logikcull

The End of Sanctions?

RULES REVISIONS AND GROWING EXPERTISE ARE "DE-RISKING" EDISCOVERY

Executive Summary

The End of Sanctions and the De-Risking of eDiscovery

The 2015 amendments to the Federal Rules of Civil Procedure have drastically reduced the risk of spoliation sanctions, creating an environment where the threat of incurring liability through the handling of traditionally risky discovery processes is significantly diminished.

Exhaustive new research by Logikcull shows that in the years following the 2015 amendments:

- Spoliation sanctions have declined by 35%
- The severest sanctions are denied in 4 out of 5 cases
- Only one in every 8,000 federal civil court cases involves motions for spoliation sanctions

The result is a 'de-risking' of eDiscovery, allowing practitioners to bring more of the discovery process in house, without the fear that has long accompanied eDiscovery practice. Read on to find out why.

Contents

INTRODUCTION

eDiscovery Without Fear

"The end result is a 'de-risking' of eDiscovery, allowing practitioners to bring more of the discovery process in house, without the fear that has long accompanied eDiscovery practice."

Are we seeing the end of eDiscovery sanctions? The data indicates a powerful trend in that direction. In the three years since the amendment of Rule 37(e) of the Federal Rules of Civil Procedure in December 2015, the number of federal cases involving spoliation sanctions has plummeted.

Exhaustive new research conducted by Logikcull shows that court issuance of spoliation sanctions has decreased by 35 percent from their height in 2014. Since 2016, more than three out of every four 37(e) sanctions motions have been denied. Such motions are, on average, denied in whole or in part in 76 percent of cases. When the stakes are the highest and the most severe sanctions are at issue, those motions were denied in whole or in part in *82 percent* of cases in 2018.

This decline in sanctions, combined with a small, but significant growth in the bar's technology expertise overall and the emergence of easier-to-use discovery tools, is leading to broad adoption of "do it yourself" discovery practices, where incurring liability through the handling of traditionally risky discovery processes is far less of a concern.

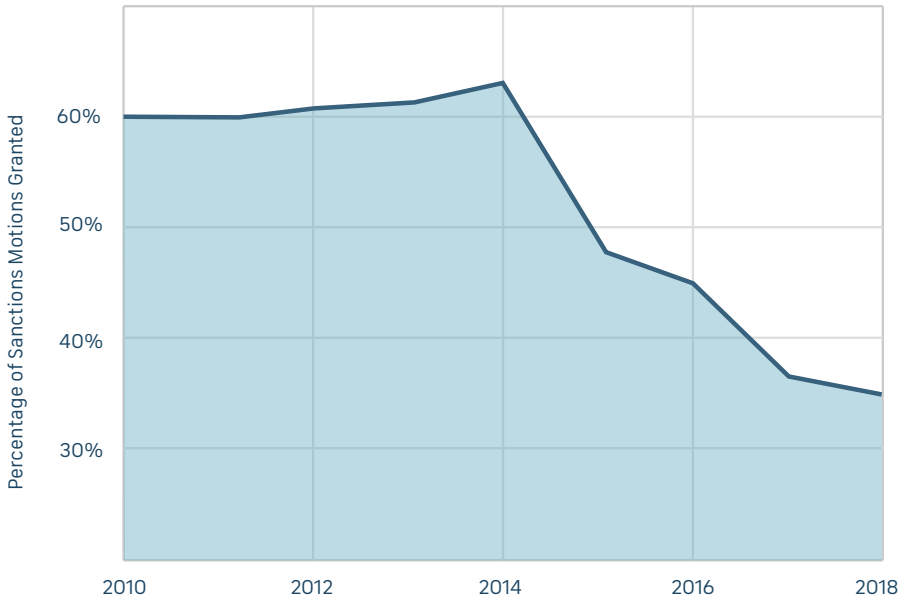
The end result, we posit, is a "de-risking" of eDiscovery, allowing practitioners, whether corporate legal departments, small firms, or their Big Law counterparts, to bring more of the discovery process in house, without the fear that has long accompanied eDiscovery practice. This change, too, has allowed corporate legal departments to focus on other imperatives, from cybersecurity to GDPR, while realizing significant cost savings[1]. In one example, one of the world's largest companies was able to realize truly significant savings by in-housing much of their eDiscovery work and dramatically reducing data reviewed by outside counsel.[2]

The implications of this change have not been lost on innovation-focused practitioners. "When the amendments were approved, in-house lawyers were ecstatic," says Mira Edelman, former Associate General Counsel of eDiscovery and Information Governance at Facebook and Senior Counsel and Discovery Manager at Google at the time of the 2015 amendments. "The new Rule gave us power to influence outside counsel who were more conservative in their approach to preservation. It gave in-house lawyers the legal authority to make decisions that weren't driven by uncertainty, to focus on creating defensible workflows, and to begin thinking about corporate information governance. It was freeing."

