]. The instruction was not given, however, because the employer reconstructed the missing ESI

albeit through an effort that was “slow, piecemeal and begrudging.” [2019 WL 172842, at *1 & *6 (S.D. Tex. Jan. 11, 2019)] (“a spoliation presumption is no longer appropriate”). The Court shifted an evidentiary burden instead, while rejecting an argument that “changes to Rule 37 with respect to electronic evidence” barred that form of relief, citing *Moody*, 271 F. Supp. 3d 410, 425 (W.D.N.Y. 2017). (*7) The court found that “sanctions are still available for intentional acts to deprive a party of discovery” and the conduct was “intentional, willful, in bad faith, and contumacious.” (*7). Subsequently, after a jury verdict for the employer, the district court, as the Fifth Circuit later put it, “impose[d] monetary sanctions on” the employer “over a contentious discovery dispute and awarded the company only \$14,920 of its requested \$44,553 in costs under Rule 54(d),” the Fifth Circuit ultimately refused to question. [976 F.3d 463, 465 (5th Cir. Sept. 21, 2020); *see* 2019 WL 1382983 (S.D. Tex. March 27, 2019)] (awarding fees and expenses to employees); *see also* 2019 WL 2344752 (S.D. Tex. June 3, 2019)] (bill of costs). [Note: The Fifth Circuit initially issued an opinion dealing with employee requests for a new trial, but it was withdrawn for lack of jurisdiction 976 F.3d 463 (5th Cir. Sept. 21, 2020). In a post Fifth Circuit opinion dealing appellate costs, the court rejected the Plaintiffs’ request for “additional relief” because they might have prevailed on appeal and “had already received a favorable, but now vacated, opinion on the merits.” The district court overruled the objections “as being outside the scope of this inquiry and the standard of review afforded to this Court.” It acknowledged there were exceptions to the mandate rule, a corollary of the law of the case doctrine, but concluded they did not apply. 2021 WL 3171954, n. 2 (S.D. Tex. July 27, 2021)]

160. **Edwards v. Kanode** [2021 WL 1234528] (W.D. Va. March 31, 2021). The district judge found no basis to conclude that a prison official purposefully failed to retain or destroyed relevant video footage while “he or she knew or should have known” that the footage, now unavailable, was or could be relevant to the litigation. (*4) The court could not find that the party met his burden to prove the required elements under Rule 37(e)(1) and overrule objections to the Magistrate Judge report on the issue.
161. **Eisenband v. Pine Belt Automotive** [2020 WL 1486045] (D.N.J. March 27, 2020). The Chief District Judge refused to grant a spoliation motion under the Rule because the evidence of intent was pure speculation “without a shred of evidence of [the party’s] motivation.” (n. 11).
162. **Eller v. Prince George’s County Public Schools** [2020 WL 7336730] (D. Md. Dec. 14, 2020). The Magistrate Judge did not apply Rule 37(e) to the loss of ESI because of a failure to institute a litigation hold because no party “addressed it” (n. 6). However, in a footnote it explained that there was no showing that the emails cannot be restored or replaced through additional discovery” implying it would not have applied the Rule at all. (n. 9). It refused to find that the party was entitled to an adverse inference because the party because the culpability “does not rise to the level of willfulness or bad faith” (n. 10), a standard was “in line” with Rule 37(e)(2). (n.13) It stated that the prejudice suffered was not sufficient to warrant any spoliation sanction for ESI under the spoliation doctrine or under Rule 37(e)(2). (n. 7). No mention was made of the possibility of informing the jury as a lesser measure or under Rule 37(e)(1). However, as to loss of certain material and relevant document forms, which was “grossly negligent,” (*8) the Magistrate Judge recommended that the jury should be instructed

to “cure the prejudice that Plaintiff would otherwise suffer” and “deter” the Defendants from repeating the mistakes that led to this spoliation in the future. (*12). The instruction would tell of the loss of the documents and state that “if the forms had not been lost they would have described the harassment that Ms. Eller experienced” and provided other information and that the defendants bear the sole responsibility for the loss of the evidence. (*12). It noted that this instruction does not instruct the jury to infer that the evidence Defendants lost would have been beneficial to Plaintiff, but it does not let Defendants off the hook” and because of the limitations in the Fourth circuit, “this lesser sanction must suffice.” (*12).

163. **Ellis v. Hobbs Police Department** [2020 WL 1041688] (D. N.Mex. March 4, 2020). After an evidentiary hearing, the Court refused to sanction deletion of audio recording from an iPhone6 under Rule 37(e)(1) because there was no “discernible prejudice” involved. (*6) However, since there was a preservation order in place, it recommended that the plaintiff be prohibited from introducing any “evidence of audio recordings” except for the purpose of impeachment. (*8) In footnote 9, the court explained that because of the “limited culpability and prejudice” involved, the party should be able to use the recording if its content “materially impeaches a witness called by or affiliated with Defendants.” The court also noted that “Rule 37(b) permits more flexibility than Rule 37(e) in the assessment of sanctions,” citing *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992) for the proposition that determination of the correct sanction for violation of a discovery order is a fact specific inquiry that the district court is best qualified to make,” noting that the court may impose any sanctions in the rule as well as “further just orders.” (*7).
164. **Elvis Presley Enterprises v. City of Memphis** [2020 WL 4015476 (W.D. Tenn. July 16, 2020). The court dismissed a motion for spoliation measures under Rule 37(e) because the party failed to demonstrate that it was ‘prejudiced by the failure to produce text messages. In nothod that a “determination of prejudice due to spoliation is a mixed question of fact and law.” It noted that the party was not prejudiced because the party had obtained the deleted text messages from a third party. There was evidence in the record to support the Magistrate Judge’s factual determination that the party was in possession of the deleted text messages and there was law to support the determination that the party was not prejudiced because it obtained the deleted text messages.
165. **Emerald Point v. Hawkins** [294 Va. 544, 808 S.E.2d 384, 392] (Va. Dec. 28, 2017). In reversing an opinion on other grounds, the Supreme Court of Virginia explained that “the resolution of a spoliation issue . . . should be guided by the same standard and applicable to all forms of spoliation evidence.” Accordingly, citing **Rule 37(e)** and *Brookshire Bros. v. Aldridge*, 438 S.W. 3d 9, 24 (Tex. 2014), the court applied Rule 37(e) logic to the loss of tangible property because the “intent to deprive” standard provides a common sense basis for determining if an adverse inference should lie.
166. **Emerson Creek Pottery v. Emerson Creek Events** [20221 WL 518910] (W.D. Va. Feb. 18, 2022). A District Judge denied an “eleventh-hour motion” for spoliation inferences on the basis of an analysis that “begins and [was] dispositively resolved by the requirement that the ESI must be “lost” before the Rule applies. Even if the party had not produced all the emails sought, the party admitted that it had received all of the emails from third parties. (*2). The court was also that that seeking a preclusion from presenting a defense or permitting adverse

inferences would be the “massively disproportionate sanction” sought relative to “the conduct” alleged, which was nearly everything that the party sought at trial. Even if a court were to consider a remedy, it would have to be “tailored to the particular discovery violation in question. (*3).

167. **Emuveyan v. Ewing** [2021 WL 3617423] (D. Utah Aug. 16, 2021) and (as to fee award) [2022 WL 43867] (Jan. 5, 2022). In a well-written opinion addressing the improper alteration of various forms of evidence in hard copy and electronic form in an employment dispute, the Magistrate Judge, after holding that it constituted spoliation in the meaning of Rule 37(e), awarded the following relief under **Rule 37(e)(1)**: reimbursement of attorneys fees for the time spent in bringing the motion to compensate the movant “for economic prejudice he incurred;” an order that all “alterations” and certain narrative information be “redacted” to protect the movant from any unfair advantage; a decision that the movant “will be permitted to present evidence to the factfinder regarding the alterations made to the records after litigation was imminent.” (*11) [citing *McQueen v. Aramark*, 2016 U.S. Dist. LEXIS 164678, at *12-13 (D. Utah Nov. 29, 2016)]. “The parties can argue what inferences they want the jury to draw from that fact.” If the case is tried to the jury, the movant is “entitled” to an instruction allow the jury to consider the alteration of the evidence “in evaluating witness credibility and making other factual determinations.” [citing *Charlestown Advisors*, 337 F.R.D. 47, 68-69 (S.D.N.Y. 2020)] “However” the movant is “not entitled to an adverse inference instruction.” (*11) The Court noted that intent to deprive had not been shown under **Rule 37(e)(2)**, and even if it had been, default judgment should not be used “when sanctions pursuant to **subsection (e)(1)** would suffice.” (n. 10). The Magistrate Judge left it to “the trial judge to determine the appropriate mechanism for permitting the presentation of evidence and argument on this issue at trial, as well as the specific wording of the jury instruction.” (n. 12) In the fee award decision, it refused to alter the decision that the award was imposed “in part” to “compensate” for the economic prejudice “incurred” in bringing the motion for spoliation and restricted to “the time spent bringing the motion for spoliation and not, under the “exceptional case” exception to the but for rule, for all the fees and expenses incurred in bringing the suit. [2022 WL 43867, at *2 & n. 2]

168. **Enoch v. Hamilton County Sheriff’s Office** [2019 WL 1755966] (April 19, S.D. Ohio). In this complex case challenging the warrantless arrests and search and seizure of electronic recording devices in the hallways of the Hamilton County Courthouse, the Magistrate Judge denied motions for spoliation regarding deletion of ESI on the grounds, among others, that “defendants have not met their burden of showing they made a good faith effort to pursue alternatives [of the missing ESI] and have found ‘such evidence cannot restore or replaced’ which is a prerequisite for sanctions under Rule 37(e).” (*11) Even if they had met that burden, the movants sought only relief under Rule 37(e)(2), and since the evidence shows at most negligence in loss of the ipad information, there is no evidence for “the severe sanctions they seek.” (*12). There is no direct or circumstantial evidence that trading and upgrading ipads and cell phones, “which defendants only speculate may have had relevant ESI on them,” was done because the plaintiffs intended to deprive defendants of the information’s use in litigation. (*12).

169. **Envy Hawaii LLC v. Volvo Car USA** [2019 WL 1292288] (D. Haw. March 20, 2019). Denying spoliation motions relating to loss of email and data in the hands of third parties since no demonstrations was made that they were irretrievable.
170. **EPAC Technologies v. HarperCollins** [2018 WL 1542040] (M.D. Tenn. March 29, 2018)(Mag. J. (EPAC #1). The Magistrate Judge authorized jury instructions under **Rule 37(e)(1)** for loss of warehouse data [ESI](at *26), rejecting the Special Master’s recommendation of preclusion of evidence of lack of merchantability. It also authorized a jury instruction permitting the jury to infer that **missing books** [documents] would have supported EPAC claims under Sixth Circuit case law (at *22). The failures were negligent or grossly negligent but did not involve an intent to deprive (at *18) and were attributable to an in-house counsel’s failure to take an active and primary role in litigation holds and meant the party had failed to take reasonable steps to preserve the ESI. (*22) In **EPAC#2**, 2018 WL 3322305 (May 14, 2018), Chief Judge Crenshaw affirmed the Magistrate Judge’s order involving the instruction regarding the failure to preserve the books, but as to the **warehouse data**, made a “slight alteration” to conform to **Rule 37(e)(1)** by restating the Magistrate’s Judge’s formulation that the missing data “**would have shown**” whether certain adverse facts existed to state that it “**may have shown**” those facts, thus leaving the findings of fact to the jury. It described the result as no greater than necessary to cure the prejudice and stated he would instruct the jury it may give this “whatever weight you deem appropriate as you consider all of the evidence” (at *3). In **EPAC#3**, 2019 WL 109371 (M.D. Tenn. Jan. 4, 2019), Judge Crenshaw granted motions *in limine* to exclude discussion, argument or evidence related to email spoliation, as to which the Magistrate Judge found had been restored and replaced (at *10) and refused to allow introduction of more evidence of spoliation as background as to the curative instruction regarding [summarizing, in a pithy list, the related findings by the Magistrate in the March opinion at *13, without noting the subtle changes made as result of consideration of Rule 37(e)(1) in the EPAC #2]. According to PACER, the jury returned a Judgment on January 28, 2019 of \$3.1 M compensatory and \$12M in punitive damages. In **EPAC #4**, 398 F. Supp. 3d 258 (M.D. Tenn. July 1, 2019), *notice of appeal filed*, August 1, 2019, the District Judge granted judgment as a matter of law vacating the award of \$12M in punitive damages on the tort claim but entered judgment on the \$3M award of compensatory damages awarded on the breach of contract claim as found by the jury. The court refused to to review the permissive adverse inference instructions because “the court cannot divine that the jury did or did not [make adverse inferences] from the verdict (*13). In **EPAC #5**, 810 Fed. Appx. 389] (6th Cir. 2020), the Sixth Circuit refused to find an abuse of discretion in the warranting entitlement to a new trial because it had been “unfairly prejudiced” by two adverse inference instructions given to the jury, one on damaged books [had a duty to preserve breached that duty by “negligently allowing the books in its control to be sold, lost, or destroyed. [Separately summarized]
171. **EPAC v. HarperCollins Christian Publishing** [810 Fed. Appx. 389] (6th Cir. 2020)(EPAC #5). In reviewing challenges to the jury verdict in favor of EPAC, the defendant argued that it was entitled to a new trial because it had been “unfairly prejudiced” by two adverse inference instructions given to the jury, one on damaged books [had a duty to preserve breached that duty by “negligently allowing the books in its control to be sold, lost, or destroyed; and you may infer that, if available, the books would support EPAC’s claims and

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

172. **Epicor Software v. Alternative Technology** [2015 WL 12734011] (C.D. Cal. Dec. 17, 2015). A District Judge applied **Rule 37(e)** to a pending motion since it would be just and practicable to do so, given that “[a]s a practical matter” it would lead to the same result if it had simply been acting under its inherent authority before the rule became effective. It decided to permit the jury to decide if an intent to deprive existed with respect to destroyed ESI since a reasonable trier of fact could conclude it existed. It stated it would permit submittal of evidence of what evidence was destroyed, the notice of litigation and intent and, if there was sufficient evidence, would instruct the jury as suggested by the Committee Note.
173. **Eriksen v. Kaplan** [2016 WL 695789] (D. Md. Feb. 22, 2016). In an employment action, the District Judge adopted Magistrate Judge’s report recommending sanctions for use of “CCleaner” and “Advance System Optimizer” shortly before a scheduled forensic inspection to determine if certain ESI had been created by Plaintiff. The deletion prevented the moving party from authenticating a letter and email relating to her termination which were favorable to the plaintiff. The Order precluded reliance under **Rule 37(e)(1)** and permitted defendants to present evidence relating to the loss to the jury. The measures would “cure the prejudice” created by the loss of evidence by eliminating any risk that the email and letter be deemed authentic. [The Magistrate Judge concluded [under pre-Rule 37(e) principles] that the party “willfully”[but not in bad faith] ran the software despite knowing some ESI could be lost. [2015 WL 6408180]]. The District court also adopted the recommendation to order payment of reasonable attorney fees, perhaps under **Rule 37(a)**.
174. **Erie Insurance v. Rauser** [2021 WL 1134766] (E.D. Tenn. March 24, 2021). A Magistrate Judge refused to sanction under its inherent authority or **Rule 37(e)** [which it felt governed, since ESI spoliation was alleged, but noted *Yoe v. Crescent Sock*, 2017 WL 5479932, at *8 (E.D. Tenn. Nov. 14, 2017) and *Hugler v. SW. Fuel*, 2017 WL 8941163, at *8 (CD. Cal. May 2, 2017)(disagreeing)] an insurance supervisor for using “Jabber” internally to tell an underwriter to clean up a comment in the file since it was discoverable and under Policy

was not sufficiently objectively worded. The court could not find “prejudice or that Plaintiff acted with an intent to deprive,” citing the Committee Note and accepting the testimony of the manager that “she trains underwriters to use objective language” and the original comment - whatever its exact wording “is not important to this litigation.” (*6).

175. **Erwine v. Churchill County** [2021 WL 4066982] (D. Nev. Sept. 7, 2021). In a creative summary of the use of **Rule 37(e)**, the court held that the Rule “provides the specific – and only – basis for sanctions for spoliation of ESI and was “substantially amended to accommodate advances in technology and provide uniformity among the circuits.” (*4) It “incorporates the common-law rule that impose a duty to preserve evidence in litigation and when litigation is reasonably foreseeable.” (*5) After summarizing what sanctions are “available” under the Rule, the court that that the Ninth Circuit had not “set for a precise standard for determining *when spoliations sanctions are appropriate* (emphasis added) and summarized the test used by a majority of trial courts in the Ninth Circuit, citing *State Farm*, 2021 WL 2269972, at *2 (D. Idaho June 3, 2021). (*5). Ultimately, the judge denied both motions for sanctions under Rule 37(e) against defendant in an employment action because it did not have sufficient notice that plaintiff intended to bring the case as the time certain video was deleted - the notice must be “probable,” meaning “more than a possibility” (*6) and because the plaintiff did not carry the burden of showing certain files ever existed or that they were destroyed while in defendant’s possession. (*6).

176. **Eshelman v. Puma** [2017 WL 2483800, at *5] (E.D. N.C. June 7, 2017). A hotly contested libel action eventually resulted in an award of \$15.9M in compensatory and \$6.5M in punitive damages (2020 WL 10314171, March 2, 2020) and is currently under appeal in the Fourth Circuit. In an early discovery dispute, a Magistrate Judge concluded that the failure of the party to act to prevent the loss of internet browser information (ultimately overwritten by Google) immediately upon receipt of a demand related to the anticipation of litigation did not justify imposition of an adverse inference under that under **Rule 37(e)(2)**. The court concluded that the loss, “at most,” resulted from negligent conduct. There was no showing that additional discovery could not provide the same information as the browser history to the movant, such as by depositions. (*5) Moreover, the moving party had failed to provide some evidence “regarding the particular nature of the missing ESI in order to evaluate the prejudice it was being requested to mitigate” thus disqualifying it from a sanction under **Rule 37(e)(1)** (*5). The moving party was the prevailing party at trial and the post-verdict opinion noted above in which a new trial was denied makes no mention of the role that this dispute, one of many, played in the case.

177. **Estate of Esquivel v. Brownsville** [2018 WL 7050211, at *7] (S.D. Tex. Nov. 20, 2018). A Magistrate Judge recommended measures for spoliation of video footage where no finding of intent to deprive was argued or found, including that court should “allow the parties to present evidence concerning the lost evidence to the jury” that the jury be instructed that “the loss of the footage may have prevented Plaintiff’s from producing evidence of BSID’s Liability” (*7). It also recommended that the court refuse to preclude admission of evidence supporting an alternative causation defense because it would eliminate a central defense and thus be an inappropriate measure in light of the fact that there was no bad faith involved, citing the Committee Note to Rule 37(e)(1). (*7) However, according to the Magistrate Judge,

“BISD should not be allowed to hide its spoliation of evidence from the jury, however unintentional that spoliation may have been. Although some spoliation cannot be completely cured, the jury should be allowed the choice to infer that the loss of the footage may have prevented Plaintiffs from producing evidence of BISD’s liability.” (*7) The R&R was affirmed by the District Court in all respects without specific comment on the logic for instructing the jury that the loss of the footage may have prevented the Plaintiffs from producing evidence of liability. 2019 WL 219888, at *1 (S.D. Tex. Jan. 16, 2019).

178. **Estate of Moreno v. Correctional Healthcare Companies** [2020 WL 5740265] (E.D. Wash. June 1, 2020). The court issued a default judgment as to liability under **Rule 37(e)(2)** and, as an alternative, under its **inherent power to deal with litigation abuse**. (*10) The prejudice could not be cured through lesser sanctions. The court concluded that it was not feasible to draft an adverse-inference jury instruction that conveys or remedies “the scope of the harm” caused in the case. A major factor in assessing intent under **Rule 37(e)(2)** was the adoption of a “**newly implemented document retention policy governing email preservation**” (*3) that automatically deleted email, even if archived, for the purpose of avoiding “discovery risks” which included “bad mails” since the information “can be good or bad.” (*5) Citing **WeRide Corp v. Kun Huang**, 2020 WL 1967209, at *12 (quoting **Porter**, 2018 WL 4215602 at *3), the court noted that conduct satisfies (e)(2) when it is “reasonable to infer that Defendants purposefully destroyed the emails to avoid their litigation obligations.” (*6) The court found that the litigation group that implemented the policy was the same that was managing the litigation and would have been familiar with the discovery requests, but “chose to permanently erase massive amounts of ESI that Plaintiffs had requested or could reasonably be expected to request.” (*6) Although the policy was nationwide, it rejected the concept that the party was immune because they intended to destroy harmful ESI “all of their cases, rather than the harmful destruction” caused in this case. (*7). In finding that, as an alternative, inherent power to levy the sanctions in response to “abusive litigation practices,” the court found the party acted willfully, citing **Leon**, 464 F.3d at 958, which was appropriate because they had notice the employees emails were “potentially relevant to this litigation prior to destroying them.” (*10).
179. **Estate of Vallina v. County of Teller Sheriff’s Office** [2017 WL 1154032] (D. Colo. March 28, 2017). Motion for adverse inference, for failure to preserve prison video denied under Rule 37(e) and **Turner v. Public Service**, 563 F.3d 1136, 1149 because of a lack of showing of prejudice, citing **Zbylski v. Douglas Cty. Sch. Dist**, 154 F. Supp.3d 1146, 1171 (“the prejudice must be actual, rather than merely theoretical”) and no showing of bad faith or intent to deprive under **Rule 37(e)**, since the loss was, at most, the result of negligence when it was automatically overwritten.
180. **Europe v. Equinox** [2022 WL 832027] (S.D.N.Y. March 21, 2022). In this plain vanilla application of **Rule 37(e)(1)**, the Magistrate Judge found the unexplained loss of a single document (apparently also in electronic form) was sufficient to qualify as spoliation under the Rule. (“Defendant should have taken steps to preserve the September 2019 schedule in December 2019 but did not). (*6). Since there was no evidence of intent to deprive by clear and convincing evidence, the plaintiff/movant in the single plaintiff employment case not entitled to “the harshest of sanctions, including an adverse inference.” (*7). However, the

plaintiff was was entitled to present the evidence to the jury under **Rule 37(e)(1)**. While an instruction to the jury that the evidence was “destroyed” was “too harsh in light of the record being silent as to any affirmative conduct,” Judge Parker agreed that the jury could be told that they “may infer” that some facts, but that the defendant would be “precluded from arguing (and the jury be precluded from interring” others. (*7) However, conceding that she would not be supervising the trial of the case, no “specific” instructions were suggested.

181. **Experience Hendrix v. Pitsicalis** [2018 WL 6191039] (S.D.N.Y. Nov. 28, 2018). In an action by the successors in interest to the estate of Jimi Hendrix, the court granted an adverse inference instruction under **Rule 37(e)(2)** based on spoliation which would permit a jury to “draw an adverse inference from the [Defendants] failure adequately to preserve and produce” to the effect that “the devices in question contained evidence of conduct” in “breach of their legal duties” in connection with sale of Jimi Hendrix-related materials. (*10) It also held that “given the resources” the parties have had to expend in establishing the non-compliance, plaintiffs are “entitled to an award reflecting the reasonable attorney’s fees and costs incurred in connection with bringing and litigating” the successful motion.” (*11). By opinion dated December 17, 2018 [2018 WL 11222520], the court explained that when granting a “discovery motion to” **Rule 37**, it must require the party whose conduct necessitated the motion to pay reasonable expenses, including fees.” [quoting **Rule 37(a)(5)(A)**] (*1). “Even outside the context of a Rule 37(e) dispute” the court has inherent authority to do so, citing Ottoson, 268 F.Supp.3d 570, 584-85 (S.D.N.Y. 2017)(quoting Best Payphones, 2016 WL 792396 (E.D.N.Y. 2016).” (*1). Without further discussion of the source of authority to impose monetary sanctions, it ordered the defendant parties to pay \$78K to “Shukat Arrow” [plaintiff’s firm] within 10 days. [A year later, it ordered terminating sanctions on liability, 2019 WL 10945118].
182. **Express Restoration v. Servicemaster Global Holdings** [2020 WL 2084669] (C.D. Cal. Jan. 24, 2020). Magistrate Judge recommended that motion for terminating sanctions be denied and the court refer the matter back to it for consideration of award of fees or monetary sanctions under Rules 11 and 37. The moving party misrepresented the deposition testimony of a Rule 36(b)(6) witness and failed to disclose clarifying information furnished. Moreover, “[t]he failure to demonstrate prejudice is a firm barrier to remedial relief under Rule 37(e)(1).” (at *4).
183. **Fahrenbruch v. Peetz** [2021 WL 2550533] (D. Colo. June 22, 2021). In a medical malpractice case where cardiac arrest went undetected, the court found a duty to preserve certain digital records, citing Rule 37(e) and Circuit authority, but found sanctions inappropriate since an adverse inference instruction, exclusion of testimony and rejection of affirmative defenses “are the type severe enough to require more than just inadvertent loss of evidence,” citing Turner, 563 F.3d at 1149 (mere negligence is not enough because it does not support an inference of “consciousness of a bad case.” The exclusion of testimony and non-use of affirmative defenses are improper since “defendant’s conduct regarding the lost data does not rise even to the level of negligence.” (*12).
184. **Falck USA v. Scott Griffith Collaborative Solutions**. See **Scott Griffith v. Falck**, *infra*.

185. **Fashion Exchange v. Hybrid Promotions** - See The Fashion Exchange, *infra*.
186. **Fast v. GoDaddy**. ___ F.R.D. ___ [2022 WL 325708] (D. Ariz. Feb. 3, 2022). After a detailed critical account of the actions of single plaintiff in an employment action, Hon. David Campbell (see n. 2) deployed sanctions under **Rule 37(e)** and **37(c)** for spoliation and delayed production of ESI in the form of Slack, Telegram messenger and Facebook posts. The Court announced plans to issue an adverse inference instruction and to inform the jury of undisclosed redactions from Facebook posts, order attorney's fees and costs and permit a forensic examination (at plaintiffs cost) as well as issue four additional third-party subpoenas for additional discovery. (*23-24). [The Court noted its frustration with lawyers and judges who are still unaware of significant changes in the law of ESI spoliation, citing several cases (n.2)]. On March 28, 2022 (2022 WL 901380), the court entered a conditional dismissal of the action with prejudice under **Rule 41(a)(2)**, requiring the plaintiff to pay \$10K of the sanctions previously imposed by the court.
187. **Faulkner v. Aero Fulfillment Services** [2020 WL 3048177] (S.D. Ohio June 8, 2020). The court rejects an attempt to sanction a good faith error a party and her counsel after production of the irrelevant contents of a Linkedin account. The court admonished the party but in footnote 10 states, with admirable restraint, that there was no need for an adverse inference or for other action under **Rule 37(e)** since the hypothetically missing content did not result in prejudice.
188. **Feist v. Paxfire** [2016 WL 4540830] (S.D. N.Y. Aug. 29, 2016). In action seeking statutory and actual damages under the Wiretap Act, where the court purported to apply **Rule 37(e)**, the court barred a party from asserting evidence in opposition to a summary judgment motion or at trial. The court found it was not reasonable for a sophisticated plaintiff to utilize a "cleaner" after it filed suit, and while it "does not conclude that [the party] acted intentionally to deprive" she must "bear the risk" of running the cleaner and the court would "presume" that any missing cookies would have been "unfavorable." It also precluded the party from arguing "that statutory damages are to be awarded in this case" but did not rule on it. [The case has been cited for the proposition that the term "lost" also encompasses deletion, destruction, and in some cases, alteration; see also CAT 3, 164 F. Supp,3d at 497]
189. **Finger v. Jacobson** [2019 WL 7557821] (E.D. La. May 10, 2019). The Magistrate judge refused to consider any sanctions under Rule 37(e) for the act of a plaintiff physician's assistant changing to auto-delete when the physician was informed his storage limits were exceeded because there was no showing of "prejudice or bad faith" and there was no evidence that "the emails were relevant or proportional to this litigation."
190. **First American Title v. Northwest Title** [2016 WL 4548398] (D. Utah Aug. 31, 2016). In action against former employees who formed a competing business, hiring other former employees, the court methodically applied **Rule 37(e)** to several losses of ESI. Relief was denied where it was not shown that the ESI could not be restored through additional discovery or where no prejudice was shown. In one case, the new enterprise failed to take reasonable steps to maintain documents and thumb drive brought over by an ex-employee (*5). As to

those materials, the court permitted the introduction of evidence and argument under **(e)(1) before the jury**, but since there was no evidence of intent to deprive, denied evidence preclusion, an adverse inference, or monetary sanctions under subdivision **(e)(2)**. However, the court noted, “the jury will not be instructed regarding any presumption or inference regarding those materials” (*2). The jury awarded a substantial verdict against the former employees and court awarded \$2.9M in attorney’s fees 2016 WL 7350319 (D. Utah Dec. 19, 2016) and 2017 WL 1456460 (D. Utah April 24, 2017). The Tenth Circuit affirmed the refusal of a new trial. 906 F.3d. 884 (10th Cir. Oct. 9, 2018).

191. **First Financial Security v. Freedom Equity Group** [2016 WL 5870218] (N.D. Cal. Oct. 7, 2016) (**First Financial #1**). In a case involving allegations of tortious interference and unfair competition when employees left a company the court decided to issue a permissive adverse inference instruction under **Rule 37(e)** given that “intentional spoliation occurred” and the spoliated text messages “might have provided direct proof” that the defendants intended to recruit the team away from FFS. (*4) In footnote 1, the court explained that it would instruct the jury that when the new entity reasonably anticipated litigation, it was required “under the law” to preserve text messages possessed by its agents so they would be available for production. However, FEG’s agents failed to preserve their text messages and “as a consequence of this failure, you may, but need not, presume that the deleted text messages contained information that would have helped FES to prove that FRG intentionally encouraged the [named individuals] to leave FFS and join FEG. The failure to produce a database in native format was to be sanctioned by an adverse-inference instruction under **Rule 37(b)** which informed the jury that during pretrial discovery, the court twice ordered FEG to produce electronically stored data, concerning the circumstances under which [named individuals] left FFS and joined FEG but FEG did not produce the data and the jury may but need not infer that the data would have shown that the [former employees] enrolled in the same hierarchical order they had at the former employer, which preserved the flow of up-line and down-line payments for policy sales.. (*5-6 and n. 2). After a six-day trial, the jury found FEG liable for intentional interference and awarded FFS \$1.2M. The trial judge denied a new trial since the jury correctly decided the case, noting the two adverse inferences and that the witnesses who destroyed their laptops acted like they had something to hide.” (*7). The 2017 WL 3593369 (N.D. Cal. Aug. 21, 2017) (**First Financial #2**). [The Ninth Circuit record shows, as of May 1, 2018 a dismissal of the appeal]

192. **Fishman v. Tiger Natural Gas** [2018 WL 6068295] (Nov. 20, 2018)(Alsup, J). The court outlined a detailed series of steps it would take at trial under Rule 37(e)(1) to ameliorate the prejudice which resulted from a failure to preserve required recordings of telemarketing calls under California regulations. The jury will be “informed” of the destruction of evidence either by evidence put on by counsel or via an instruction, and permitted to decide if the sole remaining recorded call was “representative” of the sales pitches as a whole or not and whether the same conduct occurred class-wide, a finding which the court found to be reasonable. The jury could also infer that other sales calls, had they been preserved, would have been recorded without consent. (*5). The common-law duty to preserve, which attached under Rule 37(e) [citing the Committee Note], arose because “a reasonable party” in the position of the defendant “would have foreseen putative class litigation regarding misleading telemarketing calls” under the circumstances (*3). In addition, the court concluded that the party had failed

to take “reasonable steps to obtain and to preserve” the recordings, despite assuming that a third-party it had retained to do the telemarketing would have done so. It had the responsibility to do so and failed to take any steps to assure recordings were not destroyed, which a “reasonable party” in its position would have understood risked the loss of relevant evidence, even if an early preservation letter had not demanded that it preserve “sales pitches.” (*4). A final approval of a class settlement and motion for award of attorneys fees was subsequently entered. 2019 WL 2548665 (June 20, 2019).

193. **Fiteq. v. Venture Corp.**[2016 WL 1701794] (N.D. Cal. April 28, 2016) Rulings on pretrial motions in a dispute over an operating agreement relating to a Singapore efforts involving credit cards did not result in measures under **Rule 37(e)** because missed email of an executive was “restored or replaced” once the employees former computer was located. The moving party failed to prove that other responsive documents ever existed and duplicates were produced by other parties to whom they had been sent. The Court acknowledged the argument that it was foreclosed from use of inherent authority.
194. **Fitzpatrick v. Nys** [861 Fed. Appx. 108] (7th Cir. July 27, 2021). The 7th Circuit affirmed a denial of sanctions for failing to produce videos and photos which “had been inadvertently written over in the two years preceding the suit.” (111). The court found that a “spoliation sanction is proper only when a party has a duty to preserve evidence because he knew or should have known that litigation was imminent,” citing *Trask -Morton v. Motel 6 Operating LP.*, 534 F.3d 672, 681 (7th Cir. 2009). In addition, **Rule 37(e)** requires a “showing of bad faith,” citing the Rule and **Bracey v. Grondin**, 712 F.3d 1012, 1019 (7th Cir. 2013). The movant “had no evidence suggesting that Nys destroyed evidence to hid illicit conduct. (110).
195. **Flair Airlines v. Gregor** [2018 WL 8445779, at *3] (N.D. Ill. Dec. 14, 2018), *R & R adopted*, 2019 WL 1465736 (N.D. Ill. April 3, 2019). The Magistrate Judge recommended and the District Court agreed that sanctions were not warranted because defendants had not established that the party failed to take reasonable steps to preserve the recordings and that the ESI was lost as a result. The court cited *Schmalz v. Village of North Riverside* for the proposition that, relative to its predecessor the amended rule “significantly limits a court’s discretion” to impose sanctions for the loss or destruction of ESI. The courts refused to find an intent to deprive based on mere speculation.
196. **Fleming v. Escort** [2015 WL 5611576] (D. Idaho Sept. 22, 2015). In a patent infringement action with a substantial history of discovery abuse by defendant, the court authorizing an adverse inference for failure to preserve **samples of products using challenged source codes** illustrating changes at issue in patent litigation. The court held it had the authority to admit evidence of spoliation and to permit a jury to draw an adverse inference without a finding of bad faith under Circuit authority. (*4) It acknowledged that **Rule 37(e)** (not then in effect) was drafted to deal with costly and burdensome efforts to preserve, but argued that the burden could have been avoided if the defendant had discussed it with the other party, instead of sending it on a fool’s errand to try to try to buy copies of the product in the market.
197. **Flores v. AT&T** [2019 WL 2746774, at *10] (W.D. Tex. March 27, 2019). The court found it inappropriate to grant sanctions when “no information appears to have been lost.”

198. **Folino v. Michael Hines** [2018 WL 5982448 (W.D. Pa. Nov. 14, 2018)]. The results of a forensic examination of two ipads and a laptop computer discovered that they had been wiped of all data when a factor reset had been undertaken (ipads) and active data had been deleted (laptop), with no ability to recovery same. The court found an “intent to deprive” existed and dismissed the case because this “could not have occurred without intent.” (*3). It used “factors” from *Schmid v. Milwaukee Elec. Tool Corp.* [13 F.3d 76, 79 (3d. Cir. 1994)] as a “guide” in deciding on the remedy (degree of fault, degree of prejudice, availability of lesser sanction) and noted that the defendant has “failed to offer *any explanation at all*” of what had happened (emphasis in original), which convinced the court that ‘no such good faith explanation exists.’ It also awarded the costs and fees to bring the motion and to conduct the forensic examination.
199. **Fourth Dimension Software v. Der Touristik Deutschland GMBH** [2021 WL 5919821] (N.D. Cal. Dec. 15, 2021). In a breach of contract action contending that a licensee had inappropriately permitted overuse of the licenses without compensation, the court refused to grant a summary judgment for plaintiff given a material dispute of fact over when the delay in bringing suit waived the right of enforcement. (*7) However, it resolved a sanctions motion relating to the trial on the merits under **Rule 37(e)** by holding that the defendant had a duty to preserve the records because it knew or should have known that they would be highly relevant (*9) and that there was sufficient evidence of intentionality under the rule [requiring notice of potential relevance] because it “destroyed them shortly after receiving notice” that the party was prepared to sue. (*11) It announced that it would permit the jury to be instructed at trial that it could “presume” the records were unfavorable and that they would have shown that the party “breached its contract.” (*11).
200. **Fox v. Steepwater** [2018 WL 2008308, at *3] (D. Utah May 14, 2018). A court ordered preclusion of evidence as a lesser sanction in advance of trial. The court noted the importance of placing a duty to preserve at the time counsel was hired to help an unsophisticated plaintiff file an EEOC charge, since otherwise “counsel would have a perverse incentive to tell clients not to preserve evidence upon filing an EEOC charge.”
201. **Franklin v. Howard Brown Health Center** [2018 WL 4784668] (N.D. Ill. Oct. 4, 2018), *R&R adopted* 2018 WL 5831995 (Nov. 7, 2018). In harsh and sarcastically worded opinion critical of what the court described as a “bollixed” litigation hold, the Magistrate Judge recommended that in light of the gross negligence (“and that’s viewing things favorably”) the “best route is that proposed by the Advisory Committee in its notes to **Rule 37(e)(1)**, namely to allow the parties “to present evidence to the jury regarding the situation that was caused by defendant’s faulty and failed litigation hold.” It concluded that the loss of was both relevant and prejudicial (“the question is not whether the evidence has great probative weight, but “whether it has any and in some degree advances the inquiry”)(*5). It also noted that the trial court was “in the best position to effect sanctions for loss or non-production of evidence as only the trial judge can see how the evidence unfolds and the import it has. Indeed, as the trial unfolds, “perhaps the jury might even be allowed to assess the evidence and, properly instructed, find the defendant acted intentionally.” (*7) The District Judge granted the motion and said it would allow “the parties” to present evidence and argument to the jury” regarding

the obstruction or failure to preserve electronic information and “will consider appropriate jury instructions regarding this evidence at trial.” (2018 WL 5831995 Nov. 7, 2018).

202. **Franklin v. Shelby County Board** [2021 WL 5449005] (W.D. Tenn. Nov. 22, 2021). In a single plaintiff former employee action where the plaintiff inadvertently deleted recordings [*10] with employers’ representatives, the District Court, upon de novo review, adopted the Magistrate Judge’s recommendations against sanctions under **Rules 37(b)** and **37(e)**. [2021 WL 6066673] (W.D. Tenn. Sept 28, 2021). Disagreeing with the Magistrate Judge, the District Judge held that **Rule 37(b)** was not necessarily inapplicable (*4), but refused to order measures under Rule 37(b)(2)(i) and (ii), since discretionary and not under Rule 37(b)(2)(C) (mandatory fees) since the failure to comply was substantially justified (the failure to comply was due to his inability to produce the recordings”)(*7). The court also refused to sanction under **Rule 37(e)(1)**, agreeing with the Magistrate Judge, because while a “a negligent failure to preserve ESI that a party was under a duty to preserve may warrant ‘at least some evidentiary sanctions,” citing Gomez, 2021 WL 3406687, at *4 (M.D. Tenn. Aug. 4, 2021), the court should be sensitive to sophistication, given that individual litigants may be less familiar with preservation obligations (per Committee Note) and routine-good-faith operation would be a relevant factor (same). The court focused on whether the duty to preserve had attached and could not resolve the issue, but, in any event “declined” to find that Plaintiff failed to take reasonable steps to preserve the recordings while he had a duty to do so. (*9) An unrepresented party such as the one in this case who “inadvertently lost recordings and instantly takes steps to recover the data is “not the court envisioned litigant who failed to take reasonable steps to secure data in anticipation of litigation.” In addition, plaintiff failed to prove “even by a preponderance of the evidence” that the party acted with the intent to deprive, the Court adopted the recommendation that sanctions pursuant to **Rule 37(e)(2)** be denied. (*10).

203. **Freidig v. Target** 329 F.R.D. 199 (W.D. Wisc. Dec. 19, 2018). The court found the predicate elements of Rule 37(e) to exist when Target failed to preserve video from the period before a slip and fall and held that “as a form of relief under Rule 37(e)(1), it would determine that a reasonable jury could conclude that the puddle had been on the floor long enough to give Target constructive notice of its presence leading it to deny Target’s motion for summary judgment. The court found prejudice because the plaintiff could not corroborate the statement that no one had walked through the area after the employee had (who testified that she had not noticed the puddle) (209). The court denied request for Rule 37(e)(2) because she had not adduced any evidence of intent, having failed to meet her burden of proof of intent, even though there was a rebuttable presumption of unfavourability due to a violation of records retention policy. (210). The court made a number of other interesting rulings. For example, it refused to find that the “restore and replace” requirement was satisfied by obtaining “comparable” evidence, such as eyewitness testimony, because “that is not what Rule 37(e) means. The provision is “referring to digital backups and the likelihood that electronic documents have multiple versions.” It also held that the fact that under its policy, it was to save footage of 20 minutes before and after an accident showed that Target was “aware, as a general matter, that” footage prior to an accident is “commonly relevant” to litigation and, in any event, “a reasonable person” in Target’s position would have realized it was relevant. It concluded that

the duty attached because Target was thus aware that an action like this one “could lead to litigation.”

204. **Friedman v. Phila. Parking Auth.** [2016 WL 6247470](E.D. Pa. March 10, 2016)(Opinion); see also 6246814 (Order). In action by taxi cab company against its local regulators, **Rule 37(e)** was not applied because there was (at least not yet) any showing that ESI was “lost” (§69) or that the party acted with an “intent to destroy” since negligence or gross negligence is insufficient (§73) or that there had been any prejudice under subdivision (e)(1). After additional discovery, the party “may move for evidentiary rulings, short of an adverse inference, relating to the failure to preserve” since “absent prejudice,” the court could not define the scope of the evidence to be admitted or argued to the jury. (§85). However, while court had power to act (“without limitation”) under its inherent authority to remedy litigation misconduct (§75), attorney’s fees were awarded under **Rule 37(a)** as a more “tailored” remedy (§76). The Court held that movants needed to establish by a preponderance of the evidence the “facts warranting findings under Rule 37(e)” and rejected the conclusion in CAT3 that a higher standard of proof was required for sanctions under Rule 37(e) since “non-monetary” sanctions do not involve fraud, the party sought only an adverse inference, the fact that an analysis of the state of mind did not require it and, applying a higher standard might allow a spoliator to benefit and the party was only seeking an adverse inference. (§58-59).
205. **FTC v. DIRECTV, Inc.** [2016 WL 7386133] (N.D. Cal. Dec. 21, 2016). The court refused to sanction a party that had preserved screen shots, but not the fully interactive website. The FTC argued that the party had failed to take ‘reasonable steps’ and that it was entitled under subdivision (e)(1) of **Rule 37(e)** to an order precluding use of an expert report. The Court held that the FTC should have been “more proactive in its efforts to obtain discovery.” (*4). It also noted that the FTC had not shown it was “sufficiently prejudiced to warrant exclusion of the information,” which was greater than what is necessary to cure the prejudice” identified, but ordered an additional deposition of the expert, noting that the case would be resolved by a bench trial, not a jury. “[A]fter the 2015 amendments to Rule 26(b)(1), the FTC is only entitled” to discover information that is relevant and proportional to the needs of the case” and DIRECTTV could not be sanctioned under Rule 37(e) for failing to preserve ESI “solely because” the FTC asserts that “potentially relevant” other ESI may have existed (at *5).
206. **FTC v. F&G International** [339 F.R.D. 325] (S.D. Ga. Sept. 20, 2021). Applying the “framework” of Rule 37(e), but “draw[ing] direction from general spoliation case law since the pertinent analyses of duty to preserve, prejudice and “intent to deprive” are essentially the same, (330) a Magistrate Judge ordered sanctions of preclusion from disputing the FTC’s evidence of their marketing claims or that they were unaware that customers were questioning them as well as imposed a rebuttable presumption that a witness knew claims were false and unsubstantiated and the destroyed ESI was relevant and favorable to the FTC and unfavorable to defendants. (332-33) It did so because “[t]he Eleventh Circuit has not determined whether the new Rule 37(e) has displaced the multi-factor Flury test,” noting the decision in ML Healthcare v. Publix Super Mkts., 881 F.3d 1293, 1307 (11th Cir. 2018). (329). It noted that courts had suggested that the intent to deprive standard was “harmonious” with the “bad faith” standard previously established in that Circuit and concluded that the FTC had met its burden of demonstrating that defendants had acted with an ‘intent to deprive’ it of relevant evidence

by affirmatively deleting emails with customers and potential customers after being on notice of this investigation and subsequent lawsuit. (332). It found “no need to analyze whether the FTC has demonstrated prejudice sufficient to warrant sanctions under **Rule 37(e)(1)**, since its finding of intent under Rule 37(e) supports and inference of prejudice to the FTC.” (n. 3) [citing advisory Committee Note].

