Sanctions and Federal Rule of Civil Procedure 37
Two Years after the 2015 Amendments

Kevin S. Brown
Counsel
State Farm Insurance
One State Farm Plaza, A-3
Bloomington, IL 61710

Dawn Estes
Founding Partner
Estes Thorne & Carr PLLC
3811 Turtle Creek Blvd., Suite 2000
Dallas, TX 75219

Joe Geoghegan
Senior Counsel
Travelers
One Tower Square, 4MS
Hartford, CT 06183

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Presented by:

Kevin S. Brown, State Farm Insurance
Dawn Estes, Estes Thorne & Carr PLLC (moderator)
Joe Geoghegan, Travelers.

Kevin S. Brown
State Farm Insurance

Kevin S. Brown has over 20 years' experience in-house with State Farm. He recently began working in the privacy and information security space after nearly ten years focusing on electronic discovery and related litigation issues. Kevin also has experience with information retention, contract, and general technology legal issues. Kevin has an undergraduate degree in Applied Computer Science from Illinois State University, and earned his law degree from the University of Iowa. Kevin also has his CPCU, CLU, and ChFC industry designations.

Dawn Estes
Estes Thorne & Carr PLLC

Dawn Estes is a founding partner of Estes Thorne & Carr – the largest women-owned law firm in Texas. Dawn's successful litigation track record has earned her an AV Preeminent® lawyer rating through Martindale-Hubbell, along with recognition as a Best Lawyer in America, a Texas Super Lawyer, one of the Top 50 Women Lawyers in Texas, and a Best Lawyer in Business Litigation by D Magazine. Dawn has two awesome kids and a lawyer husband. She sings in the band, Black Dirt Tango.

Joseph R. Geoghegan
Travelers

Joseph R. Geoghegan is Senior Counsel for the Major Case Unit of Travelers Claim Legal Liability Group, and provides coverage advice, litigation management and other legal services to Travelers complex claim professionals. Joe is a 2004 graduate of Columbia Law School, where he earned the designation of Harlan Fiske Stone Scholar. Prior to joining Travelers, Joe spent ten years in private practice focused on a broad spectrum of civil litigation, including positions in the Insurance Law and Litigation practice groups of Gordon & Rees LLP and Edwards Angell Palmer & Dodge LLP (now Locke Lord LLP). Joe has been published on a variety of topics related to insurance coverage and coverage litigation.

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I. Introduction

The most significant changes to Rule 37 under the 2015 amendments to the Federal Rules of Civil Procedure came in Rule 37(e) regarding electronically stored information, ("ESI"). Due to the voluminous nature of ESI it presents unique issues particularly with regards to storage and access. The changes to Rule 37(e) came as a response to the lack of consistency between federal circuits in addressing spoliation of ESI. The new Rule 37(e) was introduced in an effort to redress litigants' expenditures of "excessive effort and money on preservation" stemming from the varying standards of culpability established by the federal circuits. Fed. R. Civ. P. 37(e) Advisory Committee notes to 2015 amendment. The Advisory Committee further emphasizes that these changes "reject cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."

II. What Can Get You Sanctioned?

The largest 2015 changes occurred in Rule 37(e) regarding ESI, thus, the general conduct deserving of sanctions was not drastically impacted, however a general overview will be useful. Under Rule 37, sanctions can be imposed against a party who fails to make, or allow for, discovery. The allowable sanctions differ in severity based on the conduct and the corresponding level of default. Typically, sanctions are not applied in situations where the failing party has made a good-faith effort to comply. This good-faith effort does not negate the noncompliance, however, it is relevant to the court's decision of the appropriate remedy to employ in addressing the failure to comply. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 US 197 (1958). A mere absence of wilful disobedience is insufficient to establish this good-faith effort to comply.

A. Failure to Comply with a Court Order

Where the court "orders a deponent to be sworn or to answer a question and the deponent fails to obey," the deponent may be held in contempt. Fed. R. Civ. P. 37(b)(1). The court retains the right to enter a contingent order, which warns the defaulting party that if that party does not comply with the discovery order entered by the court within a specified time then certain sanctions will be imposed on them. *Charron v. Meaux*, 20 Fed. R. Serv. 2d 724 (S.D.N.Y. 1975).

Sanctions may be applied when discovery is not provided or permitted by a "party or a party's officer, director, or managing agent" or the designated agent of "a public or private corporation, a partnership, an association, a governmental agency, or other entity." Fed. R. Civ. P. 37(b)(2)(A) and 30(b)(6). Sanctions were assessed

on a law firm in an action under the FDCPA when the firm did not produce invoices relating to its work on a mortgagor's debt after the district court had ordered the firm to respond to a demand by the mortgagor for any invoices for services the firm provided related to the debt. *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 487. However, sanctions were not assessed against an insurer and policy administrator in a breach of contract action brought by former owners of life insurance policies when the defendants failed to produce certain documents pursuant to a court order. *Burnett v. Conseco, Inc.*, 87 F.Supp.3d 1238 (N.D. Cal. 2015), *rev'd and remanded*, 2017 WL 1828145, *on remand*, 2017 WL 3599521. The order in question required the defendants to produce these certain documents only if a nonparty did not. *Id.* The court determined that this order did not involve any of the defendants, was therefore not binding on the defendants, and even if the order had applied, did not provide unequivocal notice that the court had demanded the production of specific documents. *Id.*

Sanctions can also be applied when a party fails to produce another person for examination, unless the defaulting party can show that it is not capable of producing the other person. Fed. R. Civ. P. 37(b)(2)(B). However, where counsel has undertaken the responsibility of producing witnesses where counsel could have avoided this responsibility, through a response to opposing counsel stating that they did not have this witness under their control, or alternatively advising opposing counsel to serve the subpoena on the witness, sanctions would be imposed for this failure to make the witness available for depositions. *In re Keystone Foods, Inc.*, 134 B.R. 828 (W.D. Pa. 1991).