1. *See* Norton Rose Fulbright, 2017 Litigation Trends Annual Survey (2017), *available at*: http://www.nortonrosefulbright.com/files/20171025-2017-litigation-trends-annual-survey-pdf-157870 (noting that "spending on disputes as a proportion of the organization's revenue is least when internal spend is between 41% and 60% of overall budget…").
2. *See* Logikcull, How Walmart In-Houses Discovery to Take Control of Costs and Data (2019), *available at:* https://www.logikcull.com/public/files/Walmart-Case-Study.pdf

Sanctions Today: By the Numbers

DECLINE OF SANCTIONS, 2010-2018



82%

denial rate, in whole or in part, of severe sanctions in 2018

76%

denial rate of Rule 37(e) sanctions, in whole or in part, in all federal civil cases from 2016 through 2018

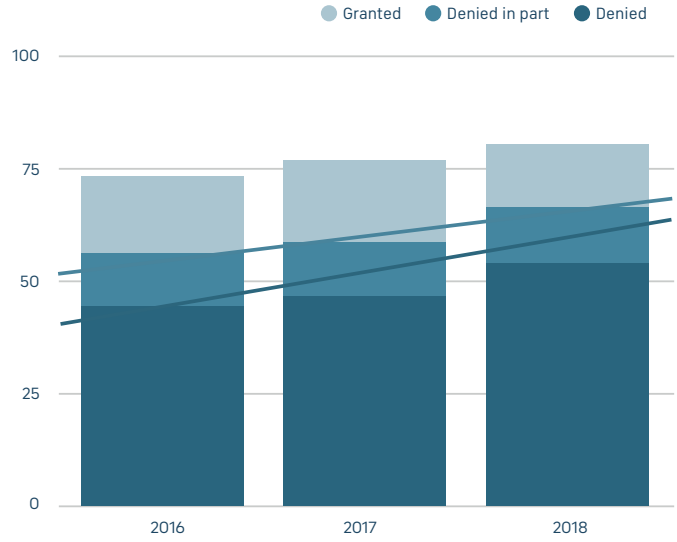
35%

decline in issuance of spoliation sanctions from 2016 through 2018 compared to their peak in 2014

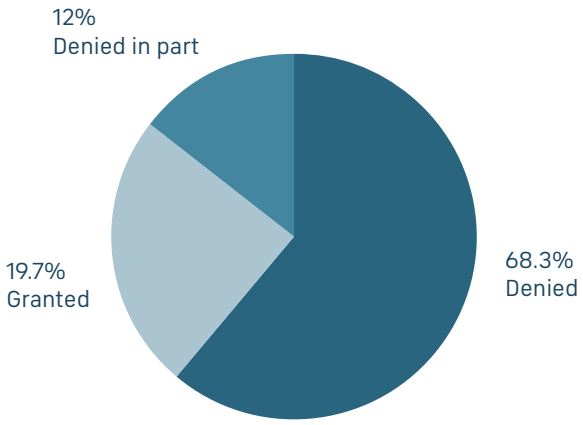
1 in 8,000

Approximate rate of federal cases where Rule 37(e) sanctions were granted from 2016 to 2018

SANCTIONS OUTCOMES, 2016-2018



RULE 37(E)(2) SANCTIONS OUTCOMES, 2016-2018



METHODOLOGY

To measure the impact of the 2015 Federal Rules amendments on the issuance of spoliation sanctions, Logikcull analyzed nearly 700 opinions dealing with sanctions for the spoliation of ESI in federal, civil district court litigation, from 2012 through 2018.[3] Those cases were then categorized by the type of sanctions sought. Adverse inferences, adverse jury instructions, dismissal or default judgement, the measures currently reserved to Rule 37(e)(2), were referred to as Rule 37(e)(2) sanctions, regardless of whether that subsection was specifically named.

Other sanctions, such as evidence preclusion or attorneys' fees, were treated as Rule 37(e)(1) sanctions, for the subsection allowing courts to take "measures no greater than necessary to cure the prejudice." In most cases, movants sought sanctions allowable under both Rule 37(e)(1) and (e)(2).

The outcomes of each of the 684 relevant opinions were then further tallied, based on whether sanctions motions were denied in whole, granted in part and denied in part, or granted fully. Two past surveys were also consulted to identify historical trends, the Federal Judicial Center's 2011 study surveying civil cases filed in 19 federal district courts from 2007 to 2008,[4] and the Gibson Dunn year-end electronic discovery updates from 2009 through 2012.[5]

3. Cases were collected from Bloomberg Law, which was determined to have the most comprehensive results after consulting Bloomberg, Lexisnexis, Westlaw, and Google Scholar databases. For cases predating December 1, 2015, keyword searches were used to identify relevant opinions, targeting the keywords spoliation, sanctions, Rule 37(e), adverse inferences, electronic evidence, ESI, and/or eDiscovery and their permutations. For opinions issued after December 1, 2015, cases citing Rule 37(e) were collected. For both data sets, the cases were reviewed, false positives and irrelevant cases excluded, and the total number culled down for analysis. Post-amendment spoliation cases that do not cite or discuss Rule 37(e) remain outside the scope of this study.

4. Emery G. Lee III, Fed. Judicial Ctr., Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases: Report to the Judicial Conference Advisory Committee on Civil Rules (2011), *available* at: https://www.uscourts.gov/sites/default/files/federal_judicial_center.pdf.

5. See, e.g., Gareth T. Evans et al., 2012 Year-End Electronic Discovery and Information Law Update (2013), *available at* https://www.gibsondunn.com/2012-year-end-electronic-discovery-and-information-law-update/.

SANCTIONS AFTER 2015

Three out of Four Motions for Spoliation Sanctions Are Denied

"When compared to historical trends, the numbers point to an unmistakable decline in spoliation sanctions and a significant barrier to receiving the most severe sanctions."