207. **FTC v. Noland**, 2021 WL 3857413, at *6 (D. Ariz. Aug. 30, 2021). A court held that it “cannot rely on its inherent authority” to impose measures for loss of ESI, citing *Newberry v. County of San Bernardino*, 750 Fed. App’x 534 (9th Cir. 2018). It quoted Gensler as describing **Rule 37(e)** as having been “completely rewritten” in 2015 to “provide a nationally uniform standard for when courts give an adverse inference instruction, or impose equally or more severe sanctions, to remedy the loss of ESI.” (*5) After carefully establishing the prerequisites for such sanctions from deletion of Signal apps and messages as well as at least one email from deletion of ProtonMail, the court found “a general adverse inference” to be “proper” which would, as requested by the FTC, provided that the “spoliated evidence is presumed to be unfavorable to the Individual Defendants.” (*14) It noted that the conduct violated not only **Rule 37(e)**, but also various orders, which raise the possibility of **Rule 37(b)(2)** sanctions, including the drawing of an adverse inference.
208. **FTC v. Vyera Pharmaceuticals** [2021 WL 2201382 and 2021 WL 2206307](SDNY June 1, 2021). The District Judge sanctioned parties connected to imprisoned official of Vyera for failures to preserve and produce texts from iPhones and a Blackberry by evidentiary sanctions relating to preclusion at trial under **Rule 37(e)**.
209. **Funk v. Belneftekhim** [2019 WL 7603139] (Jan. 17, 2019). The court refused to apply Rule 37(e) because “the documents at issue here are not ESI.” (ftn. 10) Applying Pension Committee, the court precluded use of certain records at trial but did not preclude the witness from testifying and that the party would be free to inquire of the witness without his being able to refresh his recollection from the records. (*8).
210. **Gaina v. Northridge Hospital** [2018 WL 6258895] (C.D. Cal. Nov. 21, 2018). After finding that a party failed to take reasonable steps and had prejudiced the other party by partial production of text messages, the court awarded attorney’s fees – to be paid by Kirkland and Ellis, counsel to plaintiff, to deal with prejudice under subdivision (e)(1) but refused to give an adverse inference or an evidentiary sanction in the form of a jury instruction informing the jury of the discovery conduct and prejudice (n. 4). The court found that there was insufficient evidence of the requisite intent to deprive. On appeal, the District Court found there was no clear legal error in the ruling and affirmed it. 2019 WL 1751825 (C.D. Cal. Feb. 25, 2019).
211. **Garcia v. Alka** [2022 WL 180750] (N.D. Ill. Jan. 20, 2022). A Magistrate Judge refused to agree to give a spoliation instruction regarding missing reports in the form of an adverse inference under 7th Cir. Pattern Instruction 1.20 [the 2005 Edition of which appears to require a finding of intentional and bad faith conduct by a preponderance of the evidence to justify an “assumption” that the evidence would have been unfavorable to the other party] to modify the instruction to accommodate a showing that acting at fault would be sufficient, since the moving party had failed to show “any facts that suggest that Defendants’s intentionally destroyed the reports in bad faith.” (*2). It refused to follow **National Hockey League**, 427 U.S. 639, 640

(1976), noting that Rule 37 had been amended as recently as 2015 “in part to codify common law spoliation principles in the context of electronic discovery” (*3) and **Rule 37(e)** requires a finding of intent or bad faith in that context. The “same is true of a handwritten police report preserved in an electronic database.”

212. **Garrison v. Ringgold** [2020 WL 6537389] (S.D. Cal. Nov. 6, 2020). A district court disagreed with the Magistrate Judge that **Rule 37(e)** applied in a case where the defendant argued that its crypto-asset accounts, wallets, software and transaction had been hacked and could not be produced. The Magistrate Judge had recommended a default judgment after finding the party had intentionally destroyed ESI with the intent to deprive under **Rule 37(e)**. [2020 WL 5511978] (S.D. Cal. Sept. 11, 2020)]. The District Judge agreed to the use of **Rule 37(b)** for the terminating sanctions.
213. **Garrit v. City of Chicago** [2018 WL 11199008] (N.D. Ill. March 6, 2018). After applying **Rule 37(e)(1)** and the “Advisory Notes” the Magistrate Judge recommended that the court permit the party to “present evidence to the jury regarding the loss of ESI” on a cellphone and the jury would be instructed that it may consider such evidence “along with all the other evidence in the case in making its decision.” It was noted that “this measure only allows the party to inform the jury about the loss of the ESI.” The court cited *Nuvasive v. Madsen Medical*, 2016 WL 305096, at *2 (S.D. Cal. Jan. 26, 2016) and *Cahill v. Dart*, 2016 WL 7034139, at *5 (N.D. Ill. Dec. 2, 2016). It stated that “[t]his evidence and instruction should remedy some prejudice that the defendants claim to have suffered as a result of the lost phone.” It also awarded attorneys fees under **Rule 37(a)(5)**, noting that Cahill had also imposed fees where the loss was unintentional. In a footnote, citing *Sniderv. Danfoss*, it noted that a motion under Rule 37 for sanctions was “dispositive” [in the Seventh Circuit]. The R&R was adopted without comment by the District Judge on June 27, 2018 after overruling all objections. (2018 WL 11199016).
214. **George & Company v. Spin Master** [2020 WL 3895098] (E.D.N.Y. July 7, 2020). The court refused to allow an amended claim asserting a claim for spoliation on the grounds, inter alia, that it would be futile. “Rule 37(e) is a procedural rule governing discovery and preservation of electronic information and permits the entry of sanctions, *see* Fed. R. Civ. P. 37(e); it does not provide George & Co. with a cause of action.” (*8)
215. **Gertcher v. Therrian** [2022 WL 842655] (W.D. Mich. Mar. 22, 2022). In a case where the court refused to apply Rule 37(b) (no prior order violated), focused mostly on inherent authority cases, while conceding that the rule “most applicable” to the case, which involved spoliation of audio recordings by police officers, was Rule 37(e), the court refused to act under either. The District Judge stated that “even if the Court has *inherent* authority to issue a default judgment or an adverse inference separate and apart from **Rule 37(e)**,” (emphasis in original), it would not do so because it would effectively require the jury to infer that the recording depicted the defendant using more force than necessary, tipping the scales decisively in the plaintiff’s favor. (*6).
216. **Gilmore v. Jones** [2021 WL 5280970] (W.D. Va. Nov. 12, 2021). In the context of a defamation action by a video photographer who filmed the driver into the crowd of counter protesters at “Unite the Right” the court decided to issue sanctions for discovery misconduct

under Rule 37(b). It noted in passing, however, that **Rule 37(e)** “does not displace the court’s ability to impose sanctions under Rule 37(b)(2) when it finds that the party’s failure also violated an order to provide or permit discovery.” (citing *Sines*, 2021 WL 25284807, at *8 (collecting cases)).

217. **Gipson v. Managementt. & Training Corp.** [2018 WL 736265 (S.D. Miss. Feb. 6, 2018)]. In a pithy opinion, the Chief District Judge determined that **Rule 37(e)** applied to the loss of a prison surveillance video in a prison death case and, after denying a summary judgment motion as premature, determined that it would decide at the charge conference after the parties rest if intent to deprive exists, because while some evidence has been submitted, “it would be easier to assess on a full record.” Consistent with the Committee Note, the Court “would at least consider allowing the jury to decide the intent issue - assuming there is sufficient trial evidence supporting it.” There are no further reported decision in the case.
218. **Glaukos v. Ivantis**, 2020 WL 5914552, at n. 4 (C.D. Cal. July 30, 2020). See discussion at *In Re Ivantis*, *infra*.
219. **Global Hookah Distributors v. Avior** [2020 WL 4349841] (W.D. North Carolina July 29, 2020). The District Judge refused to find that **Rule 37(e)** authorized sanctions for failing to preserve a website since it was changed before the duty to preserve arose, but it held that, given the fact that the rule did not apply, neither party was “foreclosed” from “arguing to the jury what it believes was presented on the website or informing the jury that Avior changed its website . . . such that it no longer is available in the form it existed” in the relevant period.
220. **Global Material Technologies v. Dazheng Metal Fibre** [2016 WL 4765689, at *9] (N.D. Ill. Sept. 13, 2016). In U.S. action against Chinese steel fiber metal supplier whose claims were limited to a trade secret claim by the preclusive impact of Chinese court proceedings, the Court entered a default judgment on liability (leaving damages for trial) under **Rule 37(e)** because the court concluded that when the parties “discarded one source of electronic evidence and failed to preserve others, they did so deliberately and in order to prevent [the moving party] from obtaining that evidence and using it” in the litigation. The court did not find it necessary to make a finding of prejudice because it was not required under **Rule 37(e)(2) (*10)** and it applied Circuit standards (in addition) in finding that default was appropriate because lesser sanctions were not adequate to reflect the seriousness of the egregious conduct.
221. **GMS Industrial Supply v. G&S Supply** [2022 WL 853626] (E.D. Va. Mar. 22, 2022). A District Court found that the filing of a **Rule 37(e)** motion by the plaintiff was not untimely (plaintiff argued it was not seeking discovery-related sanctions, and at its heart the motion was an “evidentiary issue”). The court agreed that it was timely since it would not entail reopening discovery or delaying the trial. It found that the former employee and part owner had made deletions from the laptop, desktop and tablet with an intent to deprive, despite his claim he had downloaded and used “file shredder” after the duty to preserve applied only to delete personal information, in part because he failed to tailor the deletions but “acted with the intent to deprive GMA of *all* information stored on his desktop, including possibly relevant documents. (emphasis in original) [citing, in footnote 10, excerpts from the File Shredders website showing options to shred documents for specific files (“Such actions reach beyond simple and even

gross negligence”]. It found the conduct “warrants an adverse inference instruction” and further instructed the defendant and his company to pay reasonable attorneys fees and costs incurred in preparing the motion for sanctions, citing Goodman v. Praxair Servs., 632 F. Supp.2d 494, 523 (D. Md. 2009).

222. **GN Netcom v. Plantronics** [2016 WL 3792833] (D. Del. July 12, 2016)(**NetComm#1**). After concluding that a senior executive failed to take reasonable steps to preserve emails which could not be restored or replaced, despite major corporate efforts to meet its obligations, the Court imposed monetary sanctions subdivision (e)(1) to partially address prejudice, ordered payment to the moving party of a \$3M **punitive monetary sanction** (three times the penalty imposed by the party on its executive who deleted the emails at issue) and imposed a permissive adverse inference instruction having found that the party had acted in bad faith and with the intent to deprive on the “totality of the record,” citing the double deletion of the email. (*7-8, *12). The conduct was attributable to the employer and was “buttressed” by actions of counsel and the party in the initial refusal to acknowledge retention of an expert (Stroz) and permit them to complete an analysis of the missing email. (*7-8) The court shifted the “heavy burden to show lack of prejudice” to the bad faith spoliator, which it did not meet. (*9-12) Subsequently, in **2017 WL 4417810 (D. Del. Oct. 5, 2017)(NetComm#2)**, it issued a pretrial order setting for the “Stipulated Facts” which would read to the jury, as well as the pre-evidence instructions and post-trial permissive adverse inference instructions. The jury was to be informed that “Plantronics committed spoliation” and that evidence relevant to this case “may have been destroyed,” meaning that you may hear questions and answers from the parties referencing missing or destroyed emails.” Thus, “[w]hile the exact contents of the spoliated evidence are unknown, you, the jury will be permitted – but not required – to infer that the lost documents were relevant and favorable to GN’s case and/or harmful to Plantronics case.” (*2). In the final instruction to the jury, it was told that it “may, but are not required, to presume” those conditions and “alternatively, you may infer that the evidence not produced would merely have been duplicative of, or similar to, the evidence before you.” (*3). The jury was also told that “your role is to determine whether Plantronics’s spoliation tilted the playing field against GN.” If so, the permission given you by the court to infer “is designed to allow you to balance that playing field, should you feel it is necessary.” (*3). It also read a series of stipulated facts which detailed the spoliation and actions of Plantronics and the results of its efforts to recover the missing emails. **In January 2018, after a six-day jury trial and a verdict for Plantronics**, the court refused a new trial. (**2018 WL 273649, at n. 2 (D. Del. Jan. 3, 2018)(NetComm#3)**). The court defended its decision to give a permissive adverse inference rather than a dispositive sanction. It explained that the “financial sanctions” amounts to nearly \$5M and that “the lesson” was that in cases “in which a dispositive sanctions is not warranted” the court can provide a fair trial to both sides by “permitting the jury to learn of the improper and to “assess” what impact, if any, it had on the ability to prove the case, while keeping the focus of the trial on the merits . The Third Circuit affirmed in part, reversed in party and remanded for a new trial on July 10, 2109. **930 F.3d. 76 (3rd Cir. July 10, 2019)(NetComm#4)**. The court (2-1) found that the District Court acted within its discretion when it denied the motion for default judgment, instead instructing the jurors that they were permitted to draw an adverse inference against Plantronics because of the missing emails. However, the court held the failure to allow an expert to testify on the extent of the spoliation (the court handled it by stipulations) “could have had an impact on the merits of GN’s antitrust

claims and it is “possible, if not entirely probable” that as a result the jurors felt only a few hundred emails were deleted where they “might have taken a very different view of whether to apply an adverse inference.” It granted a new trial because “we do not have requisite sure conviction that GN was not prejudiced” by the exclusion of the testimony, and the error was not harmless, so a new trial was granted. The Sedona Conference *Commentary on ESI Evidence & Admissibility (Second Edition)*, 22 Sedona Conf. J. 83, 178 (2020) notes that while there is a strong preference to have cases adjudicated on their merits, there is an “equally strong concern that the jury should have an adequate presentation of the facts underlying the trial court’s decision to give the permissive inference instruction” and “in some cases, that adequate presentation cannot be made by way of stipulations.”

223. **Goines v. Lee Memorial** [2019 WL 4016147, at n. 10] (M.D. Fla. Aug. 26, 2019). In a case where the court did not impose spoliation sanctions under Rule 37(c), **without mention of Rule 37(e)** (*6), it noted in a footnote that the party was not precluded from introducing into evidence “the facts concerning [the] failure to preserve relevant evidence,” citing two pre-Rule decisions.
224. **Goldrich v. City of Jersey City** [830 Fed. Appx. 88 (Mem) (3rd Cir. Nov. 25, 2020)]. The Court of Appeals refused to find it an abuse of discretion for the District Judge to have only required the Plaintiff to reimburse the City for its expenses when an adverse inference instruction was not, in fact, used at trial and had also refused, as the City requested to dismiss the case or give it more monetary sanctions. The court noted that the award was under **Rule 37(b)** and not **Rule 37(e)** for the failure to obey an order to provide or permit discovery, regardless of any failure to take reasonable steps to preserve ESI. (*1-2)
225. **Gomez v. Metropolitan Government** [2021 WL 34066687] (M.D. Tenn. Aug. 4, 2021), *new trial denied after verdict against plaintiff*, 2021 WL 5458133 (M.D. Tenn. Oct. 13, 2021). In ruling on a motion relating to admitting evidence of spoliation at trial, the trial judge cited **Rule 37(e)** and concluded that “at least some evidentiary sanctions” was appropriate where an employer had negligently failed to take reasonable steps to preserve contemporaneous emails from an account from which a hateful email had been sent to the plaintiff. It noted that that “there is nothing before the Court that the emails can be ‘obtained from another source.’” It planned to allow evidence and argument that the email came from another employee as evidence of a hostile work environment, and the jury would be told it could “give such evidence and argument whatever weight you deem appropriate as you consider all the evidence presented at trial” and that the party had a duty to preserve emails from two email accounts, including emails “contemporaneous” to a specific hateful email, but had “failed to do so.” It also planned to preclude the employer from presenting any evidence that the plaintiff was at the other employees workstation or that the other employee was not there when the email was sent, but intended to admit evidence that the other employee sent emails “in close proximity” to it. (*4),
226. **Gonzalez-Bermudez v. Abbott** [408 F. Supp.3d 25] (D.P.R. Sept. 30, 2019)(**Abbott #2**) After a jury trial and a verdict for the Plaintiff against Abbott, the court refused to grant a new trial based on the argument that the court had erred in allowing evidence of spoliation to be introduced at trial. It concluded it had acted appropriately under **Rule 37(e)(1)** and the result

was consistent with *Virtual Studios v. Stanton Carpet*, 2016 WL 5339601 (N.D. Ga. 2016), a case cited by the defendants. (*47-48). During the trial, the defendant had failed to object to the plaintiff's arguably speculative direct testimony about what the deleted emails might have shown and the defendants had engaged in extensive cross-examination which spotlighted their failure to timely issue a litigation hold. Prior to the trial, the court had refused to find whether there was an intent to deprive because there was not, at the time, enough facts of record and had determined to revisit the issue after the evidence was presented. As it turned out, the plaintiff withdrew the request for an adverse inference instruction. [214 F. Supp.3d 130 (D. P.R. Oct. 9, 2016)] (**Abbott #1**). As of November, 2020, an appeal to the First Circuit is pending.

227. **Good Kaisha IP Bridge v. TCL Comm. Tech.** [2018 WL 3387680] (D. Del. July 12, 2018). The court denied a request for an adverse inference instruction under Rule 37(e)(2) because the evidence contradicted the assertion that the party sought to intentionally deprive the other party of the spreadsheet.
228. **G.P.P v. Guardian Prot. Products** [2016 U.S. Dist. LEXIS 88926] (July 8, 2016) (E.D. Calif.) In a Memo regarding telephonic resolution of ongoing discovery disputes, the court noted that because a custodial mail box has been produced involving the sole recipient of emails at issue, a sanctions under **Rule 37(e)** were not available since the email not lost, since under **Rule 37(e)** it can be restored or replaced. Further discovery was ordered as to non-email ESI identified to determine if it is in fact lost, which would implicate Rule 37(e). The court also noted the relationship between relevance and the duty to preserve.
229. **Grant v. Gusman** [2020 WL 1864857] (E.D. La. April 13, 2020). In refusing relief under **Rule 37(e)** and **failing to compel under Rule 26(b)(2)(B)**, the Chief Judge of the Eastern District noted that the parties had focused on the “bad faith” requirement previously used in the Fifth Circuit in *Buzman*, 804 F.3d. 713. However, the 2015 version does not mention “bad faith” and the Southern District of Mississippi had noted that the Fifth Circuit had not clarified if its prior spoliation jurisprudence had been “abrogated or otherwise amended.” In any event, the party cannot meet either the bad faith nor intent to deprive standard. (at n. 175). It also noted that evidence of destruction as party of a regular course of business is insufficient to support a finding of intent to deprive as required by Rule 37(e)(2). The most severe measures are not permissible here because they party did noting more than a negligent continuation of its routine policies. (at *12).
230. **Greer v. Mehiel** [2018 WL 1626345] (S.D.N.Y. March 29, 2018), *motion for relief den.*, 2019 WL 400607 (S.D.N.Y. Jan. 31, 2019), *and aff'd* 805 F. Appx 25 (2nd Cir. 2020). The District Judge refused to sanction deletion of emails under **Rule 37(e)** because they were restored or replaced by copies and the court found no basis to conclude that any was missing, given that it was possible that the witness statement that she had seen one referred to one them. The court went on to grant summary judgment for the defendant, and the Court of Appeals, after de novo review affirmed, noting that it had found no abuse of discretion in the “discovery rulings” of the lower court.

231. **Greene v. Bryan** [2019 WL 181528] (E.D.N.Y. Jan. 14, 2019). The court ruled on an in limine motion that Rule 37(e) applied but refused to find that a party was entitled to an order of preclusion or an adverse inference because “he fails to demonstrate that he is entitled to sanctions. The court noted that “the Rule provides for “two categories of sanction” and notes that for evidence other than ESI, a movant can obtain a severe sanction that a party engaged in “negligent spoliation.” [citing *Ungar* 2018 WL 5777123, at 3]. It also precluded use of certain video footage under FRE 403 because it had little probative value for reasons unrelated to spoliation issues.
232. **Granados v. Traffic Bar and Rest.** [2016 WL 9582430] (S.D. N.Y. Dec. 30, 2015) Motion for sanctions dismissed as premature without showing that missing evidence existed and that it was relevant. To the extent it was ESI, Judge Francis implied that **Rule 37(e)** would apply rather than **Rule 37(b)**, despite the presence of a discovery order which, under the court’s view, applied to spoliation which occurred before the order was issued. (at n.4 & 6). The court also refused to apply its inherent power because of a lack of bad faith.
233. **Guarisco v. Boh Brothers** [2019 WL 4881272, at *8] (E.D. La. Oct. 3, 2019). The court refused to apply Rule 37(e) to address the alteration of digital photographs which were not permanently “lost” since an unaltered photograph of the conditions had been recovered from a Facebook post by the plaintiff after the accident at issue in the case. The court noted, however, that since the use of inherent power was “not limited by overlapping statutes or rules [quoting from *Haeger v. Goodyear Tire*, 793 F.3d 1122, 1131-32 (9th Cir. 2015)], its inherent power “is certainly not restricted when the procedural rule does not sanction the precise conduct at issue – Plaintiff’s unsuccessful attempt to destroy or alter evidence.” Accordingly, it sanctioned the conduct under its inherent powers because for a party to “avoid” sanctions because it was unsuccessful would threaten the integrity of the judicial process, citing *CAT3 v. Black Lineage*, 164 F.Supp.3d 488 (S.D.N.Y. 2016)). It found that the party had intentionally altered evidence and the other party had been prejudiced and concluded that the “least severe sanction” to deter future conduct would be to impose the expert fees incurred in analyzing the topic on the non-moving party.
234. **Gunter v. Alutiiq Advanced Security Solutions** [2021 WL 6126295] (D. Md. Dec. 28, 2021). In a single plaintiff discrimination action where the *pro se* plaintiff produced allegedly altered text messages which differed from those of his former employer, the Magistrate Judge found that he had failed to take reasonable steps to preserve under **Rule 37(e)** when he deleted the messages without preserving an electronic copy “(or even a full print copy) of a download and “did not fulfill his obligation to preserve evidence.” (*4). However, the court noted that it could not recommend dismissal because it could not find “intent to deprive” to exist for the same reasons it could not justify dismissal under **Rule 41(b) or the “courts’ inherent authority.”** The court had found it did not have enough evidence before it to justify dismissal of his case “for malfeasance” under its inherent powers, citing *Beach Mart v. L& L Wings*, 784 F. App’x 118, 124 (4th Cir. 2019, quoting from *Projects. Mgt v. Dyncorp*, 734 F.3d 366, 373 (4th Cir. 2013) that dismissal is available if a party “deceives [the] court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process.” Instead, it recommended that under **Rule 37(e)(1)** the plaintiff be barred from relying on the text messages at issue, since the defendant was

“hamstrung” in challenging the authenticity of them. (*4). The Magistrate Judge also noted that Rule 26(g) might apply to a pro se denial of the existence of text messages that were ultimately found on his phone by a forensic review. (*5) The District Judge subsequently noted that he would “receive further evidence” on the pending Motion for Dismissal and hold an evidentiary hearing “with respect to the allegedly fraudulent messages” after a forensic expert for the defendant was permitted to analyze the phones at issue. (2022 WL 137737, D. Md. Jan. 14, 2022).

235. **Roslyn Hale v. Mayor and City Council of Baltimore** [2022 WL 374512, at *7] (D. Md. Feb. 8, 2022). A plaintiff had no duty to preserve under Rule 37(e) or inherent authority to control the judicial process when she deleted a text message because she had no plans or intention to file a lawsuit or take any kind of action under several months later. (*6)
236. **Hamilton v. Ogden Weber Technical College** [2017 WL 5633106] (D. Utah Nov. 22, 2017)(**Ogden Weber #1**). A Magistrate Judge recommended that a College be sanctioned under Rule 37 for the negligent failure to retain email despite a retention policy because it had the duty to do and because plaintiff was “prejudiced by the loss of an opportunity to discover” information which was “relevant because they can reasonably be expected to contain information about possible retaliatory motive.” It planned to “allow both parties ‘to present evidence to the jury concerning the loss and likely relevance of [the lost emails related to the first two requests] and instruct[] the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision,” (*3). The court noted “there does not appear to be any alternative equivalent discovery” that could replace it and since the “true extent of this prejudice is uncertain,” the “most appropriate sanctions is one that allows the parties to argue the effect of the loss of this evidence to the fact finder. (*3). Subsequently, however, the same magistrate Judge recommended issuance of a summary judgment against “**Beth Scott (f.k.a. Hamilton)** because a reasonable jury could not find an adverse employment action. 2018 WL 5260875 (D. Utah August 10, 2018)(**Ogden Weber #2**). The Magistrate Judge rejected the argument that the plaintiff was entitled to a presumption as to the favorability of the lost emails, since they were lost by negligent conduct and could have been favorable to either party. (n. 109). After reviewing objections to the R&R, the District Judge affirmed the summary judgment because “Judge Pead did not find that the College intentionally destroyed the emails or that it did so in bad faith.” Merely that the “College negligently allowed the emails to be deleted.” “Absent a finding of bad faith, Scott is not entitled to a presumption that lost evidence would support her claims” quoting from the **Committee Note to Subdivision (e)(2)**. 2018 WL 4676154, at *1 (D. Utah Sept. 28, 2018) (**Ogden Weber #3**) (citing *EEOC v. JetStream*, 878 F.3d 960, 966 (10th Cir. 2017), quoting the Committee Note). As the District Judge put it, “Judge Pead’s sanction for negligent spoliation cannot be used to push a claim that might not otherwise survive summary judgment over the line to a jury trial. (2018 WL 5260875, at *2)
237. **Hamilton v. Oswego Community Unit School District** [2022 WL 580783] (N.D. Ill. Feb. 25, 2022). A Magistrate Judge refused to impose sanctions under Rule 37(e) because of deletion of photography on a personal cell phone or the alleged deletion of a note in a database. The duty to preserve never attached to the former, and if it had, the court did not find prejudice or intent to deprive. The movant failed to meet the burden of showing that the note existed in

the first place, “let alone destroyed.” (*4) Moreover, there was no showing of a failure to take reasonable steps to preserve or any intent to deprive the movant of the note in this litigation. (ftn. 4) (The court illustrated the logic of the Rule by reproducing a flow chart from DR Distributors, 2021 WL 185082 at *75). The court also noted, however, that it was not prohibiting the plaintiffs from “raising the whereabouts of the comments or access to the nurses notes at trial.” (ftn. 3.).

238. **Hamrick v. Splash Transport** [2022 WL 291894] (E.D. Tenn. Jan. 31, 2022). A court refused to rule on a motion for sanctions dealing with missing text messages under Rule 37€ because “it does not appear to the Court that the parties have followed up to determine whether the deleted information on the phone was saved elsewhere.” (*3).

239. **Hardy v. UPS Ground Freight** [2019 WL 3290346] (D. Mass. July 22, 2019). The Magistrate judge refused to order forensic examination of a plaintiff’s cell phone in a employment decision alleging racial discrimination because of alleged deficiencies in production highlighted in a deposition. The court treated the request first under Rule 26(b)(1), in terms of proportionality to the needs of the case, citing decisions focusing on the likely recovery will occur. It cited *John B. v. Goetz*, 531 F.3d 448, 459-60 (6th Cir. 2008), *abrogated on other grounds* by *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016) for the point that courts are “wary” to grant such requests unless the information is at the heart of a claim or defense in the ongoing litigation. (*3) It also cited *Riley v. California*, 573 U.S. 373, 403 (2014) and other cases relating to privacy concerns pointed out that there was no demonstration that the missing text messages were not available from the other employee, his supervisor, nor had proposed a protocol to restrict searches. Finally, the movant failed to show that forensic imaging of the cell phone was “a proper sanction” under **Rule 37(e)** for a variety of reasons.

240. **Harvey v. Hall** [2019 WL 1767568] (W.D. Virginia April 22, 2019). In a prisoner case the court ultimately denied any relief because it was “sheer speculation” to conclude that the ability to access the video would have produced evidence to support a claim against the parties to the lawsuit (which did not include the warden or the parties responsible for managing preservation issues). The court refused to penalize the defendants for “their colleagues oversights” but was willing to consider that conduct for purposes of considering the threshold requirements of Rule 37(e). (*6)

241. **Hashim v. Ericksen** [2016 WL 6208532] (E.D. Wisc. Oct. 22, 2016). In a prisoner case where the court refused a dismissal because of the destruction of physical copies of menus pursuant to retention policy, the court held that there was no evidence that the staff destroyed the evidence “with an intent to deprive their use by plaintiff in this litigation.,” citing Rule 37(e)(2) as well as *Faas v. Sears, Roebuck & Co*, 532 F.3d 633, 644 (7th Cir. 2008).

242. **Hassoun v. Searls** [__ F. Supp. 3d __, 2021 WL 859371] (W.D. N.Y. March 8, 2021). In a complex case dealing with the consequences of removal from the United States of a terrorism suspect during pending civil litigation challenging his detention, the District Court, while critical of governmental failures to preserve, refused to issue a “formal admonishment” under **Rule 37(e)(1)**. It noted the change in leadership of the DOJ “which may complicate any inquiry into the processes that led to the discovery failures in this case.” (*6) “Under these

circumstances, issuance of a formal admonishment is not warranted under **Rule 37(e)(1).**” (*8) However, the court “continues to be troubled by the conduct” of counsel, and the expectation that they would conduct themselves with utmost candor is “particularly keen” when it comes to attorneys representing the United States (*6). It appears they adopted “litigation tactics that did not serve the cause of justice” but in order to sanction under its inherent authority, it would have to find bad faith with a degree of specificity and conclude the counsel’s actions were “entirely without color,” which it will not make under the record before it. (*6). The court also refused to sanction by admonishment for failure to preserve because of a failure to preserve video, since no prejudice exists. (*8). It did grant attorney’s fees under Rule 37(a)(5)(a) because of a successful motion to compel unless further briefing shows that an exception applies. (*8)

243. **Hastings v. Ford Motor Company** [2021 WL 1238870] (S.D. Cal. April 2, 2021). The party moving to compel sought to require the producing party to “identify custodians and search databases using search terms provided by Plaintiff,” contending that it was “entitled to determine the way Defendants search their records.” (*2) The Court first described the process whereby under Rule 34(a) a party may request production of any document within the scope of **Rule 26(b)** but the response must state whether “inspection” will be permitted as requested or state an objection, including the reason. If the party chooses to “produce responsive information, rather than allow for inspection,” the timing is the same, and objections must state whether any responsive materials are being withheld. (*1). While the moving party seeks to obtain additional information and seeks to identify custodians and search databases, the court noted that “[n]othing in Rule 34 requires a requesting party to identify custodians or search terms or for a producing party to accede to [such] demands” (*2). Instead, the Court “subscribes to the view expressed in **Principle No. 6 of the Sedona Principles** [which it quoted from 19 Sedona Conf J. 1, 118 (2018)] that responding parties are in “best situated to evaluate” the procedures, methodologies and technologies” for preserving and producing their own ESI. (*3). It also noted that “the world of electronic discovery has moved well beyond search terms.” While search terms “have their place,” they may not be suited to all productions. The court refused to compel discovery as directed by the Plaintiff and held it must request information, regardless of how or where maintained, (*3). However, if “material information is not preserved or disclosed because of an unreasonable choice [by Ford], there may be sanctionable consequences. *See, e.g., Rule 37(e).* The parties should cooperate regarding discovery and be as transparent as possible regarding discovery.” (*3).

244. **Harper v. City of Dallas** [2017 WL 3674830] (N.D. Tex. Aug. 25, 2017). The court refused to grant any relief under Rule 37(e) where the moving party failed to demonstrate that ESI in the form of email and recordings of telephone conversations was lost because of a failure to take “reasonable steps.” (at *16). The court indicated it would entertain the motion only if an appropriate, properly supported motion were submitted.

245. **Hawley v. Mphasis** [302 F.R.D. 37] (S.D. N.Y. July 22, 2014). Pre-effective date description of **Rule 37(e)** as moving away from a negligence standard for spoliation under which “any intentional destruction suffices” and which need not be directed at the spoliation “to the other party’s detriment.” (*47)

246. **Haysbert v. Bloomin' Brands** [2021 WL 5003284] (E.D. Va. July 9, 2021). The court found that the movant failed to provide clear and convincing evidence under **Rule 37(e)** that any video footage had existed and that the contents of lost metadata from digital original of photographs was only minimally relevant and was not lost as the result of an intention to deprive the movant of its use in a slip and fall case at trial. The duty to preserve evidence applies only to evidence the party “knows or reasonably should know” is relevant to that litigation.” Here, while the Defendant reasonably anticipated litigation after the fall, that did not trigger a duty to preserve the lost ESI involving the photographs. (*5) Absent a genuine dispute about the photos authenticity which was “known or reasonably foreseeable at the time,” it had no duty to preserve the meta data. (*7) Moreover, there was no showing of an intent to deprive in any inaction to preserve video or secure meta-data. (*8).
247. **HCC Insurance Holdings v. Valda Flowers** [2017 WL 393732] (N.D. Ga. Jan. 30, 2017). In a decision applying **Rule 37(e)** to a pending case because it incorporates the existing duty to preserve (n. 3), the court refused to find that “spoliation” had occurred after reviewing forensic findings by a neutral expert of examinations of personal and work computers and assessing the explanations offered. The court distinguished cases where it was clear that relevant information existed on destroyed devices. Moreover, as to one defendant, there was no evidence that missing evidence was on personal laptop or “on a cloud-storage service in her control.”
248. **Hefter Impact v. Sport Maska** [2017 WL 3317413] (D. Mass. Aug. 3, 2017). In a particularly well-written opinion, a District Judge applied separate standards under **Rule 37(e)** and inherent powers to assess the spoliation of missing ESI and to missing handwritten notes, but awarded no measures for either. It found a weak showing of prejudice and a lack of intent to deprive to bar severe sanctions and a lack of substantial prejudice from failure to preserve notebooks. However, it concluded that “the decision to bring this motion, although not ultimately successful, was an entirely reasonable response under the circumstances, and the court required the party to pay the reasonable attorney’s fees and costs incurred in bringing the action, citing *In Re Ethicon*, 299 F.R.D. 502, 526 (S.D.W. Va. 2014)(*9).
249. **Helget v. City of Hays** [844 F.3d 1216] (10th Cir. Jan. 4, 2017). The Circuit court found that a party had waived the right to challenge the failure to resolve a spoliation motion in any meaningful way before a summary judgment was rendered. A party that fails to raise an evidentiary impediment to “meetings its summary judgement burden” for spoliation sanctions acts at its own peril.”
250. **Henry Schein v. Cook** [2016 WL 3212457] (N.D. Cal. June 10, 2016). A court cited Rule **37(e)** and Rule 26(a) as a basis for an *ex parte* preservation order and a request to order a mirror image of a former employee in a trade secrets case, deeming it a “reasonable request” The court ordered the party to avoid “altering, damaging, or destroying any evidence, electronic or otherwise, that is related to this litigation.”
251. **Hernandez v. Rush Enterprises** [2020 WL 7041822] (Dec. 1. 2020). In a pithy opinion, the Court refused to consider a **Rule 37(e)** motion - whose thresholds included “a culpable

breach that duty” – because the moving party failed to carry its burden “to demonstrate that defendants had a duty to preserve the material sought in the motion.” (*2)

252. **Hernandez v. Tulare County** [2018 WL 784387] (E.D. Cal. Feb. 8, 2018). A Magistrate Judge applied **Rule 37(e)** to a correction center’s failure to retain video footage of an incident resulting in prisoner injury resulting from non-compliance with procedures after a duty to preserve attached and acknowledging but not focusing on the “reasonable steps” requirement. However, because other measures addressed the issues, there was no prejudice and since the photo memory card was lost inadvertently, there was no intent to deprive and the court denied all relief under the Rule.

253. **Herzig v. Arkansas Foundation** [2019 WL 2870106] (W.D. Ark. July 3, 2019). The court found that the movant had established that the installation and use of Signal application (which allows users to receive and send encrypted text messages and to change setting to delete after a short period of time) was intentional and bad faith spoliation of evidence which “warrants a sanction.” (*5-6) However, while the court granted the motion for sanctions in part, the requested sanctions were denied as moot because the claims of the spoliating party were dismissed by the granting of a summary judgment, since “no reasonable juror could find in favor of Herzig and Martin on their age discrimination claim.” (*7) Rule 37(e) was not mentioned.

254. **Hice v. Lemon** [2021 WL 6053812] (E.D.N.Y. Nov. 17, 2021). In a salacious case involving action against a TV personality claiming emotional harm, a Magistrate Judge recommended use of an adverse inference and an award of fees against Plaintiff for deletion of clearly relevant evidence, but not a dismissal. It found an “intent to deprive” existed which it described as involving an “attempt to deceive this court by attacking the integrity of the litigation process. It opined that while a finding of “intent to deprive” under **Rule 37(e)(2)** was sufficient to support an award of sanction, but it “nevertheless” considered whether prejudice existed because if so, Rule 37(e)(1) “would permit a recommendation of sanctions above and beyond an adverse inference.” (*6) The court found that Lemon had been “somewhat prejudiced” because he had had to “ferret” out the malfeasance, citing Unger, 329 F.R.D. 8 (E.D.N.Y. 2018) at 13 for the proposition that “conscious dereliction of a known duty to preserve,” whether “passive or active,” is sufficient to find the party acted with intent to deprive. (*7) The court stated that if the Motion had not satisfied the Rule 37(e) standards, it would be appropriate to sanction under its inherent authority to control litigation, citing *United States v. Int’l Brotherhood*, 948 F.2d 1338, 1345 (2nd Cir. 1991) and *CAT3*, 164 F. Supp. 3d, at 498, since the Plaintiff had acted in bad faith and had made accusations for an improper purpose. (*8). Awarding Lemon his attorneys fees “should not only deter Plaintiff from further misconduct but will also restore defendant to the same position in which he found himself prior to Hice’s misconduct.” (*8).

255. **HM Electronics v. R.F. Technologies** [2015 WL 4714908, at *30] (S.D. Cal. Aug. 7, 2015). Pre-effective date recommendation that the District Court impose an adverse inference instruction and other sanctions under Rule 37(b) and inherent powers because the conduct was in breach of discovery orders. The court opined that the result would have been the same if **Rule 37(e)** had been applied. The recommendation was vacated as moot by virtue of

settlement, which also vacated the sanctions [171 F. Supp.3d 1020, at n. 4 (S.D. Cal. March 15, 2016)].

256. **HLV v. Page & Stewart** [2018 WL 2197730, at *3-4 (W.D. Mich. March 2, 2018)]. The court ordered, pursuant to Rule 37(e)(1) that an attorney who had received a demand letter and subsequently traded his cell phone for a new one was a breach of the duty to preserve since the moving party “did experience some measure of prejudice, despite securing production of texts and call logs from other sources” citing the Committee Note. It order that the moving party could introduce evidence of the litigation hold letter at trial and the subsequent failure to preserve and “argue for whatever inference they hope the jury will draw, which the nonmoving party can argue against and present “their own admissible evidence.” (*4)(arguing that the loss deprived the moving party not just of texts, but any other records like draft texts, or emails, call logs, and calendar entries”).
257. **Holguin v. AT&T** [2018 WL 6843711] (W.D. Tex. Nov. 8, 2018) The court found that the party had failed to take reasonable steps to preserve by implementing a litigation hold, which would have presented the ESI from being lost. It “would have been proportional to the needs of this case and consistent with clearly established applicable standards.” (*6) However, the court was unable to find prejudice under Rule 37(e)(1) where the party failed to explain why the discovery available was “insufficient to meet his needs.” (at *7-8). Intent to deprive was also lacking because the loss was caused by use routine procedures without bad faith one, year, citing *Russell v. 234 Fed. App’x 195, 208* (5th Cir. 2007). Accordingly, the motion for sanctions was denied.
258. **Hoover v. NCL (Bahamas)** [2020 WL 4505634] (S.D. Fla. Aug. 5, 2020). Magistrate Judge Goodman dealt with a slip and fall on a 1,094 foot passenger cruise ship where the principal focus was the stairs, but also material which might be ESI. Relying on his decision in *Williford v. Cardinal*, 2019 WL 2269155 (S.D. Fla. May 28, 2019), it summarized his twelve-point summary of the teaching of the **Rule 37(e) Committee Note**. (*9) As to written communications about the stair repairs which might have been ESI in NCL’s possession, the court found there was no anticipation of litigation (or no proof it was in the possession of the NCL) and she “has not established Rule 37(e)’s equivalent of bad faith.” [in Rule 37(e)(2)](*12) In footnote 1, the court found it was authorized to issue “an Order as opposed to a Report and Recommendation” because even if the party requests a dispositive sanction, it is not treated as such under Rule 72(a) when sanctions are denied.
259. **Horn v. Tuscola County** [2017 WL 1130095, at *4 (E.D. Mich. March 27, 2017] In an opinion overruling an earlier R&R to the contrary 2016 WL 6683570] (Nov. 8, 2016), the court analyzed the loss of a surveillance video under **Rule 37(e)** and quoted it as requiring an “intent to deprive” standard before presuming the contents of a video were unfavorable, but then applied a pre-enactment case to conclude that the rule was satisfied if the conduct was negligent. However, it refused to grant an adverse inference because the contents of the video were not relevant to the defendant’s liability.
260. **Hovannisian v. United National Insur.** [2022 WL 88484] (E.D. Cal. Jan. 7, 2022). The court was faced with missing (apparently digital) photographs under circumstances where

there was no certainty as to how they were lost, with theories ranging from a power surge, to improper loading of SD cards, etc.. Since they would have been favorable to the moving party, it could not have suffered prejudice under **Rule 37(e)(1)** by their loss nor was there a showing of intent to destroy under **Rule 37(e)(2)**. The court planned to allow argument at trial that no photos were taken since none have been located, but it was not prepared to prevent that claim, since “such a request goes beyond the law of spoliation in Rule 37.” (*8)

261. **HP Tuners v. Kevin Sykes-Bonnett** [2019 WL 5069088] (W.D. Wash. Sept. 16, 2019).

The court sanctioned a party for smashing a flash-drive with a hammer after receiving a demand that he should preserve evidence relevant to the litigation. The court concluded that the destruction indicated an “intent to deprive” and noted but apparently did not credit the testimony that he did so because he knew he should not have it and had not downloaded any of the content. (*3) The court found that the plaintiff was prejudiced by the destruction because it could be inferred from the intent, citing *Oracle America*, 328 F.R.D. 543 at 549 (N.D. Cal. 2018), and because the party must proceed with “incomplete” evidence. (*4) and prevented the plaintiff from “presenting all relevant evidence in this action.” The court recommended that the court grant an adverse inference instruction “informing the jury of the existence of the flash drive, the information that defendants admit was on the flash drive, that [he] destroyed the evidence and allowing the jury to draw an adverse inference against defendants based on these facts.” (*6).

262. **Hsueh v. New York** [2017 WL 1194706] (S.D.N.Y. March 31, 2017). In granting an

adverse inference for plaintiff’s deletion of an audio tape, despite its subsequent recovery and production from a hard drive backup, the court held that **Rule 37(e)** did not apply “because she took specific action to delete it.” The court cited *CAT3*, 164 F.Supp.3d 488, 495 for the proposition that **Rule 37(e)** was adopted to address over-preservation concerns which “are not applicable here.” As the court put it: “It was not because Hsueh had improper systems in place to prevent the loss of the recording,” instead, “it was because she took specific action to delete it.” (*4). The court ultimately concluded that “under either” **Rule 37(e)** or the courts inherent authority, an adverse inference was the appropriate remedy because the party acted in bad faith “and with an intent to deprive” the defendant of its use, despite an obligation to preserve the highly relevant recording, which was not completely produced in the end. The court also awarded attorney fees and costs. (The court rejected the argument that the audio recording might not be ESI because it could “think of no reason why a digital audio recording would not be ESI” (also at *4).

263. **Hughes v. City of New York** [2021 WL 4295209] (S.D.N.Y. Sept. 21, 2021)]. A District

Judge imposed monetary sanctions in the form of attorneys fees and costs under **Rule 37(e)** “jointly and severally” on the City of New York and its “Law Department.” It did not acknowledge that Rule 37(e) does not, as other subdivisions do, allow for either the award of fees and costs or the sanctioning of non-parties. It claimed that it had “discretion” to “apportion Rule 37 monetary sanctions between a party and its counsel” under *Charlestown Capital*, 337 F.R.D. 47, 69, n. 19 (S.D.N.Y. 2020) and under *DR Distribs. V. 21 Century Smoking*, 513 F.Supp. 3d 839, 864, 933-34 (N.D. Ill. Jan. 19, 2021). It found it appropriate to do so because the “destruction of evidence in this case resulted entirely from the Law

Department's failure to take effective steps to ensure that the ESI would be preserved." In footnote 3, it distinguished authority that a litigant chooses counsel at his peril.

264. **Hugler v. Southwest Fuel Mgt.** [2017 WL 8941163] (C.D. Cal. May 2, 2017). In an FLSA case, a Special Master dealt separately with deleted text and emails in a car wash context and videos. The court held that they did not "take reasonable steps to preserve emails and text messages as evidence for the Secretary. See Zubulake, 220 F.R.D. at 220. ("Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent")." (*6) The court held that there are "two sources of authority" to sanction a party who has "despoiled" evidence, the "inherent power" to levy sanctions "in response to abusive litigation practices, and the availability of sanctions under Rule 37[]" quoting from Leon, 464 F.3d 951, 958 (9th Cir. 2006). (*7). The Special Master "disagreed" that **Rule 37(e)** precludes reliance on "inherent or implied power" since Supreme Court authority cannot be limited by "a body such as the Advisory Committee and it would be "poor public policy" to require "courts to rely solely on the Rules to address improper conduct, citing CAT 3, 164 F. Supp. 3d 488, 497-98 (S.D.N.Y. 2016 ("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.")). (*8)) As to videos, the court "reasonably infers or presumes" that missing videos are unfavorable to the Defendant, since it flows from the conclusion that the parties acted with intent to deprive the Secretary of Labor of the information's use. (*10). It ultimately denied without prejudice the request for a default judgment pursuant to "the Court's inherent power and Rule 37(e). (*11). It also held that "**Rule 37(c)** may be applied to sanction a party who has despoiled evidence if that party has failed to disclose such evidence or has failed to supplement an incomplete disclosure by omitting the evidence," which was not the case here. (No citations to support). (*12)
265. **Hulett v. City of Syracuse** [253 F. Supp.3d 462] (N.D.N.Y. May 30, 2017). A District Judge refused to apply the Amended Rule to the loss of surveillance video because the issue of spoliation was asserted before the effective date "at a time when [the moving party] could have obtained an adverse inference simply by demonstrating that defendants were negligent." (508) Citing CAT3, the court held that the new rule governs unless its application would be unjust or impracticable.
266. **Hunt v. Toddle Inn Daycare** [2021 WL 4127280] (D. Maine Sept. 9, 2021). In an otherwise complex and difficult to follow factual context, the court found no basis in the record to have recognized a need to preserve ESI and denied a request for a spoliation instruction. (*10)
267. **Hunting Energy Services** [2018 WL 4539818] 2018 WL 4539818 (N.D. Ind. Sept. 20, 2018). The court concluded that the jury "rather than the Court to determine whether the destruction of this evidence [deleted files on a computer] was in bad faith" because "the committee notes to Rule 37 contemplate that possibility." (*10). If the jury concludes the destruction to have been in bad faith, an adverse inference would "equate to a finding" that the party disclosed confidential information and violated his confidentiality agreement and his duty of loyalty." (*10). While a default judgment is unwarranted, "imposing no sanctions at all" would be inappropriate." The "prejudice is substantial and a finding he acted in bad faith

would justify this significant consequence.” (*1)). It noted that the Seventh Circuit had also issued a pattern jury instruction (Sec. 1.20) and that there was “evidence from which the jury could make such a finding.” The jury could find the “defendants destroyed the evidence to cover their tracks” or accept the explanation that he “deleted the documents from his computer because he believed he was not supposed to have” them on his computer after he left. (*10). “If the jury accept the defendant’s explanation, then an adverse inference would not be appropriate.” “This issue thus depends on a credibility analysis and a finding as to the defendants’ mental state. Those are prototypical functions of a jury and questions that the jury will be able to fairly evaluate and resolve.” (*11) The court will “instruct[] the jury that it should infer that any destroyed documents would have been adverse to the defendants if it finds the documents were destroyed in bad faith.” [The court cited *Bracey v. Grondin*, 712 F.3d 1012 at 1019 (7th Cir 2013)(The crucial element is not that the evidence was destroyed but rather the reason for the destruction”) for the point that an adverse inference would not be appropriate if the jury accepts the defendant’s explanations.” (*11).

