

Rule 37(e) Today: By the Numbers

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Introduction

Rule 37(e) (the “Rule” or the “Amended Rule”) was revised in 2015 to provide rule-based authority to deal with spoliation of electronically stored information (“ESI”), replacing the use of inherent powers which had “result[ed] in different outcomes depending on the Circuit.”² As one commentator put it, the variations “will persist as long as the policing of pre-litigation preservation” is accomplished via the inherent power of the courts.³

The Rule has, in fact, decisively resolved the circuit split on when a court may give adverse inference instructions by imposing a strict “intent to deprive” requirement.⁴ While there is less use of adverse inference jury instructions, courts have taken the opportunity suggested by the Committee Note to rely on juries as a curative measure to assess the impact of the spoliation evidence.

Reliance on the jury has become the new normal. Of the sixty-six (66) court decisions ordering measures under the Rule during the period from January 1, 2021 through April 1, 2022 (the “study period”), fifty-five (55) of them involved plans to admit spoliation evidence to the jury for those purposes.⁵

This Essay discusses these and other ramifications of replacing the use of inherent authority with rule-based authority.

Background

Prior to the 2015 Amendments to Rule 37(e), the Federal Rules did not provide remedies for failures to preserve discoverable information.⁶ Sanctions under Rule 37 were “impossible if there [was] no court order in place.”⁷ If evidence was despoiled prior to issuance of an order of

¹ © 2022 Thomas Y. Allman. Tom was a Member of the E-Discovery Panel at the 2010 Duke Conference that recommended adoption of what became the current Rule.

² John Barkett, *Walking the Plank .Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation*, 68 (2010)(the pre-litigation duty to preserve “desperately needs attention by rule”).

³ A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Courts*, 79 Fordham L. Rev. 2005 (2011).

⁴ *Winecup Gamble v. Gordon Ranch*, 850 Fed. Appx. 573 (Mem) (9th Cir. June 17, 2021).

⁵ A total of one hundred forth-six (146) decisions were rendered during the study period. The Author has identified and tracked over six hundred (600) opinions applying the Rule in reported in WESTLAW since the Rule went into effect. See Thomas Y. Allman, *Amended Rule 37(e): Case Summaries* (2022)(available on line or from Author).

⁶ *D’Onofrio v. SFX Sports Group*, No. 06-687 (JDB/JMF), 2010 WL 3324964, at *4 (D.D.C. 2010)(the Federal Rules do not “contain a provision specifying a remedy for the failure to preserve evidence”).

⁷ *Evans v. Griffin*, 932 F. 3d 1043, 1046 (7th Cir. Aug. 7, 2019).

production, even if a common-law duty to preserve existed at the time, relief was unavailable under the Rule.

In response, courts⁸ relied on their authority to deal with litigation abuse “through the inherent power to regulate the litigation process.”⁹ It became the predominant source of authority to deal with spoliation, especially prelitigation allegations which became ubiquitous as ESI became a major focus of discovery.

However, a serious circuit split developed over the degree of culpability required to justify a spoliation inference, leading to inconsistent results depending on the venue.¹⁰ The mere negligence in destroying evidence does not support an inference of consciousness of a weak case in some circuits but the opposite is true in others when a party has acted “knowingly, even if without intent to [breach a duty to preserve it], or *negligently*.” (emphasis in original).¹¹

An initial version of Rule 37(e) added to the Federal Rules in 2006 did not deal with the issue because it eschewed dealing with pre-litigation conduct out of concern over its authority to do so.¹²

Duke Conference Recommendation

It was the unanimous recommendation of the E-Discovery Panel at the 2010 Duke Conference that Rule 37(e) should be replaced by a comprehensive rule addressing the impact of spoliation, regardless of when it occurred. It had become clear (at least to the Panel) that concerns about limited authority to deal with the consequences of pre-litigation spoliation were “overblown.”¹³

The Panel¹⁴ urged that the new rule provide authority for courts to impose sanctions (“of the sort provided for by Rule 37”) linked to the “state of mind” involved in the spoliation. It also

⁸ But not all. *Bowmar Instrument v. Texas Instruments*, No. F 74-137, 1977 WL 22799 (N.D. Ind 1977)(asserting authority to sanction “lest the fact-finding process in our courts be reduced to a mockery”).