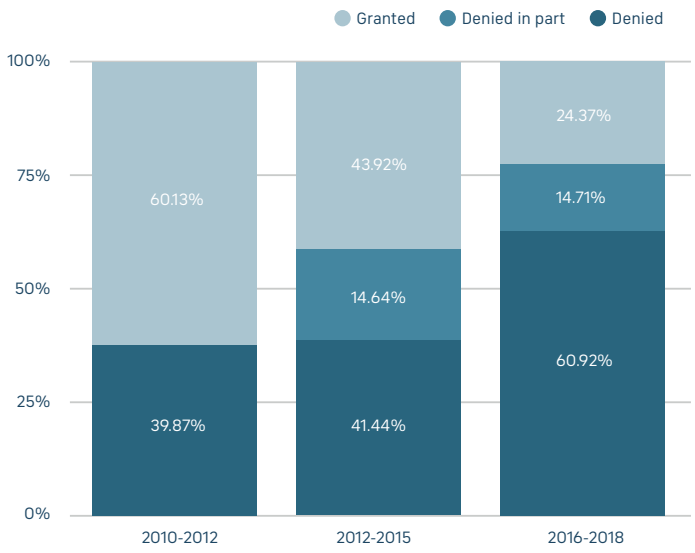
The 2015 amendments to Federal Rule of Civil Procedure 37(e)[6] have brought significant change to how courts are treating spoliation sanctions and a significant reduction in such sanctions' availability. A survey of recent spoliation case law issued between 2016 and 2018 leaves no question that such sanctions are hard to come by—and getting harder.

The Rapid Decline of Spoliation Sanctions Issued

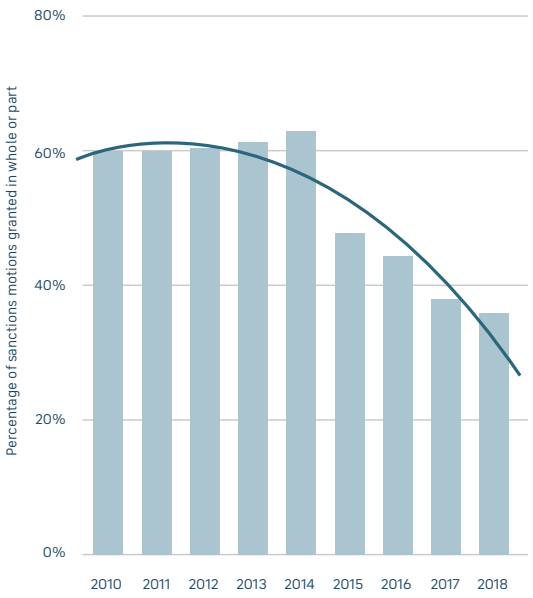
Since January 1, 2016, federal courts have considered sanctions motions under Rule 37(e) on 237 occasions. Rule 37(e) spoliation sanctions, including both (e)(2) and (e)(1) sanctions, were granted in full or in part in fewer than 40 percent of cases—and when movants seek the strictest sanctions, courts are even more disinclined to grant them.

When compared to historical trends, the numbers point to an unmistakable decline in spoliation sanctions and a significant barrier to receiving the most severe sanctions. From 2010 to their peak in 2014, the rate of spoliation sanctions granted remained relatively stable, ranging from 60 percent to 63 percent. But this trend starts to reverse around 2015. That year saw a decrease in spoliation sanctions, with just 45 percent of motions granted, and that number has continued to drop steadily in the past three years. In 2018, only 36 percent of sanctions were granted in whole or in part, meaning litigants are now more than one third less likely to be sanctioned for spoliation than they were in 2014.

SANCTIONS OUTCOMES, 2010-2018



SANCTIONS OUTCOMES, 2010-2018



6. For the full text of Rule 37, see https://www.law.cornell.edu/rules/frcp/rule_37. For the full amendment, see the Report of the Judicial Conference Committee on Rules of Practice and Procedure (2014) available at https://www.uscourts.gov/sites/default/files/fr_import/ST09-2014.pdf

The Trend Away From Sanctions Grows Stronger By the Year

"When it comes to Rule 37(e) remedies, the harshest sanctions are the most elusive."

Sanctions are not just more difficult to obtain when compared to pre-amendment years, however. Rule 37(e) sanctions have become increasingly difficult to obtain over the three years themselves as well. In 2016, as courts began wrestling with the new rules, they denied motions for Rule 37(e) sanctions in three out of four cases. Across 73 decisions, 56 percent issued outright denials, while 21 percent were denied in part and 23 percent granted. By 2018, Rule 37(e) sanctions were denied outright in 64 percent of the 86 decisions issued, denied in part in 11 percent, and granted in 26 percent.