B. Failure to Disclose, to Supplement an Earlier Response, or to Admit

The court has a discretionary power to impose sanctions for failure to disclose information including documents the disclosing party possesses that support its claims of defenses or the contact information for witnesses. Fed. R. Civ. P. 37(c)(1). In deciding when to exercise this power, courts should look to four factors: first, the explanation provided by the disclosing party as to why they did not provide such evidence; second, the importance of the subject evidence to the disclosing party's case; third, the time the opponent needs to prepare to meet the evidence; and finally, the possibility of obtaining a continuance to allow the opponent to meet the evidence. *Turley v. ISG Lackawanna, Inc.*, 803 F.Supp.2d 217 (W.D.N.Y. 2011).

When the identity of a potential witness employee was disclosed but her phone number was omitted, the failure to disclose was deemed to be harmless in an action to quiet title, and no sanctions were appropriate. *Wane v. Loan Corp.*, 926 F.Supp.2d 1312 (M.D. Fla. 2013), *reconsideration denied*, 2013 WL 1278162, *stay pending appeal denied*, 2014 WL 103451, *aff'd*, 552 Fed. Appx. 908, 2014 WL 114688. Further, the party bringing the action never sought to depose this employee

nor did they file a motion to compel upon the realization that this information was missing. Additionally, in the *Burnett v. Conseco* contract action brought by former life insurance policy owners, the failure of the insurer and policy administrator to disclose communications with regulators to the party bringing the action was not seen as a violation of the rule requiring provision of information. The court reached this conclusion because the disclosures were not relevant to the claims or defense of the insurer, and further, the defendants were not yet at a point where initial disclosures were required. *Id.*

The failure to supplement an initial disclosure without substantial justification automatically prevents a party from using as evidence any witnesses or evidence that has not been disclosed, with an exception for harmless violations. Advisory Committee Notes for 1993 Amendments to FRCP 37. If a party determines that information presented was incomplete or incorrect and "additional or corrective information has not otherwise been made known to the other parties," or if they are ordered to do so by the court, the party is required to supplement these disclosures or responses in a timely manner. Fed. R. Civ. P. 26(e)(1)(A)-(B). This same supplemental requirement applies to the contents of the report of an expert witness in addition to the information given during their deposition. Fed. R. Civ. P. 26(e)(2).

Finally, when a party fails to admit to the genuineness of a document as requested under Rule 36 and the "requesting party later proves a document to be genuine or the matter true" sanctions can be applied. Fed. R. Civ. P. 37(c)(2). Requests for Admission under Rule 36 relate to the "facts, the application of the law to fact, or opinions about either" and "the genuineness of any described documents." Fed. R. Civ. P. 36(a)(1)(A)-(B).

C. Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection

Sanctions may be applied when a "party or a party's officer, director, or managing agent" or the designated agent of "a public or private corporation, a partnership, an association, a governmental agency, or other entity" fails to appear for their deposition. Fed. R. Civ. P. 37(d)(1)(A)(i) and 30(b)(6). Additionally, sanctions may be applied if a party fails to serve answers, objections, or written responses to interrogatories under Rule 33 or a request for inspection under Rule 34. Sanctions were brought where the District of Columbia failed to educate a Department of Corrections (DOC) employee who was the designated witness on the subject matter at issue. *Smith v. District of Columbia*, 319 F.R.D. 40 (D.D.C. 2016). This DOC employee was aware that the arrestee requested this specific data in his deposition notice, yet the employee did not bring or search for the requested data, and further failed to provide any explanation for her failure to do so. *Id.*

An objection is seen as a response to a document request. *Enron Corp. Savings Plan v. Hewitt Associates, L.L.C.*, 258 F.R.D. 149 (S.D. Tex. 2009). However, unless "the party failing to act has a pending motion for a protective order under

Rule 26(c)" the mere fact that the discovery sought is objectionable is not an excuse for failing to act. Fed. R. Civ. P. 37(d)(2).

D. Failure to Preserve Electronically Stored Information

The court is authorized to issue sanctions when the following four conditions are met: first, the ESI at issue "should have been preserved in the anticipation or conduct of litigation;" second, that ESI is lost; third, the loss is due to a party's failure "to take reasonable steps to preserve it;" and fourth, the ESI "cannot be restored or replaced through additional discovery." Fed. R. Civ. P. 37(e). When these four conditions are satisfied, the second step in the sanction inquiry is to determine whether the loss of the ESI has prejudiced another non-offending party and whether the offending party "acted with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(1)-(2). Where there is a finding of prejudice, the court is allowed to "order measures no greater than necessary to cure the prejudice." Fed. R. Civ. P. 37(e)(1). Additional, harsher sanctions are available where the offending party acted with intent. Fed. R. Civ. P. 37(e)(2). The language addressing a "fail[ure] to take reasonable steps" establishes that there is no strict liability attached to a party's inability to produce ESI. Fed. R. Civ. P. 37(e). Rule 37(e) and the national standard of culpability created by the 2015 amendments only apply to producing ESI. Dismissal due to spoliation would still be appropriate in a situation where a key piece of non-ESI evidence was lost or destroyed. *See Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001) (discussing a suit against GM claiming the airbag should have deployed where the car and airbag were lost or destroyed).