⁹ *Rimkus Consulting Group v. Cammarata*, 688 F. Supp. 2d 598, 611 (S.D. Tex Feb. 19, 2010).

¹⁰ Std. Comm. Report to Judicial Conference, September 2014 (resulting in a tendency to over preserve ESI out of a fear of serious sanctions if actions were viewed in hindsight as negligent).

¹¹ *Residential Funding v. DeGeorge*, 306 F.3d 99, 107, 108 (2nd Cir. 2002)(“each party should bear the risk of its own negligence”).

¹² Rule 37(f) provided that: “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system.”

¹³ Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 Sedona Conf. J. 217, 223 (2010).

¹⁴ The panel consisted of a Federal District Judge, a U.S. Magistrate Judge, three practicing attorneys and the Author, a former general counsel. The Moderator was the author of a leading treatise on Federal Sanctions.

suggested that the rule define the trigger and the scope of the duty to preserve (“with as much precision as possible”) based on the common law duty to preserve in anticipation of litigation.¹⁵

The suggested approach satisfied Enabling Act requirements¹⁶ because it addressed only the procedural consequences of breach of pre-litigation failures to preserve. As had been pointed out by now-Associate Justice Barrett, Congress is free to “regulate most matters that federal courts would otherwise regulate themselves in reliance upon their inherent authority.”¹⁷

Amended Rule 37(e)

The Rules Committees decided to adopt the common-law duty to preserve as a predicate requirement for a new rule. An initial proposal as released for public comment empowered courts to order curative measures and limited the use of “sanctions” to instances where a party’s actions caused “substantial prejudice” and were “willful” or in bad faith.”¹⁸

After intensive review of the testimony during three public hearings, the Advisory Committee adopted a shorter and more focused version¹⁹ which applies only to the loss of ESI that should have been preserved which is irreparably lost as the result of a failure to take reasonable steps and cannot be restored or replaced.²⁰ It authorizes the measures described in subdivision (e)(1) and (e)(2), as appropriate, once the moving party satisfies the burden of showing that these prerequisites have been satisfied.

Subdivision (e)(1) authorizes use of curative measures which are no more severe than necessary to cure prejudice and do not have the effect of measures listed in Subdivision (e)(2) which require a finding of specific intent. Eleven (11) of the eighty (80) decisions refusing to impose any measures during the study period were based on a failure to make satisfy that requirement.

¹⁵ *Elements of a Preservation Rule*, Appendix to *Executive Summary: E-Discovery Panel, Duke Conference on Civil Litigation*, May 11, 2010).

¹⁶ 28 U.S.C. § 2072 (b)(rules “shall not abridge, enlarge or modify any substantive right”). See e.g., *Shady Grove Orthopedic v. Allstate*, 130 S. Ct. 1431, 1442 (2010)(only if a procedural rule alters the rules of decision by which rights are adjudicated does it improperly affect substantive rights).

¹⁷ Amy Coney Barrett, *Procedural Common Law*, 94 Virginia L. Rev. 813, 888 (2008)(promoting “uniform procedural regulation is ultimately in the control of Congress”).

¹⁸ The “Published rule 37(e) Amendment Proposal” is available, *inter alia*, at Agenda Book, Advisory Comm. Mtg, April 10-11, 2014, at 393.