RULE 37(E) MOTION OUTCOMES, 2016-2018

Year	Denied	Denied in part	Granted
2016	41	15	17
2017	49	11	19
2018	55	9	22

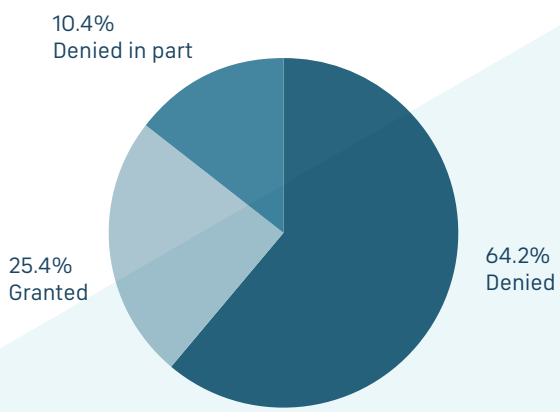
SEVERE SANCTIONS ARE INCREASINGLY OFF THE TABLE

When it comes to Rule 37(e) remedies, the harshest sanctions are the most elusive. For the three-year period following the amendments, when seeking adverse inferences, adverse jury instructions, dismissal or default judgement, the remedies reserved by the Federal Rules of Civil Procedure to Rule 37(e)(2), such motions were denied in more than 80 percent of cases, with 68 percent being denied in full and 12 percent denied in part. When lesser sanctions were sought, such as additional discovery, the exclusion of evidence, or other ameliorative measures allowed by Rule 37(e)(1), courts were slightly more permissive, denying such motions outright in 65 percent of cases and denying them in part in 16 percent. These trends, too, have become more distinct over the years. While the number of Rule 37(e) sanctions motions granted outright remains consistent, at 23 percent in 2016 and 26 in 2018, mixed rulings in which sanctions are granted in part and denied in part dropped 10 percentage points, from 21 percent in 2016 to just 10 percent in 2018—demonstrating an increasing polarization of outcomes and the increased likelihood that spoliation sanctions will be denied outright.

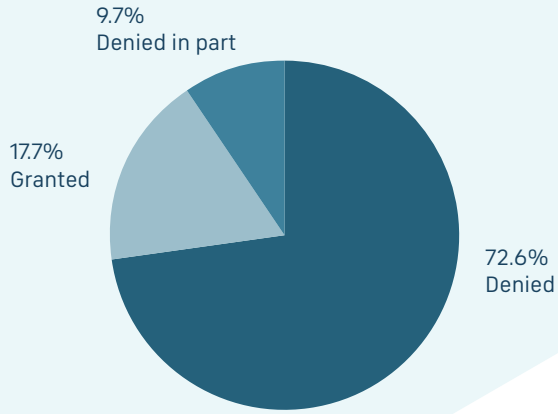
As a result, 2018 saw the greatest rate of denial of spoliation sanctions across the board, with the most severe sanctions granted fully in less than one out of every five cases. While 37(e)(1) sanctions were denied fully in 64 percent of cases, and in part in 10 percent, leaving 25 percent granted in full, 37(e)(2) cases were denied fully in 73 percent of cases, denied in part in 10 percent, and granted in full in only 18 percent.

To phrase it differently, in 2018, Rule 37(e)(1) sanctions were 43 percent more likely to be granted in full than those measures reserved to subsection (e)(2).

2018 SANCTIONS OUTCOMES, 37(E)(1)



2018 SANCTIONS OUTCOMES, 37(E)(2)



> "In 2018, Rule 37(e)(1) sanctions were 43 percent more likely to be granted in full than those measures reserved to subsection (e)(2)."

HOW WE GOT HERE: BY THE NUMBERS

$8.7 Million

sanction granted for eDiscovery misconduct in *Qualcomm v. Broadcom*[7]

949

citations to *Zubulake*, 2004-2015[8]

26

ESI spoliation sanctions granted in 2007[9]

1 in 80,000

approximate odds of getting sanctioned for ESI spoliation in 2007[10]

7. *Qualcomm, Inc. v. Broadcom Corp.*, No. 05-cv-1958-B (S.D. Cal. 2008).

8. Based on a review of cases in Bloomberg Law citing to *Zubulake v. UBS Warburg*, No. 02 Civ. 1243, (S.D.N.Y. May 13, 2003), *Zubulake v. UBS Warburg*, 216 F.R.D. 280 (S.D.N.Y. 2003), *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003), and *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004).

9. See CFJ study, *supra* note 4.

10. Based on a search of the Federal Judicial Center's Integrated Database, identifying 236,762 federal civil cases terminated between January 1 and December 31, 2007. See Federal Judicial Center, Integrated Database (IDB), *available at*: https://www.fjc.gov/research/idb

The Beginnings of eDiscovery and the Outsized Impact of Spoliation Sanctions

How did we get here and why are spoliation sanctions, in particular, so important to the history and practice of eDiscovery?

Since the emergence of eDiscovery as a significant practice area and an inextricable part of litigation in the early 2000s, adoption of discovery best practices has been motivated by both the carrot of evidentiary insights and the stick of sanctions.[11]

In many practitioners' minds, the stick has loomed much larger than the carrot. That is likely the result of severe and highly publicized judgements like those *Zubulake v. UBS, Coleman v. Morgan Stanley*, and *Qualcomm v. Broadcom*[12] in which offending parties suffered heavy monetary and evidentiary sanctions. Such high-profile cases undoubtedly provoked anxiety—and not just due to the fear of potentially case-dispositive sanctions. In *Qualcomm*, not only was the plaintiff company faced with an $8.6 million sanction, six of their attorneys were referred to the California State Bar Association's disciplinary board. The threat of client malpractice suits, occasionally accompanying failures of eDiscovery competence such as these, also loomed large—no more so than following the emergence of cases like *J-M Manufacturing Company Inc v. McDermott Will and Emery*[13], widely believed to be the first ever lawsuit for so-called "eDiscovery malpractice," and against a widely respected international law firm, no less.