The previous version of Rule 37(e) stated that generally there were no sanctions "for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system." Fed. R. Civ. P. 37(e). Under this interpretation of the rule a showing of bad faith required acts of intentionally destroying ESI. *Southern New England Telephone Co. v. Global NAPs, Inc.*, 251 F.R.D. 82 (D. Conn. 2008), *aff'd*, 624 F.3d 123 (2d Cir. 2010); *Nucor Corp. v. Bell*, 251 F.R.D. 191 (D.S.C. 2008). To be entitled to an adverse-inference instruction on spoliation under the old version the party must prove that the party with control over the evidence was obligated to preserve such evidence at the time it was destroyed, the party had a culpable state of mind at the time of the destruction, and the destroyed evidence was valuable to the party's claim or defense to the extent that a reasonable trier of fact could have drawn the connection. *See, e.g.*, *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004). In the Advisory Committee notes to the 2015 decision, ushering in the new Rule 37(e), the committee emphasizes that "adverse-inference instructions on a finding of negligence or gross negligence" are rejected under the new rule. The 2015 amendment added the "intent to deprive" language to reject the negligence standard established in *Residential Funding*. Fed. R. Civ. P. 37(e)(2).

In a case filed before the new rule went into effect, plaintiffs attempted to show that the defendants were on notice of the plaintiffs' trademark use and defendants' alleged plaintiffs altered specific email domains in messages prior to producing them to defendants' pursuant to discovery demands. *CAT3, LLC v. Black Lineage, Inc.*, 164 F.Supp.3d 488 (S.D.N.Y. 2016). In this case, the court chose to apply the newly enacted Rule 37(e) and placed sanctions on the plaintiffs for their misconduct. *Id.*

Under the application of the new Rule 37(e) the adverse-inference instruction is no longer accepted under the "negligence or gross negligence" culpability standard promulgated in *Residential Funding*. Advisory Committee notes to 2015 amendment. The application of Rule 37(e) is not mandatory; Judges retain the ability to draw on the inherent power of the court to determine means of addressing spoliation. Under the new Rule 37(e) when the laptop of a former employee was destroyed after an action had commenced, the facts did not give rise to an adverse-inference instruction that the missing evidence was unfavorable to the defendant. *Learning Care Group, Inc. v. Armetta*, 315 F.R.D. 433 (D. Conn. 2016). The laptop was destroyed in the ordinary course of business after the employee who used the laptop had left the company; in fact, the laptop had been slated for destruction months prior to the litigation being filed. *Id.* Because the destruction occurred within an established retention and destruction policy within the ordinary course of business the court did not find that it was done in bad faith or with gross negligence and such culpability is a required element for the imposition of sanctions against the defendant for the destruction of evidence. *Id.* It is important to have a clearly established record retention policy to be able to claim that destruction occurred within the ordinary course of business. Such retention policy should also have procedures in place to instigate a litigation hold as soon as litigation appears likely.

E. Failure to Participate in Framing a Discovery Plan

Specific sanctions may be assessed on a party or its attorney for failure to "participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f)." Fed. R. Civ. P. 37(f). Rule 26(f)(3) describes the requirements of the Discovery Plan and under Rule 26(f)(1) such plan must be submitted at least 21 days prior to the date a scheduling conference is held or a scheduling order is due under Rule 16(b). *Id.* An additional 2015 amendment to the Federal Rules of Civil Procedure can be found in the scheduling conference date requirements of Rule 16(b)(2). Previously, unless the judge found good cause for delay, the judge was required to issue the order "within the earlier of 120 days after any defendant ha[d] been served with the complaint or 90 days after any defendant ha[d] appeared." Fed. R. Civ. P. 16(b)(2). However, the 2015 amendments have changed these date requirements to 90 days and 60 days respectively. *Id.* (2015 amended version).

III. Discovery Sanctions – generally

If an insurer is found to have engaged in the sanctionable conduct discussed in the preceding section, Rule 37 provides for a variety of sanctions, which can have varying degrees of impact on the fortunes of a coverage lawsuit – anything from a simple monetary penalty to the loss of the case by default. While the 2015 amendments have made important modifications to the rules as they affect electronic discovery, not all discovery disputes involve ESI, and so a general understanding of the potential range of sanctions will be helpful. There is, it should be said, no definitive list of all potential sanctions, because district court judges are given discretion by Rule 37 to order remedies not specifically provided for within the rule. Rule 37(b)(2)(A) provides that where a party fails to obey a discovery order, the court "may issue further just orders" that "may include" a number of enumerated remedies, but the list is not exhaustive, and courts punishing litigation misconduct may issue "such other orders and sanctions as they find necessary . . . ." *Shepherd v. American Broadcasting Cos., Inc.*, 62 F.3d 1469 (D.D.C. 1995).