¹⁹ Tadler and Kelston, *What You Need to Know About the New Rule 37(e)*, 52-JAN Trial 20, 22 (2016). See also Thomas Y. Allman, *Rule 37(e): The Report from Portland*, April 14, 2014, at 1. An exemption from culpability requirements for conduct resulting in “irreparable” prejudice was dropped, as was a list of factors for courts to consider. Two paragraphs devoted to curative measures were consolidated into one, with a focus on the need to demonstrate prejudice as a precondition.

²⁰ Along with a completely revised Advisory Committee Note, it was adopted by the Supreme Court in April, 2015 and shared with Congress, which made no changes, coming into effect on December 1, 2015. Order, Supreme Court, 305 F.R.D. 457 (2015).

When prejudice exists, however, subdivision (e)(1) is said, according to the Committee Note, to permit a court to order the introduction at trial of evidence about the loss and allow argument to the jury as a curative measure. A total of thirty-nine (39) of the sixty-six (66) decisions granting any relief - some 60% of those decisions - cited subdivision (e)(1) for that purpose.

This was intended by the Discovery Subcommittee to provide “something curative” that would allow the jury to weigh the loss of evidence in making its decisions “using material that’s available” but would not be a sanction.²¹ The Author has previously described this as the new paradigm for courts unable or unwilling to conclude that a party lost ESI while acting with an intent to deprive.²²

Subdivision (e)(2) authorizes a court to presume (or instruct the jury it may or must presume) that the lost information was unfavorable to the offending party, dismiss the action, or enter a default judgment when the party has “acted with the intent to deprive another party of the information’s use in the litigation.” This standard is akin to bad faith but defined even more precisely. It is intended to give “comfort” that compliance with the rule will reduce over-preservation “at least in some measure.”²³

Only sixteen (16) courts imposed adverse inference instructions during the study period upon satisfying an “intent to deprive” standard. However, given that those juries also received evidence of spoliation, a total of fifty-five decisions or 83% of all decisions granting relief under the Rule relied on jury assessment.²⁴

The Duty to Preserve

Rule 37(e) is grounded on the common law duty to preserve relevant information when litigation is reasonably foreseeable. It need not be “imminent,” however.²⁵ Relief under the rule is not available when it is not reasonable to have anticipated a lawsuit.²⁶ Thirteen (13) of the

²¹ Discovery Subcommittee Mtg. Note, August 7, 2012 at 5.

²² Thomas Y. Allman, *Informing Juries About Spoliation of Electronic Evidence After Amended Rule 37(e): An Assessment*, 13 Fed. Cts. L. Rev. 81, 101 (2021)(noting similarity to the use in Rule 37(c)(1)(B) of “allowing the jury to be informed of the fact” of failures to meet rule-based requirements).

²³ Minutes, Advis. Comm. Mtg., April 10-11, 2014, at 24. The public hearings had cast serious doubt on the extent to which costly over-preservation could fairly be blamed solely on the lack of uniformity among the Circuits.

²⁴ The remaining eleven decisions (out of the total of sixty-six granting relief) involved dismissals or monetary or other sanctions.

²⁵ AOT Holding AG v. Archer Daniel Midland Company, Case No. 19-2240, 2021 WL 6118175, at n. 3 (C.D. Ill. Sept. 3, 2021)(it “is blatantly incorrect” to suggest that is the standard).

²⁶ See, e.g., Hunt v. Toddle Inn Daycare, Case No. 2:20-CV-00321-LEW, 2021 WL 4127280, at *10 (D. Maine Sept. 9, 2021)(assessing what a “reasonable person in her position” would have concluded).

decisions denying relief during the study period did so because of a lack of a duty to preserve at the time of the spoliation.

Foreseeability of litigation is a fact-specific “objective” standard under which courts have flexibility to adjust to the circumstances presented.²⁷ By “not attempting to create a new duty to preserve”²⁸ the Rule avoids an inflexible set of rules too closely linked to current technology. However, the substantial number of failures to find the duty satisfied may suggest that movants are not hesitating to “push the envelope” on such allegations.