As a result, fear of sanctions motivated many lawyers to take the most conservative possible approach. The perception that a mistake with electronically stored information (ESI) could be case- and career-ending gave rise to an entire industry of eDiscovery experts and specialized vendors[14].

Corporations, too, sought to distance themselves from eDiscovery sanctions risks, through over preservation and outsourcing all eDiscovery work to well-heeled law firms, firms whose deep pockets could satisfy whatever penalty a judge imposed for wrongdoing—whether via a malpractice suit, disgorgement of fees, or other means.

The broad fear such cases engendered wasn't always justified—or even rational.

Despite eDiscovery's notorious reputation, spoliation sanctions were not as common, nor as horrific, as they seemed. In 2011, for example, the Federal Judicial Center released a study surveying civil cases filed in 19 federal district courts from 2007 to 2008, the results of which showed that the number of cases involving eDiscovery sanctions was small[15].

The study found only 209 spoliation-related motions, or 1.5 in every thousand civil cases. Only 53 percent of those motions concerned ESI. And only 23 percent of motions involving sanctions for the spoliation of ESI were granted, resulting in fewer than 30 actual sanctions rulings issued. And not a single case involved a dismissal or default judgement for the spoliation of ESI.

11. Though the first federal court opinion to deal with sanctions for the spoliation of ESI dates to the early 1980s, *William T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984), federal cases dealing with eDiscovery sanctions of any type "did not reach an annual total in the double digits until 2004." Dan H. Willoughby et al., Sanctions for E-Discovery Violations: By the Numbers, 60 Duke L.J. 789-864 (2010), *available at*: https://scholarship.law.duke.edu/dlj/vol60/iss3/7.

12. Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422 (S.D.N.Y. 2004)*; Morgan Stanley & Co. v. Coleman (Parent) Holdings, Inc.,* 955 So. 2d 1124 (Fla. 4th DCA 2007)*; Qualcomm, Inc. v. Broadcom Corp.,* 539 F. Supp. 2d 214 (S.D. Cal. 2008).

13. See, e.g., *J-M Manufacturing Co. Inc., v. McDermott Will & Emery,* 2:11-cv-06666 (C.D. Cal. 2018)

14. Reliance on vendors, however, did not always provide the protection sought. See id. (accusing former law firm of malpractice for failure to supervise vendors).

15. See Emery G. Lee, Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases: Report to the Judicial Conference Advisory Committee on Civil Rules, *available at*: https://www.fjc.gov/sites/default/files/2012/LeeSpoli.pdf

2014 Marks an Inflection Point in eDiscovery Sanctions

In the years that followed the FJC study, the discovery landscape shifted noticeably. Starting in the late 2000s, spoliation sanctions which were previously infrequent began to become more commonplace, as ESI became ubiquitous in even the most routine disputes.

The reality was catching up to the fear. According to Gibson Dunn's year-end electronic discovery updates[16], one of the most authoritative sources on the topic, the number of federal cases where parties sought sanctions for spoliation of ESI rose steadily, if marginally, from 2009 to 2012. Cases dealing with sanctions motions increased from 89 in 2009 to 100 in 2010 before reaching a high point in 2011, with 150 cases. More significantly, the percentage of sanctions granted increased, as well. Over the three-year period spanning 2010 through 2012, nearly 60% of spoliation motions resulted in sanctions—a 37 percentage-point increase over the FJC number. That rate remained steady until 2014, when it peaked at 63 percent and began to decline.

1.7x

increase in the likelihood of sanctions issued, 2007 vs. 2014

SPOLIATION MOTIONS GRANTED IN FULL OR IN PART

23%	60%	63%	36%
in 2007	in 2010	in 2014	in 2018

While still representing a sliver of overall federal civil cases at peak levels, the near doubling of spoliation sanctions motions, combined with the judiciary's rising inclination to grant them, had an outsized impact[17] on practitioners' mentality and approach toward electronic discovery. Among the consequences was a palpable chilling effect on parties faced with the prospect of eDiscovery, which resulted, in the

16. See, e.g., Gareth Evans et al., *supra* note 5.

17. Due in no small part to the budding of an influential cadre of widely-read eDiscovery blogs that let no major sanction go unremarked upon.

most extreme instances, in agreements to forego the exchange of ESI altogether[18] for fear of its risks and high costs.

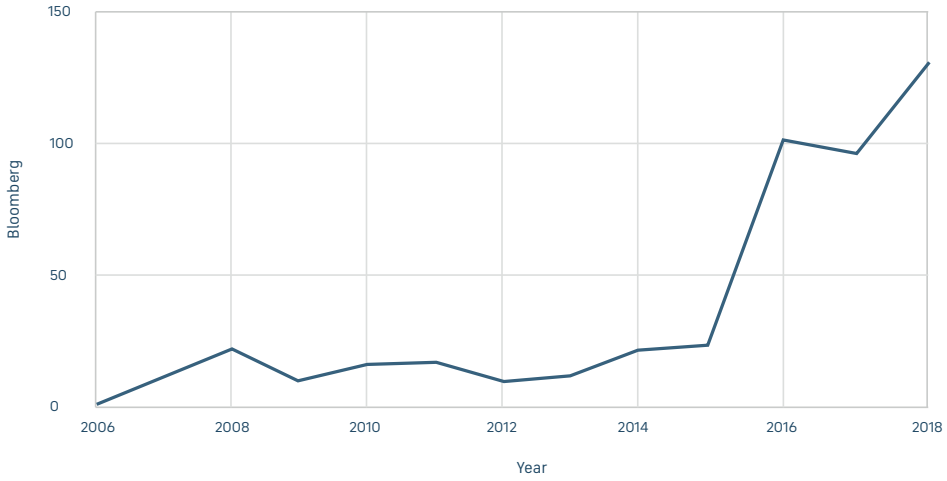
Far more routinely, parties facing complex discovery issues sought to unload both the highly technical work itself and the associated risks to third parties—law firms or vendors—to whom they could pass off liability in the event of a sanctionable offense or otherwise case-dispositive calamity.[19] This forced-sharing of responsibility went hand-in-hand with the widely adopted practice of outsourcing eDiscovery, a long-running approach that has only recently begun to reverse.