If appealed, discovery sanctions are reviewed for abuse of discretion. *Maynard v. Nygren*, 372 F,3d 890 (7th Cir. 2004). The Circuit Courts of Appeal have developed different criteria for reviewing sanctions, but a common factor is whether a less drastic sanction would have been effective. *See, e.g., Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990) (five-factor test); *Mut. Federal Sav. And Loan Ass'n v. Richards & Associates, Inc.*, 872 F.2d 88, 92 (4th Cir. 1989) (four-factor test).

While the full range of discovery sanctions is limited only by the creativity of the district court judges, the following are among the more commonly discussed sanctions:

A. Terminating Sanctions

By far the harshest sanctions a court may impose on a litigant, the so-called *terminating sanctions* are, simply put, an order that the offending party loses the lawsuit (or loses a claim within the lawsuit). The two related provisions, found at Rule 37(b)(2)(A)(v) and (vi), state that where a party fails to obey a discovery order, the court may issue an order "dismissing the action or proceeding in whole or in part" or "rendering a default judgment against the disobedient party." Courts recognize that terminating sanctions are drastic, and impose a heightened showing for a party seeking such sanctions against its adversary. In *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), the Supreme Court explained that Rule 37 "should not be construed to authorize dismissal of a complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." Relying on *Societe Internationale*, the Sixth Circuit explained that it would not affirm a dismissal order absent a showing of "willfulness," which it defines as "a conscious and intentional failure to comply with the court order." *Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6th Cir. 1995). Even where willfulness is

established, the court will consider additional factors in reviewing a district court order of dismissal, including "whether less drastic sanctions were imposed or considered before dismissal was ordered." *Id.*

Similarly, courts considering the imposition of a default judgment for discovery violations are instructed that a default judgment is a "drastic remed[y]" and "should be applied only in extreme circumstances." *Independent Production Corp. v. Loew's, Inc.*, 283 F.2d 730 (2d Cir. 1960). One district court, examining Supreme and appellate court authority on the issue, concluded that a default could not be imposed unless "(1) Defendant acted willfully and in bad faith; (2) Plaintiff was prejudiced as a result; (3) no lesser sanction would serve the punishment and deterrence goals of" Rule 37. *BankAtlantic v. Blyth Eastman Paine Webber, Inc.*, 127 F.R.D. 224, 227 (S.D. Fla. 1989).

B. Adverse Inference Instruction

An adverse inference instruction is an instruction to the jury that they are permitted to infer, based on the absence of certain evidence, that the evidence would have been adverse to the party that failed to provide the evidence. Where a litigant is found to have engaged in spoliation, then, a court may remedy the misconduct with an adverse inference instruction. While not as severe as terminating sanctions, the remedy is recognized as harsh and a heightened showing is required before the remedy may be imposed. For example, the Second Circuit requires a party seeking an adverse inference instruction based on the destruction of evidence to establish:

> (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).

The destruction of records based on a party's record retention policy presents an additional set of considerations for a district court to review prior to imposing an adverse inference instruction. Courts may consider whether a record retention policy is reasonable given the nature of the documents: "A three year retention policy may be sufficient for documents such as appointment books or telephone messages, but inadequate for documents such as customer complaints." *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1112 (8th Cir. 1988). Courts may also consider whether the record retention policy was instituted in bad faith; or, even if the policy itself is reasonable, whether a corporation should have known that certain documents would likely become material in the future and should be retained, notwithstanding the policy. *Id.* "Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy." *Id.*, citing *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983).

C. Preclusion from Introducing Designated Matters in Evidence

A failure to disclose evidence in response to discovery requests or to disclosure rules may result in an order precluding the introduction of that evidence at trial. Rule 37 provides as follows:

> **(1)** ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Fed. R. Civ. P. 37(c)(1). Unlike some of the other potential sanctions, preclusion is automatic. "Rule 37(c)(1) is a self-executing sanction . . . the overwhelming weight of authority is that preclusion is *required* and *mandatory* absent some unusual or extenuating circumstances . . . ." *Norden v. Sampler*, 544 F.Supp.2d 43, 49-50 (D.D.C. 2008) (citing *Elion v. Jackson*, 05-0992, 2006 WL 2583694 *1 (D.D.C., Sept. 8, 2006)). Furthermore, and again unlike some of the other sanctions under discussion, courts will not require a heightened showing with regard to the violating party's culpability. "[T]he motive or reason for the failure is irrelevant. It therefore is unnecessary to decide whether the defendant acted in bad faith . . . or was simply sloppy in its search for relevant documents and in assisting its litigation counsel in responding to interrogatories." *Id.* The rule is designed to avoid "surprise" or "trial by ambush." *Kunstler v. City of New York*, 242 F.R.D. 261, 264 (S.D.N.Y. 2007). Although the rule is automatic, imposition of the sanction is not mandatory, but remains within the trial court's discretion. *Kunstler*, 242 F.R.D. at 265.

While the sanction of preclusion for failure to disclose or supplement is self-executing, a party may avoid the sanction by establishing that the violation was harmless. *See, e.g.*, *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879 (8th Cir. 2006) (failure to disclose x-rays prior to trial was harmless and did not warrant preclusion where testifying doctor discussed x-rays during deposition, putting adversary on notice that the x-rays might be relied on at trial). Alternatively, the party that failed to disclose or supplement may avoid the sanction if their failure was *substantially justified*. Substantial justification is "justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the discovery request." *Kunstler*, 242 F.R.D. at 264-65, citing *Am. Stock Exch., LLC v. Mopex, Inc.*, 215 F.R.D. 87 (S.D.N.Y. 2002).