268. **Hyatt v. Rock** [2016 WL 6820378] (N.D.N.Y. Nov. 18, 2016). In discussing the potential need to produce an image from a digital camera (not at that time), the court “highlights the requirement that steps be taken by the Defendants to preserve all electronically stored evidence for trial,” citing Rule 37(e)).

269. **Hyundai Motor America v. North American Automotive** [2021 WL 3111191] (S.D. Fla. July 22, 2021). A Magistrate Judge found that the failure of plaintiffs to preserve 144 defective automobile engines returned to them by defendants caused severe prejudice to a case predicated on alleged warrant fraud (*13) and was undertaken in bad faith because it inexplicitly allowed them to be lost while under a clear duty to preserve them. (*13). Accordingly, it determined that an adverse inference jury instruction that the jury could presume the information was unfavorable to the plaintiff was warranted, but that “[p]laintiff can attempt to rebut this presumption through its presentation of evidence, including expert testimony.” (*14). It explained that since the issue was alleged failure to preserve non-ESI evidence, **Rule 37(e)** did not apply. (n. 2).

270. **IBM v. Naganayagam** [2017 WL 5633165] (S.D.N.Y. Nov. 21, 2017). The court did not find it unjust to apply **Rule 37(e)** to a case filed prior to the effective date where the issue of spoliation was briefed and argued later. The court found that the party was not entitled to an adverse inference under the rule because the only allegation was that the party acted negligently rather than intentionally. Moreover, less severe sanctions were unavailable because the party failed to establish that prejudice existed, since the contents of the allegedly spoliator emails was “fairly evident,” but were “immaterial” to the action. (*6) Similarly, even if the strategic plans for the area where he subsequently worked were spoliated, the party failed to show how they would be relevant, so that the party was not prejudiced by its alleged spoliation. (*7).

271. **Incardone v. Royal Caribbean Cruises** [2019 WL 3779194] (S.D. Fla. Aug. 12, 2019). In an unsigned [in the WESTLAW version] and typically lengthy opinion by what appears to the same Magistrate Judge that has written recent opinions in other cruise ship cases involving Carnival Line cases, the court refused to sanction a fail to preserve all of the hours of video

surveillance from all the cameras of a ship caught in a hurricane. The court found that to have done so would not be “proportional,” a view said to be confirmed by “the Sedona Conference’s recent updates to the Sedona Principles [quoting to the effect that “it is **unreasonable** to expect parties to take **every conceivable step** or disproportionate steps to preserve each instance of relevant electronically stored information.”] (emphasis in original) (*23).

272. **ILWU-PMA Welfare Plan v. Connecticut General** [2017 WL 3459880 (N.D. Cal. Jan. 24, 2017)]. In a thoughtful opinion by a District Judge applying Rule 37(e) “framework” because it is “directly on point” (but reserving right to assert inherent authority) the court held that it could not, on the record before it, determine if additional sanctions were appropriate beyond additional discovery ordered, at defendants expense. The case involved an ERISA action by trustees against a service provider which failed to preserve ESI which was contained on servers it had sold to ADP and as to which it had contractual access. The court found that it was not “per se” unreasonable to have failed to make copies of the ESI and depend upon third parties, but that under the circumstances, the party had failed to take “reasonable steps to preserve relevant information for this reasonably foreseeable litigation.” It reopened discovery and ordered subpoenas to and depositions of ADP and stated that further sanctions, if any, would be considered under “either Rule 37(e) or inherent power” after the all available evidence is placed before the trier of fact at trial so that the importance of any remaining gaps can be assessed.

273. **Infogroup v. DatabaseUSA** [956 F. 3d 1063] (8th Cir. April 27, 2020)(**Infogroup#2**). The Eight Circuit affirmed after de novo review a motion for judgment as a matter of law. After a seven-day trial, the trial court refused to order a new trial based the fact that the jury had been instructed that it could infer that the contents of the datable base were unfavorable if it found that it was destroyed by the party while knowing that it was relevant to an issue being litigated in the case. (1067). As the Court of Appeals explained, “spoliation with the other evidence, was sufficient to prove copying.” In other words, “[t]he spoliation instruction, with the other evidence, permitted the jury to infer that DatabaseUSA’s database contained the original elements from Infogroup’s database, not just the facts [from its facts].” (1067) (emphasis added). In the lower court [2018 WL 6624217] (D. Neb. Dec. 18, 2018)(**Infogroup#1**), the trial court had rejected the argument that the deletion of a database was made pursuant to a routine retention policy because the “circumstances surrounding its destruction – create a sufficient strong inference of an intent to destroy it for purposes of suppressing evidence. (*6) The party had argued it was not lost with an intent to prevent its use under Rule “37.” The court had responded that it is “difficult to imagine a scenario where the database’s destruction was a result of anything other” than that intent. (*5).

274. **InjuryLoans.com v. Buenrostro** [2022 WL 875749] (D. Nev. Mar. 24, 2022). A motion filed to exclude evidence at trial under Rule 37(e), whether made before or during trial is considered a motion in limine, not a discovery sanction, and is covered by local rules unique to it.

275. **In re Abilify (Aripiprazole) Products Liability Litigation** [2018 WL 4856767] (N.D. Fla. Oct. 5, 2018). In an opinion applying both Rule 37(e) and inherent authority, the court refuses to find that the duty to preserve email arose prior to the deletion of emails pursuant to

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

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

277. **In re CCA Recordings 2255 Litigation** [2020 WL 6077623] (D. Kan. Oct. 15, 2020), as supplemented 2021 WL 2212758 (D. Kan. June 1, 2021). The Chief District Judge in charge of this complex litigation involving governmental surveillance and access to privileged communications originally scheduled an evidentiary hearing for May, 2021 on a **Rule 37(e)** motion for sanctions regarding a loss of data on a computer noting that the sanctions it had just issued under Rule 37(b) will likely make it moot. It was subsequently cancelled and in June, 2021 it denied the motion for sanctions relating to reformatting of certain hard drives which irretrievably destroyed ESI. Although it intended to sanction misconduct under **Rule 37(b)(2)**, it was not moot for it to consider the argument for relying on **Rule 37(e)**, since it might “bolster” the existing analysis or “provide an alternative basis” for entering an adverse inference.” (*7) The moving party argued that it did not need to prove that any missing ESI was relevant since Rule 37(e)(2) contained no such requirement, and a finding of intent makes relevance “superfluous” since if a party cannot be prejudiced unless the lost information is relevant. (*8) The court rejected that logic. Even if **Rule 37 (e)(2)** permits an inference of prejudice, “if there is no evidence that logging metadata ever existed, it could not have been intentionally destroyed to deprive petitioners of its use, and there can be no spoliation as it relates that that specific ESI relevant to petitioners claims.” As the Court noted: “relevance in the context of a Rule 37(e) threshold determination is made in a different context as that in Rule 37(e)(2).” (*8) The court cited authority to the effect that “a party seeking spoliation sanctions must offer some evidence that relevant documents have been destroyed.” (n. 80). Thus, the speculation that logging metadata “should have existed remains just that - speculation.” Absent any evidence that such ESI “existed and was destroyed” the court need not engage in a substantive spoliation analysis” and the motion for sanctions was denied thout need for a further hearing. (*9).

278. **In re Disposable Contact Lens Antitrust** [329 F.R.D. 336, 431-32] (M.D. Fla. Dec. 4, 2018). The court refused to “compel, much less sanction” a party under **Rule 37(e)** for failing to preserve materials “controlled by a non-party that they had the ability to obtain themselves.”

The court held that the Rule was applicable to information retained by non-parties when there is a legal right to the information or a relationship, including one where the party has the practical ability to comply. It held that the membership in a Facebook group did not provide that control here merely because some employees were members and refused to find that subpoenas issued by the New York AG had triggered “preservation obligations which were owed to the moving parties (the plaintiffs)(“the “shifting duty” argument”)(431). It took the matter of spoliation under advisement and agreed to revisit it at trial before the jury instructions were finalized and after both parties had further developed the issue of spoliation (432).

279. **In re Erick Etienne Lagrous v. Buzulencia.** [2019 WL 2453878, at *3 (N.D. Ohio June 11, 2019). In an adversary proceeding involving a failure to preserve text messages and emails, the court found no prejudice from the loss of the information and found no measures available under Rule 37(e)(1), nor was this “the rare situation where a party ‘acted with the intent to deprive another party of the information’s use in the litigation’ under Rule. 37(e)(2).”
280. **In re Ethicon** [2016 WL 5869448] (S.D. W. Va. Oct. 6, 2016). In follow-up to earlier decision by the Magistrate Judge denying sanctions in an MDL based on allegations of spoliation decided prior to 2015 amendments [299 F.R. D. 502 (Eifer, M.J.)], the District Judge denied a motion by one plaintiff under **Rule 37(e)** for additional sanctions under either **(e)(1)** or **(e)(2)** because of the loss of a custodial file. The court held the rule applicable because the threshold requirements outlined in the rule were satisfied and the movant had demonstrated that not “all” of the emails and electronic documents were restored or recovered by other means. However, there was no prejudice simply because she had “to piece together information from other sources to try to recover relevant documents” since the party did not provide the court with “any concrete finding of prejudice to her case as a whole.” As a result no sanctions were available under the Rule. [Similar rulings were made as to the same custodial file in 2016 WL 5869449 and 5858996 involving motions by two other individual plaintiffs].
281. **In re Gold King Mine Release** [2021 WL 3472440] (D. New Mex. Aug. 6, 2021) The Chief District Judge sanctioned certain Federal Parties under **Rule 37(e)** for negligently managing the preservation and collection of ESI, especially from two key witnesses, finding it “striking that so much ESI on the OSC’s electronic devices was spoliated as a result of delay, forgotten passwords and the wiping/resetting of devices” and spelling out a series of detailed questions that were unanswered in that regard. The court decided to allow the moving parties “to introduce evidence of the Federal Parties’ spoliation at trial,” citing **Browder**, 187 F. Supp. 3d at 1295-96. It deferred ruling on requests for an adverse inference instruction or presumption because it “cannot, at this time, determine” whether the parties acted with intent to deprive, citing **Rule 37(e)** and **Turner**, 563 F.3d at 1149. It rejected a request that it also sanction under **Rule 37(b)**, based on the argument that before entering into a preservation order, the Federal parties “already violated it” because they “knew they had destroyed or rendered inaccessible ESI on” the devices. The court did so because the conduct giving rise to the **Rule 37(e)(1)** sanctions were “just” and with one exception, occurred before the order was entered.

282. **In Re Ivantis** [825 Fed. Appx. 560, 2020 WL 6437979] (Fed. Cir. Nov. 3, 2020). The Federal Circuit refused to issue writ of mandamus to vacate an order instructing a jury under **Rule 37(e)** that it could presume that destroyed evidence was “favorable” to one party and “unfavorable” to another when it did not interrupt the use of an email policy which deleted email after 12 months because “post-judgment appeal is an adequate means to correct an adverse-inference instruction.” The request did not present “exceptional circumstances” such as reviewing “novel important legal issues” and merely “challenges the assessment that ‘the party acted with the intent to deprive another party of the information’s use in the litigation’” based on a “specific sequence of events leading up to the litigation.” (*1) [listing them]. The Court of Appeals “discern[ed] no obvious basic, undecided legal issue” nor was it “so patently unreasonable as to warrant mandamus.” It also refused, an alternative request, to “order the court to defer any intent ruling” given that the trial court made no error in finding that request “procedurally improper under its local rules. [The lower court had stated that “even if” [the issue] had been timely raised, “the court would still find that it is appropriate to decide the issue of intent ahead of trial.” It noted that the Committee Note to **Rule 37(e)** explains that the finding may be made “by the court when ruling on a pretrial motion.” **Glaukos v. Ivantis**, 2020 WL 5914552, at n. 4 (C.D. Cal. July 30, 2020)].
283. **In re Marc Anthony Correra** [2018 WL 4027001, at *39] (N.D. Tex. Aug. 21, 2018). In a lengthy but well-written analysis of **Rule 37(e)**, the court awarded legal fees and costs for prejudicial misconduct and conditional sanctions (with more promised in the form of inferences and invalidity of exemptions in bankruptcy if missing ESI is produced from flash drives which were inserted around the time that the computer at issue was tampered with).
284. **In re Marsh** [2021 WL 457675] (Bkrcty. Ct. D. Minn. Jan. 25, 2021). In a bench trial, the court “heard testimony” about the disposal of a computer and took the evidence into consideration when considering the credibility of witness testimony.” (*15) However, the court refused to find that it should have ordered sanctions to that effect since it was not brought until framed as a *motion in limine*, three years after it learned of the destruction “on the eve of trial,” making it “unreasonably delayed.” However, “the facts” sought for the adverse inference instruction were proven at trial in any event.” (*15)
285. **In re Petters Company** [606 B.R. 803] (Bkrcty. D. Minn. July 1, 2019). A Bankruptcy court concluded that a violation of **Rule 37(e)** by destruction of email backup tapes justified an adverse inference instruction *as well as* the admission of evidence of spoliation as well and as an order barring objection to introduction of emails secured from third parties. It agreed that preclusion of specific factual testimony “should be left to the trial judge as they go beyond an adverse inference.” It refused the argument that the court “should decline to decide” the motion and leave it to the District Judge to address it in “the first instance,” since the motion is “premature” and “as a practical matter,” the “parties will raise the same evidentiary issues of spoliation before the District Judge” which will “ultimately result in duplicative litigation.” The Court pointed out that its authority to impose “spoliation sanctions arises from its inherent power as a federal court, citing *Stevenson*, 3543 F.3d. at 750 in a footnote. It noted that it was intimately familiar with the discovery record, the allegations of the case and had read hundreds of pages, resolved discovery disputes and had held several formal hearings, and “judicial economy favors this Court making the findings and determination about the appropriate

discovery sanctions.” In the alternative, if the District Court finds it lacks authority to issue an adverse inference instruction, it recommends that it do so. (830-833). This is one aspect of a long-standing, multiple action, multiple decision series of cases involving the collapse of a Ponzi scheme. No effort has been made to determine what, if any, results flowed from this opinion.

286. **In Re Premera Blue Cross** [2018 WL 5786206] (D. Ore. Nov. 5, 2018). In a case involving a failure to retain one of 35 servers whose breach had led to costly losses and a class action for damages, the Court found non intent to deprive but found that destruction of the logs under **Rule 37(e)(1)** caused prejudice and stated it would inform the jury of the destruction and allow arguments about the implications, including what the missing hard drive contained, but would not instruct the jury that “it must or even may” make adverse inferences. (*3). **It also precluded** testimony that “exfiltration” of data had not occurred, since the plaintiffs experts had not had the opportunity to review the hard drive. It held that these measures are “sufficient to cure the prejudice” to plaintiffs. The Court subsequently gave preliminary approval to a class settlement. 2019 WL 3410382 (D. Ore. July 29, 2019).

287. **In re Skanska USA (Exoneration From or Limitation of Liability relating to Barge KS 5531)** [2021 WL 5225477] (N.D. Fla. Aug. 23, 2021). A Magistrate Judge responded to a motion for sanctions for failures filed by “Claimants” against Skanska, for its failure to preserve text messages under **Rule 37(e)** by awarding adverse inferences in an admiralty action as well as monetary sanctions. [In a subsequent ruling on the amount of fees (2021 WL 5225476, at *1, *5 (N.D. Fla. Oct.1, 2021), it noted that if Skanska were to be successful in obtaining exoneration, it could insulate itself from compensatory and punitive damages for damages caused by one of Skanska’s barges or limit its liability to \$7.9M, the total of all values in the action]. It had earlier held that the case was a “text book case of spoliation” since Skanska failed to suspend its normal document destruction procedures, failed to collect cell phone data from key custodians [promptly enough for the court] and failed to take any steps to prevent destruction of cellphone data. The Court relied on Zubulake IV for the obligations to preserve, and for concluding that Skanska “did not take reasonable steps to preserve” the cell phone data. (*4-5) and presumed the missing data was prejudicial the failures “constituted bad faith.” The court equated the “intent to deprive” as equivalent to the pre-rule standards for finding bad faith [“The intent to deprive standard is the equivalent of bad faith” (*6)] and held that the lack of “any cogent explanation for these failures, other than ‘oops,’ points to one answer - Skanska acted in bad faith,” citing *Swofford v. Eslinger*, 671 F. Supp.2d 1274, 1284 (M.D. Fla. 2009) (*7) It thus inferred for purposes of the action [no jury would be involved] that the information in the cell phones was relevant and favorable to Claimants and that “it was not these custodians conduct that caused the barges to go adrift” [preventing Skanska from making a related argument] (*10) and reserving its decision on whether “any rebuttal evidence” will be allowed.

288. **In Re Sussman**, [816 Fed. Appx. 410] (11th Cir. July 7, 2020). The Court of Appeals upheld dismissal of a bankruptcy case after the bankruptcy had, as a sanction for destruction of the ESI in a computer, applying a rebuttable presumption that the party had not used the computer to take a course which was a prerequisite to securing bankruptcy protection. The bankruptcy court had determined after a three-day hearing that the Debtor had acted with the

intent to deprive the Estate of the laptop, **clearly relying on Rule 37(e)** although not explicitly mentioning it. The District court had affirmed. The court of appeals found the determination that the party had acted in bad faith was not clearly erroneous, citing the changing excuses and that the testimony and demeanor regarding the fate of the laptop was not credible. The court “acted well within its discretion when it imposed, as a reasonable and measures sanction,” the rebuttable presumption which the Debtor failed “to rebut.” The fact that it “ultimately led to dismissal of her case does not render the decision an abuse of discretion, since spoliation of critical evidence that deprives an opposing party of a chance to put on a complete defense warrants dismissal sanction

289. **Integrated Comm. & Tech v. HP Financial** [2020 WL 4698535, at *5] (D. Mass. Aug. 13, 2020). The District Court, in a bench trial, [in a related opinion it was noted that the trial date is May, 2021; __ F.Supp.3d __, 2020 WL 4726682, at *1 (D. Mass. Aug. 13, 2020)] relied upon subdivision (e)(1) in resolving a dispute over destroyed or lost emails by, *inter alia*, “permitting the introduction of evidence, by all parties, regarding the destruction of loss of evidence as well as the reason(s) therefor.” This was imposed “in connection with” assessing claims and corresponding defenses because the prejudice to the moving party was substantial. In addition, the court stated that it would allow “an appropriate instruction permitting the drawing of an adverse inference.” The court also cited its inherent power to impose sanctions on parties that have spoliated evidence, noting that of particular importance is “the prejudice to the non-offending party and the degree of fault of the offending party (citing *Collazo-Santiago v. Toyota*, 149 F.3d 23, 29 (1998)).
290. **Integrated Direct Marketing v. Drew May** [690 Fed. Appx. 822] (4th Cir. May 30, 2017). Without mentioning **Rule 37(e)**, but which was surely involved, the court found no abuse of discretion in refusing to find spoliation from deletion of files from a hard drive where court had. after conducting an evidentiary hearing and examining the witness, concluded that there was insufficient evident to find spoliation and bar summary judgment.
291. **International Financial v. Odara Jabali-Jetere** [2019 WL 2268961] (E.D. Pa. May 28, 2019). In an action for against a former employee, and after an evidentiary hearing, a Magistrate Judge granted a motion for spoliation sanctions after finding she had “withheld” files and “willfully tampered” and “deleted metadata” under her personal laptop” (*20). Despite quoting and citing **Rule 37(e)** (*11), the analysis was entirely conducted under *Bull v. UPS* and Schmidt requirement of suppression in “bad faith” (*15) in determining that there was prejudice because of finding “evidence linking” the party to “alleged misappropriation of trade secrets” (*17). It was recommended that the court order an “adverse spoliation inference sanction,” and monetary sanctions to level the evidentiary playing field. The jury should be instructed that if the Plaintiff had been able to inspect the files, any evidence would have been unfavorable. It found that the party had acted in bad faith as well. (*17). The court also found a “prima facie case” of civil contempt (*20) for violation of for violation of a temporary restraining order to preserve and prevent destruction of databases, files or hard drives and certified facts for a hearing for that purpose. (*18). The Magistrate Judge had quoted Rule 37(b)(*11) and the Magistrate Act 28 U.S.C. 636€(6)(B).

292. **Internmatch v. Nxbigthing** [2016 WL 491483] (N.D. Cal. Feb. 8, 2016), *vacated by order of Ninth Circuit*, 2017 WL 8944065 (N.D. Cal. Nov. 17, 2017). Plaintiffs seeking declaration that a party fraudulently obtained a trademark registration (and its cancellation) were granted an adverse inference and evidence preclusion where defendant consciously disregarded its preservation obligations regarding ESI which could have established the genuineness of use documents used in its defense. The party made bogus claims of power surges and other conduct in bad faith and prevented the plaintiff from verifying the genuineness of the evidence of certain use documents. (*13-14). It also awarded monetary sanctions in the form of attorney fees under its inherent powers as a result of the bad faith conduct, since the plaintiff had to spend substantial resources in investigating the spoliation. In footnote 6, it stated that whether it must make the findings set forth in **Rule 37(e)** before exercising its inherent authority “has not been decided,” but that it need not resolve that issue since it also concluded that defendants had acted with the requisite “intent to deprive” under **subdivision (e)(2)**.
293. **Itron v. Johnston** [2017 WL 11372353] (S.D. Miss. Oct. 26, 2017). The court found no intent to deprive and thus refused to find that Rule 37(e)(2) measures were available. It implied that it need not consider Rule 37(e)(1) measures because “the relief [he] seeks may be obtained only under subsection (e)(2)” which was, apparently, all he sought. The court rejects the use of *Zubulake*, 229 F.R.D. 422 (S.D.N.Y. 2004) to infer bad faith and intent to deprive from the failure of counsel to take possession of or otherwise safeguard all potentially relevant backup tapes since it was decided “prior to the 2015 amendments and at that time the Second Circuit permitted a fining of spoliation on a showing of negligence or gross negligence.” (*3).
294. **Jackson v. E-Z-Go Division of Textron** [2018 WL 3575924, at *4-5 (W.D. Ky. July 25, 2018)]. (**Jackson #1, before revision**) A District Court initially refused to bar “evidence of or reference to spoliation” during an upcoming product defect trial since in “the context of introducing evidence of spoliation, as opposed to tendering an adverse inference instruction, “[i]f relevant, courts have allowed spoliation evidence at trial.” [citing *VSI Holding v. SPX*, 2006 WL 568333, at *2 (E.D. Mich. March 7, 2006)](*4) However, it approved a Motion to reconsider and barred “evidence of Defendant’s retention or lack thereof of records of incidents involving its vehicles from before 2001” at trial. 2018 WL 3721385 (W.D. Ky. Aug. 3, 2018)(**Jackson #2, after revision**) upon finding that under **Rule 37(e)**, the defendant had no reason to anticipate the instant litigation in 2004 when it revised its litigation database nor did Plaintiffs suffer “any ascertainable prejudice” which **Rule 37(e)** also requires before the court may “impose any remedial measures.” (*6)(noting hard copy production of litigation files were secured by plaintiff via subpoena of insurer for litigation files) of data sought). “[U]nder the standards set by **Rule 37(e)(1)**, Plaintiffs have not shown that evidence of alleged spoliation is admissible at trial.”
295. **Jackson v. Dutra** [2022 WL 943121] (D. Nev. Mar. 29, 2022). After concluding that turning off a body-cam was not spoliation of ESI under Rule 37(e), the District Court noted that since the Rule was the “only” basis for sanctions for such spoliation, the Committee Notes “make clear that the 2015 amendment forecloses a court from imposing sanctions for spoliation under [the court’s inherent power]. (*3 & n. 3).

296. **Jackson v. Haynes & Haynes** [2017 WL 3173302] (N.D. Ala. July 26, 2017). A District Judge rendered a summary judgment against an individual pursuing an FSLA claim after barring use of summaries of data to create a genuine factual dispute about hours worked because she had failed to take “reasonable and prudent steps” as required under Rule 37(e) to preserve contemporaneous original notes relating to hours worked. The court found that this resulted in prejudice, but that this negligent and irresponsible conduct was not sufficient to show an intent to deprive. The court went through a litany of reasons, such as relying on a free version of an “Hours Tracker” on her cell phone (without paying for one that allowed export from a cell phone) and problems with use of Excel and Word spreadsheets that the Genius Desk at Apple could not resolve, compounded by her daughter’s refuse to furnish the MacBook on which the information was stored. The court did not credit the veracity of the individual plaintiff and summarized the reasons in substantial detail in the text of the opinion and in footnotes.
297. **Jaffer v. Hirji** [2017 WL 1169665] (S.D. N.Y. March 28, 2017), *rev’d and remanded on other grounds*, 887 F.3d 111 (2nd Cir. April 4, 2018). In resolving a family dispute involving ownership of residential property, the court denied an adverse inference based on deletion of a recording of a conversation when the file was transferred from a cell phone to a computer. The court noted that the “standard” under Residential Funding that it was sufficient that the evidence was destroyed negligently has been “partially supplanted” by the Rule 37(e) which requires a finding of an intent to deprive. Litigants seeking an adverse inference for destruction of ESI “face a tougher climb than in years past.” (*6). While the Second Circuit has “not yet published an opinion examining the impact” courts in the Second Circuit have recognized “that Rule 37(e) replaces the prior framework for spoliation claims,” citing *Citbank* [2017 WL 462601] and *In re Bridge Construction Services of Florida* [185 F. Supp. 3d 459, 472-73]. Given that there was no showing of intent to deprive nor of prejudice, the court declined to draw an adverse inference or impose any other sanctions.
298. **Jarvis v. TaylorChandler** 480 F. Supp.3d 1339 (M.D. Ala. Aug. 19, 2020). At the conclusion of a bench trial involving destruction of both electronic and tangible evidence, the court awarded sanctions for both, although the tests differed. Although there was little prejudice involved, “flouting of the rules cannot go unaddressed.” The electronic information was deleted with an intent to deprive under **Rule 37(e)**, but it is unlikely they “would have materially changed the case.” The court found that a “**monetary sanction**” was appropriate for the “deleted computer files” because the moving party was prejudiced and were “deleted with the intent to deprive,” citing **FPP § 2284.2**. In the Eleventh Circuit, “the bad faith test in **Calixto** is the test for “intent to deprive,” citing **Alabama Aircraft**, 319 F.R.D. 730, 746 (N.D. Ala. 2017) and *Living Color*, 2016 WL 1105297 at * 6. It noted that “[m]any federal courts have concluded that monetary sanctions are appropriate where the missing evidence is not dispositive [citing fn. 7, involving four pre-Rule 37(e) ESI cases] and since “[b]oth tangible evidence and [ESI] was spoliated with the knowledge of impending litigation,” the court awarded “all costs and fees associated with the evidence that was spoliated,” citing *DuPont*, 803 F. Suppl. 2d 469, 510 (E.D. Va. 2011) (1360). In the “Conclusion” the court noted that it had decided to award “spoliation sanctions to all Defendants in the amount of attorneys fees and expenses expended to develop and litigate the spoliation issue.” [*Calixto* (2009 WL 3823390 at *16) was cited as establishing that bad faith for spoliation of physical documents

can be “established through direct evidence, by showing that the opposing party acted with ‘willful and premeditated intent,’ see **Telectron v. Overhead Door** [116 FRD 107, 134] or through circumstantial evidence.” (1356)]

299. **Jenkins v. Woody** [2017 WL 362475] (E.D. Va. Jan. 21, 2017). In an action seeking redress from a prisoner’s death, the court applied the four prerequisites to **Rule 37(e)**, identified the need for use of a clear and convincing standard of proof, and concluded that defendants had failed to take reasonable steps which it could easily have done to preserve digital video of the prisoner (*16). The video could not be restored or replaced by testimony since the video was “the best and most objective evidence” of what happened. (*16) It did not find that the failure to preserve was undertaken with an intent to deprive and refused to impose an adverse inference. (*17) However, in view of the substantial prejudice its loss caused, it decided that it would tell the jury that the video was not preserved and that both parties could present evidence and argument at trial and the jury could consider the evidence along with all the other evidence in the case in making its decision. (*18)(and n. 34) The court also precluded any evidence or argument that the contents of the video corroborated defendant’s version of the events or that similar circumstances had existed in another death and awarded payment of fees and expenses. It found the measures necessary, but not greater than necessary, to cure the prejudice [as required by Rule 37(e)(1)] (*19) . The court also awarded monetary sanctions for late delivery of audio files under **Rule 37(b)**, as a result of violating **Rule 37(d)**, and as carefully limited to the “time and money” spent as a result.

300. **John v. County of Lake** [2020 WL 3630391] (N.D. Cal. July 3, 2020)(Kim,MJ.). The Magistrate Judge found that Defendants had failed to preserve text and emails with intent to deprive and recommended an adverse inference instruction under **Rule 37(e)** and its **inherent authority** which would allow the jury to “presume that the deleted text messages and email were favorable to Plaintiffs” and “[w]hether Defendant’s failure to preserve is important to you in reaching a verdict in this case, and what the failure signifies, is for you to decide.” (*7). It also found that counsel had violated **Rule 26(g)** by certifying responses because the actions were undertaken for an improper purpose, but found that the facts “do not make clear who bears the fault for the spoliation of evidence.” (*8). The court observed that “it is possible” that the Defendants may have lied to their own lawyers about the measures they took to preserve evidence, and agreed with counsel that providing information on the topic would require them to violate the attorney-client privilege which Defendants have not expressly waived. (*8). It noted that if Defendants wished to shift the burden to its counsel, they must obtain independent counsel to move to shift sanctions and existing counsel “may wish to move to withdraw as counsel.” In the meantime, it sanctioned Defendants (alone) in the form of attorneys fees under Rule 37(e) and the court’s inherent authority, with the final amount to be determined later (it was &106K at the time of the ruling)(*8).

301. **Johns v. Gwinn** [2020 WL 7138636] (W.D. Va. Nov. 30, 2020). The District court found compensatory and punitive damages in a prisoner case with the bulk of the opinion devoted to debunking the tactic of allowing corrections officers to avoid responsibility for the failure to preserve crucial surveillance video that they could not themselves order to be preserved. In what amounts to a bench trial, it refused the Magistrate Judge’s recommendation and imposed a limited sanction under **Rule 37(e)(1)** by giving “diminished weight” to the testimony,

because of “diminished credibility” about what they observed when they viewed the video before it was overwritten. (*14). It memorably stated that “VDOC will not rewarded for its policy of attempting to insulated responsibility to a select few unreachable in the vast majority of suits by inmates” and found prejudice from its loss. (*11)

302. **Johnson v. Brennan** [2017 WL 5672692, at 8 (S.D. Tex. Nov. 27, 2017)]. The Senior District Judge refused to find Rule 37(e) remedies were available because of the late delivery of emails since the rule applies only if the ESI “*cannot be restored or replaced through additional discovery*” (emphasis in original)).

303. **Johnson v. City of Bastrop** [2017 WL 3381340, at n. 6 & 7] (W.D. La. Aug. 3, 2017). The court declined to grant pro se motions for contempt and sanctions)a case primarily involving allegations of violation of Rule 26(g), the court found that any relief under **Rule 37(e)** would be “duplicative and redundant” and, in any event, there was no evidence of prejudice or that the non-moving party had acted with an intent to deprive.

304. **Johnson v. L’Oreal USA** [2020 WL 5530022] (S.D.N.Y. Sept. 15, 2020). Judge Schofield denied a letter motion for sanctions relating to imperfect production of e-mails without prejudice to renewal at time of motions for in limine. It attached the text of a letter in opposition from Littler Mendelson PC arguing it was premature to grant any relief since it has “yet to be determined whether relevant ESI has been lost.” The letter explains how it had cured various issues involving loss of emails and text messages during discovery and summarizing, under **Rule 37(e)(2)** why there was no showing, **either under clear and convincing or preponderance of the evidence standards** of an intent to deprive. They also argued that there was no prejudice given that the abundance of preserved information appeared sufficient to meet the needs of all parties, and speculation of suffering harm is not enough.

305. **Johns v. Gwinn** [503 F. Supp.3d 452] (W.D. Va. Nov. 30, 2020). A District court in a bench trial for excessive use of force against a prisoner imposed a limited sanction dealing with witness credibility under **Rule 37(e)(1)** for the loss of a video on an officer had “neither the ability nor the responsibility” to save the video. (462). The court acknowledged that **Rule 37(e)** did not apply to non-parties but imputed the duty to preserve to the officer as an exception, by analogy to *Silvestri v. GM*, 271 F.3d 583, 590 (4th Cir. 2001), which rejected the argument that the plaintiff had no duty to preserve the car because he did not own it, since he at least had a duty to give the opposing party of notice of the possible destruction. (463) The Court also cited a line of cases applying an exception basing the duty to preserve on non-parties based on “some special relationship or duty arising by reason of an agreement, contract, statute or other special circumstance. (463). It cited cases which “hold that state correctional departments and municipalities ultimately bear responsibility for preserving evidence and litigating cases filed by prisoners” and their failure to preserve “may be imputed to individual officer defendants “in order to avoid unfair prejudice” to inmate litigants. (463). It held that “to prevent injustice to Plaintiff, and in recognition of” the agency’s special relation to the prisoner, it had a duty to preserve for purposes of **Rule 37(e)** which, if triggered and spoliation existed, “may be imposed against Defendant [officer] to remedy harm to Plaintiff cause by any failings” by the state agency. (465). The Court refused to “award” the State “for its policy of

attempting to insulated responsibility for spoliation to a select few unreachable in the vast majority of suits by inmates.” (470).

306. **Jones v. Gillmore** [2021 WL 2917742] (W.D. Pa. July 12, 2021). In a prisoner pro se case, the court refused to impose sanctions for missing videos under Rule 37(e) because it was not convinced that “any relevant video or audio recordings existed” or that the defendants were “subject to a duty to preserve evidence.” (*3)
307. **J.S.T Corporation v. Robert Bosch** [2019 WL 2296913] (E.D. Mich. Or May 30, 2019), adopting findings and recommendations of Report and Recommendation No. 11 [2019 WL 2324488] (E.D. May 30, 2019)(Kevin F. Brady, Expert Advisor) as its “findings and conclusions.” The Expert Advisor found that prejudice existed from the deletion of the Yang emails (*9-10) under Rule 37(e)(1) but did not find sufficient circumstantial evidence of an “intent to deprive” to make a specific finding that it had occurred under Rule 37(e)(2). Bosch was prohibited from affirmatively using any emails authored by or addressed to Yang, or the absence of such emails, at summary judgment or at trial. Her emails secured from others could be used only in rebuttal to emails put in evidence by the moving party there absence could not be used to prove or disprove any fact even in rebuttal.” (*10). The court also ordered that Bosch was also barred from calling Yang as a witness at trial or providing a declaration in connection with any summary judgment motion, as recommended by the Expert Advisor. The Court ordered that the expert fees incurred be paid by Bosch; the Expert Advisor had recommended that this be done pursuant to the Court’s inherent authority (*11).
308. **Kadribasic v. Wal-Mart** [2021 WL 1207468] (March 30, 2021). After a de novo review, a District Judge did not accept an R&R recommending sanctions against Wal-Mart for destruction of e-mails and certain plans for a sale event because the record contained “only speculation and conjecture” that it had acted in bad faith. It did not mention **Rule 37(e)**, relying instead on factors used in the Eleventh Circuit in deciding whether or not to impose spoliation sanctions. (*4-5). The Magistrate Judge *had* quoted **Rule 37(e)**, but also relied on the traditional spoliation analysis. **It had recommended that the jury should “decided whether Defendant acted in bad faith,”** quoting from a 2013 Wal-Mart decision (Pope v. Wal-Mart, 2013 WL 12086325, at *7 (N.D. Ga. Nov. 12, 2013) to that effect, as well as a 2011 Wal-Mart case, 801 F. Supp.2d 1363, 1375 (M.D. Ga. 2011). The Magistrate Judge noted that plaintiff had “presented sufficient evidence to create a genuine issue of material fact as to whether sanctionable spoliation occurred” and “when presented with similar facts in Pope (where the question of bad faith was close)” the court “permitted the question of bad faith to go to the jury and, for purposes of summary judgment, assumed that the missing evidence would have been adverse to the defendants. 2013 WL 12086325.” [2021 WL 1522064, at *16 (N.D. Ga. Feb. 12, 2021)].
309. **Karsch v. Blink Health** [2019 WL 2708125, at *27] (S.D. N.Y. June 20, 2019)(Moses, M.J.) The Court concluded under **Rule 37(e)(1)** that that the Defendants would be permitted present evidence to the jury about “the loss of ESI and potential relevance of the ESI once contained [on certain servers and devices] and also seek an instruction informing the jury that it may consider that evidence in making its decision, along with all the other evidence in the case in “evaluating credibility and making its decision.” (*28) This will help “rectify the

evidentiary imbalance” created by the party and its counsel spoliating relevant ESI, provide the jury “as finder of fact, with context for that evidentiary imbalance, and leave the district judge free to determine the scope of the spoliation evidence to be admitted and to craft any related jury instructions. (*27). It also found that an award of “defendants’ expenses, including attorney’s fees, is clearly warranted under Rules 37(b)(2)(c) and 37(e)(1)). (*26) Rule 37(b) mandates that the court “must” award expenses, including fees, for failure to comply unless substantially justified. “Separately,” **Rule 37(e)(1)** “authorizes an award” of fees and costs to the moving party “to the extent reasonably necessary to address any prejudice caused by the spoliation” citing **Lokai Holdings** and **CAT3**. The court found the law firm to have been grossly negligent in failure to preserve the devices given to it, but did not discuss why it was appropriate, under Rule 37(e) to sanction a non-party (counsel). (*25-26) The Order required Plaintiff and his counsel to pay the expenses “reasonably incurred as a result of the plaintiff’s failure to obey [three listed] discovery orders as well as the fees and costs to obtain the Memorandum and Order. The “monetary sanctions shall be imposed jointly and severally” except that the firm alone shall reimburse defendants for expenses “caused by the Firm’s violation of [one of the orders]. (*28) [The Magistrate Judge subsequently ordered specific amounts paid as result of its order “that plaintiff and its counsel ‘pay the expenses, including attorney’s fees and out-of pocket costs,’ caused by their spoliation and failure to comply with court orders.” 2019 WL 6998563, at *1 (S.D. N.Y. Dec. 20, 2019)].

310. **Katebian v. Missaghi** [2020 WL 1285638] (E.D. Mich. March 18, 2020). The Court refused to dismiss a case as a sanction for spoliation under Rule 37(e) because even if it applied, “there is no indication” that the party “acted with the intent to deprive another party of the information’s use in the litigation.”
311. **Keenan v. Maricopa County** [2022 WL 684348] (D. Ariz. March 8, 2022). A court refused to impose sanctions under Rule 37(e)(2) where the defendant was careless but there was not sufficient evidence to find “purposeful” destruction of devices containing ESI “to avoid litigation obligations.” (*4) In addition, as a matter of “judicial discretion” it found that the prejudice was “marginal, at best” and the delay in seeking discovery and anctions show his claims were “exaggerated.”
312. **KCI USA v. Healthcare Essentials** [797 Fed. Appx. 1002 (2020)] (6th Cir. Jan. 16, 2020)]. The Sixth Circuit reversed and remanded an award of \$365K in fees and costs against former counsel and their law firm and \$290K against an individual on due process grounds. The Sixth Circuit opinion noted that an attorney could be sanctioned for discovery violations under rules “26(g)(3) and 37(b)(2)(C), 28 USC § 1927 and the court’s inherent powers.” (1006). However, the cause was remanded to first determine if the federal rules even allowed for sanctions “against a firm, as opposed to individual attorneys” and, alternatively, what part of the conduct on the part of the firm “is sanctionable under the court’s inherent powers.” Related decisions included [2018 WL 4327802 (N.D. Ohio Sept. 10, 2018)]; [2018 WL 3428711 (N.D. Ohio July 16, 2018) and [2018 WL 4510118 (N.D. Ohio Sept. 19, 2018)]. In June, 2018, the Court had also entered a default judgment against the party under “Rule 37) after mentioning its authority to do so under inherent powers, Rule 37(b) and **Rule 37(e)**. [2018 WL 3196950, at *9 (N.D. Ohio. June 29, 2018)]. The sole shareholder appealed to the Sixth Circuit affirmed the dismissal (and related damages and fees) “as a sanction for disobeying discovery orders”

under Rule 37(b)(2)(A)(vi) and found no violation of the right to a trial by jury because it was permissible in the “rare case of willful bad faith,” often in combination with prejudice to the other party, notice to the defendant and consideration of alternative sanctions,” as was the case here. 801 Fed. Appx. 928, 937 (6th Cir. Jan 28, 2020)(without any further mention of mention of Rule 37(e)).

313. **Keenan v. Maricopa County** [2022 WL 684348] (D. Ariz. March 8, 2022). The court refused to award any measures for failure to preserve [the contents of] certain “computer devices” under **Rule 37(e)**. While neither the Ninth Circuit nor the [text of the] Rules define intent, the Committee Note states that negligent or grossly negligent behavior does not logically support it. Here, the plaintiff merely showed defendant to have been grossly negligent and had not intentionally destroyed the devices “to skirt its legal duties.” (*4). Similarly, since plaintiff claims to have enough evidence that it is entitled to summary judgment, even assuming further evidence of retaliatory behavior was on the missing devices, its impact would likely be “marginal, at best.” The delay in asserting filing for sanctions - a year and a half – shows the claims of prejudice “are exaggerated.” (*5).
314. **Keim v. ADF Midatlantic** [2016 WL 7048835] (S.D. Fla. Dec. 5, 2016). In a putative class action under the TCPA, the plaintiff was unable to produce text messages relevant to his claim and sanctions were sought under **Rule 37(e)(1)**. The court famously noted that the rule “does not set forth a standard for preservation and does not alter existing federal law as to whether evidence should have been preserved or when the duty to preserve attaches.” The court ultimately refused to apply the rule because it could not be certain that the deletions at issue had not occurred prior to attachment of the duty. It noted, therefore, that the “better practice” would have been for the plaintiff’s counsel to “sequester and copy the contents of a plaintiff’s cell phone at the time that litigation is anticipated” so that a court can later determine which preserved portions must be produced,” saving costly and time-consuming motions that use significant court and attorney resources (n.4).
315. **Kerr v. McKay** [2022 WL 479140] (S.D. West. Va. (Feb. 15, 2022). In a confusing opinion involving a *pro se* plaintiff’s attempt to seek discovery sanctions against one part of the state government for the failures of another part of the government under subpoena, the court refused to sanction under its inherent power and, in footnote 4, also concluded that the motion “fails under the ESI analysis for the same reasons,” citing the **Rule 37(e)** decision in *Ethicon*, 2016 WL 5869448, at *2 (S.D. W. Va. Oct. 6., 2016).
316. **Kieffaber and Kieffaber v. Ethicon and Johnson & Johnson** [2021 WL 1145849] (March 25, 2021). In what appears to be an FRE 403 motion in limine raised in an individual *Ethicon* case after MDL rulings barring spoliation sanctions generally, the court may or may not compare Rule 37(e) – or it could be just Rule 37 (as to documents) - with spoliation motions. (“At this juncture, the Court merely notes the law with respect to spoliation (which places great weight on the resulting prejudice to the innocent party and the spoliator’s degree of culpability) is not synonymous with the law under Rule 37 (under which to avoid sanctions, the spoliator must show that the failure to disclose was “substantially justified” or “harmless” to the innocent party.” (*2).