Reasonable Steps

Measures are not available unless the loss of ESI resulted from a “failure to take reasonable steps” to preserve. The failure to take “reasonable steps” requirement was “meant to encourage reasonable preservation behavior” where proportionality “is part of the calculus of reasonableness.”²⁹ The reasonable steps inquiry has been “equated to roughly a negligence standard.”³⁰

Only four (4) decisions cited the demonstration that a party had taken reasonable steps as the primary reason for denying relief during the study period. This could suggest that there remains substantial room for improvement. In *FTC v. Noland*, for example, the installation of Signal and Proton mail and the activation of their auto-delete function one day after learning of an FTC investigation was clearly unreasonable and provided circumstantial evidence that the parties acted with intent to deprive.³¹

On the other hand, it may also demonstrate that parties that undertake reasonable steps are rarely the subject of serious allegations requiring litigation. Many losses which occur during the preservation process do not “show negligence, much less any intent to deprive” the other party of relevant information.³²

Fact-Finding

The text of Rule 37(e) appears to assign the predicate fact-finding responsibilities under the Rule to the courts. In *Mannion v. Ameri-Can Freight Systems*, the trial court rejected a

²⁷ Taylor v. Nepolean, Case No. 2:20-cv-01450-PLD, 2021 WL 4171423, at *4 (W.D. Pa. Sept. 14, 2021).

²⁸ Committee Note.

²⁹ Minutes, Advis. Comm. Mtg., April 10-11, 2014, at 22 (quoting Chair of the Discovery Subcommittee).

³⁰ Charlestown Capital Advisors v. Acero Junction, 337 F.R.D. 47, 61 (S.D.N.Y. Sept. 30, 2020).

³¹ No. CV-20000047-PHX-DHL, 2021 WL 3857413, at *6, *10 & *13 (D. Ariz. Aug. 30, 2021). The court quoted from the extensive discussion of the auto-delete issues found in *DR Distributors v. 21 Century Smoking*, 513 F. Supp.3d 89, 931-933 (N.D. Ill. 2021).

³² Medidata Solutions v. Veeva Systems, Case No. 17 Civ. 589 (LGS), 2021 WL 4902462, at *3 (S.D.N.Y. Sept. 22, 2021)(information lost due to a reset while transferring the data to a drive for production).

proposed jury instruction asking the jury to decide if the defendants had engaged in spoliation, underscoring its view that “judges, not juries, should be the ones deciding whether to impose spoliation sanctions.”³³

However, the Rule was not intended to preclude with any fact-finding role of the jury assigned by courts in relation to spoliation. The Committee Note acknowledges that juries could be asked to assess the impact of spoliation evidence and assigned the responsibility to determine if “intent to deprive” existed.³⁴

Courts have increasingly allocated additional fact-finding responsibility to juries in recent decisions. In *Alabama Aircraft Industries v. Boeing*, for example, the Eleventh Circuit approved use of the jury to decide whether Boeing had or should have anticipated litigation at the time of the spoliation. According to the Appellate Court, the instruction “correctly stated the law and did not mislead the jury.”³⁵

In *Danville Group v. Carmax Business Services*, a District Court approved a recommendation by the Magistrate Judge to leave the issue of prejudice for determination by the jury at trial.³⁶

In *Lexpath Technologies Holdings, Inc. v. Welch*, the Third Circuit noted with approval that the trial court had “repeatedly made clear” that “it was up to the jury to find whether spoliation in fact occurred.”³⁷

Some advocate instructing the jury that, as a matter of law, it is bound by the court’s preliminary decisions.³⁸ While courts certainly not rely on juries if there is insufficient evidence for a reasonable jury to act, the Supreme Court has noted that the federal system, “under the influence – if not the command – of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.”³⁹

³³ No. CV-03262-PHX-DWL, 2020 WL 417492, at *4 & *7 (D. Ariz. Jan. 27, 2020)(“Judges are fully capable of making discovery-related factual findings”). See also David C. Norton, *Fifty Shades of Sanctions: What Hath the Goldsmith’s Apprentice Wrought?*, 64 S.C.L. Rev. 459, 492 (2013)(it is “inappropriate for the jury to have a role in determining culpability after the judge has already made a determination”).