D. Attorney's Fees

Less severe than sanctions dismissing a suit or precluding evidence, the sanction of attorney's fees is worth noting because it is frequently imposed and in some cases mandatory (with exceptions). Where a party succeeds on a motion to compel disclosures or discovery responses, the court "must" require the party that failed to disclose or respond "to pay the movant's reasonable expenses in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A). The exceptions to this mandatory fee award are the following: where the movant filed the motion

before attempting to obtain the disclosure or discovery; where the nondisclosure was "substantially justified"; or where "other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A)(i)-(iii). Mandatory attorney's fee awards (with exceptions for substantial justification or circumstances making the award unjust) are also applied against the party bringing a motion to compel discovery or disclosure if the motion is denied, or against a party providing disclosures or discovery after a motion to compel is filed (Fed. R. Civ. P. 37(a)(5)(A)(i)-(iii) and (a)(5)(B)); against a party failing to comply with an order under Rule 35(a) requiring it to produce another person for examination (Fed. R. Civ. P. 37(b)(2)(B)); and against a party failing to appear for a deposition or to respond to interrogatories or a request for inspection (Fed. R. Civ. P. 37((d)(1)-(3)).

E. Miscellaneous Remedies

Other remedies specifically provided for within Rule 37 are as follows: an order directing that matters embraced in the order or other designated facts be taken as established (Fed. R. Civ. P. 37(b)(2)(A)(i)); an order prohibiting the disobedient party from supporting or opposing designated claims or defenses (Fed. R. Civ. P. 37(b)(2)(A)(ii)); an order striking pleadings (Fed. R. Civ. P. 37(b)(2)(A)(iii)); an order staying proceedings until the court's discovery order is obeyed (Fed. R. Civ. P. 37(b)(2)(A)(iv)); and a finding of contempt of court (except for failure to obey an order to submit to a physical or mental examination) (Fed. R. Civ. P. 37(b)(2)(A)(vii)).

Again, the enumerated remedies within Rule 37 are non-exhaustive, and district courts have broad discretion to craft appropriate orders to remedy the particular discovery failing under review.

IV. How Have the Rules Changed for Electronic Evidence?

As noted in the Introduction, Rule 37(e) was completely rewritten to ensure consistency regarding sanctions arising from loss of ESI. Also as noted in the Introduction, this Rule was drafted to preclude imposition of the most significant sanctions in response to negligent or even reckless conduct. Because existing literature generally analyzes the amended Rule at its one-year anniversary, the authors have elected to focus this paper on those federal court cases from 2017 only. For ease of reference, the new Rule 37(e) reads as follows:

> (e) **Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

A. Rule 37(e) as the Sole Remedy for Loss of ESI?

New Rule 37(e) was intended to provide sole remedy for loss of ESI, as demonstrated by the Advisory Committee Note:

> New Rule 37(e) . . . authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. *It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used (emphasis added)*.

Nonetheless, several cases have looked to inherent authority or other rules in the context of ESI-related sanctions:

- In *OmniGen Research v. Yongqiang Wang*, No. 6:16-CV-00268-MC, 2017 WL 2260071, at *9 (D. Or. May 23, 2017), the court relied on Rules 37(e), 37(b)(2), and its inherent authority to issue a default judgment as a spoliation sanction in a matter in which it had previously issued a preliminary injunction directing the defendant to preserve certain ESI.
- In *United States ex rel. Scutellaro v. Capitol Supply, Inc.*, No. CV 10-1094 (BAH), 2017 WL 1422364, at *10 (D.D.C. Apr. 19, 2017), the court found the defendant had failed to retain records as required by regulation and contract but not in anticipation of litigation. Consistent with a 2015 Advisory Committee Note, the court determined Rule 37 was inapplicable and resolved instead under its inherent power.
- Finally, in *Ottoson v. SMBC Leasing & Fin., Inc.*, No. 13 Civ. 1521, 2017 WL 2992726, at *11 (S.D.N.Y. July 13, 2017), the court noted its inherent authority to award attorneys' fees and costs to punish and deter in addition to a spoliation sanction analyzed under Rule 37(e).

Taken together, these cases reflect that ESI spoliation issues are analyzed primarily under Rule 37 but that inherent and other authority may buttress Rule 37 analysis, especially for egregious conduct.

B. Application of "New" Rule

Despite the fact that the effective date of amended Rule 37(e) was December 1, 2015, several 2017 court cases addressed application of the new versus the old rule.

As part of his transmittal letter to Congress, Chief Justice Roberts included an order presumptively directing the new Rules be applied to pending actions. 13 2015 U.S Order 0017 (directing new Rules to be applied to pending matters "insofar as just and practicable").

Not surprisingly, only three 2017 decisions explicitly considered this issue.