317. **Kimberly-Clark v. Extrusion** [2021 WL 2291078] (N.D. Ga. June 3, 2021). A District Judge granted competing sanctions in a patent infringement action where the defendant belatedly changed its product to non-infringing status without promptly informing the plaintiff, but the plaintiff did not adequately preserve ESI in anticipation of litigation. The Court refused to find that preclusion of information of the redesign was automatic under **Rule 37(c)**, but held that “no other remedy sufficiently addresses” the failure to disclose, although “an additional sanctions of a jury instruction or an award of attorney’s fees would be overly punitive” and an instruction might confuse the jury.” (*2). It found that the plaintiff should have anticipated litigation when representative met to discuss the allegations (“first accused”) of infringement and failed to act when it retained outside counsel to prepare for litigation, although there was not showing (at the time of the motion) that it was “done in bad faith,” thus limiting its remedy to measures to cure prejudice under **Rule 37(e)(1)**. (*3). The court determined to allow the defendant to admit evidence of communications in certain emails without challenging the authenticity of the copies, noting (in n. 13) that the defendant had noted it might seek further sanctions if “it discovers the destruction” of the ESI was “done intentionally.”
318. **King v. Wang** [2021 WL 5495779] (S.D.N.Y. Nov. 23, 2021). In what amounts to dicta, the court, in footnote 1, contrasted the intent to deprive requirement for sanctions such as an adverse inference or dismissal under **Rule 37(e)** the “mental culpability element” in the Second Circuit which “requires that the party breached a discovery obligation knowingly in bad faith, through gross negligence, or through ordinary negligence,” citing *Raymond v. City of New York*, 2020 WL 1847556, at *5 (S.D.N.Y. April 3, 2020), citing *Residential Funding*, 306 F.3d 108, 113. It asserted that a “failure to disclose under Rule 37 encompasses both the destruction of evidence, or spoliation, and untimely production of documents and information required to be produced,” citing *September 11th Liability Cases*, 243 F.R.D. 114 at 125, citing *Residential Funding* generically (see “306 F.3d 99”).
319. **Klipsch Group v. Epro E-Commerce** [880 F.3d 620] (2nd Cir. Jan. 25, 2018). On an interlocutory appeal before trial the court found affirmed the imposition of \$2.7M in monetary sanctions for reimbursement of counsel fees under its inherent authority, noting that the costs were carefully limited to those incurred in direct response to the party’s noncompliance with deadlines and necessitated motion practice (631). The court did not agree to consider if the fee award was consistent with the principles of **Rule 37(e)** because “the district court did not, in fact, rely on the rule” – the sanctions “were imposed under the court’s inherent power to manage its own affairs.” (632) In footnote 6, it noted that lower court had relied on *Hall v. Cole*, 412 U.S. 1 (1973) to the effect that a federal court may award counsel fees to a successful party when the opponent has acted in “bad faith, vexatiously, wantonly or for oppressive reasons” (at 5); “see also *Chambers v. NASCO*, 501 U.S. 32, 45-46 (1991)(same).” the court found that ePRO had “acted with the requisite bad faith” and “accordingly” we “have no occasion to address” whether the amendments that took effect on December 1, 2015 apply to this case.” In footnote 7, it rejected the argument that the monetary sanctions “are punitive measures that violate its due process right.” The record makes clear that “consistent with *Goodyear Tire v. Haeger*” [137 S.Ct. 1178 (2017)] the amount properly reimbursed only for the legal bills that the litigation abuse occasioned,” meaning there was “no need’ to consider if they received the heightened procedural requirements before “a litigant can be subjected to punitive damage beyond what is required to compensate is opponent.” The court noted that if

it turns out the account of actual damages in this case is “modest” in relation to the costs spent, it “would be a highly regrettable outcome” in light of Rule 1 and amended Rule 26(b) (636).

320. **Knight v. Boehringer Ingelheim**, 323 F.Supp.3d 837 (S.D. West Va. June 19, 2018). In a single plaintiff medical device products case (Pradaxa), the District Court applied Rule 37(e) (n. 1) and determined that no spoliation sanctions were to be utilized for the loss of a custodial file and “minor” documents because the party had failed to “clearly elucidate what relevant information is lost” given the “otherwise sufficient evidentiary support for their claims.” (860). It also refused to find that the “bad faith” findings made in earlier litigation since intent for the purpose of imposing sanctions is not equivalent to bad faith. (860) That is also true of the loss of emails of another witness since while some unknown emails may have been lost, the plaintiffs already possess emails that appear to support their claims. (861). “[W]ith the facts before the Court, and within its discretion, the Court finds neither prejudice, nor intent to deprive, and will not impose Plaintiff’s requested sanctions.” (861) Given the absence of findings necessary to allow for sanctions, the prejudice from admitting evidence or argument would prejudice the Defendants and the court “finds that that prejudice substantially outweighs any probative value that the previous discovery issues may have.” It excluded evidence of spoliation and prohibited “discussion of previous discovery issues, findings or sanctions.” (861).
321. **Kologik Capital v. In Force Technology**, 2020 WL 1169403 (D. Mass. March 11, 2020). In a case where the plaintiff pursued defendant to collect payments owed for use of plaintiffs software under theories of conversion and unjust enrichment, the Magistrate Judge found a failure to preserve in breach of **Rule 37(e)(1)** in a failure to preserve communications with third party users of the software. It noted that Rule 37(e) does not require a showing of intent” except for certain severe sanctions, that prejudice existed because the failure to preserve led to “months of fact discovery trying to recover” the missing information, preparing for depositions without ESI and loss of good will from customers pulled into the litigation. (citing Hefter, 2017 WL 3317413, at *6, n. 3 (D. Mass. Aug. 3, 2017). It ordered the party that failed to preserve to take responsibility for recovering the lost information from third parties and to waive objections as to authenticity (*3) and, in footnote 3, deemed the defendants to have “waive[d] an argument that Rule 37(e) does not apply because the information can be restored or replaced through discovery.” It also denied monetary relief without prejudice to be renewed at the conclusion of the case. and reserved a request for a jury instruction or allowing the plaintiff to present evidence about the destruction at trial for the trial judge. (*3)
322. **Konica Minolta Business Solutions v. Lowery Corporation** [2016 WL 4537847] (E.D. Mich. Aug. 31, 2016). In a case involving potential spoliation of emails by former employees who formed a competitive firm, the court ordered more discovery to determine if that reasonable steps had not been taken, since the Rule would not be applied if they had since “[s]anctions are not automatic.” The court also ordered more discovery to determine if there was an ability to restore or replace the lost information. The opinion is a pithy, well-written playbook outlining “four predicate elements” to use of **Rule 37(e)**, and includes a finding that it was just and practicable to apply the new Rule because no changes were made in a manner “adverse” to the party.

323. **Kortright Capital v. Investcorp** [2019 WL 306450] (S.D.N.Y. Jan. 18, 2019). A party sought an adverse inference in mid trial (a bench trial?) under Rule 37(c) for the failure to disclose information in a timely fashion. The court found that under Residential Funding, it was available for non-production and spoliation upon a showing of ordinary negligence. It conceded a uniform standard had been “codified” in Rule 37(e) to remedy the loss of ESI, but that it did not govern the “non-production of evidence nor supersede it in that context, citing the Federal Circuit decision in *Regeneron Pharms. v. Merus*, 864 F.3d 1343, 1364, n. 7 (Fed. Cir. 2017). The court awarded attorney’s fees and expenses under *Phoenix Four*, 2006 WL 1409413, at *3 (S.D.N.Y. 2006) and noted that Residential Funding “appeared to root the authority to sanction is part to the Federal Rules” having cited Rule 37(b)(2)(A)(n. 2).
324. **Kosmidis v. Port Authority** [2020 WL 5754605] (S.D.N.Y. Aug. 27, 2020). The Magistrate Judge recommended that a motion for spoliation sanctions be denied as to a summons which was issued (and then torn up) by a police officer because it could not be determined on the record before the court, and since involved the excessive force claims, should await trial and be resolved by the jury. Quoting from *Tachatat v. O’Hara*, 249 F. Supp.3d 701, 711 (S.D.N.Y. 2017, *Op. & Order aff’d*, 2017 WL 3172715 (S.D.N.Y. July 25, 2017, *aff’d* 795 F. App’x 34 (2nd Cir 2019)), the court stated that “[a]s here, where a claim for spoliation rests on disputed issues of fact, ‘the question of whether a sanction will issue would have to await trial.’” (*7). It also refused to sanction the failure to preserve the handwritten notes that were placed, through electronic means, into a written report, because any contentions as to differences are “conjecture” which is “insufficient to sustain a motion for spoliation sanctions.” (*10). In footnote 6, the Court stated that Rule 37(e) was not implicated “because the evidence at issue consists of original handwritten material, not ESI.”
325. **Kuhar v. Petzi** [2016 WL 3921145] (D. N.J. July 19, 2016). In an interesting opinion seeking to impose what it called “actionable spoliation” under “federal law as part of the inherent power of a district court to sanctions parties,” the court relied on *Bull v. United Parcel Serv.*, 665 F.3d 68 (3rd Cir. 2012) in finding no bad faith when a party authorized it expert to apply a cleaner to a portion of bolt before non-destructive testing. The “intent which must be shown is that evidence was destroyed in order to prevent it from being used by the adverse party.” (*5). The bolt had been outside for months and in a drawer for a year, so it was not possible to argue prejudice from not being able to examine it immediately after the accident at issue. The court noted in footnote 8 that “this motion obviously does not involve” analysis of **Rule 37(e)**, which addresses the failure to preserve ESI.
326. **La Belle v. Barclays Capital Inc.**, ___ F.R.D. ___, 2022 WL 121065, at *5 (S.D.N.Y. Jan. 13, 2022). Magistrate Judge Gorenstein, in a single plaintiff employment action, refused to find that an employer had a duty to preserve text messages (and the associated duty to search for them) merely because HR employees were aware that the plaintiff consulted an attorney about the underlying issues, citing the Committee Note to **Rule 37(e)**. (*7)(courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant.) Also, although **Rule 37(e)** does not address whether a party must have control over ESI at the time it was destroyed, “the standard for showing that a party had an obligation to preserve evidence is the same for both ESI and non-ESI,” citing *Leidig v. BuzzFeed*, 2017 WL 6512353, at *7 (S.D.N.Y. Dec. 19, 2017). (*5). The Court also found it

reasonable that the duty to search personal cellphones did not arise until there was “some indication that evidence relevant to plaintiff’s claims” was on the personal devices of its employees, given that the Barclay’s policy prohibited employees from discussing business on such devices without company approval. (*8).

327. **Laub v. Horbaczewski** [2021 WL 2273462] (C.D. Cal. April 29, 2021) the District Court affirmed fee awards imposed for spoliation of text messages that had occurred because Laub had access to “easy and free methods” of preserving messages but “did not take advantage of them.” (*4) The district court reviewed and modified the Magistrate’s order, which involved a reduction because of circumstances relating to the pandemic, by analogy to **Rule 37(a)(5)**, which was not legal error. (*6). The Court noted that “although [**Rule 37(e)(1)**] does not make an express reference to the ability to pay of a sanctioned party, it does grant the district court broad discretion to fashion an appropriate remedy [and the Rule] only includes a ceiling on sanctions: they must not be “greater than necessary to cure the prejudice.” (*6). In an earlier decision [at 2020 WL 7978227] (Nov. 17, 2020), dealing in part with a motion to compel under Rule 37(a), the Court had concluded that it would be disproportionate to require a user of **Slack** to take steps - or consent to others to take steps, via subpoena - to access the messages between key parties simply because the user had not upgraded its Slack membership to secure access to its stored messages. It was unaware of any precedent permitting it to compel a non-consenting party to agree to seek documents (*5). Accordingly, a request for production under Rule 37(a) was denied as not proportional to the needs of the case (*6), distinguishing, in fn. 3, **Calendar Research v. StubHub**, 2019 WL 1581406, at *4 (C.D. Cal. 2019) where the motion to compel production of slack was granted because the party had upgrade to an account that included a utility tool to extract private channel messages).

328. **Laughlin v. Stuart** [Case No. 19-cv-2547 (ECT/TNL), 2020 WL 4747665, at *2] (D. Minn. Aug. 17, 2020); *see also* 2021 WL 1589546, at *6 (D. Minn. April 22, 2021). In denying a motion for sanctions where the party had not furnished information to the party sufficient for it to determine if prison video should have been preserved, the court noted that the duty extends only to relevant ESI as viewed from the perspective of the party that lost it. Absent that assistance, officials would likely be required to preserve every video, audio recording, and every scrap of paper created, which is a burden that exceeds what is required under **Rule 37(e)**. Subsequently, after a flurry of filings without meeting standards required, the court denied a Rule 37(e) motion, stating that such conduct “reinforce[s] the increasingly ineluctable reality that [the party] is intentionally ‘conducting this and other lawsuits in a manner to oppress and unduly burden opposing parties and the Court with vexatious litigation.’” 2021 WL 1589546, at *6 (D. Minn. April 22, 2021).

329. **Lawrence v. City of New York** [2018 WL 3611963, at *5] (S.D.N.Y. July 27, 2018). The court refused to apply “Rule 37” to consider sanctions imposed for creating fraudulent digital photograph because it “did not fail to comply with discovery orders, to supplement an earlier response, or to preserve electronically store information”).

330. **Learning Care v. Armetta** [315 F.R.D. 433] (D. Conn. June 17, 2016). In a contract dispute where a former employees’ laptop was destroyed “in the ordinary course of business” after the duty to preserve attached the Court declined to apply **Rule 37(e)** because it would be

“unfair” to do so since the issue had been raised in September, 2015 at a time when Second Circuit authority would not have barred an adverse inference for negligence. (437) The negligent wiping of hard drive of laptop was sanctioned by an award of reasonable attorney’s fees to deter the party from “doing it again” which was deemed proportionate to the prejudice involved, which resulted from “careless,” but not grossly so. The court applied the *Residential Funding* “relevance” requirement of specifying “the type and substance of the destroyed evidence and that the evidence was favorable to his position,” but held there was enough evidence to satisfy it. (438-439) It also rejected the argument that prejudice could have been reduced by third party discovery since that goes to the type of sanctions the court imposes. (439)

331. **Lee v. Belvac Production Machinery** [2020 WL 3643133, at *4](W.D. Va. July 6, 2020), appeal pending. The court refused to sanction under **Rule 37(e)** because there was no showing “that the ESI was lost.” “**Rule 37(e)** is not designed to sanction a party for failing to meet their discovery obligations by refusing to turn over discoverable documents - it is designed to sanction a party who wrongfully destroys evidence or allows it to be destroyed.
332. **Lee v. Horton and Kroger Dedicated Logistics** [2018 WL 4600303] (W.D. Tenn. Sept. 25, 2018). In adopting the R&R recommendation that Kroger had no duty to preserve a daily electronic log because it had no “reason to foresee” litigation the court emphasized that there was no traffic citation issued and the moving party did not seek medical treatment while the damage to the automobile was minimal. The court refused to find that the boilerplate labeling of the incident report as prepared in anticipation of litigation “is insufficient” to demonstrate a duty to preserve, contrasting *Zuulake*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003), where it occurred against a backdrop of wide knowledge of the potential litigation.
333. **Legacy Data Access v. Mediquant** [2017 WL 6001637] (W.D.N.C. Dec. 4, 2017). After a six-day jury trial, an award of \$720K was entered against a new employer who had hired a former employee. The court gave the jury an adverse inference instruction - which is not quoted in the opinion – that was not based on **Rule 37(e)(2)** after finding that **Rule 37(e)(2) is inapplicable** “because this case involved the destruction of ESI, not the loss of ESI, quoting, in footnote 8, from the Committee Note to the effect that the provision “applies only” when ESI is lost because the party failed to take reasonable steps.” This distinction was rejected in *Brittney Gobble Photography v. Sinclair*, (2020 WL 1089191) because the rule does not distinguish between “lost and destroyed” ESI; it “applies to all loss, including destruction.” A Student Note also criticized it in a somewhat overwrought and confusing analysis. Note, *Righting the Ship: What Courts are Still Getting Wrong About Electronic Discovery*, 72 SMU L. Rev. 785, 803-806 (2019). The court noted that it had given an adverse inference instruction that permitted the jury to draw inferences from the evidence of spoliation of the contents of an SD card and related circumstances. It opined that the intent required for the adverse inference was “willful conduct resulting in the evidence’s destruction” (citing *Nucor Corp*, 251 F.R.D. 191, 194 (D.S.C. 2008) and that it had found “sufficient evidence supported allowing the jury to assess the evidence and determine whether spoliation occurred (also citing *Nucor* at 203). (*9) The court found that while there was no direct evidence that the employee had been told or orders to misappropriate trade secrets, there was “sufficient evidence, combined with the instruction on spoliation, for a reasonable jury to conclude” that it occurred. (*8) The court

also awarded attorneys fees based on the evidence “the inference allowed by spoliation” ad the jury findings, which permitted the conclusion there had been willful and malicious misappropriation. (*19). There is no indication of an appeal to the Fourth Circuit.

334. **Leidig v. BuzzFeed** [2017 WL 6512353] (S.D.N.Y. Dec. 19, 2017). In defending a libel action based on statements in a story, BuzzFeed sought sanctions under **Rule 37(e)** for several types of failures involving preservation of ESI. The Magistrate Judge (Gorenstein) found that while Leidig’s actions “might have been sufficient to obtain a harsh sanction such as an adverse inference instruction” prior to the 2015 Amendments, **Rule 37(e)(2)** permits such an instruction or dismissal only “on a showing that evidence was destroyed with “intent to deprive another party” of the use of the information. (*11). While there was an “insufficient evidence” that Leidig acted with that intent, its actions were “certainly negligent” since it took no timely action to implement a litigation hold. (*12) [“The opening paragraph of **Rule 37(e)** permits sanctions upon a showing the party failed to take reasonable steps, “which we equate to roughly a negligence standard.” (*10) The court noted in a footnote that it was irrelevant if they were grossly negligent, as “**Rule 37(e)(1)** “provides no reason to distinguish between gross negligence and ordinary negligence.” (n. 8).] It described the “amateurish” collection of documents leading to destruction of perhaps crucial metadata as reflecting a failure to take reasonable steps as required and prejudice, making sanctions available under **Rule 37(e)(1)** “although not under Rule 37(e)(2). (*12). Ultimately, it decided that BuzzFeed “may present evidence to the jury that plaintiffs disabled the websites listed in their Initial Disclosure after litigation was threatened and at a time when they were legally obligated to preserve those websites,” among other remedies. (*14). It noted that the remedy may be inadequate to remedy all prejudice but “harsher sanctions” risk falling outside of those permissible under Rule 37(e)(1) or being greater than necessary to remedy any resulting prejudice. (*14) [Noting **in footnote 12**, that the ruling “should not be construed as opining on whether a permissive (rather than a mandatory) adverse inference instruction” is appropriate as the result of the loss of evidence. It noted that the Second Circuit had made clear that a “permissive adverse inference does not necessarily reflect a sanction, and its delivery to a jury does not require the same findings necessary to impose a spoliation sanction.” See *Mali v. Fed. Ins. Co*, 7201 F.3d 387, 391-94 (2nd Cir. 2013); *Kilpich v. Big Box Store* [2014 WL 904595, at *4]. It stated that such “permissive adverse instruction” will “necessarily be informed by factors and evidentiary support different from what is necessary to obtain a spoliation sanction.” [citing *Penske Truck*, 2015 WL 802994]. Such an instruction could be requested at the time pretrial order materials are submitted to the court. The District Judge eventually granted a summary judgement in favor of BuzzFeed, 371 F.Supp. 3d 134 (S.D.N.Y. 2019), which was reviewed de novo and affirmed by the Second Circuit. 788 Fed. Appx. 76 (Mem), cert. den. 141 S. Ct. 256 (2020). Sedona cites the case how the lack of sophistication and “amateurish” preservation efforts supports its observation that knowledge and expertise may be needed when ESI is at issue. Sedona Conf. Commentary on Legal Holds (2nd Ed), 20 Sedona Conf. J. 341, 357 (2019).
335. **Leonard v. St. Charles** [2021 WL 5161731] (E.D. Mo. Nov. 5, 2021). A prisoner video allegation of an “intent to deprive” was denied since it was “too great a leap” to conclude that the county saved and turned over plainly relevant video but “allowed this less relevant, at least on its face, footage to be overwritten with the intent to deprive the Plaintiff of it use in this litigation.” (*2)

336. **Leroy Bruner v. American Honda** [2016 WL 2757401] (S.D. Ala. May 12, 2016). The duty to preserve inherent in **Rule 37(e)** was invoked to justify an order requiring a litigation hold to prevent the deletion of email.
337. **Lewis v. Erfe** [2020 WL 4581724] (D. Conn. Aug. 10, 2010). The court decided to allow testimony about the failure to preserve surveillance video in case involving defendants who did not have custody and control but could have requested its preservation after prisoner complaints. Although a bench trial, the did not regard the request for an adverse inference to be moot since it could be converted to a jury trial. The court found prejudice because it could bear on disputed testimony and the credibility of the defendants relating to the deliberate indifference claim “to the extent they had the ability to affect is preservation and failed to make a reasonable attempt to assure its preservation” (*4).
338. **Lexpath Techs. Holdings v. Brian R. Welch** [744 Fed. Appx. 74] (3rd Cir. July 30, 2018)(**Lexpath #2**). In a decision not explicitly mentioning **Rule 37(e)**, although the lower court had cited it in its decision prior to trial when authorizing an adverse inference [2016 WL 4544344 (D. N.J. Aug. 30, 2016)(**Lexpath #1**)] the Court of Appeals affirmed a jury verdict for defendants, who prevailed on their counterclaim that the suit was brought in bad faith. The moving party argued it was unfairly denied a spoliation instruction after the judge changed his mind about giving an order that “would tell the jury” a paragraph or two about spoliation and “instruct that the jury may consider the lost information unfavorable” to the defendant. (77) [The lower court had IN LEXPATH #1 that it would use the “**second option under Rule 37(e)**” [ie, (e)(2)] and instruct the jury that it may presume the information to be unfavorable]. According to the Third Circuit, lower court was willing to “charge spoliation” but not give a presumption, but the moving party asked the spoliation charge not be included. (78-79). In footnote 2, the Court of Appeals noted that while the details of the charge were not in the record, but “we presume the Court meant that it would tell the jury that it was up to them to determine whether or not spoliation had occurred.” The Court of Appeals refused to find an abuse of discretion. The court had repeatedly told the parties that it was “up to the jury to find whether spoliation in fact occurred” and after hearing the evidence it concluded that a presumption was not warranted given the lack of testimony on certain key issues. The Court said that “a district court’s findings of fact in deciding a pretrial motion cannot foreclose a jury from making its own factual findings” (79). It cited a Supreme Court decision [312 U.S. 450. 453 (1941)] that Rule 50(b) had not “taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact – a jury being the constitutional tribunal provided for trying facts in courts of law.” In a footnote at that point, note 3, the Third Circuit observed “we have not yet spoken on the “proper division of fact-finding labor, Nucor Corp. v. Bell, 251 F.R.D. 191, 202 (D.S.C. 2008), between judges and juries when issuing a spoliation sanctions” and need not do so on this appeal because it was not an abuse of discretion “to decline to give an adverse inference charge” under these circumstances. The court also noted that the lower court had “never indicated” that it would instruct the jury that, as a matter of law, spoliation had occurred” and had repeatedly reminded the court before trial that “the facts should be tried by the jury.” (79) Also, “it was within the Court’s discretion to revise its prior ruling upon hearing the evidence at trial.” (80)

339. **Linior v. Polson** [2017 WL 7310076, at *2 (E.D. Va. Dec. 6, 2017)]. A Magistrate Judge recommended that the court deny a motion for dispositive sanctions under Rule 37(e) because, *inter alia*, the individual defendant had no power to have compelled its former employer to take “reasonable steps” to compel his TSA employer to preserve video recordings of the incident involving excessive force at the security screening. The court also noted the lack of prejudice or evidence of intent to deprive, since even if the agency had such an intent, that does not support a finding of intent by the defendant.
340. **Living Color v. New Era Aquaculture** [2016 WL 1105297](S.D. Fla. March 22, 2016). In a methodical opinion applying Rule 37(e) to dispute with a sympathetic former employee who failed to disable the auto-delete feature of his cell phone after litigation began, no measures were found to be available under either **Rule 37(e)(1)** or **(2)**. The prejudice was minimal from deletion of text messages, the bulk of which were secured from recipients, and there was “no **direct nexus** between the missing text messages and the allegation in its complaint.” (*5) The plaintiff did not explain how the missing text messages would establish a key fact. (*6). It was not a nefarious practice to delete text messages as soon as received or thereafter under the circumstances. The court found that the former employee’s description of the missing content as unimportant was credible and the court noted that the abundance of preserved information was sufficient to meet the needs of the moving party, citing Committee Note to Rule 37(e)).
341. **Lokai Holdings v. Twin Tiger** [2018 WL 1512055] (S.D.N.Y. March 12, 2018). A Magistrate Judge sanctioned an entity sued for trade dress copying of a bracelet as a result of the loss of emails under confusing circumstances sufficient, in the courts view, to justify remedial measures under **Rule 37(e)(1)** but not under (e)(2) given a lack of intent to deprive (*15-*16) and a failure to show selective deletion (*16). The attorney for the non-moving party came in for criticism for failure to follow *Zubulake* standards of overseeing compliance with a litigation hold and not becoming familiar with policies and architecture. (*11). While the court found that prejudice existed, it was clear that it had been able to obtain discovery sufficient to support its claims. It exercised its discretion to order reimbursement for attorney’s fees and costs to ameliorate “economic prejudice” citing CAT3 and precluded the nonmoving party from using unpreserved emails unless duplicate copies obtained any testimony suggesting such emails would support defenses or counterclaims. It permitted the movant to seek an instruction from the trial judge that the jury is permitted to make “reasonable extrapolations or interpolations” from existing sales data if it is shown that material gaps resulting from deletions of email exist (*17). In explained that the “prior version of Rule 37, an array of sanctions, including severe sanctions, could be imposed for spoliation of evidence merely upon a court’s finding that the non-moving party had destroyed evidence through negligence” (citing **Residential Funding**). However, the amended **Rule 37** makes it “more difficult for a moving party to obtain sanctions for spoliation of ESI, by rejecting the Residential Funding standard that authorized the giving of adverse-inference instructions on a finding of negligence or gross negligence. (8*).
342. **Lopez v. Winco Holdings, Inc.** [2021 WL 3773619, at n. 9] (Aug. 25,2021) The District Judge refused to find that the defendant has acted with the intent to deprive under Rule 37(e)

and accepted the representation that once the records were requested in discovery, “they had been destroyed.” (n.9)

343. **Love v. City of Chicago** [2017 WL 5152345, at *5] (N.D. Ill. Nov. 7, 2017). The court, applying former version of **Rule 37(e) because the current version** is not retroactive held that there was no duty to preserve audio recordings overwritten in the regular course of business absent notice of the duty (citing *In re Pradaxa*, 2013 WL 5377164 at *3 (S.D. Ill. 2013)).
344. **Love v. Medical College of Wisconsin** [350 F. Supp.3d 730] (E.D. Wisc. Nov. 20, 2018). The court denied a motion for sanctions under Rule 37(e) despite the failure to take reasonable steps to preserve the emails of a third party witness because there was no satisfactory explanation of the degree of prejudice suffered and the moving party had access to an “abundant amount of preserved information on the topic,” since production had been made of some of the emails from other sources.
345. **Mafille v. Kaiser-Francis Oil Company** [2019 WL 2189515] (N.D. Okla. May 21, 2019). In ruling that it was premature to find a party should be sanctioned under Rule 37(e), the court noted that on the record to date there was no factual showing of prejudice and that efforts were still available to search a LAN server for the missing ESI. The court decided against sanctions without prejudice, but expressed the hope in a footnote that there would be no need to address it further and “the focus of the litigation” will not “devolve into a search for a tenuous basis for sanction.”
346. **Mahboob v. Educational Credit** [2021 WL 791853] (March 1, 2021). The court refused to hear a motion for sanctions for spoliation of “call data” filed three years after it became aware of the spoliation but did hear a motion for spoliation of “call recordings” three weeks after learning of it, since “reasonable and falls within the time frame allowed by chamber rules.” (*2). It found a failure to take reasonable steps under **Rule 37(e)** when a litigation hold forwarded to the manager of the “call archive process” apparently failed to do so, citing **Zubulake V** admonitions that counsel must oversee compliance. [“Rule 37(e) ‘does not call for perfection in preserve ESI, but it does ‘call for reasonabl[ness].’” (*3). It found the data was destroyed by a two-year data-retention policy, which the party had claimed “kicked in” because the entity “inadvertently didn’t place the hold.” This was “at worst gross negligence” and “harsh sanctions” are not appropriate. (*4). It also found that the spoliation of the call records did not prevent plaintiff from proving her claim, but “did create ‘at least *some* prejudice” since the party had to expend “additional time, money and resources” on deposition about destroyed evidence. (emphasis in original) [citing *Borum*, 332 F.R.D. 38, 47 (D.D.C. 2019)] “To cure the prejudice,” the party should pay reasonable attorney’s fees incurred “due to” the call-recording spoliation, including fees for the motions and deposing the party regarding the failure to preserve. [citing *Youngevity Int’l v. Smith*, 2020 WL 7048687, at *5 (S.D. Cal. July 28, 2020). (*4) It also barred the party “from using any call recording in its defense.”
347. **Malone v. Weiss** [2018 WL 3656482, at *7 (E.D. Pa. Aug. 2, 2018). The court used its inherent authority to deal with spoliation because it is “a more appropriate rubric” here since the Rule 37(e) by its very terms “only” applies when a party has failed to take reasonable steps

to preserve. The Rules “does not speak to the current dispute” which were “more serious” given that there was “intentional manipulation of emails and contracts.” The court cited to a pre-2015 decisions that found it appropriate to impose sanctions under inherent power because the misconduct at issue was “broader than a Rule 37 violation.

348. **Man Zhang and Chunman Zhang v. The City of New York** [2019 WL 3936767] (S.D.N.Y. Aug. 20, 2019). In a Rikers Island case involving death of the prisoner from allegedly denial of medical care, the court sanctions for loss of ESI but not documents, in part because the conduct was “at worst negligent,” since nothing in the record suggested the defendants had destroyed evidence in bad faith or with an intent to deprive, but was awarded attorney’s fees under **Rule 37(e)(1)**.
349. **Mannion v. Ameri-Can Freight Systems** [2020 WL 417492] (D. Ariz. Jan. 27, 2020). A court order setting for the reasons it had denied an adverse-inference instruction after concluding a trial on the merits and dealt with related issues as to the division of labor between court and jury. At one point, the court famously stated that “judges, not juries, should be the ones deciding whether to impose spoliation sanctions.” (*4). It subsequently noted that Nucor v. Bell, 251 F.R.D. 191, 202 (D.S.C. 2008) had noted (at 202-03) some courts permit the jurors to “re-assess” the evidence and determine whether spoliation” has occurred at all.” The court noted that it was “not convinced that such reassessment by the jury is ever necessary or appropriate.” (*4) [citing Aaron v. Kroger, 2012 WL 78392 and Brookshire Bros, 438 S.W.3d 9 (2014)]. While the entire opinion is useful and instructive, footnote 5 speaks of allowing the court to “delegate” only one “spoliation-related factual finding” to the jury, citing Woods v. Scissons, 2019 WL 3816727 (D. Ariz. 2019) and Glover, 6 F.3d at 1329-30. The opinion can be cited for the proposition that “this type of issue” should be raised via a pretrial motion, “not via trial briefs submitted in the middle of trial.” (*6)
350. **Mannina v. District of Columbia** [437 F. Supp.3d 1] (D.D.C. Feb. 4, 2020). In a curious opinion, the Magistrate Judge gave what amounts to an advisory opinion that a party had failed to preserve ESI (a video) and documents, thus constituting spoliation, but eschewed dealing with prejudice and an appropriate remedy which, it implied, is the time to talk about culpability, leaving its findings of “spoliation” - without reference to **Rule 37(e)** - to be found in the abstract. It noted in fn. 8, however, that **Rule 37(e)** might bar penal sanctions (“because the court has not found intentional or wilful spoliation, penal sanctions may be barred pursuant to Rule 37. Fed. R.Civ. R. 37(e).”
351. **Manning v. Safelite Fulfillment** [2021 WL 3542808] (D. New Jersey Aug. 11, 2021). The District Judge overruled most objections to an R&R by the Magistrate Judge as reported at 2021 WL 3557582, at *6 (D. N.J. April 29, 2021)(refusing to impose sanctions pursuant to its inherent authority because Rule 37(e) provides “the exclusive remedy” for spoliation of ESI) but refused to accept the finding that the party had not acted with an intent to deprive and that the appropriate sanction under **Rule 37(e)(1)** would be to allow Defendants to “present evidence of the deleted Facebook messages to the jury at trial. (*2)] The District Judge, without explaining why, decided that it would “reserve judgment” and “will submit to the jury the issue of whether Plaintiff acted with an intent to deprive Defendants of relevant information when he deleted his Facebook messages.” (*4) (quoting Committee Note and noting that it

would choose an appropriate sanction after considering “the jury’s intent finding.”) [The district court had utilized a “de novo review” of the ruling on burden of proof regarding prejudice, rejecting the argument that the Magistrate Judge had erred in using pre-2015 standards, citing *GN Netcom v. Platronics*, 930 F.3d 76 (3rd Cir. 2019). (*3)]

352. **Mannion v. Ameri-Can Freight Systems** [2020 WL 417492] (D. Ariz. Jan. 27, 2020). After jury trial was concluded, the court explained why it had not given a spoliation instruction as suggested by the moving party. In the court’s view, the proposed instruction intruded too far into the fact-finding about spoliation which was the province of the court. It acknowledged that the Committee Note to **Rule 37(e)** stated that “one particular spoliation-related factual finding – whether the party against whom sanctions are sought acted with a culpable mindset” could be delegated to the jury. (Footnote 5) It then cited **Woods v. Scissions**, 2019 WL 3816727, *6 (D. Ariz. 2019)”allowing jury to decide whether alleged spoliator acted with requisite intent”); **Glover v. BIC Corp.**, 6 F.3d 1318 (9th Cir. 1993), at 1329-30 (“noting that the district court allowed the jury to make factual findings on intent but not addressing the propriety of that approach”). However, the movant did not ask the Court to delegate “this particular sub-issue to the jury - they sought to have the jury make all of the spoliation-related factual findings.”
353. **Manufacturing Automation v. Hughes** [2019 WL 266970, at *6] (C.D. Cal. Jan. 15, 2019). In deciding a motion in *limine* prior to trial, a District Court decided not to allow the party to inform the jury of an award of monetary sanctions which was paid and not appealed. [2018 WL 5914238, at *18 (C.D. Cal. Aug. 20, 2018)] The moving party argued that it “simply want[s] to be able to present evidence to the jury of the plaintiff’s spoliation, so the jury may draw its own conclusions about what that means,” citing the Committee Note to Rule 37(e). The court agreed that “it would be improper to provide an additional remedy, held that his ruling did not preclude the moving party from “identifying for the jury any missing documents that may pertain to plaintiffs claim.” (*5) Also, both parties may inquire at trial how each party handles document retention policies, changes to them, as well as the plaintiff’s failure to comply with their own polices “and the reasons for this lack of compliance.” The information is ‘relevant to the merits and burden of persuasion’ in the case. (*5) The court earlier stressed that presenting of evidence about the loss to the jury under subdivision (e)(1) is “a remedy, not an automatic right” which was available *only if no greater than necessary to cure prejudice.* (*6) (emphasis in original). After a seven day jury trial in February, 2019 the jury returned a split verdict liability but found no damages, and the trial court entered judgement for the defendants since “plaintiff was required to prove damages or otherwise obtains some remedy to prevail on its claims.” 2019 WL 2396308 (June 3, 2019). The post-verdict opinion dealt solely with attorneys fees under the various theories. On September 11, 2019, the Ninth Circuit entered an order reflecting the “voluntary dismissal of the case by the appellant. 2019 WL 4729846 (9th Cir. Sept. 11, 2019).
354. **Marquette Transportation v. Chembulk** [2016 WL 930946] (E.D. La. March 11, 2016). In an action alleging negligent operation of a vessel near New Orleans, allegedly causing a moored boat to capsize, **Rule 37(e)** was not applicable even if reasonable steps had not been taken to initially preserve because certain key audio and radar data, which had been deleted, was acquired after a DVE/CD-ROM to which it had been downloaded had been found by the

captain of the vessel. The court also refused a request under **Rule 37(c)** for costs of expenditures for expert during period before the full data set was recovered because “the matter involves VDR data, which is electronically stored information (“ESI”).”

355. **Marshall v. Dentfirst** [313 F.R.D. 691](N.D. Ga. March 24, 2016). No measures were available under **Rule 37(e) (or if the Rule did not apply, under Eleventh Circuit standards, which are “substantially similar”)** for failure to retain browsing history or emails of terminated employee since there was no evidence that they existed when the duty to preserve attached after filing of an EEOC charge. Even if they had existed when the computer was wiped and recycled there was no evidence that the party acted in “bad faith” or with “intent to deprive” under **Rule 37(e)(2)**. Moreover, there was no prejudice from their loss since there was no evidence it was relied upon in the termination process and the party can depose them on the topic. **Rule 37(a)(5)(A)** did not allow award of attorney fees and expenses since the motion was not granted (n.9).

356. **Marten Transport v. Plattform Advertising** [2016 WL 492743](D. Kan. Feb. 8, 2016) In a trademark and unfair competition action based on continued use of plaintiff’s mark after termination of the agreement permitting it to do so, the court refused to find a breach of the duty to preserve under **Rule 37(e)**. While it was clear that the ESI at issue was not preserved (internet browsing history) the party “did not know or have reason to know” that it would be relevant at the time. (*3). By the time it became clear that it was at issue, the employee had moved to a new work station and the browsing history had been recycled pursuant to standard procedures in effect at both parties. The court noted that the **Rule 37(e)** Committee Notes expressly instruct that reasonable steps suffice, the rule did not call for perfection and the “routine good faith operation of an electronic information system” is a relevant factor in determining if a party took reasonable steps. (*5) It refused to use a “perfection standard” or “hindsight” in determining the scope of the duty to preserve. (*10).

357. **Martin v. Wetzel** [2020 WL 6948982] (W.D. Pa. Nov. 25, 2020). In a video surveillance prisoner case, the trial court received a status report that the cell-door camera view was blocked and that while spoliation had occurred, sanctions were unwarranted because the loss did not “materially” affect the “substantial rights of the party” as required and there was no prejudice involved as required nor had the prisoner made any suggestion as “to what the missing video would show.” (*4).

358. **Martinez v. City of Chicago** [2016 WL 3538823] (N.D. Ill. June 29, 2016)(Dow, J.) In ruling on motions in limine filed prior to a trial arising out claims against police after arrests, the court apparently applied existing Circuit Principles to refuse to permit use of a dash cam video to the extent it captures references by an officer to “another” lawsuit involving one of the suspects (it would open the door to irrelevant information with the capacity of unfairly prejudicing both sides, citing FRE 401 & 403)(*16) and refused to instruct the jury that they should draw an adverse inference from a failure to produce other “videos from the cameras” in the squad cars (*23- 24). The court noted that **Rule 37(e)** negated use of gross negligence as a basis for adverse inferences, but since no evidentiary showing of bad faith existed, it was not necessary to rule on the interaction between **Rule 37(e)** and Seventh Circuit rulings on adverse inferences where the Circuit had not yet “addressed how, if at all, the Rule 37 impacts

its rulings on adverse inferences.” [“the Committee [Note] is silent on how the amendment impacts presumptions based on document retention policies.”(*24).] The Court also noted since plaintiff only sought an adverse inference, it had “no occasion” to determine if a less severe remedy might be available. [n.11].

359. **Matthew Enterprise v. Chrysler** [2016 WL 2957133] (N.D. Cal. May 23, 2016). n action by car dealership challenging failure to adjust sales incentive by Chrysler, the dealership was sanctioned under Rule 37(e) for failures to preserve. Although acknowledging the “**genuine safe harbor**” available under **Rule 37(e)** for parties that take “reasonable steps” it was not the case here, although there was no intentional spoliation (n.55) leaving only **Rule 37(e)(1)** measures. Prejudice existed because lost customer communications “could” have contained information whose loss denied Chrysler the ability to undercut statistical evidence by anecdotal evidence of customer communications. As a remedy, the Magistrate Judge held that Chrysler would be allowed to use evidence of communications post-price discrimination period, to support arguments as to reasons for choosing dealership and present evidence and argument about spoliation of communication lost if Plaintiff offers testimony. Moreover, “if the presiding judge deems it necessary,” it can provide instructions to assist the jury in evaluation. In addition “Chrysler is awarded the reasonable attorneys fees it incurred in bringing thihs motion.” (*5) [The court refused to assess the deletion of emails under **Rule 37(b)** because the issue “is spoliation and not compliance with” the court’s order on motion to compel” their production. (n. 47 at *4)]. [It is not known if the instructions were given. After a 7-day jury trial, a jury found in favor of Chrysler against a claim of offering incentives in violation of Robinson Patman. Neither the post-judgment opinion by the trial judge [250 F. Supp. 3d 409 (N.D. Cal. April 20, 2017) nor the Ninth Circuit affirmation (738 Fed. Appx. 569 (Mem)(9th Cir. Sept. 26, 2018) mentioned the jury instructions discussed in the lower court opinion cited here]
360. **Mavoides v. Ryan** [2021 WL 410859] (Feb. 5, 2021). A prisoner motions seeking sanctions for failure to preserve surveillance videos was dismissed because there was no evidence the videotape existed. In a footnote, the court noted that it did not have to resolve the issue of whether individuals sued in their own capacity “could be sanctioned under **Rule 37(e)** even though Rule 37(e) is only triggered when “a party has failed to take reasonable steps and that the entity that destroyed it - the Arizona Department of Corrections - is a non-party, citing *Petit v. Smith*, 45 F. Supp.3d 1099 (D. Ariz. 2014).
361. **Sandoz v. United Therapeutics** [2021 WL 4553351] (D. N.J. Oct. 4, 2021). The District Court spelled out the elements of the “tort of fraudulent concealment” under New Jersey law (*4) and but found it was not legally cognizable as a counterclaim against a plaintiff, whicle, concluding that **Rule 37(e)** “provides the appropriate avenue for seeking these litigation-related costs, not an independent fraudulent concealment claim used to bolster UTC;s defenses.” (*7). If that is sought, it “may file a separate motion under Rule 37.” (*7). On the same date, the same court reached a similar conclusion in a case not involving Rule 37(e), *MaxLite v. ATG Electronics*, 2021 WL 4520418 (D.N.Y. Oct. 4, 2021).
362. **Mazzei v. The Money Store** [656 Fed. Appx. 558] (2^d Cir. July 15, 2016)(**Mazzei #3**) In a summary order issued at the same time as a decision decertifying a class after a jury verdict

[829 F.3d 260 (2d Cir. July 15, 2016)](**Mazzei #2**), the Second Circuit affirmed a refusal to grant a new trial based on the argument that the party was deprived of crucial evidence at trial because of the denial of an adverse inference for the failure of a party to maintain a database in its “original, accessible” fashion. The district judge had found that the information contained only “tangential information” and that the party had failed to pursue discovery from other obvious sources and that any additional information would have made no difference in the trial. The Circuit court noted that “under the current **Rule 37(e)(2)**,” which went into effect after the post-trial motions were decided, “an adverse inference instruction may be given or failure to preserve [ESI] only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation.” Further, “[t]he district court specifically found that defendants did not act with such intent. The lower court (Koeltl, J.) had found [308 F.R.D. 92, 101 (S.D.N.Y. May 29, 2015) (**Mazzei #1**)] that although the party willfully failed to preserve, there was “no evidence of bad faith ‘in the sense that the defendants were intentionally depriving the plaintiff of information for use in this litigation.’” (citing *Linde v. Arab Bank*, 2009 WL 8691096, at *2)(considering “whether the party [was] motivated by a bad faith desire to deprive the court of evidence that would be damaging to it.”) (308 F.R.D. 92 at 101). Judge Koeltl had also denied a motion to preclude the party from informing the jury that there was no evidence of fee splitting in the database and had stated at the beginning of the trial that would not permit “harping” on that fact and that it would permit a few questions to show that was not what the invoice system was constructed to show. (102) In 2020, the court refused to re-open the matter and seek sanctions for “fraud on the court” including requests for Rule 37 sanctions. The request was refused on res judicate grounds, 2020 WL 7774492 (S.D.N.Y. Dec. 30, 2020)(**Mazzei#4**) and because Rule 37 does not create a cause of action, quoting *George & Co. v. Spin Master*, 2020 WL 3865098, at *8 (E.D.N.Y. July 7, 2020) to the effect that “Rule 37(e) is a procedural rule governing discovery and preservation of electronic evidence and permits the entry of sanction[s]; it does don’t provide [the plaintiff] with a cause of action.”

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

364. **McCoy v. Transdev Services** [2021 WL 1215770](D. Md. March 31, 2021). In applying **Rule 37(e)**, the court found it an appropriate response for grossly negligent conduct in failing to preserve that the judge presiding at trial use a “jury instruction” which would be a “curative instruction.” It recommended that “the content of that instruction” depend upon what facts are determined at trial” since “at this juncture in the litigation” it is not feasible to “fashion an instruction in a vacuum.” The instruction should “include the fact that Transdev destroyed

the ESI contained” on the cell phone but it “should not include requesting the jury draw an adverse inference from the spoliation.” It also noted that “it is up to the presiding judge to determine whether any instruction (and the content of that instruction) is warranted at trial. (*3). It also award “attorney’s fees and costs incurred” in this motion without articulating a source of authority to do so. (*3).