³⁴ The Discovery Subcommittee had suggested that the Committee Note should address issues when court choose to leave it to the jury to decide whether a party failed to preserve with intent to deprive. Notes, Conference Call, March 12, 2014, at 2-3.

³⁵ Case No. 20-11141, 2022 WL 433457, at *6 (11th Cir. Feb. 14, 2022) (“[Y]ou are the judge of the facts as to what happened in this case, including what happened to these electronic documents, and why it happened”).

³⁶ Case No. 1:20-cv-00696, 2021 WL 6332786, at *2 (E.D. Va. June 11, 2021).

³⁷ 744 Fed. Appx. 74, 79 & n. 3 (3rd Cir. 2018).

³⁸ *Pension Committee v. Banc of America*, 685 F. Supp.2d 456, 487 & n. 251 (S.D.N.Y. 2010)(“I direct you that I have already found as a matter of law that this lost evidence is relevant to the issues in this case”).

³⁹ *Gasperini v. Center for Humanities*, 518 U.S. 415, 432 (1996)(quoting the “trial by jury” Clause of the Seventh amendment).

Inherent Power

The Committee Note accurately asserts that use of inherent authority to impose “certain measures” is “foreclosed” by Rule 37(e). However, the rule does not provide the “exclusive” source of authority to deal with *any* spoliation of ESI.⁴⁰ That level of preclusion is limited to the measures listed in Rule 37(e)(2) requiring a showing of “intent to deprive.” An adverse inference jury instruction or dismissal of a case is not available under either inherent authority or the Rules for merely negligent destruction of ESI.⁴¹

While Article III of the Constitution endows courts, as “an independent and coequal Branch of Government” with “implied powers,”⁴² Congress may by “express grant or limitation” supersede or displace an inherent power in favor of a Federal Rule.⁴³ The limits on use of inherent power inconsistent with subdivision (e)(2) measures stands in contrast to the availability of inherent power to deal with conduct subject to measures under subdivision (e)(1). That authority merely provides an “additional tool” to deal with litigation abuse.⁴⁴

Courts are typically encouraged to rely on rule-based authority without resorting to their inherent powers even it is available.⁴⁵ In *Peals v. QuikTrip Corporation*, the court explained that because the Rule “adequately address the lost [digital footage] at issue, the Court will not draw from its inherent powers.”⁴⁶

Courts turn to their inherent authority to deal with conduct that is not covered by the Rule or “does not neatly fall within Rule 37.”⁴⁷ At the very least “inherent power must continue to exist to fill in the interstices” and if a rule is “not up to the task,” inherent powers are available even if the same conduct is covered by a rule.⁴⁸

⁴⁰ Cf. *Nyerges v. Hillstone Restaurant Group*, No. CV-19-02376-PHX-DWL, 2021 WL 3299625, at*5 (D. Ariz. Aug. 2, 2021)(the standards are “exclusive”). The court, however, misread *Newberry v. County of San Bernardino*, 750 App’x 534, 537 (9th Cir. 2018) which merely held that the “detailed language” of the Rule foreclosed reliance on inherent authority.

⁴¹ *CAT 3 v. Black Lineage*, 164 F. Supp.3d 488, 497 (S.D.N.Y. Jan. 12, 2016).

⁴² *Chambers v. NASCO*, 501 U.S. 32 (1991)(Scalia, J., citing *United States v. Hudson*, 7 Cranch 32, 34, 3 L. Ed. 259 (1812)).