The fact that much of the case law at the time followed no one precedent as to the degree of culpability required to impose sanctions did nothing to assuage practitioners' misgivings. Indeed, the version of Rule 37(e) in effect from 2006 to the enactment of the 2015 amendments—the so-called "safe harbor" provision—fell well short of its writers' intent to protect parties from sanctions over ESI lost due to "routine, good-faith operation of... electronic information system(s)" by providing neither guidance for when sanctions could be imposed nor when they were required.

As the Rules Advisory Committee noted of the old regime:

> Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.[20]

RULE 37(E) CICTATION TRENDS



18. Judge Joy Flowers Conti, Chief District Judge for the U.S. District Court for the Western District of Pennsylvania, has noted "conscious choices" by parties in her court to mutually opt out of eDiscovery. In 2015, she told Logikcull that, though the practice was becoming infrequent, it was still occurring "in a small number of cases where the parties were large corporations." See Daniel Miller and Tina Miller, *What the Judges Think: E-discovery Practices and Trends*, 17 J. Allegheny Cnty Bar Ass'n (2015), *available at*:https://www.ediscoverylaw.com/files/2015/04/What-the-judges-think.pdf.

19. Most notably, perhaps, a waiver of confidential material for failure to take reasonable preventive steps. See, e.g., Casey C. Sullivan, *A Clawback Agreement Can't Save Botched Privilege Review*, Closing the Loop (2017), *available at:* https://blog.logikcull.com/a-clawback-agreement-cant-save-botched-privilege-review

DISCOVERY DE-RISKED

How Changing Incentives Are Opening Up Opportunities to Bring eDiscovery In-House

The 2015 amendments sought to address this uncertainty by creating a nationwide spoliation standard that, in theory, limits application of sanctions to instances in which a finding of prejudice against the requesting party has been made, and reserved the most severe penalties only for spoliation where there is a showing that a party acted with the intent to deprive[21] another of ESI.[22]

As the above research shows, these changes have prompted courts to apply Rule 37's protective utility to an unprecedented degree.

New barriers to sanctions, it appears, culminate in a true "de-risking" of discovery. In conjunction with easier-to-use discovery tools and a significant growth in the bar's technology expertise overall,[23] the decline in sanctions is driving the broad adoption of "do it yourself" discovery practices, where incurring liability through the handling of traditionally risky discovery processes is far less likely and where more practitioners, whether lawyers in private practice or in corporate legal departments, are willing to bring their discovery process in house—and to reap the significant cost benefits that come with in-housing eDiscovery.[24]

"New barriers to sanctions, it appears, culminate in a true 'de-risking' of discovery."

21. This is an important distinction that, respected authorities have bemoaned, essentially countenances run-of-the-mill incompetence. Speaking to Logikcull in 2017, U.S. District Judge Shira Scheindlin (Ret.), author of the *Zubulake* rulings, described the effect of the amendment bluntly: "You can't be sanctioned with a heavy sanction without being negligent, grossly negligent, and maybe even being reckless. So, having that comfort may mean that some parties aren't as careful as we would like." See Casey C. Sullivan, *Judge Scheindlin on Proportionality, Technology, and the Future of Discovery*, Closing the Loop (2017), *available at*:https://blog.logikcull.com/judge-scheindlin-goodyear-decision-inherent-authority-sanctions.

22. Notably, the new rule also formalizes two thresholds that must be met prior to the consideration of sanctions: first, that the lost ESI should have been preserved in the first place and, second, that the lost ESI cannot be "restored or replaced" through additional discovery—a remedial measure that, it can be argued, is far easier to meet in an age where most ESI exists in multiples in the cloud or is otherwise easily restorable.

23. See, e.g., American Bar Association, *Vol. V: Litigation Technology and E-Discovery*, Legal Technology Survey Report (2018). See also the commentary to Rule 1.1 of the Model Rules of Professional Conduct (2012), defining "competent representation" to include keeping abreast of "the benefits and risks associated with relevant technology."

24. See *supra* notes 1 and 2.

Part II:

Rule 37(e) in Practice: A Review of Recent Case Law

Want more case law?

Jump to our Amended Rule 37(e) Case Law Cheat Sheet and appendix of 2016-2018 Rule 37(e) decisions.

The trends are clear: Since Rule 37(e) was amended on December 1, 2015, the issuance of sanction has significantly declined. But that doesn't mean the questions surrounding Rule 37(e)'s interpretation and application are settled. Below, we explore the workings of the revised Rule 37(e), outstanding issues regarding the imposition of sanctions under that rule, and survey key spoliation cases issued since its inception.