365. **McGee v. Pacheco** [2021 WL 2104831] (D. Colo. May 25, 2021). In reviewing a request for sanctions for failure to produce video surveillance tapes in a prison excessive force applying **Rule 37(e)** (and relying on *Session v. Romero*, 2019 WL 324777 (D. Colo. Jan. 25, 2019) which did not but could have relied on Rule 37(e) but allowed parties to argue what inferences they hoped the jury would draw), the Magistrate Judge found that since the plaintiff had suffered “some prejudice,” it would be appropriate to allow the party to present “evidence at trial about the failure to preserve the videos” but the “issues of relevance of this evidence and the appropriateness of arguing for inferences therefrom should be determined” by the trial judge. (7) The court refused an adverse jury instruction or entry of a default judgment.
366. **McFadden v. Washington Area Transit Authority** [2016 WL 912170] (D.D.C. March 7, 2016). Court noted that removal of website posting [relating to soliciting business in District] could have been found to have resulted from “intent to deprive” and sanctioned under **Rule 37(e)(2)**.
367. **McGowan v. Schuck** [2016 WL 4611249] (W.D.N.Y. Sept. 6, 2016). The Chief Judge of the District Court noted in a footnote that Rule 37(e)(2)(C) was one of two federal rules (the other being Rule 37(b)(2)(A)(vi) which “allows a court to enter default judgment against a party for “particularly egregious discovery violations.”
368. **McGhee v. North American Bancard** [2021 WL 2577159] (S.D. Cal. June 23, 2021). The court denied a motion of sanctions without prejudice to renewal if the party is subsequently permitted to renew his motion upon, inter alia, a “proper showing” that the ESI in question cannot be restored or replaced through additional discovery,” citing *Garrison*, 2020 WL 6537389, at *6 (S.D. Cal Nov. 6, 2020) (. 3). Among the reasons was that shorn of its class allegations, the party had not shown the missing ESI was relevant, which “also forecloses a finding of prejudice,” citing “**Rule 37(e)** and **Reinsdorf v. Sketchers**, 296 F.R.D. 604 at 627 (requiring a showing of prejudice is an “important check on spoliation allegations and sanctions motions.” (*5). It also noted that the District courts in this circuit are split “as to whether Rule 37 provides the exclusive remedy for spoliation of ESI or whether the court may also impose such sanctions pursuant to its inherent authority. See **Aramark Mgt. v. Borgquist**, 2021 WL 864067, at *4 (C.d. Cal. Jan. 27, 2021). (*5) (Asserting that a “court may also punish ‘discovery violations’ pursuant to its inherent power to regulate litigants and counsel who come before it, citing **Jackson v. Microsoft**, 211 F.R.D. 423, 430 (W.D. Wash. 2002).
369. **McIntosh v. US** [2016 WL 1274585] (S.D.N.Y. March 31, 2016). Court refused to apply **Rule 37(e)** to deletion of video surveillance tape because it would make no sense to apply it to a case briefed before the new rules came into effect. The court acknowledged that the movant is on “shakier legal footing” in seeking adverse inferences if the new Rule were to be applied,

and while reluctant to reward the “capriciously aggressive tactics” in submitting the request after the rule went into effect, it would apply the “familiar law” of Residential Funding since the plaintiff is proceeding pro se. In footnote 34, it noted that courts differed as to whether Rule 37(e) applied to “videotape.”

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

371. **Medidata Solutions v. Veeva Systems** [2021 WL 4902462] (S.D.N.Y. Sept. 22, 2021). District Judge Schofield refused to grant an adverse inference under Rule 37(e) because the defendant had failed to prevent one of its employees from deleting data which showed his use of trade secrets. The employer had issued a blanket legal hold and neither party had searched employees personal devices for discoverable information. The court conceded that employers have sufficient control over their employees that they can be compelled to produce documents in the employee’s possession, but that was “beside the point” because the employer had not known the employee had the information and it “took immediate action to preserve” them and notified the other party when it learned that fact. (*3). The court refused to infer from the evidence presented that the employer had “through some unspecified communication” directed the employee to reset his personal Mac after transferring files to a Drive, barring evidence of when he had accessed them. (*2). “Viewed without the benefit of hindsight,” the employer’s actions are “consistent with the normal discovery process in complex civil litigation, in which “document holds are imposed” and a “huge number of attorney hours are expended reviewing millions of documents from dozens of custodians.” The employer’s conduct was “reasonable and consistent with its discovery obligations, and does not show negligence, much less any intent to deprive.” (*3)

372. **Medina v. The Boeing Company** __ F. Supp. 3d __ [2022 WL 599021] (C.D. Cal. Jan. 27, 2022) The District Judge awarded Boeing \$27K in monetary sanctions and announced it would consider an adverse inference if the case went to trial where the plaintiff in an

employment discrimination case “destroyed or created after the fact the eight page email she allegedly sent to Boeing” with a sufficiently culpable state of mind, citing *Residential Funding* and *Zubulake*. The Court described that as resolving a motion for spoliation sanctions, which it defined as as the “destruction or significant alteration of evidence,” and quoted **Rule 37(e)** as applying to the spoliation of ESI without applying its standards. It is conceivable that the quoting of Rule 37(e) was pure dicta. Had the rule been applied, it seems likely that the court could have found “intent to deprive” given the discussion in the Opinion.

373. **Milke v. City of Phoenix** [2020 WL 6383252] (D. Ariz. Oct. 30, 2020). After several years of willful and intentional conduct in a civil rights action, the court granted dismissal under its inherent authority and **Rule 37(e)**, finding that lesser sanctions would be inadequate in a case involving a former prisoner whose conviction for first degree murder had been set aside by the Ninth Circuit.
374. **Miller v. Thompson-Walk** [2019 WL 2150660] (W.D. Pa. May 17, 2019). District Judge Conti adopted the recommendation of a Special Master for entry of a default judgment on claims arising out a business dissolution under **Rule 37(b)** and **Rule 37(e)** (*11) because they engaged in “egregious misconduct” (listed at *7) “in bad faith with intent to deprive Miller of the [ESI’s] use in this litigation.” (*13). The plaintiff was also entitled to “the expenses and costs he incurred for all activities identified as reimbursable by the special master and court.” (*14). The Court also noted that the Defendants “did not act in good faith in developing a discovery plan” because the destruction of documents and computers should have been disclosed to the parties and the court in their **Rule 26(a)** disclosures and at the “initial case management conference,” resulting in a violation of **Rule 37(f)**. (*10)
375. **Mkrтчhyan v. Sacramento County** [2021 WL 5284322] (E.D. Cal. Nov. 12, 2021). In applying **Rule 37(e)** in a missing video prisoner’s case, the court noted that the “applicable standard of proof for spoliation” in the Ninth Circuit was preponderance of the evidence (*1) and that defendants failed to take reasonable steps by not placing a litigation hold after receipt of a complaint, citing *Zubulake* (2003), even though it may not have been available because of computer problems with the servers at the prison. (*9). It was not, however, reasonable to infer that “defendants intended to deprive plaintiff of the video evidence based only” on the failure to request a litigation hold.” (*11) The court found prejudice to exist because it would have given him “independent and objective evidence” about his treatment in custody. (*13). The plaintiff was awarded monetary sanctions against defendants under **Rule 37(e)(1)** in the form of reasonable attorneys fees incurred by plaintiff in bringing the motion for sanctions regarding the video evidence” without further explanation. (*13).
376. **ML Healthcare Services v. Publix Super Markets** [881 F.3d 1293] (11th Cir. Feb. 7, 2018). The Eleventh Circuit affirmed the rejection of a spoliation motion for retention of a limited amount of video in a slip and fall case under federal law, citing both its previous rulings based on *Flury*, where it had found Georgia spoliation law consistent with federal principles, and under **Rule 37(e)**, while declining to determine if the *Flury* principles still applied since the court did not abuse its discretion under either. Specifically, it found that the failure to retain more video “did not constitute bad faith or demonstrate an intent to deprive” since it had immediately saved the most relevant part of the video – the hour during which the fall occurred.

The court ruled that despite later requests for broader preservation, “it might reasonably, and in good faith, have concluded that it did not have to comply with such a broad and far-reaching request.” (*10). The court also noted the lack of evidence of bad faith, since it acted consistent with its normal video-retention policies and while plaintiff might have hoped to show other aspects of causation, it narrow narrowed its request nor is that any reason to believe the video would have actually shown conflicting testimony, inconsistent statements or observations from others. Similarly, since the court found there was no prejudice, any additional benefit was purely speculative since the resolution was not clear enough to see any liquids, even if videos were available. Under “**either *Flury* or Rule 37(e),**” it was no abuse of discretion for the court to deny requests for exclusion. Ron Hedges, in his article on reasonable steps describes this as showing how proportionality fits into a **Rule 37(e) analysis**.⁴

377. **Modern Remodeling v. Tripod Holding** [2021 WL 3852323] (D. Md. Aug. 27, 2021). In a crisp, well-written decision applying **Rule 37(e)** to losses of text and email and inherent power to loss of handwritten notes, the court found that the intent to deprive at issue depended heavily on determination of witness credibility – “an issue best reserved for the jury”- and that it would allow the jury to hear appropriate evidence regarding the resetting of his laptop so the jury could determine if it was done to deprive the other party of the evidence and determine the impact the non-production of evidence it might contain had on the merits of the claims or defenses. (*13). It also awarded monetary sanctions under **Rule 37(e)(1)** after concluding that the subsection authorized sanctions such as “assessing attorney’s fees and costs, giving the jury an adverse inference instruction, precluding evidence, or imposing the harsh, case-dispositive sanctions of dismissal or judgment by default. Victor Stanley, 269 F.R.D. [497], at 533.[D. Md. 2010]”
378. **Monolithic Power Systems v. Intersil Corp.** [2018 WL 6075046] (D. Del. Nov. 11, 2018). Chief Judge Stark refused to impose sanctions under **Rule 37(e)** for losses of WeChat messages which were deleted in the ordinary course of business (“there is no evidence that the messages were deleted for any reason other than in the ordinary course –and consistent with industry practice – to conserve limited space on employees’ phones”) before the Legal Department of the entity involved became aware of the need to preserve. (“There is no evidence any message was deleted after anyone associated with [the party] reasonably anticipated litigation to which the messages would be relevant”). (*2) It also denied measures - perhaps under the Rule, but perhaps not - for samples of a product that was not destroyed, and may exist (and the party had not sought its recovery from third parties.). The court cited to *Schmidt v. Milwaukee Tool*, 13 F.3d 76, 79 (3rd Cir. 1994) and a 2012 decision, speaking of the need to show bad faith.
379. **Montana State University v. Montana First Judicial Court** [2018 MT 220, 2018 WL 4327887] (S.C. Mont. Sept. 11, 2018). In a well written opinion blending the former Rule 37(e), as adopted verbatim in Montana circa 2006, with Rule 37(e), as amended in 2015, the court reversed a lower default judgment based on alleged spoliation of email after a duty to preserve attached. The court provided a concise summary of how federal courts had “effectively read the intended safe harbor” out of the initial rule by concluding that once the

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

duty to preserve arises “and it arises as soon as litigation becomes foreseeable – any deletion of relevant data is, by definition, not in good faith.” (n. 17 and text at *9). It “construed” the former rule (still in effect in Montana) “in the context of [amended Rule 37(e)’s] duty, breach, prejudice and proportionality analysis,” as the good faith and exceptional circumstances are “necessarily subsumed into the prejudice and proportionality elements” of the new analysis. (*10 and n. 20).

380. **Montgomery v. Iron Rooster-Annapolis** [2017 WL 1902699] (D. Md. May 9, 2017), *rept. and recommendation adopted* [2017 WL 4868918] (May 9, 2017). In refusing to recommend that the loss of text messages on a cell phone was not done with an intent to deprive, the Magistrate Judge recommended that under **Rule 37(e)(1)** that the court “given an instruction to the jury that Plaintiff had a duty to maintain potential ESI contained on her phone, but failed to so.” It also noted that the court may instruct the jury “as to any inference to draw from the . . . failure to preserve texts” and the court can consider whether the moving party can show if there were in fact texts between the plaintiff and others during the time frame and whether “there is any evidenced to show those communications would have been favorable to Defendant’s claim of exempts status of Plaintiff.” (*2). One author was led to conclude that “some cases, like Iron Rooster, understand the first part of Rule 37(e) as essentially swallowing the second, so that an adverse inference instruction can be given without a finding of intent when that instruction is necessary to cure the prejudice.” Frank Harrison, *Potential Adverse Inference Instruction for Unintended [ESI] Spoliation May Suggest Limitation of Recently Amended Rule 37(e)*, 65-MAY Fed. L. 48, 50 (2018). Robert Keeling suggests that Iron-Rooster left “the door open for instructing the jury to draw an adverse inference.” *Sometimes, Old Rules Know Best: Returning to Common Law Conceptions of the Duty to Preserve in the Digital Information Age*, 67 Cath. U. L. Rev. 67, n. 230 (2018).
381. **Montoya v. Loya Insur.** [2019 WL 5456797] (D. New Mex. Oct. 24, 2019). The court refused to enter a default judgment under Rule 37(e)(2) for a failure to preserve an audio tape of the plaintiff since any prejudice suffered does not justify the relief sought and the court “dies not consider whether lesser sanctions would be appropriate because Plaintiff does not request any.” (*2).
382. **Moody v. CSX Transportation** [271 F.Supp.3d 410] (W.D.N.Y. Sept. 21, 2017). In a personal injury action crucial data in an event recorder “black box” on the railroad engine was unavailable because of human error in failing to accurate transfer it electronically to a “vault,” which was compounded, over the years, by the loss of the laptop from to which it had been downloaded and from which it had been transmitted. The Court methodically applied Rule 37(e) and after a lengthy analysis, came to the conclusion that the party had not taken reasonable steps. Ultimately, the court inferred that the party had acted with the intent to deprive, because the repeated failure over a period of years to confirm that the data had been preserved, particularly before discarding the laptop, was so “stunningly derelict as to evince intentionality.” As a measure under Rule 37(e)(2), the Magistrate Judge refused to strike the answer, but ordered an adverse inference to “address” the “evidentiary gap caused by the loss of material evidence, with the wording to be decided by the Court at time of trial. (at *15).

383. **Morgan Art Foundation v. Michael McKenzie** [2020 WL 5836438] (S.D.N.Y. Sept. 30, 2020). While many emails were deleted – by someone at some point – after a meticulous effort based on an FTI Report, the court concluded that only two emails were after the duty to preserve attached, they were not “permanently lost” and that this did not warrant sanctions under Rule 37(e). (*19) “Ordinarily, if emails were sent to or from other parties,” they can be replaced in discovery by obtaining them from those other parties. The movants failed to carry their burden as to the “two threshold elements need before spoliation sanctions can be assessed.” (*23) It noted that while it had left open the possibility of “reallocating the costs associated with the FTI Report,” the court “in its discretion declines to shift those costs.” **Rule 37(e)**, “unlike for example, Rule 37(a) does not include any presumption as to fee-or cost-shifting in the event the motion is denied.” (*230)
384. **Morris v. King** [2021 WL 6066275] (W.D. Ark. Dec. 22, 2021). In a pro se prisoner case requesting production of footage that no longer existed, and thus it is not in their “possession, custody or control” as required by Rule 34, the Magistrate Judge did not find that Rule 37(e) had been violated, citing to Laughlin v. Stuart, 2020 WL 4747665, at *2 (D. Mn. Aug. 17, 2020) for the principle that merely requesting preservation of a video “cannot trigger the duty to preserve” since it would “create a burden that exceeds what is required under Rule 37(e)” (*3). It also found no prejudice from its absence since the party could submit affidavits, subpoena witnesses, and testify as to what he had observed. [As the Court also noted: the defendants cannot produce what they do not have nor produce what does not exist. (*3)].
385. **Morrison v. Veale, M.D.** [2017 WL 372980] (M.D. Ala. Jan. 25, 2017). In FLSA action by former employee who accessed and deleted emails from a gmail account, the court acknowledged **Rule 37(e)** but held it was not binding because it became effective after the filing of the case. It applied Eleventh Circuit case-law and conducted an evidentiary hearing after which it found the non-moving party’s explanatory testimony not to be credible. It concluded that since the party “deliberately” logged on to its former employers email in bad faith, “the fact-finder must accept as true the time cards/timesheets” plaintiff had created (a “mandatory evidentiary presumption”).
386. **Moser v. Health Insurance** [2018 WL 6735710, at *6 and n. 1 (S.D. Cal. Dec. 21, 2018)]. A court refused a defendants demand under Rule 34 for direct access to examine all of the electronic devices forensically where it is not clear the duty to preserve may not have attached, there are other means to get the information and there was not prejudice shown by the overwriting of the browsing history under **Rule 37(e)**. The court noted that there is “no routine right of direct access” (quoting the Committee Note) and in former times such an argument would not have permitted a party to enter an opposing party’s office “to rummage through filing cabinets and desks.”
387. **MPLA v. Gateway Community College** [717 Fed. Appx. 96] (2nd Cir. April 6, 2018). The Circuit court affirmed, without discussion, the refusal of the district court to reopen the judgment in a Section 1983 case because of illness of an attorney and the refusal to enter sanctions based on the failure to preserve surveillance video of the library from which he was banned. The court held that Rule 60(b) did not apply and, moreover, he “did not demonstrate that he was prejudiced by the alleged failure” to preserve **citing Rule 37(e)**.

388. **Mueller v. Taylor Swift** [2017 WL 3058027] (D. Colo. July 19, 2017). In a thoughtful opinion in a case against Taylor Swift (and others), by Mueller, who had inappropriately touched Swift at a meet and greet preceding a concert, the on-air radio personality, subsequently fired by his employer, was found to have spoliated an audio tape of his firing under either or both inherent authority or **Rule 37(e)(1)** at a time that litigation was anticipated. The District Judge decided to allow cross-examination of the Plaintiff in front of the jury to enable it to make its own assessment of the “degree of culpability and of the actual prejudice” involved, as the record did not establish an “intent” to deprive. If the jury decided the Plaintiff had acted with bad faith or an intention to destroy or conceal evidence, the court had “little doubt” that it would draw their own adverse inferences whether the court instructs it or not. If convinced the actions were “indeed innocent,” however, the impact will be far less harsh. (*6). The court also noted in footnote 6 that counsel could not discuss the contents of the Order nor the court’s imposition of sanctions in front of the Jury. Press reports indicate that there was a jury trial, that Mueller’s case in chief against Swift was dismissed as a matter of law and that the jury returned a verdict on counterclaims by Swift and her mother and awarded \$1 in damages against Mueller. The NPR report states that Mueller was “questioned about several devices that supposedly contained recordings of the phone call in which he was fired. All of the devices were accidentally broken, he said. “He destroyed the evidence,” Swift’s attorney said, as BuzzFeed reported. Mueller maintained their destruction were accidents.” NPR. *Judge Dumps Lawsuit*, Aug. 31, 2017
389. **Muhammad v. Mathena** [2017 WL 417122 (Order) and 2017 WL 395225 (Memorandum Opinion)] (W.D. Va. Jan. 27, 2017)]. In a Memorandum Opinion adopting a R&R [2016 WL 8116155 (W.D. Va. Dec. 12, 2016)] utilizing **Rule 37(e)**, the court denied an adverse inference because there was no basis to find the loss was intentional but permitted, under **Rule 37(e)(1)** evidence of spoliation of a video to be presented to the jury because of the negligent breach of the duty to preserve with an instruction that “a recording of the January 5, 2013 altercation was made, the plaintiff requested that it be preserved, but it was subsequently lost through no fault of the plaintiffs, and jurors should not assume that lack of corroborating objective evidence undermines the plaintiff’s version of events surround the fight.” In n. 7 of the Magistrate’s R&R, it noted that under **Rule 37(e)** the **threshold issue** of whether spoliation occurred requires only a finding of negligent conduct. The District Judge referred to the conduct at issue as “negligent spoliation of the footage.”
390. **Mule v. 3-D Building and Construction** [2021 WL 2788432] (E.D.N.Y. July 2, 2021). In resolving motions for spoliation of physical boxes of files and the contents of missing hard drive containing Quickbooks, the court “pierced the corporate veil” (*8) and found by clear and convincing evidence that the circumstantial evidence supported a finding of “intent to deprive” under Rule 37(e), but given the lack of specific prejudice, an order of monetary sanctions (fees and costs) and a preclusion of testimony and argument on matter inconsistent with discovery sufficed. (*17). The court left it open for the trial court to give an adverse inference instruction if specific evidence of “material gaps” could be shown.
391. **Musse v. King County** [2021 WL 4709875] (W.D. Wash. Oct. 8, 2021). In a decision summarizing measures available under **Rule 37(e)** (at *1), the court announced plans to

sanction a failure to preserve a video of prisoner assault which was destroyed despite a policy that would have required its export to an “archived video file.” The court held that the “county acted culpably and committed spoliation,” quoting **Residential Funding** to the effect that a culpable state of mind exists when evidence was destroyed “negligently.” (*4). If found an “appropriate sanction” under **Apple** to be available (*4) and selected a “permissive adverse inference” because it was sufficient to cure the prejudice involved. The proposed instruction allows the jury to “assume” that the footage would have shown “aggressive” and “erratic” actions of the prisoner and would have corroborated the evidence of plaintiff and “undermined” any contrary evidence.” (*5) [In summarizing **Rule 37(e)**, including the “intent to deprive” element, the court omitted any reference to its limitation to losses of ESI. The court quoted **Leon v. IDX Sy. Corp.**, 464 F.3d 951,958 (9th Cir. 2006) to the effect that courts may impose spoliation sanctions under their “inherent power or under Rule 37 against a party who fails to obey and order to provide or permit discovery.” No mention was made of Rule 37(b)].

392. **Nationwide Life Insur. V. Betzer** [2019 WL 5700288] (M.D. Fla. Oct. 28, 2019). In an interpleader action where the issue was whether a beneficiary had drained a decedents assets, a mandatory adverse inference instruction was sought under **Rule 37(e)(2)** for the deletion of data on the decedents computer. A forensic examination confirmed the deletions. After a complex recitation of the application of the predicate conditions and the circumstantial evidence of bad faith, the Magistrate Judge stated that it could, “as a sanction under **Rule 37(e)(1)**,” allow the parties to present evidence concerning the loss of ESI and its likely relevance to the jury and, “in allowing that presentation,” prohibit the other party from presenting certain rebuttal testimony to the forensic examiner conclusions. However, given the extent to which it appeared the party acted with an intent to deprive, it recommended that an “adverse instruction be given to the jury that it must presume that the lost information was unfavorable [to the adverse parties].” (*15). In addition, citing **Borum v. Brentwood**, 2019 WL 3239243, at *10 (D.D.C. July 18, 2019) as authority for sanctions under **Rule 37(e)(1)** in the form of reasonable fees and costs), the court found the party “entitled to reasonable attorneys fees and costs from Defendants (not their counsel) for filing the motion to compel and the motions for sanctions). (*14) In footnote 6, it noted that “no assertion has been made that counsel appearing in this case were in any way involved in the spoliation issues. [It also cited **Alabama Aircraft**, 319 F.R.D. 730, 747 (N.D. Ala. 2017) and **Morrison v. Veale**, 2017 WL 372980, at 9 (M.D. Ala. Jan. 25, 2017) in support of fees and costs for prosecuting sanctions motions.]
393. **Nealy v. Wal-Mart** [2021 WL 3398145] (N.D. Ga. Jan. 26, 2021). The court refused to find a basis to sanction the failure to retain any more of a video than “presumably” required by Wal-Mart policy of the area where a patron suffered injuries from a falling can from a shopping cart under **Rule 37(e)** “or the Flury test.” As in **ML Healthcare Servs. v. Publix**, 881 F.3d 1293, 1307, the party “has not shown that Wal-Mart acted in bad faith to intentionally destroy evidence.” (*8)
394. **Neely v. Boeing** [2019 WL 1777680] (W.D. Wash. April 23, 2019). In a case where a box of documents held by counsel for Plaintiff was inadvertently rerouted and ultimately landed in the lap of counsel for Boeing, the Plaintiff sought sanctions for the alleged spoliation of the documents and of pst. records of Boeing employees, which had made considerable efforts to do so. The exercised its inherent powers to refuse entry of a default judgment and

applied Rule 37(e) in concluding that there was no basis for entry of default judgment under the Rule.

395. **Neighborhood Networks v. Lyles** [2021 WL 328844] (Jan. 31, 2021). **Rule 37(e)** inapplicable because “plaintiffs are unable to show that the information could not be replaced through additional discovery.” The party could have used a subpoena or deposition to ask about the missing emails but by failing to do so, failed to meet requirements of rule, citing Eshelman, 2017 WL 2483800, at *5.
396. **Newberry v. County of San Bernadino** [750 Fed. Appx. 534] (Sept. 18, 2018). A Panel of the 9th Circuit affirmed a decision not to impose sanctions under Rule 37(e) while noting that the parties had improperly framed the issue as one involving the district court’s inherent authority since “at the time the sanctions motion was filed, sanctions” were governed by the current version of Rule 37(e). The court noted that the “detailed language of Rule 37(e) ‘therefore foreclose[d] reliance on inherent authority,” citing the Committee Note. The Panel described the Rule as providing “[t]wo categories of sanctions” and concluded that the court did not abuse its discretion in concluding that sanctions “were not warranted” under either subsection. The district court reasonably concluded that the missing “emails cause not prejudice,” since the officers played only minor role and that the court “properly exercised its discretion in finding spoliation unlikely in this case,” and terminating sanctions “unjustified, given the relative insignificance of any gap in the Count’s production.”(537).
397. **Newman v. Gagan** [2016 U.S. Dist. LEXIS 120501] (N.D. Ind. Sept. 7, 2016). The District Court adopted, after a de novo review, the Report and Recommendations that the jury be instructed that they may infer that deleted ESI would have supported claims of the defendants the information was taken and used without authorization in an employment action based on wrongful discharge. It apparently relied upon its inherent authority under Seventh Circuit principles. The Report refused to apply **Rule 37(e)** to loss of files on a hard drive because the motion was filed before December 1, 2015. [2016 U.S. Dist. LEXIS 123168]. The District Judge also barred any defense based on a claim that the devices which were wiped or from which records were deleted had any of Defendant documents. The District Judge agreed with the recommendations that default judgment was not warranted and with the recommendation that it should refuse to award attorney’s fees as well. The Magistrate Judge had noted that if **Rule 37(e)** had applied, it “does not specifically list attorney’s fees as an available sanction.”
398. **New Mexico Oncology v. Presbyterian Healthcare Services** [2018 WL 1010284 (D. New Mex. Feb. 21, 2018)]. The District Judge, after a de novo review, adopted in full the findings of Magistrate Judge at 2017 WL 3535293, at *13 (D. New Mex. Aug. 16, 2017) which denied adverse inference and default judgment under Rule 37(e) but awarded attorney fees under its inherent powers citing *dicta* in Browder v. City of Albuquerque, 209 F. Supp. 3d 1236, 1295-1296 (2016) because it would “serve the interest of justice,” citing *In re Rains*, 946 F.2d 731, 733 (10th Cir. 1991)). The Magistrate Judge spoke of awarding “lesser sanctions” under Browder, which included, using inherent authority “an award of attorneys fees; an order that the culpable party produce related documents regardless of any claims of privilege or immunity; precluding evidence or striking part of a party’s proof; allowing the aggrieved party

to question a witness in front of the jury about the missing evidence; and imposing costs for creating a substitute for spoliated data.” (at *12, quoting from 187 F. Supp. 3d at 1295-96).

399. **Nguyen v. Costco Warehouse Corp.** [2020 WL 413898] (S.D. Fla. Jan. 27, 2020). The Court denied a motion for sanctions for failure to preserve a surveillance video under Rule 37(e) because the court determined the movant failed to demonstrate the retailer had failed to take reasonable steps to preserve video that “would not have captured the alleged slip-and-fall.” (*3). The party had no duty to preserve the allegedly spoliated video for almost two years without any indication from the party that they intended to pursue litigation against Costco.
400. **NITV Federal Services v. Dektor Corporation** [2019 WL 7899730, at *9](S.D. Fla. Sept.20, 2019). After finding both prejudice and intent to deprive, the court issued a default judgment pursuant to **Rule 37(e)** to penalize because the misconduct was so pervasive and impactful that “normal sanctions are not enough.
401. **Nomadix v. Guest-Tek Interactive Entertainment** [2019 WL 8355729] (C.D. Cal. Oct. 16, 2019). The court refused Rule 37(e)(2) measures because the court found that Plaintiff has not shown the loss of the HEP Source Code was intentional, rather than merely negligent.” (*2).
402. **Novit v. Metropolitan School District** [2021 WL 4033910] (S.D. Ind. Aug. 24, 2021). In denying a spoliation motion without prejudice to refile, the court admonished the moving party that **Rule 37(e)** governed, and that to secure the relief it sought, it must demonstrate that the evidence was destroyed “in bad faith with the intent to deprive another party of the information, citing, “e.g.” *Bracey v. Grondin*, 712 F.3d 1012, 1018-19 (7th Cir. 2013), where the “crucial element” when requesting an adverse inference in the Seventh Circuit is “not that the evidence was destroyed but rather the reason for the destruction. A party destroys a document in bad faith when it does so for the purpose of hiding adverse information.” (*1)
403. **Nunnally v. District of Columbia** [243 F. Supp. 3d 55] (D.D.C. March 22, 2017). In a lengthy opinion adopting after review a R&R dealing in an employment retaliation case, the court ordered an adverse inference instruction at trial for negligent failure to preserve potentially relevant email despite acknowledging (in note 10) the existence of **Rule 37(e)**. The court held that since Rule 37(b) did not apply in absence of a discovery order, the court may issue appropriate sanctions under its inherent power. The court also held that only “a very slight showing” of relevance was required since the burden on the party seeking the adverse inference is lower.
404. **Nuvasive v. Absolute Medical** [2021 WL 3008153] (M.D. Fla. May 4, 2021). In a case where the District Judge concluded that the party had acted with an intent to deprive Plaintiff from using the evidence in the case under **Rule 37(e)(2)**, the District Judge ordered the party’s attorney to show cause “why he should not be personally sanctioned for his involvement in the spoliation of evidence discussed in the case.” (*9) [citing **Pesaplastic v. Cincinnati Miacron**, 799 F.2d 1510, 1522-23 (11th Cir. 1986).] The attorney had “instructed” a client that it was okay to close a Google email domain “despite not knowing whether the emails would be

preserved” which was particularly troubling because “a member of the Bar is expected to have significantly more legal sophistication than a litigant.” (*5). “The District Judge concluded that it would “presume” the spoliated evidence was unfavorable and if the case proceeded to a jury trial, the Court will “instruct the jury that it *must* presume the spoliated evidence was unfavorable to the Defendants.” (*20) (emphasis in original).

405. **Nuvasive v. Kormanis** [2019 WL 1418145] (M.D. N.C. March 29, 2019). In a decision **not citing Rule 37(e) but adopting an R&R that does [2019 WL 1171486]**, the District Court agreed that the court should “submit to the jury, with appropriate instruction, the disputed question” of whether the party had acted to deprive the moving party of the use of the lost text messages in litigation. The Magistrate Judge had recommended that course after a detailed analysis and had also determined that the party had failed to take reasonable steps to preserve text messages which could not be restored or replaced through additional discovery. The District Judge agreed to “defer until trial a decision on whether more serious measures are need to cure the prejudice.”
406. **Nuvasive v. Madsen Medical** [2016 WL 305096] (S.D. Cal. Jan. 26, 2016) Chief District Judge vacated his earlier decision to impose a permissive jury instruction [2015 WL 4479147] at an upcoming trial because **Rule 37(e)** applied and there was no finding that the party had “intentionally” failed to preserve text messages so they could not be used in the litigation. The Court decided, however, to allow both parties to “present evidence regarding the loss” to the jury and will instruct is that it may consider such evidence “along with all the other evidence in the case in making its decision” to serve as a “remedy or recourse (*3). The claims and counterclaims were tried in a 13-day trial in which MMI was the prevailing party, recovering \$22M in compensatory and \$20M in punitive damages. There is no indication in the subsequent opinion awarding attorneys’ fees under a contractual clause (\$1M) and taxable and nontaxable costs) which indicates that the admission of testimony or argument about spoliation occurred or played any role. (2016 WL 5118325, S.D. Cal. July 1, 2016). The parties “stipulated motion to dismiss the appeal” to the Ninth Circuit, with each party to bear their own costs on appeal, was entered May 30, 2018. (2018 WL 3031481, 9th Cir. May 30, 2018).
407. **Nutrition Distribution v. PEP Research** [2018 WL 6323082](S.D. Cal. Dec. 4, 2018). In a decision concluding that spoliation of Facebook posts occurred after the duty to preserve attached with a culpable state of mind under pre-2015 precedent, the court granted a “Motion for Sanctions pursuant to **Fed. R. Civ. P. 37(E)**” and stated the jury would receive an instruction that the party failed to preserve social media posts after the duty to preserve attached and you may, but are not obligated to, infer that the deleted posts were favorable to the Plaintiff and unfavorable to the defendants. (at *5, relying on the *Apple v. Samsung*, 888 F. Supp.2d 976.995 (N.D. Cal. 2012)).
408. **Nyerges v. Hillstone Restaurant Group** [2021 WL 3299625] (D. Ariz. Aug. 2, 2021). In a dram-shop liability case where a patron choked while eating a meal, the court refused to find a duty to preserve footage of the bar area (the dining room footage of the choking was preserved) because there was no anticipation that the missing footage, which would not have portrayed the decedent, was probative or “should have been preserved in the anticipation or conduct of litigation” as provided in **Rule 37(e)** because of a possible dram-shop claim. (*6-

8). The court concluded that it could not “rely on its inherent authority” because “the standards supplied by Rule 37(e) are exclusive,” citing **Newberry v. County of San Bernardino**, 750 Fed. App’x. 537 (9th Cir. 2018). However, in n. 4, it concluded it would reach the same result “were the Court to weigh the propriety of sanctions under its inherent power or **other subsections of Rule 37.**”

409. **O’Berry v. Turner** [2016 WL 1700403](M.D. Ga. April 27, 2016) A mandatory adverse inference was imposed under **Rule 37(e)** because it was “beyond the result of mere negligence” to make a single hard copy of downloaded ESI without taking further steps to preserve. The copy was placed in a file folder, ultimately moved to a new building and not reviewed until much later, when it was found missing. The court concluded that all the facts “when considered together” lead the court to but “one conclusion – that [defendants] acted with the intent to deprive Plaintiff of the use of this information at trial.” The “minimal” effort undertaken to preserve was a failure to take “reasonable steps.” There was no discussion of the “prejudice” caused by loss of the data, which was apparently presumed to have occurred.
410. **Ocean Sky Int’l v. The Limu Co.** [2021 WL 1971505] (W.D. La. April 16, 2021). The Magistrate Judge, citing Chambers, found it “manifest” that the loss of ESI is directly contemplated by **Rule 37(e)** and “should be addressed within the parameters of that rule,” not under its inherent power. (*10-11). It could not identify any prejudice suffered by deleted data but indicated that at “the bench trial to be held in this matter” the court may make allowances “or effect other curative measures” if plaintiffs establish that they were materially prejudiced by the failure to preserve ESI. (*12)
411. **Official Committee of Unsecured Creditors of Exeter Holdings**, 2015 WL 5027899 (E.D. N.Y. Aug. 25, 2015). In pre-effective date decision, the court noted that Rule 37(e) would “scale back some of the more stringent guidance offered in Residential Funding” (n. 19) It also labeled requests for “punitive monetary sanctions” and “attorneys’ fees and costs” as “two separate and distinct inquiries.” (n. 25).
412. **Oliver v. Meow Wolf** [2021 WL 3618314] (D. New Mex. Aug. 16, 2021). In a somewhat confusing opinion, a Magistrate Judge denied sanctions for pre-trial deletions of email without deciding if “foreseeable, but not imminent, litigation gives rise to a duty to preserve” because the “suspicious” timing was not enough to find “intentional spoliation,” since “intent is required” under **Rule 37(e)(2)**, and the “Court does not find intent to spoliage.” (*8) It also decided that since the Tenth Circuit has held that since a finding of “bad faith” “is a necessary finding to issue an adverse inference,” the court denied a request for adverse inferences to be drawn in the absence of such a finding. (8*) However, in a footnote, it stated that had “no view of whether the suspicious timing of the deletions might be a topic for cross-examination at trial such that the jury might draw its own adverse inference.” Such questions are reserved” for the trial judge. (n. 11). The Court made no mention of **Rule 37(e)(1)**, nor of the prejudice, if any resulting from the deletions. Instead, it stated that since the account “could contain some relevant emails, it would be reasonable under **Rule 26(a)** to require” the plaintiff to search the account with specific terms and orders that if the moving party is “willing to bear the cost of a forensic expert,” it would require Plaintiff to “make her devices available” so that “the expert may seek to recover the deleted emails.” (*9). [No case authority for the order is articulated and no mention is made of the need to deal with privacy issues. The Court

may be referring to **Rule 34(a)**, as amended in 2006, which permits testing and sampling, in addition to a request for inspection. However, as the related Committee Note cautioned, the amendment “is not meant to create a routine right of direct access to a party’s electronic information system[s]” 234 F.R.D. 219, 362 (2006)].

413. **Omnigen Research v. Wang** [321 F.R.D. 367] (D. Ore. May 23, 2017). The court granted a terminating sanction against parties involved in a Chinese-American venture under Rules 37(b), **37(e)** and inherent authority after finding that “all the required elements for spoliation are met under the required preponderance of evidence standard.” The court found that the spoliation of ESI at issue had undermined the courts ability to render a judgment on the evidence and threatened the orderly administration of justice, and that the destruction was intentional, and the required preponderance of evidence standard was satisfied. It also refused to find that some of the destroyed evidence was not relevant, citing *Leon*, 464 F.3d 951, 959 (9th Cir. 2006) for the proposition that the responsible party may not assert a presumption of irrelevance.
414. **Oppenheimer v. City of La Habra** [2017 WL 1807596, at *7] (C.D. Cal. Feb. 17, 2017). In a prisoner suicide case, a court **applied Rule 37(e)** to the loss of text messages and emails after the event since litigation was reasonably anticipated and found subsection (e)(1) to be applicable since the party was prejudiced by loss of “potentially relevant information.” It also found an intent to deprive [**under (e)(2)**] by following the reasoning in *First Financial Security*, 2016 WL 5870218, at *4 (N.D. Cal. 2016) that the police gave no explanation for why they did not preserve them other than an existing policy. It found that “instructing the jury that it may presume information in the text messages and e-mails was unfavorable” is an “appropriate sanction. (*12-*13). The court **refused to apply Rule 37(e) to the loss of video footage** of the cell because “Rule 37 does not directly address destruction of video equipment or video footage.” (*7). No terminating sanction was available because there was no showing of “willfulness, bad faith, or fault.” (*10). However, the Plaintiff was “free to argue to the jury the fact that the recording system was destroyed” and were “free to question what the destroyed system might have shown.” (*11).
415. **Optrics, Inc. v. Barracuda Networks, Inc.** [2021 WL 411349] (N.D. Cal. Feb. 4, 2021). Monetary sanctions for discovery misconduct were imposed on a party and its former counsel jointly and severally under **Rule 37(b)**. Only after being terminated and “thrown under the bus” by the former client was counsel able to (ethically) reveal that it had told its Canadian client that it “could not and would not manage the collection of Optrics’ electronic data, and that it did not have the software of the personnel to manage the e-discovery.” (*11 & footnote 5). [The e-discovery process, with Judge LaPorte issuing many futile orders, went downhill from there, and the case is a cautionary tale on how not to manage and conduct e-discovery]. Ultimately, citing **Qualcomm I** (and ignoring **Qualcomm II**), the successor Magistrate Judge held that despite its caveat, counsel had an independent duty to supervise discovery compliance and that it “wasn’t enough” to caution the client but simply keep moving for extensions while the client “botched production, lost data, and missed deadline after deadline.” (*11). The award against Optrics and its former counsel in the amount of \$202K was for “fees and costs incurred as a result” of the prolonged discovery misconduct and repeated violations of Court orders.” (*12) The court collected cases illustrating the “but-for-cause” standard required by **Goodyear Tire & Rubber**, 137 S.Ct. 1178, 1186, n. 5 (2017)(the complaining party may only

recover the portion of his fees “that he would not have paid for but for the misconduct”). Since the case had settled, “terminating sanctions or preclusionary sanctions” would have been “meaningless at this stage.” (*6).

416. **Orion Drilling Company v. EQT Production Company** [826 Fed. Appx.204] (3rd Cir. Aug. 28, 2020)(**Orion #2**). The Third Circuit refused to find error in the district court’s refusal to order a new trial after a two-week trial resulted in a jury verdict in favor of a gas company (EGT). The court agreed that preclusion of irrelevant evidence was not unreasonable and did not constitute an abuse of discretion. As to the spoliation of a handwritten note of one employee and the marked-up notes and contracts of another, the relevance was clear and it was reasonably foreseeable that there was a duty to preserve. Thus, the finding that the failure “included both intentional destruction and bad faith failure to preserve” was not unreasonable. (217, citing 2019 WL 4273861, at * 32 [W.D. Pa. Sept. 10, 2019])(**Orion #1**). Further, given the timing in failing to preserve and the fact that it would have buttressed the EQT contention that the defects were known and uncured, it meant that the “permissive and tailored adverse inference instruction was reasonable and not an abuse of discretion” (218) (citing, *inter alia*, GN Netcom, 930 F.3d at 83 (noting that a ‘permissive adverse inference instruction is a lesser sanction’)). Footnote 21 notes that the district court had permitted Orion to present “rebuttable evidence,” citing the passage from Orion #1 where they were permitted “to present testimony regarding the circumstances of how the documents were purportedly ‘thrown away’ to rebut the inference that the destruction was intentional. [at *32]. Footnote 22 points out that the instruction was “permissive as opposed to mandatory, giving the jury the option to decide whether the evidence not preserved or destroyed “was relevant” as well as to decide if that evidence would have “been unfavorable to Orion and favorable to EQT.” The instruction appears in **Orion #1**, at 2019 WL 4273861 (W.D. Pa. Sept. 10, 2019) and shows that the jury was told that it “[m]ay infer that evidence not preserved or destroyed was relevant to this case, would have been unfavorable to Orion and favorable to EQT. Whether this finding is important to you in reaching a verdict in this case is for you to decide. You may choose to find that it is determinative, somewhat determinative, or not at all determinative in reaching your verdict. (at *32). After reciting the factors that allowed the court to conclude that favored issuing an adverse inference instruction, it noted that no new trial is warranted on the basis of the instructions since the permissive instruction allows the jury to “draw its own conclusions after weighing the credibility of each witness and his testimony.” (Id.) The court explained that the trial ran from 9-4 each day and involved 2 hours of opening, 2 hours of closing, 138 exhibits and 16 fact and expert witnesses. (n.1) In the related litigation over rule 54(d), the court granted \$1.9M in fees and \$,M in costs, explaining that co-counsel Reed Smith (alone) had a team of three dozen counsel, associates, e-discovery attorneys, paralegals and other staff working on behalf of EQT. 2019 WL 4267386 (W.D. Pa. Sept. 10, 2019).

417. **Oracle America v. Hewlett Packard**, 328 F.R.D. 543 (N.D. Cal. Aug. 17, 2018). In declining to hold that any measures were available under Rule 37(e) because of deleted emails In the case at bar, many of the Co-CEO’s deletions were undertaken either before the duty to preserve attached or copies were furnished by other custodians and the court refused to infer that HPE had failed to at least “show that categories of irreplaceable relevant documents were likely lost, as in the cases on which it relies,” citing *Alabama Aircraft Indus. v. Boeing Co.*, 319 F.R.D. 730, 553 (N.D.. Ala. 2017), *Matthew Enter. v. Chrysler*, 2016 WL 2957133, at *5

(N.D. Cal. May 23, 2016). (553) The court also noted that the Rule “essentially functions as a decision tree” with measures such as was sought here, namely “non-dispositive measures to cure any resulting prejudice. (549) It explained that the threshold inquiry is whether ESI has been “lost” which, in turn, requires a showing that (a) discoverable ESI existed when the duty to preserve arose but was not preserved due to a party’s negligent failure to take reasonable steps to preserve it *and* (b) that it cannot be restored or replaced (emphasis in original). (549).

418. **Oracle USA v. Rimini Street** [2021 WL 1224904] (D. Nev. March 31, 2021). The objections to a Magistrate Judge’s R&R recommending denial of a motion for sanctions under **Rule 37(e)** were reviewed under a de novo standard and denied. (*21) The court also denied Oracle’s motion for sanctions against Rimini under **Rule 11, section 1927** or the Court’s **inherent authority**, because the record did not support a finding of bad faith in filing the underlying motion because it was “improperly duplicative and an attempt to relitigate (for the seventh time) the scope of the permanent injunction” at issue in the case. The court did not find that the motion was “vexatious or unreasonable given Oracle’s conduct, or that it was filed for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.” The court “strongly” cautioned the parties “against reaching a point that zealous advocacy overshadows professional conduct.” (*21).

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

420. **Ortega v. United States** [2021 WL 3869915] (E.D. Aug. 30, 2021). In a prisoner case seeking to compel production of a video, the court noted that since the defendant asserted it had conducted a search and could not find it, it could not be compelled to do so. However, since “spoliation is an evidentiary doctrine under which a district court can, in its discretion, sanction a party that destroys evidence, if the party is on notice that the evidence is potentially relevant to pending litigation,” *Leesson v. Transamerica*, 279 Fed.Appx. 563. 565 (9th Cir. 2008) (and listing what must be established) as well as Rule 37(e), the denial is without prejudice to filing a motion for spoliation sanctions if he believes the defendant failed to comply with its obligations. (n. 5).

421. **Ottoson v. SMBC Leasing**, 2021 WL 839437 at *2-3 (S.D. N.Y. March 5, 2021). After a jury trial with a mixed result, a successor District Judge sanctioned a *pro se* plaintiff \$60K award in favor of Defendants under a pre-trial ruling by an earlier judge relying on its inherent authority and **Rule 37(a)(5)**. The earlier opinion had stated that courts could impose sanctions for failing to preserve under **Rule 37(e)** and “in addition” its inherent power. 268 F. Supp. 3d 570, 579-580 (S.D. N.Y. July 13, 2017). The successor judge acknowledged that the jury had been given an adverse inference instruction because of emails “destroyed or withheld - which Defendants eventually obtained from a non-party”. It refused to reassess the earlier ruling,

which it described as the “law of the case” and “not a situation addressed by **Rule 37(e)**” where the spoliated evidence was never recovered.