- In *Hefter Impact Techs., LLC v. Sport Maska, Inc.*, No. CV 15-13290-FDS, 2017 WL 3317413, at *6 (D. Mass. Aug. 3, 2017), the court applied the new Rule to a case filed three months before the effective date and answered after the effective date.
- In *Citibank, N.A. v. Super Sayin' Publ'g, LLC*, No. 14-CV-5841 (SHS), 2017 WL 946348, at *2 (S.D.N.Y. Mar. 1, 2017), the court applied the new Rule where a spoliation motion was made more than nine months after the new Rule's effective date and where the moving party cited the current version of the Rule in its motion.
- However, in *Rhoda v. Rhoda*, No. 14 Civ. 6740 (CM), 2017 WL 4712419, at *3 (S.D.N.Y. Oct. 3, 2017), the court applied the old Rule where the alleged spoliation occurred in March 2014, the case was commenced in August 2014, where the defendant first raised the spoliation issue in 2015, but where the instant spoliation motion was not filed until September 2017.

While the *Rhoda* outcome seems appropriate, given that 2018 draws near it would seem increasingly unlikely to expect courts to apply the pre-2015 Rule in future matters.

C. Threshold Requirements

While the majority of 2017 decisions focus on the intent to deprive and proper application of subsections (e)(1) and (e)(2), a number of interesting cases analyze elements of this language: "If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery . . . ." Fed. R. Civ. P. 37(e).

a. Electronically Stored Information

The initial question is whether ESI – as opposed to tangible evidence – is at issue, and several 2017 cases evaluate this with the following results:

- Cellphone video is ESI. *Simon v. City of New York*, No. 14-CV-8391 (JMF), 2017 WL 57860, at *7 (S.D.N.Y. Jan. 5, 2017).

- Jail video recording system probably is not ESI. *Oppenheimer v. City of La Habra*, No. SACV1600018JVSDFMX, 2017 WL 1807596, at *7 (C.D. Cal. Feb. 17, 2017) ("Rule 37 does not directly address destruction of video equipment or video footage, so the Court will examine whether sanctions are appropriate under its inherent authority").
- Electronic information on a "crashed" laptop is ESI. *Moody v. CSX Transportation, Inc*., No. 07-CV-6398P, 2017 WL 4173358, at *10 (W.D.N.Y. Sept. 21, 2017).
- Electronic components of a pickup truck may constitute ESI. *Below by Below v. Yokohama Tire Corp.*, No. 15-CV-529-WMC, 2017 WL 764824, at *2 (W.D. Wis. Feb. 27, 2017) ("Left unexplained is how plaintiffs ended up with the single, allegedly defective tire without preserving the other three; why other steps were not taken to preserve similar evidence, including possible electronic evidence that must be preserved under Fed. R. Civ. P. 37(e)").

b. Lost

Only one case addressed the common-sense point that sanctions or other remedial measures cannot be ordered for ESI that is not lost. In *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, No. 16-CV-7634 (JMF), 2017 WL 4334138, (S.D.N.Y. Sept. 28, 2017), the court noted a spoliation motion "border[ed] on frivolous, for the simple reason that they cannot even show that the evidence at issue was 'lost.'" *Id.* at *1.

c. Should Have Been Preserved or was Lost Because a Party Failed to Take Reasonable Steps to Preserve it

These provisions are discussed together because they are so analyzed by courts. Restated, courts often discuss failure to take reasonable steps to preserve in the context of existence of a preservation duty and scope thereof.

Three 2017 cases resolved either that ESI should not have been preserved or that the responding party's preservation efforts were not unreasonable because the requesting party did not demonstrate the relevance of lost ESI:

- *Simon*, 2017 WL 57860 at *7 (finding purported relevance of deleted cellphone video to be "pure speculation").
- *Robinson v. Renown Reg'l Med. Ctr.*, No. 3:16-CV-00372-MMDWGC, 2017 WL 2294085, at *3 (D. Nev. May 24, 2017) (declining to issue sanctions in part on lack of reasonable awareness of the potential relevance of phone system data).
- *HCC Ins. Holdings, Inc. v. Flowers*, No. 1:15-CV-3262-WSD, 2017 WL 393732, at *5 (N.D. Ga. Jan. 30, 2017) (finding only "bare speculation" that relevant data would have ever existed on a destroyed laptop computer).

Similarly, in *United States ex rel. Scutellaro,* at *10, the court found that failure to preserve records as required in violation of regulatory and contractual requirements did not run afoul of Rule 37 since there was no suggestion that missing information was destroyed because of litigation relevance.

In one unrelated case, a court declined to sanction several defendants for destruction of video because of their lack of possession, custody, or control over it. *Storey v. Effingham Cty.*, No. CV415-149, 2017 WL 2623775, at *2 (S.D. Ga. June 16, 2017). Though not discussed in these explicit terms, the court found that they were not required to take any steps to ensure preservation.

d. Cannot be Restored or Replaced Through Additional Discovery

Although this requirement appears more frequently discussed in the context of Rule 37(e)(1)'s requirement of prejudice, one 2017 case explicitly used this provision to deny relief under Rules 37(e)(1) or 37(e)(2):

> As an initial matter, Eshelman has not established one of the threshold elements of Rule 37(e)—namely, that the lost ESI "cannot be restored or replaced through additional discovery . . . ." Here, while the internet browser search information was automatically deleted and cannot be restored, other avenues of discovery are likely to reveal information about the searches performed in advance of the investor presentation. For example, Eshelman could seek information about the internet searches performed by the individuals who prepared the investor presentation through deposition testimony. *Eshelman v. Puma Biotechnology, Inc.*, No. 7:16-CV-18-D, 2017 WL 2483800, at *5 (E.D.N.C. June 7, 2017).