Until the latest set of eDiscovery-focused amendments to the Federal Rules of Civil Procedure became effective on December 1, 2015, sanctions in eDiscovery under FRCP 37(e) could be imposed for a wide range of standards for a variety of misconduct. To put it simply, it didn't work.

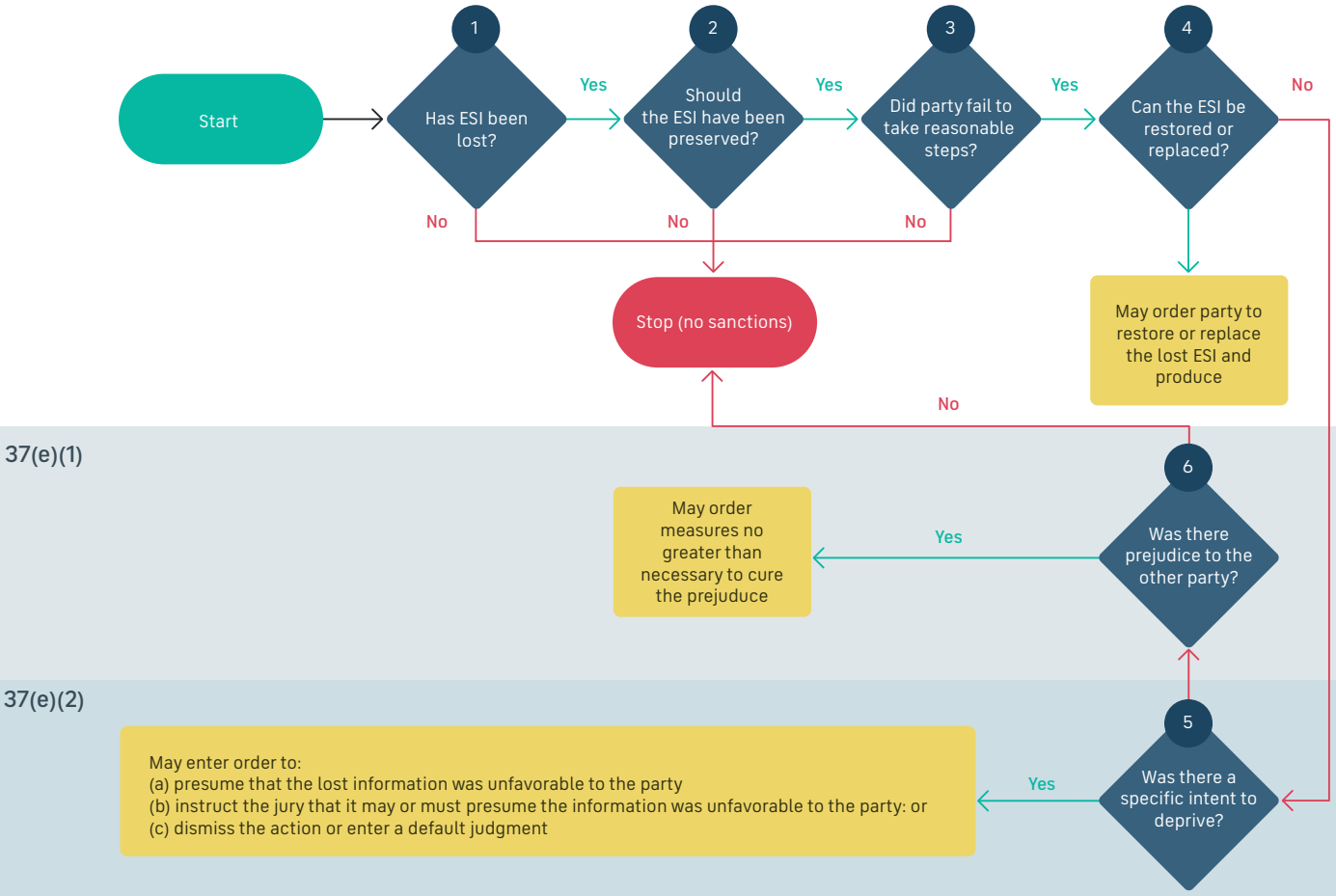
THE NEW RULE 37(E): AN INTRODUCTION

The 2015 amendments replaced these different standards with a single workflow, whereby severe sanctions could only be granted by judges after a finding that the guilty party "acted with the intent to deprive."

> (e) 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.

As some judges have noticed "the 2015 amendment changed the focus of the Rule from one precluding sanctions in designated situations to one authorizing specific measures that a court may take—but restricting the most severe sanctions to scenarios involving bad faith." [26]

26. *Sosa v. Carnival Corp.*, No. 18-cv-20957 (S.D. Fla. Dec. 4, 2018).
27. *Oracle America, Inc. v. Hewlett Packard Enterprise Co.*, No. 16-cv-01393 (N.D. Cal. Aug. 17, 2018)



The above flowchart shows that for a court to enter any of the severe, potentially case-terminating sanctions under subsection (e)(2) there must be a clear finding of a specific intent to deprive—otherwise, "measures no greater than necessary to cure the prejudice" can be entered pursuant to subsection (e)(1).

Indeed, in many ways the question of "intent" supersedes the quest of prejudice. First, parties aggrieved by discovery violations, both real and imagined, nearly always ask for severe sanctions. Between 2016 and 2018, the severest sanctions were sought in 77 percent of all spoliation cases. Second, prejudice is not an issue if specific intent to deprive can be found, as the Advisory Committee Notes make abundantly, and perhaps even redundantly, clear:

"Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information… Subdivision (e)(2) does not require any further finding of prejudice."