422. **Oxbow Solar v. Borrego Solar** [2021 WL 2228112] (D. Minn. June 2, 2021). In a case where the court dismissed the action under **Rule 37(b)** because “less drastic sanctions contemplated in Rule 37 would be either futile or insufficient,” the court also noted that both **Rule 41** and a court’s inherent power also supported dismissal since the case had “all the markers of the ‘contumacious conduct’ that the Eighth Circuit requires for a **Rule 41(b)** dismissal. (*6) It noted that the moving party did not argue that the failure to preserve the digital information it allowed to lapse warranted dismissal under **Rule 37(e)**, since it would have to show that the information cannot be restored or replaced through additional discovery” and that the party acted with an intent to deprive. “As it stands now,” the record does not support those conclusions. However, it was appropriate to consider the failure to preserve “in assessing the prejudice” and as part of the general pattern of irresponsibility. (n. 8) Counsel for the party, having been order to show cause “why he should not be sanctioned personally” will be addressed at a June 9, 2021 hearing. (n.6).
423. **Paavola v. Hope Village** [2021 WL 4033101] (D.D.C. Sept. 4, 2021). In connection with motions for sanctions dealing with destruction after commencement of the suit, Judge Bates concluded he would assess the spoliation as if pertained entirely to “non-ESI,” thus not considering sanctions under **Rule 37(e)** since neither party had argued it governed. (at n. 3). He relied on his inherent authority to sanction “abuses of the judicial process, including discovery abuses,” citing *Gerlich v. U.S. Dept of J.*, 711 F.3d 161, 170 (D.C. Cir 2013) for authority to provide a “negative inference” as well as *Shepherd v. ABC*, 62 F.3d 1469, 1474 (D.C. Cir. 1995) for issue-related sanctions whenever a preponderance of the evidence establishes that a party’s misconduct has tainted the evidentiary resolution of an issue. The Court agreed that “[b]ecause the documents at issue here were destroyed before discovery began, Rule 37(b)(2) does not control.” (n. 3). Citing *Clarke*, 904 F. Supp. 2d 11, 20, n. 6 (D.D.C. 2011) and *Attny Gen. v. Irish People, Inc.*, 684 F.2d 928, 951, n. 129 (D.C. Cir. 1982).
424. **Packrite v. Graphic Packaging** [2020 WL 7133806] (M.D. N.C. Dec. 4, 2020). Following **Snider v. Danfoss**, the court refused to recommend sanctions under **Rule 37(e)(1) or (2)** because prejudice had not been shown nor was there any intent to deprive the party of the use of ESI. However, **Rule 11** issues were implicated, warranting entry of a show-cause order directed at plaintiff and its counsel, because it had filed a Memorandum which incorrectly asserted a certain deletion had occurred at a time Plaintiff “and its counsel” possessed proof “that conclusively contradicted those assertions.” (*11) The court denied that aspect of the motion which alleged a failure to properly search and produce ESI. The court cited *Lee v. Belvac Prod. Mach.*, 2020 WL 3643133, at *4 (W.D. Va. July 6, 2020), *appeal filed*, No. 20-1805 (4th Cir. July 24, 2020) for the proposition that the party had “improperly attempt[ed] to shoe-horn issues regarding Defendants production of ESI (a subject for a motion to compel under [Rule 37(a)] with issues regarding Defendant’s preservation of ESI (a subject for a motion for sanctions under Rule 37(e)).” “Rule 37(e) is not designed to sanction a party for failed to meet their discovery obligations by refusing to turn over discoverable documents – it is designed to sanction a party who wrongfully destroys evidence or allows it to be destroyed). (Footnote 11).

425. **Paisley Park Enterprises v. Boxill** [330 F.R.D. 226] (D. Minn. March 5, 2019). In an action for trademark infringement, conversion and other claims, the Magistrate Judge concluded that the failure to prevent auto-deletion of relevant text messages and the affirmative wiping of information from cell phones, justified sanctions under both **Rule 37(b)** [for failure to obey scheduling order that contained a preservation order](see text at 231) and **Rule 37(e)** for pre-order spoliation of a cell phone, under circumstances that where the court could “draw only one conclusion” that they “acted with intent to deprive.” (237) It deferred consideration of an adverse inference or presumption to a later date. In the meantime, it ordered that the parties pay “monetary sanctions” noting that it was doing so despite the fact that “neither Rule 37(e)(1) nor (e)(2) expressly authorizes the imposition of monetary sanctions.” (237) It noted that **Rule 37(e)(1)** allows “any measures” necessary to cure prejudice, and many courts have imposed monetary sanctions under that rule, citing **Spencer v. Lunada Bay Boys**. While it could order fees paid on that basis alone, the conduct was so “egregious” that “monetary sanctions are available under Rule 37(e)(2).” (238-39) While **Rule 37 (e)(2)** lists three measures, they are not exhaustive and the Court may “order any remedy that ‘fit[s] the wrong.’” (citing Committee Note). (238). In addition, “pursuant to Rule 37(e)(2)” and the pretrial scheduling order, the Court also ordered the parties, jointly and severally, to pay “into the court a **“fine of \$10,000.”** (238 [noting in footnote 3 that since one party had destroyed his phone before the pretrial scheduling order, he shall “pay costs, attorney’s fees and the fine pursuant to Rule 37(e)(2)]). See Tinkham and Johnson, EDiscovery Without the Endless Battles, 77-FEB Bench & B. Minn, 18 (2020) (“Significant monetary fines often accompany the finding that spoliation was intentional, citing **GN Netcom v. Plantronics**, [lower court, 2017] & **Paisley Park**).
426. **Palmer v. Allen** [2016 WL 5402961] (E.D. Mich. Sept. 28, 2016). Rule 37(e) was applied to alleged destruction of video in prisoner case since Applebaum (831 F.3d 740 (6th Cir. 2016)) and Konica Minolta had applied the new rule to cases initiated before the rule became effective and because the “spirit and principles underlying them have not materially changed in a manner adverse to [the moving] party.”
427. **Pals v. Interstate Highway Construction** [2019 WL 7482263] (D. Neb. June 18, 2019). A court was unable to determine if items were lost or destroyed with an intent to deny the other party its use, and, citing Rule 37(e), determined to have parties present evidence of the issue to the jury which would decide the spoliation issue. (*2-3).
428. **Palomo v. Demaio** [2019 WL 1323927] (N.D.N.Y. March 25, 2019). Where the moving party did not show that the party had a duty to preserve the disputed audio files, the first element of Rule 37(e) is not met and the court need not reach the remaining arguments.
429. **Pandya v. Marriott Hotel Services**, 552 F. Supp. 3d 1364 [2021 WL 3464263] (N.D. Ga. Aug. 5, 2021). In an opinion by Chief Judge Batten, the court refused to sanction the automatic overwriting of digital surveillance footage of the location where a wheelchair had overturned, injuring the decedent, in front of the hotel. While conceding that “federal law governs the imposition of spoliation sanctions, and citing **Rule 37(e)**, it noted that “courts in this district borrow a multi-factor test from Georgia spoliation law to determine whether spoliation sanctions are warranted.” *Flury v. Daimler Chrysler*, 427 F.3d 939, 944-945 (11th Cir. 2005).

(*3) The court noted that “The Eleventh Circuit has not yet determined whether the multi-factor Flury test is still applicable when a party seeks sanctions based on the spoliation of [ESI].” (*4) [citing *ML Healthcare Serv.*, 881 F.3d 1293, 1308]. It noted the standards of culpability but found neither bad faith nor an intent to deprive the plaintiff of the use of the video, and that the party had failed to meet the burden of showing that the video would have resolved an issue in the case. (*4). [For further on preclusion of Flury, see **Wiegand v. Royal Caribbean Cruises**, *infra*, 2021 WL 3934199 (S.D. Fla. August 11, 2021)].

430. **Parker v. Case Farms** [2020 WL 7029156] (W.D. North Carolina Nov. 11, 2010). In refusing sanctions under **Rules 37(a),(b)** and **(e)**, a visibly frustrated Magistrate Judge dealt with the fact that plaintiff had given responses to requests for production that implied text messages existed at a time when it had not actually searched for them (but did not disclose that fact) and later denied there were any relevant text messages on his phone. The defendant had failed engage in a “pre-filing conference” prior to filing the motion, but the court “was not persuaded” that its motion for sanctions should be denied on that basis. (*2) The court held that sanctions under (a) or (b) were not available because there had been no prior orders and a spoliation instruction under (e) was not available because nothing had been destroyed. (*3). In closing, the Magistrate Judge stated it was “compelled to address” the deficiencies in the plaintiff’s conduct (without differentiating counsel’s role) which it did but declined the invitation to award sanctions *sua sponte* and expressed no opinion as to whether the plaintiff’s conduct “may have supported sanctions under any other theory or principle of law.” (*4).

431. **Partners Biomedical Solutions v. Saltsman** [2021 WL 309032] (S.D. Fla. Jan. 29, 2021). The Magistrate Judge refused to find that the unavailability of a laptop and thumb drive justified sanctions under Rule 37(e), since “all of the documents and emails” were transferred to a law firms’ thumb drive, which exists and has been produced. “There is no spoliation,” as it was never “lost” and, furthermore, it “seems that” the laptop was not intentionally destroyed, but simply malfunctioned.” (*13).

432. **Peals v. Quicktrip Corp.** [2021 WL 2043185] (E.D. Tex. May 21, 2021). In a case fast approaching trial, the plaintiff sought and was refused an adverse inference at trial because of the failure to retain more than 30 minutes of a video surveillance. The court noted that “numerous courts” had found that “video footage from security cameras constitute ESI” and that sanctions for such loss is “evaluated under Rule 37(e) (collecting cases) (*4). Because the rule “adequately address the lost footage at issue, the Court will not draw from its inherent powers, citing **Rimkus**, 688 F. Supp.2d at 611; see also Comm. Note to 2015 Amendments. Here, since Quick Trip could not have reasonably known that it should have preserved additional footage under Rule 37(e) predicate requirements. (*6) Even if the predicate elements had been met, the court did not “discern any intent to deprive the Plaintiff of evidence,” citing *UMG Recording*, 2019 WL 4738915, at *4 (W.D. Tex. 2019) and *Bryant v. Wal-Mart*, 729 F. App’s 369, 370 (5th Cir. 2018). Given that the case was a “relatively straightforward slip-and-fall-case, and the plaintiff could present the case before the jury without the video footage, the court also found that there was no need for “curative sanctions” under Rule 37(e)(1).

433. **Pelino v. Gilmore** [2020 WL 2572361] (W.D. Pa. May 21, 2020). In a prisoner case where motions to preserve had resulted in orders to do so, the court sanctioned for loss of a surveillance video under **both Rule 37(b)(2) and 37(e)(1)**. It “appears” to come within the latter “relative to a party’s negligent or grossly negligent failure to preserve ESI” but “at this point” the court has no evidence that the failure to preserve was “intentional destruction.”(*6) Rule 37(e)(1) permits order of measure necessary to cure the prejudice caused by the loss of any ability to “rebut” the claim about the use of “cages” to shield private areas from the cameras view. (*5) Accordingly, “at time of trial, the jury will be given an appropriate permissive adverse inference instruction” for failure to preserve in violation of an order and will be prevented from introducing any evidence at trial supporting any defense during the search and will be prevented from introducing any evidence in support of a motion for summary judgment, and the defendants must reimburse for postage and copying cost relating to the motion.
434. **Percella v. City of Bayonne** [2020 WL 6559203] (D. N.J. Nov. 9, 2020). The Magistrate Judge refused to find that the loss of text messages “were relevant to the action” and that their non-production” prejudiced their defense, citing to **GN Netcom**, 930 F.3d 76, 83-85 (3rd Cir. 2019). Accordingly, an imposition of **Rule 37(e)** sanctions was unwarranted “even if the unproduced text messages are unfavorable to [the party].” (*11).
435. **Peterson v. Washington County** [2021 WL 2686119] (D. Minn. June 30, 2021). The court refused to strike defenses and award fees as a sanction for loss of a prison video under Rule 37(e) which had been destroyed automatically pursuant to policy because not marked for an indefinite hold. The prisoner did not make the requisite “showing of bad faith to warrant this pretrial sanction” and such a sanction “would run afoul of the strong policy of deciding a case on the merits.” (*5)
436. **Pettit v. Smith** [2014 WL 4425779] (D. Ariz. Sept. 9, 2014)(Campbell, J.). In a pre-effective date opinion written by the then Chair of the Rules Committee, a digital video recording in a prison case was deleted without deliberate attempt to make them unavailable in the lawsuit. The court planned to allow the parties to present evidence and argument and would instruct the jury that the there was a duty to preserve and that they may infer that the lost evidence would have been favorable. In fn. 6 the court stated that although the case involved “deletion of a digital video file, **it does not concern ESI in the sense addressed in the proposed amendment [ie, Rule 37(e)]**, which is concerned more with the operation of modern ESI systems and ease with which information can be added to and lost by such systems.”
437. **Philmar Dairy v. Armstrong Farms** [2019 WL 3037875] (D. New Mexico July 11, 2019). In deciding that Rule 37(e) did not apply because the alleged spoliation of photos on a cell phone of a small fire occurred prior to the duty to preserve attached, the court perceptively noted that the duty to preserve applied only when the litigation was “imminent” (*2) and that most courts find that a party “reasonably anticipates litigation” after it “has had a certain type of negative interaction with its potential adversary,” with an excellent collection of cases (*3). It contrasts that situation with the fact that it is “possible, though uncommon, for a event to trigger the duty to preserve evidence, even without any interaction with a potential adversary,” citing *Stevenson v. Union Pacific* and other serious accidents, events “commonly producing

litigation, including *ArcelorMittal v. Amex Nooter*, 2018 WL 509890, at *6 (N.D. Ind. Jan. 232, 2018).

438. **Phan v. Costco Wholesale Corporation** [2020 WL 5074349 at *4] (N.D. Cal. Aug. 24, 2020). The District Judge hearing a spoliation motion in a slip and fall case, apparently unaware of the option articulated in the Committee Note, decided to sanction the party at trial but use of a California form instruction which provided that “[y]ou 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.” The court did not find that **Rule 37(e)(2)** intent factors were required, but agreed to instruct on CACI 204 under **Rule 37(e)(1)** because it “allows the factfinder to reach its own conclusion about the video evidence in light of all the facts that may be presented.” (*4).
439. **Philpot v. LM Communications** [2018 WL 3371038] (E.D. Ky. July 10, 2018). A court denied a spoliation motion brought under its inherent authority, but also citing to Rule 37(e), where a failure to preserve a digital copy of photograph was not shown to have occurred at the time the party had notice of its relevance to the case (*5).
440. **Pletcher v. Giant Eagle** [2021 WL 6061729] (W.D. Pa. Sept. 3, 2021). The Special Master appointed to deal with spoliation of text messages and Facebook and other forms of ESI in a contentious case involving mask wearing in a supermarket chain relied on Rule 37(e) in making recommendations.
441. **Pointdexter v. Western Regional Jail** [2021 WL 1169383] (S.D. West Va. March 26, 2021). A prisoner sought a conditional adverse inference which would apply only if the jury found, by a preponderance of the evidence, that spoliation had occurred. The District Judge evaluated the request as “distinguishable from the typical adverse inference instruction under [Rule] 37(e)(2), which provides that the court may give the jury an adverse inference instruction upon a factual finding of spoliation by the court.” (*4) It noted that in *Vodusek v. Bayliner*, 71 F.3d 148, 155 (4th Cir. 1995) had upheld an instruction “similar to the one Plaintiff requests.” [The Court did not cite the 2015 Committee Note]. Ultimately, it refused to submit the question to the jury because although the jury may be “the proper fact-finder for a spoliation issue in some instances, a party must still present a plausible claim that the opposing party ‘acted with the intent to deprive another party of the information’s use in the litigation.’” (* 4). If found that “Plaintiff has not done so here.
442. **Porter v. City and County of SF** [2018 WL 4215602] (N.D. Cal. Sept. 5, 2018). The Magistrate Judge granted relief under **Rule 37(e)(1)** after refusing to give an adverse inference instruction under **Rule 37(e)(2)** against the City for failure to preserve a call reporting an AWOL escape by a mental health patient from the custody of the Zuckerberg General Hospital and Trauma Center. There was “no evidence” that it was intentionally erased as it was erased pursuant to a two-year ESI retention policy, which was at most gross negligence ‘not intentional malfeasance.’” (*4). Because the call cannot be restored or replaced “and constitutes relevant and material evidence, the court found an “appropriate” sanction to be to “inform the jury that the call was spoliated.” Thus, “the court orders that the jury may hear a short factual statement at trial regarding the spoliation” including that there was a duty to

preserve a copy of call, and that “despite this duty” it was erased and is no longer available, which has “prevented the jury from hearing what” was communicated, how it was communicated and what was said in response. (*4) The Magistrate Judge also noted that “subject to discretion and direction of the trial judge,” the factual statement shall be provided to the jury.” (*5) The court also ordered payment of the reasonable attorney’s fees and costs in bringing the motion which will cure the prejudice but “goes no further.” (*5) The case was subsequently terminated on the merits by a summary judgment in favor of the defendants which was upheld by a divided panel of the Ninth Circuit. 824 Fed. Appx. 515 (9th Cir. Sept. 2, 2020)(without reference to the spoliation issue).

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

444. **Preston v. County of Macomb** [2021 WL 4820556] (E.D. Mich. Oct. 15, 2021). The court refused to order extraordinary production of information about the destruction of certain ESI such as identification of the IT specialist involved and requiring the results of his consultation with the plaintiffs IT expert. The court noted the movant had not provided any legal authority supporting the request nor had the motion to compel been based on a duty to preserve nor had the party sought discovery sanctions under **Rule 37(e)**.

445. **Prime Energy and Chemical v. Tucker Arensberg, P.C.** [2020 WL 5653351] (W.D. Pa. Sept. 23, 2020). A court declined to compel discovery relating to the alleged spoliation of text messages lost when an **attorney** for a party exchanged a cellphone prior to the commencement of the lawsuit against it relating to a transaction in which counsel had participated. The court held that the asserted duty was far too speculative and sweeping in its reach since it would impose a duty on all attorneys to do for all time “in the off chance that some future litigation adversary might elect to sue the law firm.” (*4). The attorney had not been placed on notice by the client of an intent to sue and “was not reasonably foreseeable “when the attorney replaced his cellphone and there was no justification to hold a spoliation hearing. (*4). The

foreseeability requirement is “expressly incorporated into **Rule 37**” and there must also be a showing of intentional conduct to constitute spoliation in the Third Circuit. The fact that the attorneys represented the party does not create a reasonable inference the text messages need to be preserved into “the indefinite” future (*4)

446. **Prudential Defense Solutions v. Graham** [2021 WL 4810498] (E.D. Mich. Oct. 15, 2021). A District Judge determined to issue terminating sanctions but issued an order to show cause to permit the defendants to explain why it should not do so. In describing amended Rule 37(e), it noted that “left undisturbed by the amendments” was the court’s “broad discretion in crafting sanctions under Rule 37(e)(1),” referring to pre-rule authority, although “courts must “take care that the measures [are] no greater than necessary to cure the prejudice” and “do not have the effect of measures that are permitted under subdivision (e)(2).” [quoting Advisory Comm. Notes] (*5). In finding if intent to deprive existed, courts “should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant.” *Culhane v. Wal-Mart Supercenter*, 364 F. Supp.3d 768, 772-73 (E.D. Mich. 2019) (*7). It noted that “a clear intent to deprive is lacking” about some of the defendants. However, the conduct is “accurately characterized as ‘reckless’” and they did not act with an ‘intent to deprive.’” (*8) It noted that under *Automated Solutions v. Paragon Data*, 756 F.3d. 504, 514 (6th Cir. 2014) a party seeking sanctions “may rely on circumstantial evidence to suggest the contents of destroyed evidence.” (*8) The court also sua sponte addressed Rule 37(b) dispositive sanctions for the failure to obey orders in the case when the failure to cooperate in discovery is willful, in bad faith, or due to its own fault (*9).
447. **Puente Ariz. v. Arpaio** [2016 U.S. Dist. LEXIS 104883] (D. Ariz. August 9, 2016)(Campbell, J). The court applied circuit spoliation standards, **not Rule 37(e)**, “because the evidence allegedly lost [notes taken during a meeting] is not ESI.”
448. **Pugh-Ozua v. Springhill Suites** [2020 WL 6562376] (S.D.N.Y. Nov. 9, 2020). The District Court found no error in the ruling by the Magistrate Judge on a non-dispositive discovery matter that no curative measures were available under **Rule 37(e)(1)** “as the record does not establish the requisite prejudice.” (*4). The arguments as to prejudice were generic and merely asserted that a limited sample of text messages supported the claim. Citing to the court in **Karsch**, 2019 WL 2708125, at *20, it noted that “the mere fact that deleted audio materials were relevant does not itself establish prejudice. (*4) The court also cited **Ungar v. City of New York**, 329 F.R.D. 8 (E.D.N.Y. 2018) for the proposition that there might be an exception if a party destroys the only evidence that might vindicate claims. In a complicated aspect of the case, the issue of **Rule 37(e)(2)** was inconclusively explored, but no relief was granted.
449. **Punzo v. Sugarhouse Casino** [2021 WL 5867144] (Sept. 23, 2021) and [2022 WL 62888] (Jan. 5, 2022). The District Judge initially indicated that if physical evidence - apparently hard copy, but the court also cites **Rule 37(e)** - of audition notes was destroyed despite the EEOC requirement of one year preservation, it “would suggest that [the party] acted with intent to deprive Plaintiff of this information and may warrant an adverse inference under” **Rule 37(e)(2)**. (*3) The court ordered the filing of an affidavit that there were no forms created or used or “show cause” why the party is not entitled to an adverse inference. (*3). Once filed,

the court ruled in favor of the defendant since there was no evidence that a duty to preserve existed nor that prejudice had occurred. No further mention was made of **Rule 37(e)**.

450. **QueTel Corporation v. Hisham Abbas** [819 Fed. Appx 154] (4th Cir. July 16, 2020), *affirming* 2018 WL 8997471 (E.D. Va. Jan. 19, 2018). The Fourth Circuit found it was not an abuse of discretion to enter a **default judgement** where the party had acted in bad faith and with the intent to deprive the other party of the ESI. The district judge, affirming the Magistrate’s findings based on **Rule 37(e)**, found that the party had been irreparably harmed” and rejected the Magistrate Judge’s recommendation for a jury instruction as insufficient because the “purposeful spoliation” had effectively deprived the party of its ability to pursue the claims. The Circuit court could discern no abuse of discretion based on the finding that “no less drastic sanction would adequately address the prejudice suffered” or “adequately deter the type of spoliation that occurred in this case.” (156)
451. **Radiologix v. Radiology and Nuclear Medicine** [2019 WL 354972, at *9 (D. Kan. Jan. 29, 2019)]. The court applied the intent to deprive standard of Rule 37(e)(2) in barring use of adverse inference where party “engaged in reasonable discovery efforts under the facts presented.” It observed that any errors were “the product of negligence and mistake- not intentional conduct or bad faith.” It rejected the view that the party violated discovery obligations because it never implemented a litigation. “But not every case requires a legal hold.” (*10). The Court relied on the Sedona Principles (Comment 5.d.)(2018) and the 2010 Commentary on Legal Holds. It reviewed and rejected complaints about the review process for relevancy being conducted by a non-layer (*12); all of the sanctions requested on both sides were denied.
452. **Ramirez v. Wal-Mart Stores** [2019 WL 4037951] (D. Colo. Aug. 27, 2019). In a theft and apprehension by private security at a store the court refused any measures since litigation was not “imminent” at the time of the overwriting of the video footage other than that which Wal-Mart retained for law enforcement purposes, citing *Burlington N. & Santa Fe v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007) and the Committee Note to Rule 37(e). In a footnote, it refused to apply Colorado precedent, stating that “Federal courts apply the Federal Rules of Civil Procedure and **federal common law** to discovery offenses.”) (n. 1).
453. **React Environmental v. Buzan** [2021 WL 3604079] (E.D. Pa. Aug. 13, 2021). In a dispute with a former business partner over the alleged theft of trade secrets, the District Judge granted summary judgment in favor of the former partner on all counts for failure to show damages after concluding that **Rule 37(c)** barred any further changes to the non-responsive information furnished under **Rules 26(a)**. It also refused to re-open discovery to seek evidence of spoliation under because it was “moot” and found that that “spoliation sanctions would be inappropriate” under **Rule 37(e)** since a forensic examiner concluded there was no evidence of impropriety. (*15)
454. **RealPage v. Enterprise Risk Control** [2017 WL 3313729](E.D. Tex. Aug. 3, 2017)(the court drew a presumption that a third party’s acts of massive deletion may be “imputed to the employer” when foreseeable considering the employees duties. the party regularly consulted with the employee and decisions relevant to the enterprise and the court found sufficient evidence to establish a prima facie case that the individual was acting within the scope of his

employment. Citing **Rule 37(e)**, the court drew a presumption that the missing information was sufficiently unfavorable to the party's case that it had made out a prima facie showing of misappropriation of trade secrets. *Id.* at *11-12.

455. **Reed v. Royal Caribbean Cruises** [2021 WL 515624] (S. D. Fla. Feb. 11, 2021). The Chief Magistrate Judge denied a motion for an adverse inference instruction relating to the failure to preserve and produce crew body camera footage under **Rule 37(e)** because there was no evidence presented that the party possessed the footage. The plaintiff sought damages because of the alleged assault by a drunk passenger during an on-board dance lesson. However, it noted that at trial "the Court" will decide if the party may examine witnesses "in front of the jury regarding whether any body camera footage" existed and, if allowed, "the jury would consider that evidence, along with all of the other evidence in the case, in making its decision." (*7). *See also* 2020 WL 5878814 (S.D. Fla. Oct. 2, 2020)
456. **Regeneron Pharmaceuticals v. Merus** [864 F.3d 1343, 2017 WL 3184400] (Fed. Cir. July 27, 2017). The Federal Circuit, in dicta (the case involved discovery misconduct but not a failure to preserve), while applying Second Circuit authority, including Residential Funding, noted in footnote 7 that "Residential Funding may have been superseded in part by the 2015 Amendment to [FRCP] Rule 37(e)" quoting from the Committee Note as to rejection as to adverse inferences based on findings of negligence or gross negligence. The Court noted that for sanctions based on other discovery misconduct, Residential Funding remains good law in the Second Circuit.
457. **Reifler v. North Carolina Mutual Life** [2019 WL 396525] (S.D.N.Y. Jan. 31, 2019). A District Judge upheld a default judgment entered under **Rule 37(b)** as a sanction for spoliation of ESI of emails, texts, etc. using Eraser in a bankruptcy proceeding where the party had intentional deleted emails, not all of which were "irrevocably destroyed." (*8) The court also cited to CAT3 [**quoting Fed. R. Civ. P. 37(e)(2)**] to show that the party had acted without the intent to deprive another party of the information's use in the litigation" and distinguished a series of cases under Rule 37(e) as "inapposite" as they involved negligent spoliation. (ftn. 9).
458. **Reynes v. Paradise Cruise Line Operator** [2021 WL 2905503] (S.D. Fla. June 10, 2021). A court found no basis for spoliation sanctions based on the destruction of a cruise ship on which a slip and fall occurred, since "there is nothing to indicated that Defendant sold the ship "for the purpose of hiding adverse evidence," the requisite standard in the Eleventh Circuit (citing *Tesoriero v. Carnival Corp*, 965 F.3d 1170 (11th Cir. 2020). It cautioned the defendant to "be wise" and avoid trying to point to the failure to examine the ship nor use an expert who did have access. (*4). As to the failure to preserve a second video of the incident (it did preserve the one which "best" captured it) the court cited **Rule 37(e)**, found no intent to deprive, and noted that if defendant seeks to "gain some advantage" from its absence at trial, relief is available. As to allegations of spoliation of hard copy records relating to the incident, the court noted the defendant's representations that all records were searched and no responsive documents were found, so there was no proof of the first element of spoliation, namely, that the missing evidence existed at one time. (*2).

459. **Resnik v. Coulson** [2019 WL 1434051, at *11] (March 30, 2019). The court, finding that a party was collaterally estopped by the findings in a state action, but also that Rule 37(e)(2) provided it may do so, decided to utilize an adverse inference instruction to inform the jury that the spoliated ESI would have “tended to corroborate Plaintiff’s theory of statutory damages.” In response to the intentional destruction of recordings from spyware installed by the party on the party’s wife’s telephone, the court also ordered that he would be precluded from denying that he made use of it to monitor her whereabouts or listened to her telephonic and live conversations. The court described this as “an adverse inference (*11).
460. **Rhoda v. Rhoda** [2017 WL 4712419] (Oct. 3, 2017). The court acknowledged Rule 37(e) but refused to apply it under the Supreme Court Order because it would be unjust to apply a rule rejecting Residential Funding because the issue was raised before the Rule became effective. However, since the party has not met the burden of showing that “the missing ESI would have contained relevant information *unfavorable* to” the non-moving party or “that [the moving party] is now prejudiced without” the emails, no adverse inference is appropriate. (emphasis in original). In dicta, the Court asserted that it had authority to impose sanctions for misconduct in discovery in addition to the authority under Rule 37(e)(2), without mentioning the Committee Note on Foreclosure.
461. **Richard v. Digneau** [2021 WL 5782106] (W.D.N.Y. Dec. 7, 2021). After an evidentiary hearing on sanctions for failures to preserve certain documents and ESI in a prison case, the court made two disparate rulings based on essentially the same failures to take action after a duty to preserve attached. It ordered an adverse inference instruction under **Residential Funding** because of a failure to institute a litigation hold because it found it to be grossly negligent to have failed to act, which permits “the assumption of relevance.” [prejudice was not mentioned] (*6) However, it refused to impose any sanctions under **Rule 37(e)** because it required a showing of prejudice, which make and the prison authorities had not acted with intent to deprive, although they were certainly negligent.
462. **Richard v. Inland Dredging** [2016 WL 5477750] (W.D. La. Sept. 29, 2106). In personal injury action relating to a barge, post-accident photos alleged stored on a hard drive were lost when the barge sank. The Court refused a request for adverse presumption or inference under **Rule 37(e)(2)** because there was no showing that digital copies of the photographs existed which could have been lost or should have been preserved. In addition, even if the Rule applied, there was no showing that the party intentionally sunk the barge in order to hide or destroy the evidence from the plaintiff.
463. **Ringers Technologies v. Harmer** [2020 WL 6385813] (S.D. Tex. Aug. 17, 2020). A Magistrate Judge denied a motion for an adverse inference under **Rule 37(e)(2)** [no sanctions were sought under (e)(1)] because finding intent to deprive from a decision to delete all emails from 2008-2014 was “too far a leap” when it the only missing emails with arguably relevant testimony was a small number sent during a few months in 2014, albeit they should have been saved when litigation was foreseeable before the data was deleted. (*6).
464. **Rivera v. Hudson Valley Hospitality** [2019 WL 3955539, at *8 (S.D.N.Y. Aug. 22, 2019). The District Court, without reference to **Rule 37(e)**, agreed with the Magistrate Judges

recommendation that evidence of the destruction of the original handwritten time records would be admitted as well as the excel spreadsheets based on them although an adverse inference was unwarranted.

465. **Rivera v. Mathena** [2017 WL 3485012] (W.D. Va. Aug. 14, 2017). In a prisoner video case, the court concluded that no prejudice had resulted from missing video, and refused to sanction the failure to preserve under Rule 37(e) while also granting a motion for summary judgment on one of the claims because it could find no basis to believe that the unavailable video footage would change the outcome” of a summary judgment.
466. **Roadrunner Transportation v. Tarwater** [642 Fed. Appx. 759] (9th Cir. March 18, 2016). The Ninth Circuit affirmed default judgment and attorney’s fees award for willful destruction of emails and files on laptop in a case where the court had ordered the party to preserve all data on its electronic devices. The court noted that the district court did not clearly err in finding that the party had been “deprived of its ‘primary evidence’” of the alleged misappropriation and that a “less drastic sanction could not have adequately redress the prejudice to Roadrunner.” (759-60) It also noted in a footnote that even if **Rule 37(e)** applied to the case, the district court findings would lead to the conclusion that the party “acted with the intent to deprive” Roadrunner of the spoliated information’s use in the litigation.
467. **Roberts v. Payne** [2022 WL 987924] (E.D. Ark. March 31, 2022). In a pro se prisoner case involving potential spoliation of video evidence, the court determined that it was “possible” that the failure to preserve violated Rule 37(e), but that since “the primary remedy for spoliation is imposed at trial, with an adverse inference instruction,” it would “take up any spoliation issue *after* it resolved further motions for summary judgment and determined tha the case was ready to be set for trial. (emphasis in original).
468. **Robyn Bragg v. Southwest Health System** [2020 WL 3963714] (D. Colo. July 13, 2020). After an evidentiary hearing, the Magistrate Judge found that it was pure speculation to contend that user-created files were deleted after a litigation hold was in place. The employee could not identify what information was involved and there was no reason to believe (“pure speculation”) that spoliation occurred. The court noted that there may a case where overwriting unallocated space may result in the loss or destruction of potentially relevant information, but “this is not such a case.” The court also noted that if her logic were followed ‘mundane acts like turning a computer on and off or putting it in sleep mode will automatically crease system files which then overwrite unallocated space” and the party would be engaging in spoliation which “result would be absurd.” The court also found that the party had taken reasonable steps to preserve, the party had not been prejudiced in any way or did they act with an intent to deprive the party of the use of any ESI in the litigation, per **Rule 37(e)**.
469. **Robertson v. USAA** [2016 WL 5864431] (S.D. Fla., Sept. 22, 2016). **Rule 37(e)** measures were not available regarding failure to preserve computer notes because there was no evidence of intent by defendants to deprive the moving party of the information or that the party had otherwise acted in bad faith, such as where a party purposefully “tamper[s] with evidence.” (citing Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997).

470. **Robinson v. Renown Regional Medical Center** [2017 WL 2294085] (D. Nev. May 24, 2017). Court refused to impose sanctions under **Rule 37(e)** because it accepted the defendant's IT affidavit that the server containing the telephone call logs and attendant data had "failed" prior to the events at issue. The plaintiff had argued that the failure to preserve them connotes and "intent to deprive" the party of access to them.
471. **Romero v. Regions Financial** [2019 WL 2866498] (S.D. Fla. July 3, 2019). In an employment dispute over a bank tellers interaction with a customer, the court failed to find the failure to preserve a longer segment of video than the bank did of the scene to be relevant, quoting from *ML Healthcare* to make the point that there was no showing of prejudice under Rule 37(e)(1). There was also nothing in the record to show that the defendant bank had acted with an intent to deprive her of the footage at issue.
472. **Ronnie Van Zant v. Pyle**, 270 F. Supp. 3d 656, 2017 WL 3721777 (S.D.N.Y. Aug. 28, 2017), *reversed on other grounds*, 906 F.3d 253 (2nd Cir. Oct. 10, 2018). The District Judge in a footnote (n.16) rejected the argument that the recent amendments to **Rule 37(e)** "and its advisory notes limit a court's ability to exercise inherent powers to remedy spoliation." Citing *CAT3 v. Black Lineage*, 164 F. Supp.3d 488,497 (S.D.N.Y. 2016), the court noted that "even after the 2015 amendments, courts have continued to recognize powers to sanction the destruction of evidence outside of Ruled 37(e)" because certain implied powers cannot be dispensed with because they are necessary to all others. On appeal to the Second Circuit, the injunction issued in the lower court was reversed without mention of this footnote.
473. **Roost Project v. Andersen Construction** [2020 WL 6273977] (D. Idaho Oct. 26, 2020). The court delayed ruling on whether metadata was "lost" within the meaning of **Rule 37(e)** or if the moving party suffered prejudice as the result of a producing party furnishing construction status reports in in pdf. format rather than in Microsoft Project format (".mpp"). The moving party had requested the reports in pdf. Format and had received them without complaint prior to the duty to preserve attaching. However, it stated it would permit the moving party to "explore the circumstances surrounding the native files at the trial to the extent relevant to the claims, such as the impact on the ability to monitor the status. The scheduling expert would also be permitted to comment on any impact. However, the moving party "may not" argue that the producing party "destroyed or failed to preserve evidence" unless the court modifies the ruling at trial. (*5).
474. **Root v. Montana** [2021 WL 1597922] (D. Mont. April 23, 2021). After deciding that the loss of audio recordings qualified under **Rule 37(e)(1)** for measures, the Magistrate Judge concluded that the party claiming retaliation in employment "should be permitted to present evidence and argument at trial concerning the lost audio recordings, and the [defendant's] intent with regard to the lost evidence" with the jury "permitted to draw whatever reasonable inferences may follow from the evidence presented." It also concluded that the party could "request" the trial court to give "a jury instruction to assist the jury in its evaluation of such evidence" given that these measures "are sufficient, but not 'greater than necessary to cure the prejudice resulting from' the spoliation. It noted that based on the "present record" it did not find that the [defendant entity] acted with the necessary intent to deprive, but if sufficient information develops "through trial," the party may request adverse inference instruction,

should the Court determine it is warranted. (*4). In addition, citing **Nat'l Ass'n of Radiation Survivors**, the court agreed that a "remedial award of fees and costs incurred related to the" spoliation may be imposed, but did not find it to be "warranted" here.

475. **Roscoe v. Mullins** [2019 WL 4281719] (W.D. Va. Sept. 10, 2019). Finding that the party had not been prejudiced under **Rule 37(e)** nor that the party had acted with any intent to deprive him of the use of the video evidence in the litigation, the Motion by the prisoner for sanctions was denied.
476. **Rose v. Target** [2022 WL 906051] (W.D. Tenn. March 28, 2022). A district judge denied a nonsensical motion for spoliation sanctions arising from alleged implications from a routine response to an interrogatory under both **Rule 37(e)** and inherent authority.
477. **Rossbach v. Montefiore Medical Center** [2021 WL 3421569] (S.D.N.Y. Aug. 5, 2021), *attorneys fees awarded*, 2021 WL 4940306 (S.D.N.Y. Oct. 22, 2021), *appeal pending*, . An action was dismissed as a sanction, and monetary sanctions in the form of fees and costs were imposed against plaintiff and her counsel and law firm for failure to prevent production of an email which was deemed to be a fabrication by expert testimony of Dan Regard after an evidentiary hearing. The court imposed monetary sanctions on counsel and law firm under 28 U.S.C. § 1927 and its inherent powers and dismissed the case with prejudice "as an exercise of its inherent power to sanction and pursuant to" Rule 37(e). (*10). It found that counsel had "failed to take reasonable steps to preserve critical evidence" and failed to recognize the "gravity of his client's misconduct and its implications for his own duties." He also "suborn[ed] his client's perjury" and made "frivolous and procedurally improper legal and factual arguments." (*10)
478. **Rothman v. City of New York** [No. 19-CV-225 (CM)(OTW), 2020 WL 5628051 (S.D.N.Y. Nov. 21, 2020)(McMahon, C.J.) In an action by counsel frustrated with his reception at a City building and suing for the tort of battery and conversion when his pen was seized, the court granted the City's *motion in limine* the trial court precluded the plaintiff from mentioning that the City had not retained a video of the confrontation at One Police Plaza, "albeit with a caveat." It had earlier affirmed the finding of Magistrate Judge Wang that there had been no intentional effort to get rid of the evidence in a videotape of the encounter in the "the face of a demand for its preservation." Accordingly, "the fact that there once was a tape and that it was destroyed, should not be conveyed to the jury, because the only reason for telling the jury about the destruction of the videotape is to ask them to infer that the tape's contents were favorable to the plaintiff – i.e. to draw an adverse inference against the defendants." The court conceded that while the jury could be told that the tape was not intentionally or knowingly destroyed, and that "they are not to hold the destruction against the defendants, I conclude that any probative value in the fact of the destruction (which, in light of Rule 37 seems non-existent) is significantly outweigh[ed] by that prejudice)." However, there is "a lack of evidence" argument" to be made "just as there would be if no demand letter had been sent or if no videotape had ever been made." Therefore, defendants are free to argue "to the jury that there is lack of evidence because there is no videotape of the incident," but may not "tell the jury that there once was a videotape and may not tell the jury why there is no longer any videotape or "ask the jury to infer that if there were a videotape it would support

his version of the events.” Defendants that the lack of a videotape does not matter, but “cannot say that the lack of evidence makes it just as likely the officers are telling the truth as that Mr. Rothman is telling the truth.” (*3) [At the trial, the jury returned a verdict for defendants and the court subsequently refused to award attorney’s fees other than costs and a nominal \$1 payment. The court found that any amount would be “unreasonable” and no reasonable attorney with his considerable experience in the civil rights field could have concluded that the discourtesy on the part of a single police officer would result otherwise. 2020 WL 7022502 (S.D.N.Y. Nov. 30, 2020)].

479. **Russell v. Nebo School D. District** [2018 WL 4627699, at *2 (D. Utah Sept. 26, 2018)] there was no duty to retain text messages simply because the party had complained about harassment, since it is the “existing common law” – not whether inherent power or **Rule 37(e)** applies - that is determinative. In the case before it, the defendants had failed to show that the plaintiff “knew, or should have known, that litigation was imminent.”
480. **Saller v. QVC** [2016 WL 4063411] (E.D. Pa. July 29, 2016). In action by former employee based on discrimination based on disability and denial of FMLA where moving counsel did not “even allude” to **Rule 37(e)**, court rejecting the intimation that spoliation had occurred since it was “far from certain” that the documents (or ESI from which the documents were generated) were lost because of Defendant’s failure to take reasonable steps since they were overwritten before the litigation began.
481. **Salami v. Trumbley** [2021 WL 1702390] (E.D. Mich. March 22, 2021). The Magistrate Judge refused to apply Rule 37(e) to a prisoner complaint about a lack of video since the defendant denied it existed and he “cannot produce what is not within his lawful custody and control, and any video evidence, even if it exists would be in the custody of the MDOC, not [defendant]” not would he “have the authority to order the video evidence preserved.” (*2).
482. **Sanchez v. Albertson’s LLC** [2022 WL 656369] (D. Nev. March 3, 2022). In this personal injury action from an umbrella falling on a customer’s head, the defendant was sanctioned for having failed to preserve the umbrella under its “inherent discretionary power in response to spoliation because it was “at least negligent” in doing so and recommended a jury instruction that it could have weighed between twenty and seventy pounds. (*11). It refused to impose attorney’s fees under *Leon v. IDX*, 464 F.3d 951, 961(9th Cir. 2006) because there was no showing the defendant had acted in bad faith, vexatiously, wantonly, or for oppressive reasons. In footnote 8, it assessed whether Rule 37(e) foreclosed from using inherent authority to impose “sanctions for the destruction of physical – as opposed to electronic – evidence, noting that some court had postulated that the “Ninth Circuit will likely apply Rule 37(e) standards to physical, as well as electronic evidence, citing *Ski Lifts v. Schaeffer*, 2020 WL 1492676, at *3-4 (W.D. Wash. Mar. 27, 2020) and a GM case, 542 F. Supp.3d 1124 (D. Idaho June 2, 2021), both using inherent authority as compared to *Sherwood v. BNSF*, 2019 WL 1413747, at *1 (D. Idaho Mar. 28, 2019) applying the rule. The court stuck with inherent authority.
483. **Sandoz v. United Therapeutics** [2021 WL 4553351] (D. N.J. Oct. 4, 2021). The District Court spelled out the elements of the “tort of fraudulent concealment” under New Jersey law

(*4) and but found it was not legally cognizable as a counterclaim against a plaintiff, because **Rule 37(e)** “provides the appropriate avenue for seeking these litigation-related costs, not an independent fraudulent concealment claim used to bolster UTC;s defenses.” (*7). If that is sought, it “may file a separate motion under Rule 37.” (*7). On the same date, the same court reached a similar conclusion in a case not involving Rule 37(e), *MaxLite v. ATG Electronics*, 2021 WL 4520418 (D.N.Y. Oct. 4, 2021).

484. **Sanz v. Wells Fargo** [2021 WL 2530257] (S.D. Fla. June 21, 2021). In an employment discrimination suit where handwritten notes in a physical file were produced late, the court noted that **Rule 37(e)** did not apply but that spoliation sanctions was inappropriate because the physical file was produced and “evidence cannot be missing or destroyed” if it has been provided. (*5) Since the individual was working from home due to the pandemic and came to office rarely, the court was not “willing to make the leap” and opine some “nefarious intent” was behind the delay. It refused the request for an adverse inference [which in any event required a showing of bad faith, citing *Cox v. Target*, 351 Fed. App’x 381, 383 (11th Cir. 2009)] or presentment of the evidence of “discovery delays and missteps to the jury.” (*6) However, it awarded fees and expense for the work done “before the physical file was ultimately and belatedly provided.” (*6) since **Rule 37(a)(5)(A)(iii)** allowed such expenses as were not unjust under those circumstances, granting an award of \$3,320.00, subject to the right of either party to request an evidentiary hearing. (n. 5).

485. **Sapia v. Home Box Office** [2022 WL 769798] (S.D.N.Y. March 14, 2022). A District Judge refused to award any sanctions under Rule 37(e) in a case involving multiple plaintiffs seeking to recover on a employment retaliation claim after having been among plaintiffs suing HBO based on “the present state o the record, and without a frolic and detour that might result in the severance of the attorney-client relationship.” It did not rule out the possibility of sanctions such as an adverse inference instruction at a later point, but declined to do so “at this juncture.” (*11).

486. **Saulsberry v. Savannah River Remediation** [2019 WL 4509064] (D.S.C. Sept. 19, 2019). Refusing to impose **Rule 37(e) sanctions for loss of a hard copy file** since it is not ESI and proceeding under its inherent authority. (*3) It notes that “[q]uestions of trial management are quintessentially the province of the district courts” but refuses, on the record before it, to rule on a motion in *limine* to bar the ability to “elicit testimony regarding the circumstances of the disappearance” of the file, instead reserving the matter to be handled at the trial. “An evidentiary ruling” on such an issue “depends on the particular content of the evidence and argument and the context is which the party seeks to introduce it.” (*3) (internal quotes omitted).