D. Relief Under Rule 37(e)(1)

Only after the threshold requirements have been met do courts address remedial measures available under Rule 37(e)(1): "upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice."

Several courts in 2017 have declined to order *any* measures due to lack of prejudice:

- *Hefter Impact Technologies*, 2017 WL 3317413 at *7-8 (finding it unlikely the plaintiff suffered prejudice from routine wiping of a laptop computer given production of other emails and deposition testimony).
- *Eshelman*, 2017 WL 2483800 at *5 (finding the requesting party had not demonstrated any non-speculative prejudice resulting from destruction of marginally-relevant web browser search history).
- *Snider v. Danfoss, LLC*, No. 15 CV 4748, 2017 WL 2973464, at *7 (N.D. Ill. July 12, 2017), *report and recommendation adopted*, No. 1:15-CV-

04748, 2017 WL 3268891 (N.D. Ill. Aug. 1, 2017) (finding no prejudice and, therefore, "No Harm; no foul").

- *Bouchard v. United States Tennis Ass'n, Inc.*, No. 15CIV5920AMDLB, 2017 WL 3868801, at *2 (E.D.N.Y. Sept. 5, 2017) (finding no prejudice arising from destroyed video recordings where other video recordings were promptly produced and where favorable deposition testimony existed).

Similarly, two courts ordered additional discovery to determine existence of any prejudice: *Zamora v. Stellar Mgmt. Grp., Inc.*, No. 3:16-05028-CV-RK, 2017 WL 1362688, at *3 (W.D. Mo. Apr. 11, 2017) and *ILWU-PMA Welfare Plan Bd. of Trustees & ILWU-PMA Welfare Plan v. Connecticut Gen. Life Ins. Co.*, No. C 15-02965 WHA, 2017 WL 345988, at *6–7 (N.D. Cal. Jan. 24, 2017).

Where prejudice *is* found, the 2015 Advisory Committee Notes provide examples of curative measures:

> In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting 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, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

The most common curative measure ordered in 2017 is the type of jury instruction envisioned by the Advisory Committee. Such instructions have been ordered four times in 2017: *Storey*, 2017 WL 2623775 at *5; *Jenkins v. Woody*, No. 3:15CV355, 2017 WL 362475, at *18 (E.D. Va. Jan. 21, 2017); *Mueller v. Swift*, No. 15-CV-1974-WJM-KLM, 2017 WL 3058027, at *5 (D. Colo. July 19, 2017); and *Barry v. Big M Transportation, Inc.*, No. 1:16-CV-00167-JEO, 2017 WL 3980549, at *8 (N.D. Ala. Sept. 11, 2017).

Three other measures were ordered in three different cases:

- Exclusion of evidence. *Jackson v. Haynes & Haynes, P.C.*, No. 2:16-CV-01297-AKK, 2017 WL 3173302, at *4 (N.D. Ala. July 26, 2017).

- Payment of costs (despite not being mentioned as an available option in the Advisory Committee Notes). *New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, No. 1:12-CV-00526 MV/GBW, 2017 WL 3535293, at *13 (D.N.M. Aug. 16, 2017).
- A permissible adverse inference jury instruction (despite appearing to be an (e)(2)-only option). *Montgomery v. Iron Rooster-Annapolis, LLC*, No. CV RDB-16-3760, 2017 WL 1902699, at *2 (D. Md. May 9, 2017).

In summary, a significant number of 2017 courts applying Rule 37(e)(1) resolved no prejudice. Several others ordered additional discovery to better ascertain prejudice. Those courts finding prejudice ordered a variety of curative measures, most commonly in the form of a jury instruction.

E. Relief Under Rule 37(e)(2)

Assuming threshold requirement are found, courts may consider significant sanctions under Rule 37(e)(2):

> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

Note that an "intent to deprive" *must* be found before adopting any of these measures. The Advisory Committee Note explains that a showing of prejudice is not required because it can be inferred from intent to deprive.

So far in 2017, seven courts have issued sanctions under Rule 37(e)(2) after finding an intent to deprive. Of these, five resulted in adverse inference instructions. Most of these appear to be of the permissive variety, while others are unclear or – in one case – to be resolved later. Here is an explanation of the conduct that resulted in these findings of intent to deprive:

- Loss of train accident data purportedly uploaded to centralized storage but not confirmed for years after the accident and during which time the intermediate laptop had "crashed" and was discarded, apparently without any forensic attempt at data recovery. *Moody*, 2017 WL 4173358 at *7.
- Failure to preserve text messages from old phone despite knowledge of relevance and despite preservation of (irrelevant) pictures. *Ronnie Van Zant, Inc. v. Pyle*, No. 17 CIV. 3360 (RWS), 2017 WL 3721777, at *9-10 (S.D.N.Y. Aug. 28, 2017).

- Disposition of a laptop and an external hard drive despite knowledge of litigation relevance. *TLS Mgmt. & Mktg. Servs. LLC v. Rodriguez-Toledo*, No. CV 15-2121 (BJM), 2017 WL 1155743, at *2 (D.P.R. Mar. 27, 2017).
- Intentional destruction of ESI by an affirmative act, which was not credibly explained. *Alabama Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 746 (N.D. Ala. 2017).
- After knowledge of litigation relevance, deletion of relevant emails purportedly because the computer was acting "sluggish." *Edelson v. Cheung*, No. 213CV5870JLLJAD, 2017 WL 150241, at *4 (D.N.J. Jan. 12, 2017).