⁴³ *Dietz v. Bouldin*, _ U.S. _, 136 S. Ct. 1885, 1892 (2016)(rule-based limitations on use of inherent power are “as binding as any statute duly enacted by Congress).

⁴⁴ *Chambers*, *supra*, at n. 13 (describing how Rule 16(f) was not intended to “displace” inherent power, but “simply to provide courts with an additional tool by which to control the judicial process”).

⁴⁵ *Id* at 50 (“when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power”).

⁴⁶ Civil Action No. 4:20-cv-22-KPJ, 2021 WL 2043185, at *5 (E.D. Tex. May 21, 2021).

⁴⁷ *Espinoza v. Chavarria and VRP Transportation*, EP-19-CV-00365-DCG, 2022 WL 136465, at *2 (W.D. Tex. Jan. 14, 2022).

⁴⁸ *Chambers*, *supra*, at 50. See also *Clientron Corpo v. Devon IT*, 894 F.3d 568, n. 4 (3rd Cir. 2018)(when “statutory or rules-based sanctions are adequate, they should be invoked, rather than the inherent power”). As noted

The inherent power also remains available when needed to vindicate judicial authority.⁴⁹ In *Gunter v. Alutiq Advanced Security Solutions*, the court acknowledged its authority to order a dismissal, despite lacking a basis under Rule 37(e) to do so, when 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 [judicial] process.”⁵⁰

Admitting Spoliation Evidence

As noted earlier, an overwhelming majority of decisions imposing relief under the Amended Rule admit evidence of spoliation to a jury in the absence of a finding of “intent to deprive” upon finding prejudice or in connection with being asked to address predicate conditions under the Rule.

It is not clear exactly *why* spoliation evidence should be admissible given the risks of confusion and misleading the jury.⁵¹ One explanation is that “[t]here is a proper evidentiary aspect to lost information, something that is not a ‘sanction.’”⁵² Others cite the value of relying on the “good sense” of the jury as informed by arguments of counsel.⁵³ Yet others argue that it permits the jury to evaluate relevant circumstantial evidence while providing “disincentives” for the sort of conduct [spoliation] at issue.⁵⁴

The Committee Note suggests that any guidance to the jury must not “direct or permit” it to infer from the loss of information that it was unfavorable to the party that lost it.”⁵⁵ In *EPAC Technologies v. Thomas Nelson*, for example, the Sixth Circuit approved use of an instruction to the jury after admitting spoliation evidence that “you may give this whatever weight you deem appropriate as you consider all the evidence presented at trial.”⁵⁶

in *CAT3 v. Black Lineage*, 164 F. Supp.3d 488, 497 (S.D.N.Y. 2016), even if Rule 37(e) was construed not to apply to the alteration of the ESI the court could exercise inherent authority to remedy spoliation).

⁴⁹ *Johnson v. Hankook Tire*, 449 Fed. App’x 329, 332 (5th Cir. 2011).

⁵⁰ Civil Case No.: 1:20-cv-03410-RBD, 2021 WL 6126295 (D. Md. Dec. 28, 2021)(concluding that it did not have enough evidence of malfeasance to do so)..

⁵¹ The Sedona Conference *Commentary on ESI Evidence & Admissibility* (2nd Ed.), 22 Sedona Conf. J. 83, at n. 213 (2021)(“ The “degree to which it makes an act material to the claims or defenses more or less probable is crucial).

⁵² Advisory Comm. Minutes, April 10-11, 2014, at 24.

⁵³ Charles W. Adams, *Spoliation of Electronic Evidence: Sanctions v. Advocacy*, 18 Mich. Telecomm. & Tech. L. Rev. 1, 6 (2011).

⁵⁴ Andrew S. Pollis, *Trying the Trial*, 84 Geo. Wash. L. Rev. 55 (2016).

⁵⁵ The Discovery Subcommittee concluded that juries should not be instructed that they could conclude that the missing ESI was unfavorable from the “loss of information alone.” Discovery Subcommittee Conf. Call, March 12, 2014 at 2-3.