487. **Sawyer v. Locy** [2021 WL 4458822] (N.D.N.Y. Sept. 29, 2021). In prisoner case alleging excessive force scheduled for a bench trial, the District Judge denied a motion in limine for spoliation sanctions relating to destruction of a video surveillance footage of the choking incident because the officer did not have control over the video footage and thus had no duty to maintain it and did not fail to preserve it. (*2) Although the motion requested “spoliation sanctions pursuant to” **Rule 37(e)**, the court [incorrectly] cited **Residential Funding** as having stated at 306 F.3d 99, 107 that the “right to impose sanctions for spoliation arises from a court’s

inherent power to control the judicial process and litigation, but the power is limited to that necessary to redress conduct which abuses the judicial process” and is cited as cited as “superseded by statute on other grounds.” (*1). [the actual quote was] “Even in the absence of a discovery order, a court may impose sanctions on a party for misconduct under its inherent power to manage its own affairs,” citing *DLC Management*, 163 F.3d 124, 135-36 (2nd Ric. 1998) and, generally *Chambers*] The movant failed to show that the prison officer had any reason to anticipate litigation (the prisoner had not personally filed a grievance, although someone else had [*2]) until the Amended complaint was served on him and there was no showing he had “any control over the video footage” such as a duty to maintain it or was involved in the failure to preserve. (*2 & *3) (citing lower court cases while conceding that the Second Circuit had not addressed “this specific situation. (*3) The court also held that the “rote denial” of a FOIL request did not imply the footage still existed at the time of the request.

488. **Scalia v. KP Poultry** [2020 WL 6694315] (C.D. Cal. Nov. 6, 2020). The Magistrate Judge recommended that an adverse inference instruction be issued under **Rule 37(e)(2)(B)** where the party took no steps to prevent videos from being deleted after the duty to preserve attached in March 2020. It found intent to deprive under **Rule 37(e)(2)** to exist because they were “aware of their duty to preserve and purposefully failed to take any steps to prevent the deletion of the recordings, citing **Porter v. City and Ctny of SF**, 2018 WL 4215602, at *3 *(N.D. Cal. Sept. 5, 2018) for the “purposefully failed” language as sufficient. (*6) The court noted that the evidence of spoliation “does not rise to the level of warranting terminating sanctions.” (*7).
489. **Scalpi v. Amorim** [2018 WL 1606002] (S.D.N.Y. March 29, 2018). District Judge denied motion for spoliation sanctions under Rule 37(e)(1) because there had been neither prejudice from the loss nor an “intent to deprive.” (*17-18). In the course of describing and applying Rule 37(e), the court in dicta remarked that “the Second Circuit has not yet published an opinion examining the impact of the new Rule 37(e) and collected key cases such as *In re Bridge*, 185 F. Supp. 3d 459, 472-473 (S.D.N.Y. 2016)(noting rejection of Residential Funding)(Koeltl, J.)). In footnote 26 the court notes that neither party discussed whether or not the surveillance video at issue was ESI, citing cases under the former rule which imply it did not apply.
490. **Schein v. Cook** [2016 WL 3212457] (N.D. Cal. June 10, 2016). Court cited **Rule 37(e)** in connection with an ex parte preservation order.
491. **Schmalz v. Village of North Riverside** [2020 WL 4464263] (N.D. Ill. Aug. 4, 2020). The District Judge responsible for this case noted that its predecessor had disagreed with the recommendation of the Magistrate Judge and had concluded (in an unpublished order) that the evidence was sufficient to show bad faith and had reserved until “closer to trial” the issue of instructing on an adverse inference. The Magistrate Judge [2018 WL 1704109, at *7] (N.D. Ill. March 23, 2018) had recommended a finding that it was grossly negligent to fail to retain “highly relevant” text messages and that under **Rule 37(e)(1)**, the court should allow evidence of their destruction and likely relevance to be presented to the jury along with an instruction that it may be considered by the jury when making its decisions. The Magistrate Judge also

granted reasonable attorney's fees under Rule 37(a) and commented on the guidance to be given if its recommendation was accepted.

492. **Schmidt v. Shifflett** [2019 WL 5550067] (D. New Mex. Oct. 28, 2019). In a case involving the discarding of a cell phone and the failure to preserve mobile phone data of a former employee, the court cited **Rule 37(e)(1) at the outset** (*1) and appears to have interpreted it as mandating that, as a lesser sanction in the absence of an adverse inference instruction, "a court must impose the sanctions necessary to cure any resulting prejudice." (*6) It suggested that the "two most important factors" were "culpability and actual prejudice," citing *Browder v. City of Albuquerque*, 187 F. Supp. 3d 1288, 1297 (D.N.M. 2016)(*4-6) and concluded that "[b]alancing the spoliation considerations, the Court will allow Plaintiffs to introduce evidence of [the other party's] purported willful spoliation of his personal cell phone and will also allow" introduction of the personal cell phone records from T-Mobile. It reserved for ruling at trial as to whether an adverse inference instruction warranted. (*6)
493. **Schnider v. Providence Health** [2018 WL 1558554] (D. Ala. March 9, 2018). A court found that a party that failed to take reasonable steps to preserve a Facebook account by permanently deleting it was "motivated" to do so "because it would deprive Providence of that information in the litigation." It did not find it credible that he did so solely to alleviate emotional distress since it occurred after he hired counsel and the Court had an "expectation that an experienced attorney such as [named attorney] would very likely to [have] inform[ed] his client of the duty to preserve evidence." The court ordered the movant to address the nature of the sanction it was seeking under Rule 37(e).
494. **Scott Griffith Collaborative Solutions v. Falck Northern** [2021 WL 4846926] (N.D. Cal. Sept. 10, 2021), *R&R affirm'd as modified*, **Falck USA .v Scott Griffith Collaborative Solutions**, A2021 WL 4846244 (N.D. Cal. Oct. 4, 1021). A Magistrate Judge made various recommendations "both under" the FRCP and the court's inherent power to prevent abuse of the judicial process, citing Rules 16(f), Rule 37(b)(2) and **Rule 37(e)** as well as *Leon v. IDX*, 464 F.3d 951 (9th Cir. 2006) and other 9th Cir. decisions since lesser sanction had not been tried, it recommended a forensic examination and that the issue of an adverse inference be considered. (*9). In accepting the recommendation, the District Court "reserve[d] consideration of an adverse inference or jury instruction for summary judgment and/or trial." (2021 WL 84846244, at *3 and entered a formal order that SGCS should submit to a forensic examination of certain devices, with the parties ordered to meet and confer as to a search protocol and contractor to conduct the examination, and required to reimburse expenses for the examination, as well as "reasonable" attorneys fees for the meet-and-confer process. *Id.* at *3.
495. **Scruggs v. Miller** [2021 WL 1739973] (March 8, 2021). In a prisoner case challenging the failure to preserve video the court interpreted **Rule 37(e)** as requiring "a showing of bad faith" in order to draw inferences that it contained "negative information," contrasting it with the Sixth and Ninth Circuits, "which have less stringent standards." (*2). While denying the motion because the prisoner had not "sustained" the burden of showing bad faith, the Court "ADMONISHED that, when an inmate alerts them to the need to preserve evidence for litigation (whether before or after a complaint has been filed) they have an affirmative obligation to take prompt steps to ensure that evidence is preserved." (*3).

496. **SEC v. CKB168 Holdings** [2016 U.S. Dist. LEXIS 16533](E.D. N.Y. Feb. 2, 2016). In an action challenging a “multi-national pyramid scheme revolving around a series of related entities” [2016 U.S. Dist. LEXIS 18624 (E.D.N.Y. Feb. 12, 2016)] a Magistrate Judge withdrew its earlier recommendation [reported at 2015 WL 13742421 (E.D.N.Y. Nov. 3, 2015)] for an adverse inference in light of **Rule 37(e)** since the deficiency could not be said to the result of an “intent to deprive” under the record before the court. However, if the case goes to trial and the SEC makes the requisite showing of intent associated with the loss of ESI, the SEC was authorized to renew its motion under the Rule. The court also noted (n. 7) that it had not recommended that “certain facts be deemed established” but that a “forceful closing argument by counsel for the SEC could well persuade the jury to draw such a conclusion without a jury charge from the Court giving it express permission to do so.” The District Judge upheld the recommendation in all respects. [2016 U.S. Dist. LEXIS 136922 (Sept. 28, 2016)]. The case was ultimately terminated by a summary judgment in favor of the SEC. 210 F. Supp.3d 421 (E.D.N.Y. Sept. 28, 2016).
497. **SEC v. Dean** [2018 WL 10715230] (S.D.N.Y. Oct. 19, 2018). In a opinion based on a transcript of a telephone call between the parties and the court, the District Judge explained that “the evidence presented to me on the record” did not support the conclusion that the non-moving party had acted with “intent to deprive” when recordings on his cell phone (?) were lost. Among the factors that convinced the court was that the party had reached out his counsel for advice. The court found that counsel “bears much of the blame: for the series of event, and there is not evidence the advice was so profoundly flawed that sanction on the attorney are warranted. (*6).
498. **Security Alarm Financing (SAFE) v. Alarm Protection Technology (APT)** [2016 WL 7115911] (D. Alaska Dec. 6, 2016). the District Judge found that customer recordings requested by APT from SAFE for defense in a claim of illegal competition for home security alarm customers [per 743 Fed. Appx. 786, 787 (9th Cir. July 30, 2018)] had been lost by SAFE as the result of a failure to take reasonable steps and could not be replaced under **Rule 37(e)**. SAFE had selectively retained recordings favorable to it, which it produced. The court was “not persuaded that the failure to preserve” was “done with the intent to deprive” the party of the recordings. (*6) But because the “call notes and depositions” would be inferior evidence, there was prejudice from their loss. The court stated under the Rule, it intended to instruct the jury that the party was under a duty to preserve and had failed to do so. “In addition,” the court will “permit the parties to present limited evidence and argument in this regard, consistent with this order.” “The court finds that these remedies should put the parties on equal footing with regard to all of SAFE’s recordings, and are no greater than necessary to cure the prejudice to APT.” (*7). In its conclusion, it noted that “APT shall not argue that the jury may or should presume that the spoliated evidence was favorable to APT.” (*8). In footnote 51, it stated that even if SAFE had acted with an intent to deprive under (e)(2), it “would have imposed only those sanctions necessary to cure the prejudice to APT.” In footnote 61, it explained that it “does not intend to permit extensive evidence or argument on any ancillary matters. After trial, however, the jury found for SAFE on all counts and assessed damages in the amount of \$920,700 which was affirmed by the Ninth Circuit. 743 Fed. Appx. 786 (9th Cir. July 30, 2018).

499. **Sempowich v. Tactile Systems** [2020 WL 6265076] (E.D. N.C. Oct. 23, 2020). The District Judge, among other motions, refused to exclude an exhibit as a sanction for failing to preserve the dataset from which the spreadsheet had been compiled because even if the threshold requirements of **Rule 37(e)** were met, the party had failed to show how it had been prejudiced under Rule 37(e)(1), since it failed to show the loss of “evidence essential to its underlying claim,” citing *Al-Sabah v. Agbodjogbe*, 2019 WL 4447235, at *5 (D. Md. Sept. 17, 2019).
500. **Shafer v. Skyline** [2021 WL 2662100] (N.D. Cal. June 29, 2021). A court which had dismissed a complaint for compensation because the lawyer-plaintiff had engaged in spoliation refused, under **Rule 60(b)(3)** to set aside the judgment because the defendant had, contrary to its contentions in moving for sanctions, retained access to missing emails (and had failed to take steps to replace) and other ESI. The court held that the complained of representations were “not determinative” as to sanctions. The Court noted that dismissal was warranted under **Rule 37(e)** as well as under its inherent powers, citing *Leon v. IDX*, 464 F.3d 951, 959 (9th Cir. 2006) and *Wyle v. R.J. Reynolds*, 709 F.2d 585, 589 (9th Cir. 1983). Thus, “[e]ven if” the moving party “could have restored or replaced” the information, the plaintiff had “willfully deceived the Court and willfully spoliated evidence from her laptop and other sources.” The court implicitly rejected the argument that a dismissal was disproportionate. The court agreed with the Magistrate Judge that the “combination of willful evidentiary spoliation . . . attended with such wildly inconsistent, and patently false, testimony by a private party who is a licensed attorney and an officer of the courts, warrants no lesser sanction.” (*6-7)
501. **Shaffer v. Gaither** [2016 WL 7331561 (Dec. 12, 2016)] (“Shaffer II”). In an employment action by a former ADA, the Court twice denied motions to dismiss on the same set of facts. In the second opinion, the court stated that under **Rule 37(e)(1)**, the defendant would be “allowed to fully explore the alleged document alterations in front of the jury, making the alleged alterations an issue of weight, not admissibility. It is for the jury to determine how much weight it will give to the alleged name-change.” The missteps are “fertile ground for cross examination, not dismissal” and while the texts might be gone, the defendant will be “free to examine those witnesses in front of a jury; they may deny those texts ever existed; and the jury will be free to decide whether to believe that testimony.” If there is evidence at the trial that shows the missing evidence was “intentional” the court may revisit the issue of a “spoliation or modified spoliation instruction” upon the filing of an “appropriate post-judgement motion and/or a motion at the conclusion of the plaintiff’s evidence.” (at *2). In an earlier opinion is at 2016 WL 6594126 (“Shaffer I”) (W.D. N.C. Sept. 1, 2016), the court had found that a request for dismissal as a sanction for the same conduct was “disproportionate.” (*1).
502. **Shim-Larkin v. City of New York** [2019 WL 5198792, at *12] (S.D.N.Y. Sept. 16, 2019). The Court acted “pursuant to Rule 37(e)” [and] the Court’s inherent power” in concluding that the party had control of the contexts of work-related texts on a personal cellphone since the employee had used it “without objection.” (*10). The failure to take affirmative steps to preserve them for 11 months after learning the messages might be relevant permitted the court to conclude that the party had acted intentionally to deprive the party of the use of the texts in

the litigation. The court found that the party had thus failed to take reasonable steps to preserve. (*10). Based on the timing, the court infers that “the unpreserved text messages would have been relevant to the issues in this action,” citing *Kronish*, 150 F.3d at 128 to the effect that the court should not hold the prejudiced party to too strict a standard. The court refused to establish certain facts as a sanction, since the statements sought concern “hotly contested matters” that are best left for the jury.” (*11) Accordingly, it will allow the plaintiff to “present to the jury that quantum of evidence that will enable it to consider” the “gravity” of the conduct, the materiality of the evidence and the “import of the remaining proof,” together with an instruction that “it may presume that the lost information was unfavorable to the defendant.” (*12). *See also* 2020 WL 86810 (S.D.N.Y. Jan. 7, 2020)(awarding \$114.90 in costs under Rule 37(a)(5) because she made a motion for spoliation sanctions for ESI under Rule 37 and the “motion was successful).

503. **Showcoat Solutions v. Butler** [2019 WL 3332617] (M.D. Ala. June 7, 2019). In a decision that **did not mention Rule 37(e) because [apparently] it involved a civil contempt proceedings**, the Magistrate Judge stated that since it had recommended granting the Motion for Contempt as to spoliation of a cell phone and hard copy labels, it would also recommend sanctions. (*5). While it refused to strike pleadings, since it was a drastic remedy which “would not ensure compliance with the courts orders,” it recommended that as to spoliation of the cell phone a forensic expert be hired to try to retrieve the information from the cloud-based server and, if needed adverse inferences be issued. As to the counterfeit labels, if the moving

504. **Sines v. Kessler** [2021 WL 5492826] (W.D. Va. Nov. 19, 2021). In a case involving the Charlottesville White Supremacist trial the District Court adopted the recommendation of the Magistrate Judge at 2021 WL 1208924 (W.D. Va. March 30, 2021) that he make use of permissive adverse inference jury instruction under **Rule 37(b)** as to certain defendants. (*1). The court noted that it also agreed with the Magistrate Judge that **Rule 37(e)** authorized the same adverse inference instruction as to another defendant. It reproduced the “final jury instruction” it intended to use, which included the statement that the jury was permitted, but not required, to infer that the defendants had intentionally withheld or destroyed documents and ESI because they “were aware that such documents and [ESI] contained evidence that they each conspired to plan racially-motivated violence at Unite the Right.” (*3) In another case under the *Sines v. Kessler* umbrella, at 2021 WL 4943742, at *2 (W.D. Va. Oct. 22, 2021), a Magistrate Judge spoke of applying the “standard reasonableness framework” of *Paisley Park*, quoting *Steves & Sons*, and argued that the need for “additional or specific steps” would depend on the parties “resources, technological sophistication or familiarity with litigation generally. (*2). In yet another case under the *Sines v. Kessler* umbrella, at 339 F.R.D. 96 (June 23, 2021), the District Court held that Rule 37(b), not **Rule 37 (e)**, applied since the latter “does not govern the non-production of evidence,” including ESI, in violation of a prior court order, citing *Kortright Capital Partners*, 330 F.R.D. 134, 138 (S.D.N.Y. 2019). (108).

505. **Singanonh v. Rodriquez** [2021 WL 2268312] (E.D. Cal. June 2, 2021). In an aside to a pro se prisoner case which involved a multitude of allegations of misconduct, the court flatly rejected the argument that an inference of spoliation could be drawn from the malfunction of a video camera. “Plaintiff has not cited to any law, and the Court is not aware of any, stating

that it is a due process violation to keep a camera in working order or to fail to interview witnesses in an excessive force incident.” (*11).

506. **Simon v. City of New York** [2017 WL 57860] (S.D.N.Y. Jan. 5, 2017). Court refused to impose measures under **Rule 37(e)(1)** for failure of plaintiff to retain cell phone video of assembly of group near at time of arrest in context of civil actions for false arrest. The court held that there was no allegation of an attempt to deprive defendants of the video footage and that there was no showing of prejudice under (e)(1) because it was “pure speculation” as to the contents of the video or whether it would be helpful to the defense. Moreover, even if it showed location of a weapon, it would be “largely irrelevant” to the issue of probable cause, quoting from *Mazzei v. Money Store* [656 Fed. Appx. 558 (2nd Cir. July 15, 2016)] to the effect that no measures are available if the ESI would “not have made any difference” at the trial. The court applied **Rule 37(e)** because it was neither “infeasible nor [would it] work injustice” to do so.
507. **Simon v. Northwestern University** [2017 WL 467677] (N.D. Ill. Feb. 3, 2017). A Magistrate Judge in an action by an individual complaining he had been falsely accused by an investigative journalism class, the court refused to compel production of certain ESI in light of the party’s willingness to produce relevant information and its obligation to “retain electronic records for the duration of this litigation (thus making them available for later, more focused discovery requests)” citing to **Rule 37(e)** as “describing repercussions for failing to preserve electronically stored information.”]
508. **Sinclair v. Cambria County** [2018 WL 4689111] (W.D. Pa. Sept. 28, 2018). The District Judge ordered a plaintiff to pay the reasonable fees and costs incurred in pursuing a sanctions motions as a remedy under **Rule 37(e)(1)** where through the efforts of counsel copies of many of the missing text messages deleted after a duty to preserve attached were recovered. The court concluded that defendants were “not severely prejudiced” and the conversations were not likely to have contained information that materially damaged the ability to pursue claims. The court found that it was not necessary to show the contents of the missing messages because, according to *GN Network v. Plantronics*, 2016 WL 3792833, at *9 (D. Del. July 12, 2016) the moving party need only offer a “plausible, good-faith explanation of what the deleted text messages may have contained.” (n. 6; also citing the 2015 Committee Note that it may be “unfair” to put the burden of showing prejudice on the party that did not lose the information).
509. **Six Dimensions v. Perficient** [2018 WL 7108060] (S.D. Tex. Dec. 14, 2018) The court refused to strike an Answer because the evidence “did not establish” that the party disposed of a cell phone with the intent to deprive the moving party of the texts stored on it as required under Rule 37(e). The same applied to the two other measures sought, namely precluding an offer of evidence on one the party’s defenses and for a “spoliation instruction.”
510. **SL EC v. Ashley Energy** [2021 WL 4281293] (E.D. Mo. Sept. 21, 2021). A court issued dismissal of certain counts under **Rule 37(e)(2)** because of “behavior” amounting to “intentional, bad-faith misconduct. (*7) It also found that dismissal was warranted under its inherent authority found it “unnecessary” to rely on the courts inherent authority, citing *Sentis*

v. Shell Oil, 559 F.3d 888, 900 (8th Cir. 2009), where the court advised that “the best practice is keep the structured analysis for a particular rule separate from the relatively unstructured analysis associated with inherent authority.” (*2). It noted that under **Gallagher v. Magner**, 619 F.3d 823, 845 (8th Cir. 2010) it would not abuse its discretion “by imposing sanctions, *even absent an explicit bad faith finding*, where a party destroys specifically request evidence after litigation has commenced.” (emphasis in original)(*7). In footnote 2, the court observed that “there is some tension between this holding and the clear requirement of Rule 37(e)(2) that a court find the party acted with intent to destroy evidence.”

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

512. **Smith v. Phelps County Sheriff’s Department** [2021 WL 3616762] (E.D. Mo. Aug. 16, 2021). In a contentious deceased prisoner case alleging medical neglect, the court refused to find that the failure to preserve was caused by actions “with the necessary intent to suppress the truth” required under **Rule 37(e)** [citing *Auer v. City of Minot*, 896 F.3d 854, 858 (8th Cir. 2018)] and through a court’s “inherent power” to exercise “discretionary ‘ability to fashion on appropriate sanction for conduct which abuses the judicial process” citing *Cody v. City of St. Louis*, 2021 WL 2454215, at *8 (E.D. Mo. June 16, 2021), citing *Chambers v. NASCO* and *Stevenon v. Union Pacific*, 354 F.3d 739, 750 (8th Cir. 2004). (*3) It also concluded that it was “mere speculation” that the missing email “from in-house counsel would have contained material evidence regarding the adequacy of plaintiff’s care.” (*4)

513. **Snap Lock Industries v. Swisstrax** [2021 WL 864054] (D. Nev. March 5, 2021). A court dealt with allegations of spoliation in a case where both original and modified Facebook posts were still visible. The court denied a request for a **Rule 37(e)** sanction without prejudice to refile, since it had not been fully briefed. It suggested that if the party decided to file a **Rule 37(e)** motion, it should pay attention to whether the ESI had been “lost and cannot be restored or replaced through additional discovery. (*4) It also noted that since there were allegations that the party had failed to “produce the original, unedited posts” in discovery, sanctions “under rule 37(c)” might be appropriate, and stated that the party could file an appropriate motion or sanctions under that Rule. (*5) As to its authority to sanction under inherent authority, the court noted **Newberry v. City of San Bernardino**, 750 F. App’x 534,537 (9th Cir. 2018) which had held that the detailed language of the **Rule** “foreclose[d]” reliance on inherent authority as to ESI, but stated it was not “controlling” since “unpublished.” It found it persuasive and predicted that if the Ninth Circuit were to take it up in a “published” opinion,

it would find that Rule 37(e) limited its inherent authority to sanction.” (*3) It toyed with the argument that because the modifications were “intentional,” the Rule did not apply, conceding “there appears to be a split in authority across district courts” but noted that the “plain language” of the Rule, the comments and other secondary sources were “instructive.” (*3). It said it was “persuaded” that the Rule applied. (*4).

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

515. **Sonrai Systems v. Anthony Romano** [2021 WL 1418405] (N.D. Ill. Jan. 20, 2021). In an action against a former employee for unfair competition, etc., the court found intent to deprive under **Rule 37(e)(2)**, but refused to enter a default judgment because the prejudice was not irreparable and the party had considerable evidence to prove its claims. (*16) The court planned to utilize an adverse inference instruction since it was possible that “there is additional probative evidence that was deleted” and “is non-recoverable.” (*Id.*) In addition, citing **Karsch**, 2019 WL 2708125 at *14, the court recommended that the plaintiff receive an award of “its reasonable attorney’s fees and costs that it has incurred in filing this motion” because “such an award will help address the prejudice caused” and “serve to deter future spoliation,” citing **Schmalz, Distefano** and a 2012 decision in **Top Tobacco**, 2012 WL 4490473, at *3. (*16-17) [without stating if it was acting because of (e)(1); but arguably under (e)(2)]

516. **Sosa v. Carnival Corporation** [2018 WL 6335178] (S.D. Fla. Dec. 4, 2018), reconsideration denied 2019 WL 330865 (Jan. 25, 2019). In a fifty page initial opinion (December 4, 2018) dealing with the application of **Rule 37(e)** to the unexplained loss of surveillance video footage [which the moving party contends is not ESI but the court, after much agony, holds is, indeed, ESI] after it was initially viewed by defendants key witness, the court made preliminary findings that Rule 37(e) applied and decided to leave it to the jury (subject to a choice by the party) as to whether “intent to deprive” existed. The court found that the burden of proof is on the moving party to show a failure to take reasonable steps (*16), which was satisfied because the key employee did not act reasonably (*19). The court also concluded that (e)(1) measures apply, since the Rule does not require a finding of “great” prejudice or that it was crucial to the case (*20), contrasting it with what the moving party

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

517. **Soule v. P.F. Chang’s China Bistro** [2020 WL 959245, at *6 and *9] (D. Nev. Feb.26, 2020). The Magistrate Judge ordered that “in accordance with Rule 37(e)(1), [the innocent party] shall be entitled to an adverse inference instruction to the trier of fact at the time of trial as the result of [non-moving party’s] spoliation [which] shall state, in sum that video footage . . . which was within the control of and made unavailable by [the non-moving party] “could have provided “information unfavorable” to the [non-moving party]. The court confused the parties in the actual text, which is corrected here. The court also erred by citing Rule 37(e)(1), then relying on earlier case law which did not emphasize that a finding of prejudice was required. However, a fair reading of the court’s opinion is that it found prejudice to exist.

518. **Spears v. Tyler** [2021 WL 4845798] (E.D. Wisc. Oct. 18, 2021). The court in an excessive force prisoner case refused to rule on **Rule 37(e)**’s application to a failure to retain a video of the booking area based on a decision that no use of force occurred because the movant had not shown any prejudice. (*2)

519. **Spencer v. Lunada Bay Boys** [806 Fed. Appx. 564] (9th Cir. March 27, 2020). The Ninth Circuit affirmed an award of monetary sanctions for spoliation of the text messages, although reversed and remanded for correction because it included fees for a deposition that had never occurred, citing Goodyear Tire & Rubber. [2018 WL 839862 (C.D. Cal. Feb. 12, 2018)]. The Magistrate Judge recommended [2017 WL 10518023 (C.D. Cal. Dec. 13, 2017)] and the District court agreed court to award monetary damages in the form of attorney’s fees as a sanction for the failure to preserve “unrecoverable text messages.” (*2) In doing so, the court rejected the argument that the silence as to remedies available under **Rule 37 (e)(1)** necessarily implied that that inherent authority must supply the basis for measures. The court held that the Committee Note “expressly contradicts” that argument because it provides that the rule

“forecloses reliance on inherent authority” and allowed the recovery of reasonable attorney’s fees as well as further discovery as to spoliation since the Magistrate Judge had found prejudice to exist. The Magistrate Judge had found prejudice to exist from missing text messages and recommended that under **Rule 37 (e)(1)**, the parties should be permitted to present evidence and argument as to unrecoverable text messages at trial, noting that “depending on the sufficiency of Plaintiff’s evidence at trial regarding intent, the District Court may decide at trial whether to give an adverse inference instruction. See Committee Notes. Alternatively, if the intent finding is left for the jury, the District court may instruct the jury that may infer from the loss of information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with intent to deprive another party of the information’s use in litigation. See id.” The Magistrate Judge had noted that the plaintiff should “not be precluded from presenting evidence at trial as to whether Defendant Blakeman acted with the intent to deprive Plaintiffs of the se of the evidence at issue.” (2017 WL 105180232 at *11, *12)(noting the that Committee Note allowed such an instruction). The District Court adopted that recommendation by confirming that “[a]t trial, Plaintiffs and Defendant Blakeman will be permitted to present evidence and argument related to the unrecoverable texts messages.” (2018 WL 839862, at *2).

520. **Stanbro v. Westchester County Health**, [2021 WL 3863396, at *16] (S.D.N.Y Aug. 27, 2021). In a complex case by a prisoner allegedly injured during premature discharge after an outpatient procedure, the Magistrate Judge held that it would be “mere surmise and conjecture” to find an “intent to deprive” under **Rule 37(e)(2)** by an officer involved in the inexplicable loss of a video and denied a request for an adverse-inference instruction. However, because of the inability of the officer and the Department to explain what happened to the video, it found the Plaintiff entitled to present evidence at trial concerning the loss and possible relevance of the video. The bulk of the opinion is a detailed discussion of the unique case law developed to deal with the relationship of such personnel in regard to control, or lack of it, over lost ESI. The court cites **DR Distributors**, 513 F. Supp. 3d 839, 880 n. 19 (N.D. Ill. 2021) for the conclusion that stored digitized video constituted ESI for purposes of the Rule. (*10). For a detailed summary of the opinion, see Mark S. Sidoti and Kevin H. Gilmore, *The Resurgence of Electronic Evidence Spoliation Sanctions*, 333-DEC N.J. Law 28, 32 (2021).
521. **Stemmelin v. Matterport** [2022 WL 818654] (N.D. Cal. March 17, 2022). In denying motions for sanctions for multiple failures to satisfy the Rule 37(e) criteria, the Magistrate Judge makes the point that it is not enough to simply find a place where a party “fell down on the job” in failing to preserve from email from seven GSuite custodians. The movant did not “identify anything that was lost” in the sense that it could not be restored or replaced through additional discovery” nor did it show that prejudice existed because they had “documents that different in type or category as compared” to other productions (*3) nor that intentional conduct occurred; the deletion “should not have happened, but [that fact] has no indicia of an intent to deprive” plaintiff of information. (*3).
522. **Steves and Sons v. Jeld-Wen** [327 F.R.D. 96] (E.D. Va. May 1, 2018). In a well-written, thorough opinion, a Senior District Judge found that no measures were available under **Rule 37(e)(1) or (2)** because the moving party had failed to show by clear and convincing evidence that the “lost” ESI could not be “restored or replaced” (109). The moving party is not required

to “pursue every possible avenue for replacing or restoring the ESI, but it must show that it made some good faith attempt to explore its alternatives before pursuing spoliation sanctions.” (109) The requirement provides a binary choice with the court directing “the parties to pursue such discovery” if it could be replaced, provided it was proportional to the importance of the lost claims; otherwise, if it cannot be restored or replaced, the court then turns to the appropriate sanctions “under the subsequent provisions of Rule 37(e) (109). Earlier, given the “apparently low bar for showing loss,” the court had concluded that a limited category as defined in the case had “satisfied this element of Rule 37(e). (108). ESI is lost for purposes of **Rule 37(e)** “only if it is irretrievable from another source, including other custodians.” (107) [citing the Note: loss from one source, etc. and Black’s definition of “lost” as “beyond the possession and custody of its owner and not locatable by diligent search”]. As the court saw it, “a movant must satisfy four threshold requirements before it decides if any spoliation sanction is appropriate,” namely, (1) ESI should have been preserved (2) “ESI was lost” (3) the loss was due to a part’s failure to take reasonable steps to preserve the ESI; and (4) “the ESI cannot be restored or replaced through additional discovery”. (104). It noted the analysis for use of inherent authority to deal with information “lost or destroyed” is not ESI is “similar to the Rule 37(e) framework in that it asks whether the responsible party had a duty to preserve and “breached that duty by failing to take reasonable steps to preserve, citing *DuPont v. Kolon*, 803 F. Supp.2d 469, 496 (E.D. Va. 2011) (104) The court found that while the duty to preserve likely existed, the culpability and prejudice involved in failing to suspend a standard “document deletion policy” was “limited” and a “relatively harsh sanction like an adverse inference” was unwarranted, citing *Kolon*. It also noted that since the evidence of “possibly non-existent documents” makes it extremely difficult to determine an appropriate sanction, it will not impose any spoliation sanctions using its inherent powers. (110). [In a footnote, the court expressed the view citing CAT 3, 164 F. Supp.3d 488 at 497 a court could not rely on alternative sources of authority to dismiss a case as a sanction for merely negligent destruction. However, “even if the court’s discretion is limited as to the sanctions noted in **Rule 37(e)(2)**, Court may well retain its full discretion to impose lesser sanctions even if a party cannot establish all the Rule 37 prerequisites.” (n. 4).

523. **Stevens v. Brigham Young University** [2019 WL 6499098] (D. Idaho Dec. 3, 2019), decision on renewed motion reported at ___ F.Supp.3d ___, 2022 WL 612451, at *15 (D. Idaho March 2, 2022)(affirming previous ruling denying motion for sanctions without prejudice to renew at trial). The District Judge in 2019 refused to find that plaintiff had acted with an intent to deprive as defined in **Rule 37(e)** in the selective deletion of text messages, but ordered that the evidence could be submitted to the jury in light of prejudice involved. The court concluded that the intent to deprive requirement was intended to preempt use of inherent power, but under Rule 37(e)(1) it could address prejudice. Moreover, [e]ven if Rule 37(e) is inapplicable,” the deletions of texts are relevant to her credibility and the court “will allow a full inquiry at trial into these matters.” (*5). Also, while it might increase the length of the trial and create a trial within a trial, it was necessary to do so to give the defendant a “fair opportunity to challenge the narrative created by “selective, intentional, and substantial deletions of text messages.” (*4) [Note: on the same day, the court ruled on a motion for sanctions by Plaintiff dealing with the interactions of the University with a witness, also referring the issue to the jury despite risks of “trial-within-a-trial.”. 2019 WL 6499097// 2019 U.D. Dist. Lexis 209982 (D. Idaho Dec. 3, 2019)]. The 2022 decision affirmed the original

decisions since “none of the new information conclusively demonstrates intent or bad faith on the part of counsel or Stevens in deleting the text messages, or the timing of when the duty to preserve attached in relation to the text deletions. These are questions that must be decided by the fact finder at trial.” 2022 WL 612451 at *15.

524. **Stinson v. City of New York** [2016 WL 54684] (S.D.N.Y. Jan. 5, 2016). The court refused to apply **Rule 37(e)** because motion was fully submitted prior to effective date of new Rule. The court granted a permissive adverse inference based on gross negligence without finding any prejudicial impact under existing Residential Funding standards. In Note 5, the court acknowledged that “new standards” in Rule 37(e) were in effect but found that it was not just and practicable to apply them since the motion for sanctions had been briefed before the effective date. It also noted that the amended rule presented a “thorny” issue of application where a party fails to preserve both ESI and hard-copy evidence.
525. **Storey v. Effingham County** [2017 WL 2623775] (S.D. Ga. June 16, 2017). A court concluded that a failure to preserve videotapes which might have shown the tasing and roughing up of a prisoner occurred at a time when there was a duty to preserve under Rule 37. (The court “cannot fathom a reasonable defendant who would look at those facts and not catch the strong whiff of impending litigation on the breeze”). The court held that the “multi-step: process to determine if sanctions or curative measures are appropriate was satisfied. However, given that the “negligence – even recklessness – in allowing the normal video destruction policy to patter away unimpeded does not rise to the stringent ‘intent’ requirement set forth in the **amended Rule 37(e)**, it denied an adverse inference. However, because some prejudice had occurred, the court expressed the intent to tell the jury that “the video was not preserved” and would allow the parties to present evidence and argument at trial” about the destruction or failure to preserve the videos. The jury will be instructed that it may consider that evidence along with all the other evidence in the case, in making its decision. In n. 5, the court made it clear there will not be any adverse inference instruction “that the destroyed evidence is *unfavorable* to the defendants.” (emphasis in the original). The court also precluded “any evidence or argument” that the contents of the missing video corroborated defendant’s version of events. It noted that “[t]hese sanction will go some way in restoring Storey to the same position he would have been in had the County defendants abided their duty to preserve. (*5).
526. **Storz Management v. Carey** [2019 WL 2615755] (E.D. Cal. June 26, 2019). The court refused to sanction by entering a termination sanctions because there was no indication of what relevant ESI was lost (“something more is need beyond a vague reference to the unknowable”) and because “beyond vague and conclusory assertions,” the movant was “unable to articulate how defendants’ action impaired a claim or defense.” (*5) The court quoted *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (“The prejudice inquiry looks to whether the spoiling party’s actions impaired the non-spoiling party’s ability to go to trial or threatened to interfere with the rightful decision of the case.” (*5).
527. **Stovall v. Brykan Legends** [2019 WL 480559, at *2 (D. Kan. Feb. 7, 2019). In an employment action, the plaintiff sought sanctions under **Rule 37(e)(2)** by way of dismissal or adverse inference for failure to preserve a surveillance video of an altercation. The Magistrate Judge noted if these three prerequisites are met, the court may go on to determine [if intent to deprive exists].” The court found that they were not met, but even if they had been, the court

would have refused the harsh measures sought under Rule 37(e)(2) because “the court is not convinced that defendant’s negligence – even recklessness” – is not taking steps to preserve a second copy of a video surveillance tape “rises to the **stringent** ‘intent’ requirement of the Rule (at *4), thus denying the “motions for sanctions.” However, in a footnote, it noted that the ruling would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence along with other evidence, citing Rule 37 “**Advisory Committee Note to Subdivision (e)(2)**); but such is a decision for the presiding U.S. district judge at trial.” After trial, the jury awarded \$100K in compensatory and \$200K in punitive damages and the court awarded \$160K in attorneys fees and denied the defendant’s motion for a new trial. 2020 WL 108704, at *1 (D. Kan. Jan. 9, 2020)(without mentioning if or how spoliation evidence was handled at trial)

528. **Summers v. City of Charlotte** [2022 WL 385163, at *5-6] (W.D. N.C. Feb. 8, 2022). In an employment action of some duration involving promotions in the Fire Department, the court, mixing Fourth Circuit authority regarding non-ESI documents and **Rule 37(e)** cited an apparent failure to issue litigation holds as indicating both a failure to take reasonable steps and as evidence of “intent to deprive” citing *Moody v CSX Transp.*, 271 F. Supp. 3d 410, 432 (W.D.N.Y. 2017). It struck the Fire Department’s Motions for Summary Judgement [it is not clear whether this was a sanction under Rule 37(e) or as premature; the court stated that “discovery sanctions are typically decided independently from the ultimate outcome of the case,” citing *Klipsch Grp. V. ePro E-Dom*, 880 F.3d 620, 633 (2nd Cir. 2018).] and decided to give an adverse inference instruction and awarded reasonable fees and costs incurred in bringing the motion for a default judgment, which it “granted in part and denied in part.” (*6)
529. **Syntel Sterling v. TriZetto Group** [328 F.R.D. 100] (S.D.N.Y. Sept. 19, 2018). In an incredibly long, unnecessarily complicated opinion, a Magistrate Judge sanctions a law firm and its client, jointly, for permitting its review team to apply what the court deems inconsistent relevance standards to a small number of hits on search terms. The court finds that repeated representations that it had produced all responsive documents from the “devices” of a witness where, therefore, at best misleading [citing a case holding sanctions are available for negligent counsel sanctions, *Jindan Wu v. Seoul Garden*, 2018 WL 507315, at *13 (E.D.N.Y. Jan. 22, 2018). Accordingly, the court concluded that the failure to produce certain documents “appears to have been a deliberate choice to limit the scope of discovery.” (at *20). It also indicates a willingness to sanction a failure to preserve a “live inventory” of computer assets as spoliation under Rule 37(e) but citing *Watkins v. New York City Transit Auth.*, 2018 WL 895624, at *10 (S.D.N.Y. Feb. 13, 2018) suggests it is best raised though a request for “a jury instruction or motion *in limine*, at the appropriate time.” (*24).
530. **Systems Spray-Cooled v. FCH Tech** [2019 WL 10154221] (W.D. Ark. Feb. 22, 2017). In a decision applying an adverse inference under Rule 37(e) because the party acted with an intent to deprive, the court granted attorney’s fees and costs under pre-rule authority because the party had acted in bad faith.
531. **Talbot v. Foreclosure Connection** [2020 WL 4365501] (D. Utah July 29, 2020). In an FLSA action, sanctions were granted under inherent authority for “discovery abuses” when

Rule 37(e) was technically inapplicable because after filing the sanctions motion, the party produced the recording (ESI) at issue. (*1) After considering the Tenth Circuit factor involved, default judgment on liability was granted and counsel was sanctioned.

532. **Taylor v. Nepolean** [2021 WL 4171423] (W.D. Pa. Sept. 14, 2021). Court in a prisoner case denied a motion for sanctions dealing with failure to produce a video under Rule 37(e) because of a “failure to meet his burden to demonstrate” that any video was destroyed or that it was “overridden with the deliberate intent to impede” the prisoner from presenting his claim. The court relied on Rule 37(e)(2) citing *GE Netcom v. Plantronics*. (*2). It also noted that under *Brewer v. Quaker State Oil Refining*, 72 F.3d 326, 334 (3rd Cir. 1995) “the trier of fact generally may receive the fact of the document’s nonproduction or destruction as evidence that the party that has prevented production did so out of the well-founded fear that the contents would harm him.”

533. **Tchatat v. O’Hara** [249 F.Supp.3d 701] (S.D.N.Y. April 14, 2017) (**Tchatat #1**) In a case involving alleged spoliation of videotape and digital photographs by police officers who had arrested the plaintiff for shoplifting, the Magistrate Judge found that the police officers did not have a duty to preserve at the time the evidence was allegedly lost. [cited in 8B Fed. Prac. & Proc. Civ. § 2284.2 (3d ed.)(October 2020 Update)]. The court did not “consider” Rule 37(e) because “[n]either party has argued that Rule 37(e) applies here” but “our ruling would be the same even if” it did. (n. 2) It also could not make a finding on the current record because it turned on issues “best decided by the District Court in the context of the trial itself.” (711). The District Court (2017 WL 3172715 [S.D.N.Y. July 25, 2017])(**Tchatat#2**) agreed with the denial of spoliation sanctions on eve of the trial on the merits because it was being asked to “adjudicate” disputed facts at a time when it would “usurp the jury’s function as the trier of fact and could result in inconsistent findings.” (*11). It noted that the plaintiff “may nevertheless request an adverse inference instruction at trial, to be submitted with his proposed jury charge, not as a punishment but ‘as an example of the reasoning process known in law as circumstantial evidence, that a jury’s finding of certain facts may (but need not) support a further finding that other facts are true.’” (*11)(quoting from *Mali v. Fed. Ins. Co.*, 720 F.3d 387, 393 (2nd Cir. 2013)(contrasting an adverse inference instruction that is ‘a punishment for misconduct’ with one where the jury is free, but not required, to make certain inferences as part of its ‘fact-finding powers’”). On appeal (795 Fed. Appx. 34 [2nd Cir. Dec. 20, 2019])(**Tchatat #3**) after a jury verdict in favor of the defendants the Court of appeals found that the “district court correctly pointed out that issues involved in determining spoliation sanctions overlapped with the merits issues of the case, e.g., whether the [police officer] deliberately destroyed or failed to preserve the evidence and whether the evidence was exculpatory.” It held that the district court did not error by denying spoliation sanctions. (37). No mention was made in the appellate opinion of whether Rule 37(e) did or did not apply.

534. **Tejada v. Delbalso** [2021 WL 2457747] (M.D. Pa. June 16, 2021). In a *pro se* prisoner case alleging excessive force and other mistreatment, the court refused to sanction a failure to retain video longer than the targeted and quite precise recordings of the various incidents involved. The “defendants could have reasonably anticipated – and did anticipate - litigation” and preserved the relevant evidence (“only so far as they could reasonably foresee litigation”). (*4).

535. **Terral v. Ducote** [2016 WL 5017328 (W.D. La. Sept. 19, 2016)]. A failure to preserve surveillance video in a prisoner excessive force action pursuant to a routine retention policy did not meet the moving party's burden to show a failure to take reasonable steps under **Rule 37(e)**.
536. **The Fashion Exchange v. Hybrid Promotions** (also cited as: "FASHION EXCHANGE") [2021 WL 1172265] (S.D.N.Y. March 29, 2021) The Court overruled objections to the order of Magistrate Judge Wang, 2019 WL 6838672] (S.D.N.Y. Dec. 16, 2019), which found that measures under **Rule 37(e)(2)** were not available but cited **Rule 37(e)(1)** in ordering that the party could present evidence to the jury concerning the loss and potential relevance of the ESI as well as whether certain financial documents ever existed (*10 & *7), awarding monetary sanctions in the form of attorney's fees and costs. (*8).] Judge Wang ordered counsel to share in the costs to deter conduct in the future, which included misrepresentations to the court about the status of document production (*9) since she had **"wide discretion" to "apportion Rule 37 sanctions between a party and its counsel, especially when both are "equally at fault,"** citing **Joint Stock**, 2017 WL 3671036, at *20 (S.D.N.Y. 2017). [In August 2020, the Magistrate Judge ordered a total of \$96K in attorney's fees to be paid, described as "monetary sanctions against Plaintiff and Plaintiff's counsel for their pattern – over a series of discovery conference – of Plaintiff's misrepresentations to Defendants and the Court about their discovery obligations" (*1) since both "appeared to be responsible for the discovery faults" (n.2)(2020 WL 4750600 (S.D.N.Y. Aug. 17, 2020)]. In affirming, the District Judge noted that **"Fashion Authority does not cite to any authority whatsoever for the proposition that an attorney cannot be sanctioned under Rule 37(e)(1)."** (*5). Courts have sanctioned attorneys under the rule, citing **Karsch**, 2019 WL 2708125, at *26-28, sanctioning "plaintiff and his attorneys under **Rule 37(b)(2)(C) and 37(e)(1)** for "discovery misconduct" and at 2019 WL 6998563, at *1 for awarding "attorney's fees against plaintiff's counsel pursuant to" the same two rules. (*5) Moreover, aside from the authority to sanction counsel under **Rule 37(e)(1)**, the court "possessed inherent authority pursuant to 28 U.S.C. § 1927 to hold counsel liable for "excessive costs," which the defendants had cited as a source for the sanctions. It concluded that there was no reason why the sanctions imposed by the magistrate upon plaintiff's counsel were improper. (*5).
537. **Thomas v. Butkiewicz** [2016 WL 1718368] (D. Conn. April 29, 2016). Court refused to apply **Rule 37(e)** to loss of video surveillance tape since the issue would likely have been resolved before the effective date if new counsel had not been substituted. The court described Rule 37(e) as "procedural" and noted that it "overrules" Second Circuit precedent on state of mind required for an adverse inference.
538. **Thomley v. Bennett** [2016 WL 498436] (S.D. Ga. Feb. 8, 2016). Court refused to apply **Rule 37(e)** where loop-type video of prison incident was recorded over before there was demand for its production at a time when they had no reason to know it should be preserved. In n.18, the court also stated that there was no showing of prejudice or that defendants had acted with an intent to deprive.