In *Morrison v. Veale*, No. 3:14-CV-1020-TFM, 2017 WL 372980, at *6-7 (M.D. Ala. Jan. 25, 2017), the court found the plaintiff had logged onto a shared Gmail account to delete relevant emails and to lock other users from accessing the account. As a sanction in the wage underpayment claim, the court precluded her from contesting the accuracy of the official timesheet.

Finally, in *OmniGen*, 2017 WL 2260071 at 17, and in response to repeated destruction of ESI in violation of court order, the court ordered a default judgment in favor of the plaintiff, who alleged trade secret misappropriation and similar matters.

As can be seen by these 2017 cases, egregious facts were found in these cases, in which each court found an intent to deprive. And not surprisingly, in such cases the *least*-significant sanction was issuance of an adverse inference instruction.

V. Conclusion

Because not all instances involve ESI this paper briefly addressed the unchanged portions of Rule 37 addressing discovery of non-ESI including the types of conduct that are eligible for sanctions and what those sanctions are. However, the bulk of the analysis focused on the changes to Rule 37(e) addressing ESI and the shift from the pre-2015 amendment version of the rule requiring a culpable state of mind at the time of destruction of the evidence for the conduct to be eligible for sanctions. Due to the uncertain nature of the application of this rule by the various courts the new Rule 37 was introduced in 2015 to address the exorbitant costs taken on by potential litigants to preserve this voluminous ESI in an attempt to comply with the inconsistent requirements of the federal circuits. The drafters of the new Rule 37(e) designed the completely rewritten section to ensure that the standard of culpability for the most severe sanctions was higher than mere negligent or even reckless conduct. While this new subsection was intended by the drafters to provide the sole remedy for loss of ESI for the sake of consistency among the circuits its implementation has not foreclosed the reliance of the courts on their inherent authority to determine means of addressing spoliation, particularly in cases of egregious conduct.

A handful of 2017 cases addressed the application of the new Rule 37(e) versus the old version, however, given that we are approaching three years under the 2015 amended version it appears to be less and less probable that courts would attempt to apply the older, pre-2015, version of Rule 37(e) in future litigation. In addressing a spoliation claim involving ESI there are various threshold requirements to be met. First, is the claim addressing tangible evidence or ESI; second, is this ESI lost; third, the ESI should have been preserved or was lost due to a party's failure to take reasonable steps to preserve it; and finally, the ESI cannot be restored or replaced through additional discovery.

Only once these threshold requirements have been met can courts move to the question of relief under Rule 37(e)(1), which requires a "finding [of] prejudice to another party from loss of the information." In making this determination of prejudice, courts have the ability to order additional discovery. *See Zamora*, 2017 WL 1362688 at *3 and *ILWU-PMA*, 2017 WL 345988 at *6–7. The 2015 Advisory Committee Notes provide a non-exhaustive list of curative measures for situations where prejudice is found, including:

> forbidding the party that failed to preserve information from putting on certain evidence permitting 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, other than instructions to which subdivision (e)(2) applies.

The aforementioned jury instruction has been the most common curative measure under Rule 37(e)(1) in 2017 and has been ordered four times. *Storey*, 2017 WL 2623775 at *5; *Jenkins*, 2017 WL 362475 at *18; *Mueller*, 2017 WL 3058027 at *5; and *Barry*, 2017 WL 3980549 at *8. However, other courts have ordered the exclusion of evidence (*Jackson*, 2017 WL 3173302 at *4), payment of costs (*New Mexico Oncology & Hematology Consultants, Ltd.*, 2017 WL 3535293 at *13), and a permissible adverse inference jury instruction (*Montgomery*, 2017 WL 1902699at *2). The facts that payment of costs was not mentioned in the Advisory Committee Notes as an available option and that adverse inference jury instructions appear to only be available under Rule 37(e)(2) did not bar the application of these other measures.

Where the threshold requirements are met and the court is able to find that "the party acted with the *intent to deprive* another party of the information's use" (*emphasis added*) the significant sanctions under Rule 37(e)(2) become available. A separate showing of prejudice is not required because it can be inferred from the intent to deprive. Advisory Committee notes to 2015 amendment. Sanctions have been issued under Rule 37(e)(2) seven times so far in 2017 for conduct typically involving some knowledge of relevance to litigation. In these cases with egregious facts the baseline for sanctions began at the issuance of an adverse inference instruction and one case even went so far as to grant a default judgment in favor of

the plaintiff where ESI was repeatedly destroyed in violation of a court order. *OmniGen*, 2017 WL 2260071 at 17.

In conclusion, the new Rule 37(e) has sought to establish consistency in the application of sanctions by the various courts by assigning more specific levels of culpability to significant sanctions. Thereby attempting to decrease the burden on litigants and the associated costs of maintaining voluminous ESI. However, these changes do not mean that litigants who act egregiously will have any less significant of sanctions assessed against them in an attempt to redress such conduct. Further, the courts still maintain their inherent authority to determine appropriate sanctions for spoliation, even if this power is not expressly stated in the 2015 amended version of Rule 37.