⁵⁶ 2018 WL 3322305, at *3 (M.D. Tenn. May 14, 2018), *aff’d after verdict*, 398 F. Supp. 3d 258, 280 (M.D. Tenn. July 1, 2019), *aff’d* 810 Fed. Appx 389, 403 (6th Cir. April 15, 2020).

As the court in *Mueller v. Taylor Swift* pointed out, however, the jury “will draw their own adverse inferences, whether the Court instructs it or not.”⁵⁷ Some trial courts admit evidence about spoliation at trial, aware that the jury may, without further guidance, draw their own inferences.⁵⁸ Much remains unknown about the behavior of juries when faced with spoliation evidence and argument of counsel.

Dismissals and Defaults

A finding of “intent to deprive” is a predicate requirement to imposing a dismissal or to enter a default judgment. The Advisory Committee felt it important to provide the same standard as was required for an adverse inference instruction, since it would be incongruous to allow dismissals or defaults on a lesser standard.⁵⁹ However, of the decisions during the study period, only six (6) such measures were utilized.

This reflects the strong predisposition to resolve cases on their merits. In addition to the “intent to deprive” requirement, court have “carved out their own [additional] tests” to ensure that due process and respect for fairness is ensured.⁶⁰

Attorney’s Fees and Expenses

At least twenty-seven (27) of the sixty-six decisions granting relief during the study period awarded monetary damages in the form of attorney’s fees and expenses to cure the prejudice from bringing a successful motion to address a failure to preserve under the Rule.⁶¹ It frequently accompanies relief under either or both subdivisions (e)(1) and (2).

Rule 37(e) contrasts, however, with Rules 37(a), (b), (c) and (d), in that it does not mention the authority to order the payment of reasonable expenses including attorney’s fees. The initial proposal included such a reference but it was excluded when the language was simplified in the final version.⁶²

⁵⁷ No. 15-cv-1974-WJM-KLM, 2017 WL 3058027, at *6 (D. Colo. July 19, 2017).

⁵⁸ See e.g., *Oliver v. Meow Wolf*, Civ. No. 20-237 KK/SCY, 2021 WL 3618314, at n. 11 (D. New Mex. Aug. 16, 2021)(“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”).

⁵⁹ “The [Advisory] Committee thought it incongruous to allow dismissal or default in circumstances that do not justify [a mandatory adverse-inference instruction].” Report, Advisory Comm. June 14, 2014.

⁶⁰ *GN Netcom v. Plantronics*, 930 F.3d 76, 84 (3rd Cir. 2019)(requiring compliance with the three factors set forth in *Schmid v. Milwaukee Elec. Tool*, 13 F.3d 76, 79 (3rd Cir. 1994).

⁶¹ *CAT3 v. Black Lineage*, 164 F. Supp. 3d 488, 502 (S.D.N.Y. Jan. 12, 2016)(to “ameliorate” the economic prejudice and serve as a deterrent). See also Thomas Y. Allman, *Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation measures*, 26 Rich. J.L. & Tech. 1, ¶92 (2020).

⁶² This is sufficient indicia of congressional intent to satisfy the American Rule. Allman, *supra*, at ¶¶ 92-93 (citing other examples).

In *Spencer v. Laguna Bay Boys*, however, the District Court rejected the argument that authority was lacking because the Rule and Notes “do not mention sanctions or monetary sanctions.” The court found that the range of curative measures under Rule 37(e) “is quite broad if they are necessary” to cure prejudice.⁶³ The Ninth Circuit affirmed.⁶⁴

The Advisory Committee subsequently rejected the need for further clarification because “courts do not encounter any problem with authority to direct the wrongdoer to reimburse the victim for the that cost.” There was also a concern about the consequences of reopening the process that led to the rule itself.⁶⁵

Some courts have asserted the authority to “apportion” sanctions imposed under Rule 37(e) to counsel.⁶⁶ In *CAT3 v. Black Lineage*, for example, the court offered to conduct “further proceedings to apportion responsibility” among party and prior counsel for monetary sanctions imposed under Rule 37(e)(1).⁶⁷ This may invoke inherent equitable authority not arising out of the Rule.⁶⁸

Non-Electronic Spoliation

An open question is whether Rule 37(e) should be expanded apply to losses of non-electronic documents and tangible property. Currently, a separate analysis is necessary for each form if both forms of evidence are lost in the same case.