539. **Thompson v. Clarke** [2019 WL 4039634] (W.D. Va. Aug. 27, 2019). Prior to trial on multiple issues arising out of prisoner allegation of mistreatment, the court denied a request for spoliation sanctions for failure to preserve “videos” which had been recorded over as part of the video surveillance system. The court asserted it had both **Rule 37(e)** and “inherent power” to control the judicial process, citing *Silvestri*, 271 F.3d 583, 593 (4th Cir. 2001)[including the argument that if so prejudicial that relief was available (*4)] and the court addressed it under both sources. It acknowledged the problem with imputing failures to preserve by non-parties to the party officer, but ducked that issue by concluding that the missing footage was not relevant to the remaining claims in the case. (*4) [in footnote 5, it noted that courts had taken different positions on imputing actions on non-party prison to individuals]. “Sanctions are not appropriate for the destruction of irrelevant evidence.” “Put differently, if the evidence was not relevant, then there can be no prejudice to Thompson from any failure to preserve it and sanctions under Rule 37(e)(1) are not permitted or necessary.” Citing *Knight v. Boehringer Ingelheim*, 323 F.Supp.3d 837, 845 (S.D. W. Va. 2018). Relief under inherent authority was also denied because it would have to conclude, which it could not, that the lost evidence would have supported its claim.
540. **Thorgersen v. Siemens Building Technology** [2021 WL 2072151] (N.D. Ill. May 24, 2021). In a well-written opinion relying heavily on **DR Distributors**, the court found that the plaintiff in a construction accident had acted with intent to deprive in deleting his Facebook account and met the threshold requirements for applying **Rule 37(e)** after applying the decision tree advocated by Johnston and Allman. It found that the plaintiff had acted with an intent to exist by “more than” a preponderance of the evidence (*4-5) but determined that a dismissal would not be an appropriate remedy, choosing instead, to give a mandatory adverse inference instruction coupled with a jury instruction containing a very detailed recitation of the facts relating to spoliation. (*5) It also announced that it would take “appropriate steps to ensure the jury does not hear from Plaintiff any benign explanations (rather than facts) that would minimize the extent of the activities depicted in any photographs.” (at n. 9)
541. **Threatt v. Sylacauga Housing Authority** [2021 WL 535534] (N.D. Ala. Feb. 12, 2021). The court refused to draw an adverse inference as to the relationship between representations said to create a conflict from the deletion of emails given that the “intent to deprive” standard of **Rule 37(e)(2)** was not satisfied, even under the assumption, which it was not prepared to make, that it was not possible to replace the missing emails through other means. (*8)
542. **Thurman v. Bowman** [199 F. Supp.3d 686] (W.D.N.Y. August 10, 2016). The District Court applied Circuit case law in affirming that the movement of Facebook posts to “private” was not sanctionable because the contents remained available. A failure to institute a litigation hold did not alone establish the relevance of any missing ESI as a matter of law, since it occurs only “in the most egregious cases,” which this case was not. In a footnote 5, the District Judge noted that the Magistrate Judge applied current law because “neither party advocated for retroactive application” of Rule 37(e). **The Magistrate had commented [2016 WL 1295957 (March 31, 2016)] that the outcome would have been the same since the deletion did not cause prejudice nor was it done with an intent to deprive.**

543. **Tipp v. Adeptus** [2018 WL 447256, at *5 (D. Ariz. Jan. 17, 2018)]. The court held that **Rule 37(e)** provides “helpful rationale” in deciding a case involving shredding of hand-written notes); see also *Emerald Point v. Lindsay Hawkins*, 808 S.E.2d 384 (Va. 2017) and *EEOC v. Jetstream*, 878 F.3d 960 (10th Cir. 2017).
544. **Title Capital Mgt. v. Progress Residential** [2017 WL 5953428, at *4 (S.D. Fla. Sept. 29, 2017)]. A court applying **Rule 37(e)** found the onset of the duty did not have to include the exact type of litigation which ultimately ensued, since reading such a requirement “into the Rule” would allow misbehaving parties to escape through “the careful splitting of hairs.” It rejected as “disingenuous” the argument that the actual litigation commenced must be reasonably foreseeable. However, the court did not apply any remedy under either subsection as it could not find that prejudice had resulted or that the “draconian sanction of dismissal” because the “intent” issue was “a close call and one that will be better made after completion of all discovery.” (*6) [It also collected cases where emails, information stored on laptops, iphones and external hard drives constituted ESI] (at *4).
545. **TLS Management and Marketing Services v. Ricky Rodriguez-Toledo** [2017 WL 115743] (D. Puerto Rico March 27, 2017)]. The court ordered an adverse inference and forensic examination of a hard drive because the non-moving party acted with an intent to deprive when it discarded a laptop after it malfunctioned, rejecting the argument that the existence of copies in the cloud and on flash drive negated allegations of prejudice in violation of **Rule 37(e)**. *Id.* at 2 (“Defendants have not . . . proffered clear and convincing evidence that all information that might have been stored . . . including metadata – is discoverable from the information transferred to the cloud computing service and the USB flash drive”). This was sufficient to satisfy the **Rule 37(e)(2)** intent to deprive requirement, since the party “willfully discarded or deleted” ESI from a laptop and external hard drive.
546. **TLS Management and Marketing Services v. Mardis Financial Services** [2018 WL 3673090] (S.D. Miss. Jan. 29, 2018). The court ultimately granted a default judgment on liability because of the deletion of documents and ESI by finding, under **Rule 37(e)(2)**, intentional destruction, including use of CCleaner, although it spoke entirely of “bad faith,” without specifically finding “intent to deprive,” which it nonetheless referenced in Note 61. The court noted that “similar” tools are available through a court’s inherent power, citing *Rimkus v. Cammarata*, 699 F. Supp.2d 598, 611 (S.D. Tex. 2010) to the effect that such power is used “only when evidence destruction ‘occurs before a case is filed or if, for another reason, there is no statute or rule that adequately addressed the conduct.’” (Note 2) The court here held that Rule 37(e) adequately and justly address Defendant’s conduct, and does so in the same way this Court’s inherent power would.
547. **Torgersen v. Siemens Building Technology** [2021 WL 2072151] (N.D. Ill. May 24, 2021). In a construction fall accident case, the Magistrate Judge sanctioned the plaintiff under **Rule 37(e)** for deletion of a publicly viewable Facebook account after finding, by a preponderance of evidence, that it had done so with an intent to deprive. The court concluded that the excuse for the deletion was “balderdash” and it was “incredible” to believe the deletion was caused by concerns over threats relating to his political beliefs. (*4) The court planned to instruct the jury that the Facebook page contained information and images relevant to the

claims and damages, that defendant affirmatively deleted it shortly after it was requested despite being told by his attorney it must be preserved and that the jury “must presume the information contained on the Facebook page was unfavorable to the plaintiffs’ claims in the lawsuit. The court also “precluded” the plaintiff from asserting he deleted the Facebook pages for political reasons. (*5) The Court reproduced a **Rule 37(e) Sanctions Flow Chart** by Hon. Iain D. Johnston & Thomas Y. Allman. (at *2)

548. **Toussie v. Allstate Insurance** [2018 WL 2766140, at *4] (E.D.N.Y. June 8, 2018). In the course of reaffirming an order requiring continued storage of tangible things pending determination of the adequacy of photographs in an insurance case, the court comprehensively discussed the authority of courts to issue preservation orders, and noted the Committee Note to **Rule 37(e)** which predicted greater use of preservation orders in light of the 2015 amendments to Rules 16(b)(3)(B)(iii) and 26(f)(3)(C), as well as citing **Rule 37(e)** itself because it limits a courts ability to sanction. The court also cited the reference in the 2006 Committee Note to Rule 37(f) to the effect that a preservation obligation “may arise from . . . a court order in the case.” It also derived a standard (“the proper standard”)(at *7) as involving the “balancing test” of the danger to destruction absent a court order, whether irreparable result is likely to result and the burden of preserving the evidence.
549. **Trading Places International v. Summerwinds** [2017 WL 6383983] (W.D. Mo. May 12, 2017). A court refused to issue a sanctions under Rule 37(e)(1) or (2) because the missing billing records have been restored or replaced and any concerns about “the accuracy of the restoration or replacement” had been eliminated by a concession that there would not be a challenge to resulting accuracy of calculations and the party “[has] not been prejudiced,” Similarly, the court was not persuaded that any of the lost emails relate to the issues that remain relevant. Moreover, to the extent the issue remains relevant, the was able to “ascertain the information by asking the individuals directly about” it and “any lost information” can be “replaced” by “relying on answers” provided during their depositions. (*2).
550. **Trainer v. Continental Carbonic Products** [2018 WL 3014124] (D. Minn. June 15, 2018). The court refused to find that a duty to preserve had been triggered since the party to understand the implications of deleting some texts (he could have saved them and sought a protective order under Rule 26(c) against their production). It denied intrusive forensic examination of devices used to send text messages and email since only marginally relevant information was missing and “forensic imaging is not proportional to the needs of this case, given the availability of the missing texts from other sources.
551. **UMG Recordings v. Grande Communications** [2019 WL 4738915] (W.D. Tex. Sept. 27, 2019). In a decision acknowledging **Rule 37(e)**, the court noted that while ESI at issue was captured in a temporary table in a database which exists only when the software is actively lost, once the process as acquired the data its removed. The court concluded that this did not mean that it was “lost” within the meaning of Rule 37(e). (*3). Since the software does not identify and retain the bitfield data, it is a “far cry from proof that” the party destroyed it; the system was “never intended, and was not designed, to retain it.” As “best the Court can understand,” what the party is complaining about is a “criticism of the software, not the

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

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

553. **USI Insur. v. Bentz** [2020 WL 7753690] (D. North Dak. Dec. 29, 2020). The court refused to provide any sanctions under **Rule 37(e)(1)** because the failure to promptly institute a litigation hold did not result in the loss of ESI that “would have been responsive or relevant to the issues” in the case, largely because “USI employees, with some exceptions, did not use their personal devices for business communications, and further, what business communication did occur over text message appear to have been disclosed. (*7) It also noted, for the sake of argument, that no basis had been shown for contending the loss of communications would have affected the litigation.

554. **University Accounting v. Schulton** [2020 WL 2393856] (D. Ore. May 11, 2020). After a nine-day trial, a jury “returned its verdict in favor of both Defendants, rejecting claim of misappropriation of trade secrets and intentional interference.” (*1) The court had instructed the jury that if it found the party had deleted the ESI with intent to deprive, “you may presume or infer” that the information was “unfavorable” to the defendants.” It cautioned that this “is

only a permissive inference, not a mandatory one” and if you “do not first find” that the party acted with an intent to deprive, you “may not draw any inference at all about the content of the lost information based on the fact of that deletion.” (*22). After the verdict, the party renewed its motion for terminating spoliation sanctions based on additional testimony at trial. Both parties presented expert testimony, but the movant did not present its expert in rebuttal. Based on the conflicting testimony and the absence of any rebuttal testimony, the court declined to “revisit its prior ruling. [The court had noted in a pretrial ruling that a “reasonable factfinder could conclude” that the party acted with intent to deprive, and that the court would instruct the jury that if it “first found that Schulton had acted with the intent to deprive” the jury may presume the deleted information was unfavorable,” which it described as a “permissive inference instruction.”] **[2019 WL 2404512, at *7 (D. Ore. June 7, 2019)]**. An appeal to the Ninth Circuit was filed on June 10, 2020 from a judgment entered on May 11, 2020 after a jury verdict but dismissed by voluntary stipulation of the parties on Oct. 10, 2020. In an unreported decision “Opinion and Order Regarding Cost Bills,” the District Judge noted that after a nine-day trial, the court had returned a verdict in favor of both Defendants and that it had entered judgment in favor of Schulton on all claims and awarded thus awarded him \$2,312.32 on his cost bill.

555. **U.S. v. Capitol Supply** [2017 WL 1422364] (D.D.C. April 19 2017)], the court held that “by its express terms, **Rule 37(e)** does not govern the instant spoliation motions” because “the data was not overwritten “in the anticipation or conduct of litigation’ but rather . . .in violation of the defendant’s regulatory and contractual obligations.” (*10) The defendant did not argue that it was “overwritten unknowingly or accidentally” but because of a practice or for many years in violation of clear regulatory and contractual obligations to retain the information for specific periods. (*10) Applying Circuit law, the court held that the plaintiff was entitled to an adverse inference instruction because the violation of a record retention regulation creates a presumption that the missing evidence contained evidence adverse to the spoliator [citing, among other cases, *Hicks v. Gates Rubber*, 833 F.2d 1406, 1418-19 (10th Cir. 1987)].

556. **U.S. v. Karl Carter** [2019 WL 3798142, at *63] (D. Kan. Aug. 13, 2019). In the course of assessing the loss of ESI under retention policies, where the Government acted with intent to deprive the Special Master of evidence in complex Sixth Amendment violations, the court found it had “purposefully’ delayed issuing a litigation hold and withheld information about the hold. It noted that “[t]o the extent a litigant can show that information relevant to his or her case was lost during these various litigation hold delays and cannot be restored,” **Rule 37(e)** arguably may be invoked, potentially “triggering sanctions that may include adverse inferences.” (63). It “easily” found that the Government “did not take reasonable steps to preserve at the time the duty to preserve arose. It must suspend a document retention or destruction policy to ensure the preservation of relevant documents. (*62) (collecting cases under Rule 37(e)). **NOTE: The opinion is quite long, with over 600 footnotes. It focuses on both spoliation sanctions under Rule 37(e) and non-spoliation for violations of preservation orders, including sanctions under Rule 37(b) and its inherent authority. (*63 et. seq.).** It found the elements for a finding of contempt to be met and awarded “a compensatory award” either a remedy for contempt or for abuse of the judicial process under its inherent authority. (*66-67) It noted it must find a “but-for” causal link under *Haeger* and ordered submission of application for attorneys fees and costs. (*67)

557. **U.S. v. Ind. Univ. Health** [2016 WL 4592210] (S.D. Ind. Sept. 2, 2016). In case not involving spoliation, the court cited **Rule 37(e)(2)** as an example of where “the Court-as-factfinder is free to evaluate the credibility of, and assign weight to, all offered evidence.”
558. **U.S. v. Safeco** [2016 WL 901608] (D. Idaho March 9, 2016). Court exercising inherent power refused to sanction loss of tangible property (notebook) because the court was not persuaded conduct was “willful or done in bad faith.” The court noted that **Rule 37(e)** requires a finding of “bad faith intent” but that it applies only to ESI, not to missing tangible evidence.
559. **U.S. and States ex. rel Schutte and Yarberry** [2018 WL 3388133, at *4-5] (C.D. Ill. July 12, 2018). A court delayed consideration of measures under Rule 37(e) until after the moving parties had had a chance to interrogate relators about the circumstances under which spoliation may have occurred and “if it comes to light” that parties acted inappropriately, the court was prepared to consider the possibility of “excluding evidence, informing the jury and permitting an adverse inference, or any other appropriate measure.”
560. **U.S. v. Woodley** [2016 WL 1553583] (E.D. Mich. April 18, 2016)]. **Rule 37(e)** does not apply to allegations of government spoliation of surveillance video in a criminal case.
561. **Van Dam v. Town of Guernsey** [2021 WL 2942769] (June 4, 2021). Finding prejudice from the negligent failure to take reasonable steps under **Rule 37(e)** to preserve recordings of executive sessions of governing body which “could” have contained relevant information, the Magistrate Judge found that the “appropriate” sanction under **Rule 37(e)(1)** is to allow the parties to present evidence to the jury concerning its “loss and relevance” and recommended that, if necessary, “the finding of intent should ultimately be left to the jury.” It quoted the language from the Committee Note outlining what the jury should be told. (*4).
562. **Variable Annuity Life Insur. Co. v. Coreth** [535 F. Supp.3d 488, 2021 WL 1566447] (E.D. Va. April 21, 2021). In a request for TRO against former employees to prevent solicitation of clients and theft of trade secrets, the court ordered a preliminary injunction which ordered each defendant to “preserve evidence during the proceedings” since it “imposes no additional burdens beyond [**Rule 37(e)**] but “affords meaningful protection” for the plaintiff “as well as the interests of justice.” (*24).
563. **Via Vadis v. Amazon.com** [2021 WL 3134257] (W.D. Tex. July 23, 2021). The court refused to sanction Amazon when it established that it had “replaced” certain missing and relevant ESI it had not preserved and had not acted with “intent to deprive” under **Rule 37(e)** when it lost server logs in a dispute over alleged infringement of a patent involving a data access and management system.
564. **Virtual Studios v. Stanton Carpet** [2016 WL 5339601] (N.D. Ga. June 23, 2016). In a breach of contract case, the court applied **Rule 37(e)** because reasonable steps were not taken to preserve emails (although does not explicitly find that they could not be restored) whose loss was “certainly prejudicial” since it would have been helpful in evaluating the merits of the case. The court declined to “impose sanctions” under **Rule 37(e)(2)** because it was not shown that the party “acted in bad faith or with intent to deprive.” While the party could have taken

greater care, the evidence indicates that the party was “negligent or careless” at most. Instead, the “appropriate sanction” is to allow the moving party to “introduce evidence concerning the loss of emails and to make an argument to the jury concerning the effect of the loss of the emails.” (*11).

565. **Void v. Large** [2018 WL 1474550] (W.D. Va. March 26, 2018). Court applying **Rule 37(e)** refused to find any measures available because surveillance tape was not lost because a “party” failed to take reasonable steps to preserve it in case challenging prison misconduct. Those in control of decisions to retain or delete prisoner video surveillance tapes were not joined as parties.
566. **Wadelton v. Department of State** [2016 WL 5326402, at *4 (Sept. 22, 2016)]. The duty to preserve in anticipation of litigation under **Rule 37(e)**’s trigger provisions are inapplicable in regard to FOIA requests since there is no statutory requirement to preserve ESI or documents prior to receipt of a FOIA request.
567. **Wager v. G4S Secure Integration** [2021 WL 5304321] (S.D.N.Y. Nov. 15, 2021). In connection with a motion for spoliation sanctions considered under, *inter alia*, **Rule 37(e)** for destruction of a information on a non-party’s iphone, the court ordered the party to produce “records concerning when it collected [the] phone and when the phone that was imaged was obtained” and, if the plaintiff determined that she wished to pursue the spoliation motion, provided a schedule to do so. (*8). It also awarded “reasonable attorney’s fees and costs” in connection with the motion without specifying which, if any, subsection of Rule 37 it was relying on. The defendant claimed it had acted properly in accordance with orders relating to collecting ESI.
568. **Wai Feng v. Eastern Foundry** [2019 WL 118412, at *8 (D. R.I. Jan. 7, 2019)]. In a case where the party did not establish a basis for establishing the prerequisites for either measure to cure prejudice or to find bad faith or intentional destruction, the court and it did not preclude further motions, noting that many courts reject such requests “until a party lays the evidentiary foundation at trial.”
569. **Wal-Mart Stores v. Cuker Interactive** [2017 WL 239341] (W.D. Ark. Jan. 19, 2017)]. A District Judge refused to impose either a dismissal or an adverse inference under **Rule 37(e)** when the moving party did not demonstrate it suffered prejudice from the routine deletion of a former employee’s laptop shortly prior to Wal-Mart’s instituted litigation against it. It was of “central importance” that the moving party declined the opportunity to review, at its expense, backup tapes containing the former employee’s emails. The court denied Wal-Mart’s request for its expenses in responding to the Motion under **Rule 37(a)(5)(B)** because the rule did not apply and because it would be “unjust” to do so because it was “a very poor practice” for a sophisticated company to have wiped the laptop with litigation looming. The court did not reach intent, since prejudice was not shown, but whether the wiping was “the result of bad intent or a simple oversight,” it would not “reward” Walmart for such conduct.
570. **Washington v. Rounds** [2017 WL 5668216, at *5 (D. Md. Nov. 27, 2017)(Grimm, J.)] The court ordered discovery be taken in a prisoner surveillance video case as to whether

spoliation was committed by defendants or their supervisors and pointedly noted that “the appropriate authority to govern this dispute is not the court’s inherent authority, as [the moving party] argues, but [Rule 37(e)].”

571. **Watkins v. New York Transit Authority**, 2018 WL 895624, at *10 (S.D.N.Y. Feb. 13, 2018). The District Court, in denying a motion for sanctions without prejudice to renewal before trial addressing the elements of **Rule 37(e)**, held that while the plaintiff had a duty to preserve a cell phone, the motion would be denied because the moving party had not established either that the ESI could not be restored or replaced through additional discovery or that the party acted with a culpable state of mind. Citing *Best Payphones v. City of N.Y.*, 2016 WL 792396, at *5 (E.D.N.Y. 2016), the court noted that the party could have questioned or requested production from other employees or “sought to subpoena Plaintiff’s cell phone records.” The court also noted that there was no proffer of evidence that the party acted with the requisite intent to deprive the moving party of relevant evidence, “rather than negligence.” The court cited to *Rhoda v. Rhoda*, 2017 WL 4712419 (S.D.N.Y. Oct. 3, 2017) for the proposition that the movants have the burden of proving intent to deprive under **Rule 37(e)(2)**.

572. **Waymo v. Uber Technologies** [2018 WL 646701] (N.D. Cal. Jan. 30, 2018)]. Judge William Alsup issued an “Omnibus Order” governing treatment of allegations of discovery misconduct by Uber at an upcoming trial. The Court observed that “Waymo seems unwilling or unable to prove its case at trial with qualified witnesses and evidence and seeks to have the Court fill in the gaps with adverse inferences instead.” (*18). The stated goal was not “to transform this trial on alleged trade secret misappropriation into a trial on Uber’s litigation conduct (or misconduct”). (*22) Allegations of breach of an earlier preliminary order governing discovery were part of the Waymo approach. The court agreed to instruct the jury about the order and the obligations, and that Uber failed to disclose the destruction of five discs, but “the jury will *not* be directed to draw any adverse inference based on these facts “but will be free to do so (or not) of its own accord.” (*13) (emphasis in original)(see also*23 [“Summary”]). Separately, the District Court dealt with the argument that Uber had failed preserve text messages, discs, emails and had denied access to personal laptops in violation of **Rule 37(e)(2)**. The court rejected the argument that the missing evidence was irrelevant (“Tell this to the jury”)(*17) because five discs and personal laptops “could have been a link” in the chain of funneling information or could “potentially support” a narrative that Uber was trying to *avoid* misappropriation.” (*17)(emphasis in original). However, the court delayed ruling on whether Uber spoliated evidence with an “**intent to deprive**” reserves decision as to whether the jury “will be instructed that it may or must presume the lost information was unfavorable” until after Waymo presented its “case-in-chief” at trial, during which “at least some proof of the facts underlying the spoliation motion (to the extent admissible), and possibly additional evidence on point, will go before the jury” as well as addition evidence on point which it will use to supplement the issue of intent. (*18) Although not specifically mentioning Subdivision (e)(1), Ubers use of ephemeral communications is “relevant as a possible explanation of why Waymo failed to turn up more evidence of misappropriation and Waymo will be permitted to present evidence and argument about this subject at trial, provided that it can do so through qualified witnesses and evidence.” (*21) However, “the entire narrative” about an Uber plan, never implemented, which has no discernable relevance to the claims is excluded since it its an apparent attempt to poison the judge, if not the jury, against Uber. (*22) The “Summary”

explains that evidence of Uber’s litigation conduct or corporate culture will not be allowed to “consume the trial to the point that it becomes a distraction from merits or turns into a public exercise in character assignation.” (*23). The point is to maintain a “fair balance between allowing Waymo to reasonably explain any weaknesses in its case on the one hand,” and preventing it from “sidestepping its burden of proof by inflaming the jury against Uber on the other.” The court also ordered that no witness or lawyer may reference the order or the courts intention to inform the jury of certain facts, although the opening statement could reference counsel’s intent to prove up “underlying facts, e.g., in connection with Uber’s violations of prior orders. (*23)

573. **Weber v. Carnival Corp.** [2021 WL 3371913] (S.D. Fla. Aug. 3, 2021). In a decision refusing to find spoliation sanctions warranted by the negligent failure to preserve a broken deck chair, the court cited, by analogy, the Committee Note to **Rule 37(e)(1)** in support of its decision to allow the Plaintiff to “put forth trial evidence [to the jury] concerning the missing chair and the circumstances under which it was not available for his inspection” which will minimize any “modest prejudice.” (*5) It cited a list of Florida district court decisions before and after the Rule which permitted introduction of such evidence “without a bad faith finding.” (*6).

574. **Wellington Lake Health System** [2019 WL 4918686, at *8] (N.D. Ohio Oct. 4, 2019). The court, exercising its inherent power, refused to issue sanctions regarding allegations of lost text messages (noting that “Rule 37” may have applied, but not considering it,” (at n. 3), while also noting that “the questionable statements made by the party in regard to her cell phone are the type of statements that *may* be admissible at trial as relevant to her credibility” (emphasis in original).

575. **WeRide Corp. v. Kun Huang** [2020 WL 1967209] (N.D. Cal. April 24, 2020). In a trade secret case against a former CEO and Head of Hardware Technology involving theft of autonomous vehicle technology, the defendants deleted email accounts, and engaged in other spoliation before and after joining a new competing company (“AllRide”). AllRide “changed the default settings” of its Microsoft Office 365 server “so that all emails would be deleted after 90 days, instead of the default setting to preserve emails for two years before archiving them.” (*3). The Court found that a conditional adverse inference modeled on Rimkus was “far too mild and vague to sufficiently cure the prejudice to WeRide” because, inter alia., the spoliation was “on a massive scale” and “would be futile.” (*11) The court struck answers and entered default judgments under Rule 37(b) and Rule (e)(2) against the parties (including the new employer) (“terminating sanctions”)[*9, *12], but did not rule on the issue of whether the Rules displaced its inherent authority to issue sanctions. (*8) It noted the split as to whether preponderance of evidence or clear and convincing standard applied (collecting cases) and adopted the former. (*9). It found intent to deprive under Rule 37(e), where applicable, because “the totality of the circumstances” indicate that the spoliation was “intentional.” (*12) The court held that a “lesser sanction” was not appropriate as to the spoliation involved because the spoliation prejudiced the ability to raise an affirmative case, meaning that specific jury instructions or an exclusion of evidence “cannot cure the prejudice.” (*16). It also awarded reasonable fees and costs connected to the motion, the discovery related to spoliation and other “all discovery” practice, jointly and severally. (*16)

576. **Westgate Resorts v. Reed Hein & Associates** [2021 WL 4428753] (M.D. Fla. March 25, 2021). A Rule 37(e) motion was denied by the Magistrate Judge because the missing ESI had been recovered and thus “the requisite condition” that the data “has not been lost or destroyed such that it cannot be restored or replace” does not exist. (*5)
577. **Western Power v. TransAmerican Power** [316 F. Supp. 3d 979] (S.D. Tex. June 7, 2018). After the impact of a cyberattack on servers and personal workstations caused the loss of information subsequently sought in litigation, the court held that in light of **Rule 37(e)** and the Committee Note to the topic, it would consider giving a spoliation instruction to the jury if, after hearing evidence at trial, it concluded that the entity “did not take reasonable steps” to protect against such an attack. The moving party argued that it was prejudiced by the loss and there was sufficient circumstantial evidence to infer that the party “intended to deprive” it of the relevant data.
578. **Wheeler v. Jones** [2016 WL 11480400] (M.D. Ala. May 20, 2016). A Magistrate Judge applying the *Flury v. Daimler Chrysler* doctrine [427 F. 3d 939, 944 (11th Cir. 2005), cert. den. (2006)] in the Eleventh Circuit uses Alabama law which it finds to be consistent with **Rule 37(e)** in ordering an adverse inference because it is fundamentally fair to do so. (*6-7). It also shifts attorney’s fees and expenses, in part because the movant is the prevailing party under Rule 54(d) on the motion for sanctions, but primarily because it believes Rule 37(a)(5) entitles it to do so. (*9). It refuses to apply **Rule 37(e)** since the suit was filed before the rule became effective, although it views it as “instructive and persuasive” since it is “wholly consistent with Alabama and Federal case law” on spoliation. (n. 3).
579. **White v. United States** [959 F.3d 328] (8th Cir. May 13, 2020). The Circuit Court found the district court did not abuse its discretion in refusing to draw an adverse inference at the trial below because the ATF deleted data from its servers without making copies. The Court found that the lower court finding that the party did not act in bad faith “is supported by evidence that the interruption of the wireless signal likely caused the problems with the recordings and that the ATF followed its standard procedure in copying data and deleting it from its servers.” Rule 37(e) was not cited in the Opinion, which relied on pre-Rule precedent for the principle that only upon a finding of bad faith were “severe spoliation sanctions” appropriate. (331). The court held there was no evidence proffered that the original recordings were “intentionally destroyed” to suppress the truth or to contradict the government’s evidence. [The district court, in opinion dealing with a Motion in *Limine*, had declined to issue an adverse inference and “withdrew” its “earlier statement that ‘plaintiffs will be permitted to argue an inference – as opposed to a presumption – that the missing parts of the video would have been detrimental to defendants.’” It noted that it had held that the party failed to show “culpable intent” and “prejudice” sufficient to warrant severe sanctions. [2018 WL 10419742, at *2 (E.D. Mo. July 16, 2018)]. **The earlier opinion, unlike the July opinion, had explicitly referenced Rule 37(e)** [2018 WL 2238592 (E.D. Mo. May 16, 2018)].
580. **Whitten v. J.G. Johnson** [2022 WL 885773] (W.D. Va. March 25, 2022). A pro se prisoner motion for sanctions was denied under Rule 37(e) because it did not show the videos of Camera Two and Three should have been preserved, that their loss was prejudicial or that

the party acted with an intent to deprive. It was premature to decide if the motion in limine as to retained video existed since there has been a finding of spoliation as to any other video.

581. **Wichansky v. Zowine** [2016 WL 6818945] (D. Ariz. March 22, 2016)(Campbell, J.)). In a case where Rule 37(e) was not applied because “the parties do not contend that the lost information constitutes [ESI](n. 1), Court declined to issue an adverse inference because there was no need to put its “thumb on the scale” with an adverse inference instruction. The moving party “has not been seriously prejudiced by the loss of the recording,” since it has admissions from depositions that support its version of the altercation. Accordingly, the “grievance about the missing recording can be presented to the jury through evidence and argument.” It allowed the moving party to present evidence that there had been a recording, and that the police have no record of it “(assuming [they] can provide admissible evidence on this point and they preserved it in the final pretrial order)” and that “the recording contained information contrary” to non-moving party’s description of the altercation.
582. **Wiegand v. Royal Caribbean Cruises** [2021 WL 3934199] (S.D. Fla. Aug. 11, 2021). The court, as a matter of discretion, was not prepared to impose measures under **Rule 37(e)(2)**, but decided to impose sanctions applying its inherent powers “based on the weight of the factors set forth by the Eleventh Circuit in *Flury v. Daimler Chrysler*, 427 F.3d 939 (11th Cir. 2005). It acted in part because the Eleventh Circuit in *ML Healthcare v. Publix Super Mkts*, 881 F.3d 1293 (11th Cir. 2018) had declined to determine if Rule 37(e) **precludes** a district court from imposing sanctions” based on Flury factors. (*2) The court was particularly upset about the “blatant disregard for the” FRCP because if it was not prepared to save more than the 30 minutes of video footage it saved, it “should have sought court approval.” (*3)
583. **Williams v. American College of Education** [2019 WL 4412801] N.D. Ill. Sept. 16, 2019. After an evidentiary hearing, the District Judge determined, citing **Rule 37(e)** and its inherent authority, that a former employees claims should be dismissed with prejudice based on his installation of a new operating system which rendered it impossible to determine what files had been rendered unrecoverable. The court found that “by a preponderance of the evidence” the spoliation was “willful” – not only “intentional” but “also that he knew that the reinstallation would destroy relevant” data. (*14). It “presumed” that the wipe files were detrimental to his case.” (*15) **Rule 37(e)** makes the “common sense assumption” that parties who engage in “intentional spoliation have something to hide,” which meant that “some of what Williams destroyed would have damaged his case.” (*15). There was “no way to approximate the presumably unfavorable effect of that information, and thus no way to craft instructions or presumptions that would eliminate – or even substantially mitigate - the prejudice to ACE.” (*16). The court barred him (he “forfeited”) from receiving a lesser sanction than dismissal because by not proposing one, he waived it. (*15). The claims were “dismissed with prejudice, and Williams must pay the reasonable attorneys fees and costs” incurred. 9*17)
584. **Williams v. State Farm** [2019 WL 6036808] (W.D. Mich. Nov. 14, 2019). The court refused to dismiss a case as a spoliation sanction under Rule 37(e)(2)(B) because there had been no prior warning of such measures given. It deferred to the trial judge was to whether a “spoliation jury instruction” should be given, but did award reasonable fees and costs under

its inherent authority, citing Goodyear Tire & Rubber v. Haeger as authority based on a finding of bad faith. To the extent they duplicated those awarded under Rule 37(a)(5)(A) earlier, they were “excluded from this sanction.” [Interestingly, two versions of this opinion have been published. The quotations and references to Goodyear and inherent authority appear in the 2019 version and a shorter version, available in 2020 reaches the same conclusions but eliminates the details such as those].

585. **Williford v. Carnival Corporation** [2019 WL 2269155] (S.D. Fla. May, 28, 2019). Magistrate Judge Goodman, relying on the same type of analysis he used *Sosa v. Carnival* (*12), found that Carnival failed to take reasonable steps to preserve x-rays (ESI) but did not do so with a intent to deprive. (“It may have been reckless . . .[or] even grossly negligent, But that does not equate to an intent to deprive.”)(*12) Thus, remedies were available only under Rule 37(e)(1). The missing x-rays prejudiced the plaintiff because they make it “more difficult for her to successfully and strategically demonstrate to the jury that that the medical evacuation expenses” were due to an incorrect interpretation of the x-rays. (*12) Thus, it permitted plaintiff to decide if it wished to present evidence to the jury about the loss and destruction of x-rays (ESI) which resulted in a diagnosis requiring her removal from a cruise ship, since there are some “negative consequences flowing from it.” (“that evidence might cause some or all of the jurors to sympathize with Carnival’s it’s-no-our-fault position” (*13). She can also have *all* the evidence presented or prevent Carnival from introducing any and have the court advise the jury “had the images at one time, but they are no longer available.” (*13)(emphasis in original). It that choice is made, Carnival will be permitted to present evidence of the circumstances which it believes demonstrates an innocuous reason for the inability to find the x-rays and they it is not at fault for their being missing. (*1) Carnival may, at trial, stipulated that the x-rays did not reveal a fractured hip and that the resulting medical expense were caused by a medical staffer incorrectly interpreting the x-rays. Such a stipulation would negate the medical malpractice claims and allow Carnival to challenge liability based on meeting its standard of care as to the slippery stairs or because of negligence on the plaintiffs part (*1). The trial judge will decide whether the court should give the jury instructions to assist in evaluation of such evidence or argument, citing the Committee Note. (*13).

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

internal policies, citing Federal Rule of Evidence 607 (witness credibility) – and may argue for whatever inference she deems may be draw due to the absence of items of potential evidence. (*6).

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

588. **Wilmoth v. Murphy** [2019 WL 3728280] (W.D. Ark. Aug. 7, 2019). In a prisoner case where photographs were not produced, despite a litigation hold demand timely served, the defendant’s counsel “buried her head in the sand” and never committed to producing evidence or discovering where it was, leading the court to conclude that there was an “intent to deprive.” (*3). It also found prejudice (“easily does so”) and ordered that a prison officer directly involved in failure to preserve be barred from being called by the defendant as a witness. (*4). The court cited its finding of intent and Rule 37(e)(2)(B) as justifying an instruction to the jury that it ma, but is not required to, presume that the photographs would have supported the claimed injuries from the in-cell confrontation and that the lack of such evidence should not be held against the moving party in the case. (*5). In a footnote, it agreed that the moving party could call witnesses but they could not be cross-examined on their recollection of the injuries unless the party opened the door. (n. 6).

589. **Winecup Gamble, Inc. v. Gordon Ranch**, 850 Fed. Appx. 573 (Mem) (9th Cir. June 17, 2021). On appeal, the decision below at 2020 WL 384020 (D. Nev. July 8, 2020) was reversed and remanded “because the court erred in imposing case-terminating discovery sanctions, citing **Facebook v. Power Ventures**, 844 F.3d 1058, 1070 (9th Cir. 2016). The record “did not support” the conclusion that the individual, “let alone” the party, acted with intent to deprive Gordon Ranch of any ESI, citing **Rule 37(e)(2)**. Moreover, “the Advisory Committee Notes” emphasize that the remedy should fit the wrong, and the party represents that “all of Worden’s relevant ESI has been produced through other sources, and several individuals testified that there would be few, if any, relevant text communications. (574-75). On remand, the Chief Judge was instructed to assign the case to a different judge, sine it has “now twice erroneously issued pretrial orders terminating the case.” (575). [The district court at 2020 WL 3840420, at *5 (D. Nev. July 8, 2020) had concluded that the failure to allow a computer to be upgraded without backing up information and without altering backup settings provided sufficient facts “for the Court to draw an inference that [the party] acted intentionally” which was deemed sufficient under **Rule 37(e)(2)** to justify dismissal of the complaint and entry of a judgment. The court also found that a presumption that the lost information was unfavorable would not “sufficiently cure Defendant’s prejudice” since the lost ESI would provide the most relevant evidence for determination of the issues in the case. It had also found *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004) to provide an “aptly analog[ous]” case and that the 2015 amendment “did not lessen Plaintiff’s burden.” The appellant had also argued that “public policy favored disposition of cases on their merits,” citing *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990).]

590. **Wine Education Council v. Arizona Rangers** [2021 WL 3550213] (Aug. 11, 2021). The District Court refused to rule on a spoliation motion based on **Rule 37(e)** or,

alternatively, sanctions in response to abusive litigation practices under a courts inherent power (citing *Leon v. IDX*, 464 F.3d 951, 958 (9th Cir. 2006) because it was a “discovery motion” which was “untimely” under either of the competing Circuit tests involved.

591. **Winfield v. City of New York** [2017 WL 5664852, at *9 (S.D.N.Y Nov. 27, 2017)] The opinion, which involves challenges to the use of TAR relies on *Sedona Principle 6* and cites other reasons to defer to party choices, including the statement that “perfection in ESI discovery is not required” citing to **Rule 37(e)**.
592. **Wolff v. United Airlines** [2019 WL 4450255, at *4 *(as to Defendant) & *6 (Plaintiff)(D. Colo. Sept. 17, 2019). The Court concluded that “the circumstances involved in this dispute do not warrant sanctions for alleged spoliation notwithstanding the Parties’ respective preservation failures.” It quoted Rule 37(e) and *Turner v. Public Service*, 563 F. 3d 1136, 1149 (10th Cir. 2009)(“mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case”)(*2-3). The court noted that it was “perplexed that Defendant apparently made no effort to suspend the automatic deletion of emails related to Plaintiff at any time.” (*4) However, “though negligent and careless,” there was no indication of “intentional conduct or bad faith” or “acted with intent to deprive Plaintiff of that evidence, or otherwise engaged in bad faith conduct.” (*4-5). It also declined to sanction with a judgment and “further declines to impose a lesser sanction because Plaintiff has not been prejudiced by the loss of these emails. (*5) It was “equally perplexing” that the Plaintiff lost the iphone either by losing it because it fell in a lake or because it turned it in for an upgrade. (*6).
593. **Wooden v. Barringer** [2017 WL 5140518, at *4] (N.D. Fla. 2017). In a prisoner case, the Court found no spoliation conduct covered by **Rule 37(e)** for loss of video recordings “which presumably are digital,” since there was no evidence of alteration. The same result would obtain if, arguendo, the video recordings were not ESI, (n. 3).
594. **Woods v. Scissons** [2019 WL 3816727] (D. Ariz. Aug. 14, 2019). In an excessive force case arising from an arrest which may have been captured on dash cams which were automatically deleted, the court found that the resulting “spoliation” could be imputed to the employee “for the purpose of imposing sanctions.” (*6) (collecting cases). Since it could not find an intent to deprive, it decided it would be appropriate to allow the parties to present evidence to the jury regarding the potential existence of video footage. The moving party would be permitted to present evidence to the jury about the potential existence of video footage that was subsequently erased and would be instructed that the City had a duty to preserve the evidence and that “it may consider that evidence along with all the other evidence in reaching its decision.” Further, “should it conclude” that the video was “destroyed and [the party] acted with the intent to deprive,” it may “assume that the video footage would have been favorable” to the moving party. (*6 - 7). The remedy is no greater than necessary to cure the prejudice and would “allow the determination of intent to be made on a more fully developed evidentiary record” and is in harmony with the “Advisory Committee Note.” (*7).
595. **Wooten v. Barringer** [2017 WL 5140519, at *4 (N.D. Fla. Nov. 6, 2017)]. The court held that Rule 37(e) applied because “the [prisoner surveillance] video recordings (which

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

596. **World Trade Centers Assn. v. Port Authority** [2018 WL 1989616] (S.D.N.Y. April 2, 2018); report adopted, 2018 WL 1989556 (S.D.N.Y. April 25, 2018). Spoliation sanctions for loss of documents and ESI was denied in separate analysis. As to documents lost when a contractor executed oral instructions, the court noted that the instructions were adequate and while any loss is negligent [citing *Zubulake*, 220 FRD 212 at 220 (any destruction of documents is negligent)], it was not sufficiently egregious to support a finding of either gross negligence or bad faith nor was there evidence that relevant evidence was destroyed (*8-9). As to ESI, there is no evidence that ESI was actually destroyed and the actions challenged were “consistent with normal business practices and are not consistent with the intentional or even negligent destruction of electronic documents.”(*10). Applying amended Rule 37(e), the court refused sanctions, and even if the older version were to be applied, same result would obtain given the lack of evidence from which a “reasonable inference can be made that relevant evidence was destroyed.” (n. 12).

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

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

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

or to a defense.” (at *11 - *13). In the REVISED opinion, also quite long, the court concluded that it would reserve rulings on monetary remedial measures until post trial proceedings.

600. **Yokum v. Bell** [2021 WL 4259645] (W.D. Tex. Jan. 27, 2021). In an R&R dealing with a motion to dismiss, the Magistrate Judge recommended dismissal of a claim where the party “appears to allege a claim under” **Rule 37(e)** because the Rules are “procedural rules; they do not confer substantive rights absent other statutory authority. [quoting 28 USC 2072(b)]. [see also *Mazzei v. The Money Store*, 2020 WL 7774492, at *9 (S.D.N.Y. 2020), citing *George & Co. v. Spin Master*, 2020 WL3865098 at *8 (E.D.N.Y. July 7, 2020)].
601. **Youngevity Int’l v. Todd Smith** [2020 WL 7048687] (S.D. Cal. July 28, 2020); see also [2021 WL 2559456]. In two well-reasoned opinions, the court determined to allow presentation of evidence of intent to the jury under **Rule 37(e)(1)** even though it had not found sufficient evidence to conclude it to exist because it had discretion to do so “where there is prejudice, so long as it is less formidable than sanctions allowed for a finding of intent.” (*5) It listed examples which would be too prejudicial where no intent had been found. It also awarded monetary sanctions in the form of attorney’s fees under **Rule 37(e)(1)** as long as they were compensatory rather than punitive in nature. As it confirmed in its subsequent opinion awarding the fees [2021 WL 2559456], “There is no requirement in **Rule 37(e)** or the Committee Notes that a court must make a finding of bad faith before imposing sanctions and district courts have imposed monetary sanctions pursuant to **Rule 37(e)(1)**.” (citing **Spencer v. Lunada Bay Boys**, 2018 WL 839862 at *1 (C.D. Cal. Feb. 12, 2018)(rejecting argument that the rule does not authorize same), *aff’d* 806 F. Appx. 564, 568 (9th Cir. 2020).
602. **Zamora v. Stellar Mgt.** [2017 WL 1372688] (W.D. Mo. April 11, 2017)]. A district court in the Eighth Circuit applying **Rule 37(e)** must make a finding of “prejudice to the opposing party” and of “intentional destruction indicating a desire to suppress the truth” before an adverse inference is warranted. The court found it premature to find that prejudice existed “when at least some” of the absent material “is available through other discovery” and ordered extensive further discovery of cell phones, with a special master determining which communications are relevant, at a cost to be split. Because it could not find prejudice, it need not determine intent, noting that the memory of the plaintiff cannot be relied upon and that the record “might permit a reasonable inference” that she was aware of the importance of preserving information when she reset her company phone and deleted a Facebook message. The court acknowledged that it was somewhat sympathetic to a lay witness in contrast to a corporation subject to a formal litigation hold.”
603. **Zbyski v. Douglas County School District** [154 F.Supp.3d 1146] (D. Colo. Dec. 31, 2015)]. In case involving missing hard copy notes and documents, court applied the language from the Committee Note to **Rule 37(e)** in assessing onset of the duty to preserve as measured from the time of notice of potential litigation but not necessarily the specific litigation before the court.