However, courts have coped well in the reported decisions requiring such analyses. In *Cianci and Cianci v. Phoenixville Area School District*, for example, the court adroitly handled spoliation of electronic data and the shredding of physical paper.⁶⁹ In *EPAC Technologies, supra*,

⁶³ Case No. CV 16-02129-SJO (RAOx), 2018 WL 839862, at *1 (C.D. Cal. Feb. 12, 2018).

⁶⁴ 806 Fed. Appx. 564, 568 (9th Cir. Mar. 27, 2020) (“the district court did not abuse its discretion “by ordering the sanctions award”).

⁶⁵ Report, Hon. Robert M Dow to Hon. John D. Bates, May 21, 2021, at 23. The Discovery Subcommittee noted that the “potential problem” was not a practical one since “almost all courts that address the question find authority to” award attorney’s fees. Minutes. Advisory Comm. Mtg., April 23, 2021, at 29. The Subcommittee had expressed concerns that once opened for amendment, it might prove impossible to confine the amendments to the narrow issue identified. Report, copy at April Agenda Book, 202.

⁶⁶ *Hughes v. City of New York*, Case. N. 1:18-cv-09380-MKV, 2021 WL 4295209, at *14 & n. 3 (S.D.N.Y. Sept. 21, 2021). However, the sanctioned “law department” was part of the City of New York, which was responsible for satisfying both parts of the allocated sanction.

⁶⁷ *CAT3, supra*, 164 F. Supp 3d 488, at n. 7.

⁶⁸ Something akin to that approach was followed in *Merck Eprova AG v. Gnosis S.P.A.*, No. 07 CIV 5898 (RJS), 2010 WL 1631519, at *6 (S.D.N.Y. 2010) where the court, asserting inherent authority, sanctioned the defendants, but elected not to apportion liability between them and defense counsel, noting that it was available to intercede if they could not agree on an apportionment.

⁶⁹ Civil Action No. 20-4749, 2022 WL 824026 (E.D. Pa. Mar. 18, 2022).

the use of slightly different jury instructions for the loss of ESI and tangible things did not present a problem at the trial or appellate level.⁷⁰

The better part of valor may well be to celebrate the success of Rule 37(e) in dealing with electronic spoliation and simply let sleeping dogs lie. The Advisory Committee is unlikely to entertain a request for amendment without solid evidence that an actual problem exists which is susceptible of correction. The Author has found no evidence that this is the case, nor does there appear to be any support for undertaking the effort.

Conclusion

Rule 37(e) has fulfilled the expressed preference of the Supreme Court in *Societe Int'l v. Rogers*, 357 U.S. 197, 207 (1958) that courts should be able to rely on rule-based sanctions, not inherent powers, in dealing with discovery misconduct. Much remains to be learned, however, as to the changes, if any, which have resulted.

⁷⁰ 810 Fed. Appx. 389, 402 (6th Cir. April 20, 2020). Because the instructions were “merely permissible, telling the jury what they ‘may’ infer neither the trial nor the appellate courts expressed any interest in examining potential jury confusion by the differing instructions. See also *Richard v. Digneau* Case No. 6:11-CV-060313 EAW, 2021 WL 5782106] (W.D.N.Y. Dec. 7, 2021)(using different jury instructions resulting from the same grossly negligent failure to institute a litigation hold).