Thus, as it was prior to the recent amendments, if bad faith can be proven then the difficult issue of prejudice can be presumed. But where intent has not been found, proving prejudice over ESI that has been lost often remains a difficult hurdle to leap over, as explained below. Further, "specific intent to deprive" under (e)(2) is not an easy standard to meet either, particularly in the earlier stages of litigation, and many sanctions motions that may have once easily prevailed earlier are being denied as a result. Even some of the seemingly easier tests within the Rule, including determining whether ESI has actually been "lost" and if it could be "restored or replaced" have seemingly become tougher to meet, as well.

Indeed, though the amendments still speak of sanctions, the new rule is, in fact, more focused on remedies. Aside from the four measures enumerated in subsection 2 of Rule 37(e)—adverse inferences, adverse jury instructions, and dismissal or default judgement—courts are otherwise instructed to impose no sanctions beyond those "no greater than necessary to cure the prejudice" resulting from spoliation.

Calling the available measures under Rule 37(e) sanctions at all may be a misnomer in most cases. They are explicitly focused on remediating wrong, rather than punishing it. Even the most severe sanctions may not be that severe—after all, how punishing are adverse inference jury instructions when 98 percent of cases never go before a jury?[28]

28. See Robert P. Burns, *The Death of the American Trial*, Northwestern University School of Law Scholarly Commons (2009).

Barriers to Rule 37(e) Sanctions

PROVING THAT ESI HAS BEEN LOST MAY BE HARDER THAN IT SEEMS

One of the first major hurdles to overcome by movants seeking sanctions is proving that the ESI is actually lost and "cannot be restored or replaced through additional discovery." These requirements can blend together at times, and can present a surprisingly difficult issue for movants as well, as the following cases demonstrate.

In a major commercial dispute over support contracts, *Oracle America, Inc. v. Hewlett Packard Enterprise Co.*, No. 16-cv-01393 (N.D. Cal. Aug. 17, 2018), Hewlett Packard Enterprise Company ("HPE") moved for sanctions against Oracle for spoliation of ESI. That ESI consisted of just over 500 emails authored by Oracle's Co-CEO, Mark Hurd, concerning the reasons for customer cancellations of those contracts. HPE claimed that some of the documents produced by other Oracle custodians should also have been produced from Hurd but were not, and they used the documents Oracle produced from other custodians to argue those additional relevant documents existed.

HPE was able to show that there were at least a few emails missing, and that the production from Hurd had been leaner than expected at times. However, the court rejected HPE's claim because the company failed to identify which specific documents were missing. While the court was sympathetic to the difficulty of identifying documents not received because they have been deleted, it held that a claimant must at least show that categories of irreplaceable, relevant documents were likely lost. Since HPE could not do so, the ESI was not technically "lost," and the motion was denied.

Similarly, in *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 327 F.R.D. 96 (E.D. Va. 2018), an antitrust and trade secrets battle between door manufacturers, defendants sought a spoliation jury instruction over missing emails from one of its former employees who had joined with plaintiff to execute a secret scheme to steal manufacturing information. The ex-employee-turned-spy had even gone so far as to send a series of rather incriminating emails to his new employers that were produced through other custodians. In those emails, he:

- Asked his new employers whether it would "be wise for us to take precautions to be sure that we are not forced to send them anything that would give them even the most remote basis to continue with proceedings."
- Proposed "Delet[ing] from all of our email servers, programs, and folders all copies of every email and document we have exchanged to this point, including every copy that is in the 'SENT' email folder."
- Also proposed "delet[ing] all meeting notes" and "hav[ing] me re-compose all of the information that I've sent you to remove indications that any of it is verified current information"; and then "[s]end[ing] you re-drafted versions of all the information that I have provided so far—to eliminate any references that

KEY CASES:

Oracle America, Inc. v. Hewlett Packard Enterprise Co., No. 16-cv-01393 (N.D. Cal. Aug. 17, 2018)

Steves & Sons, Inc. v. JELD-WEN, Inc., 327 F.R.D. 96 (E.D. Va. 2018)

FiTeq Inc. v. Venture Corp., No. 13-cv-01946 (N.D. Cal. Apr. 28, 2016)

> indicate that current informa[ti]on was passed to me by current [JELD-WEN] employees."

After making quite clear his various nefarious schemes, the ex-employee then lamented, over email, that "We can't unring a bell, but perhaps we can replace the bell with one that's more attractive to Steves… and less attractive to J[ELD-WEN]."

Despite this blatant bad faith caught on (virtual) paper, defendants found themselves having difficulty proving that the emails were lost and unrecoverable. In fact, defendant did not seem to put much effort into actually retrieving the ESI, which the court did not appreciate:

"JELD-WEN has done little to establish that Pierce's deleted ESI outside of Steves' productions is unrecoverable…

"After receiving Pierce's paltry response to the Subpoena, JELD-WEN waited several months to even raise the possibility of a forensic examination with Pierce's counsel, and then, when that request was denied, never filed a motion to compel such an examination in this litigation."

However, the court had to reluctantly admit that defendant had indeed crossed "the apparently low bar" for proving the "loss" element. Where the court did not give defendant a pass was on proving that the ESI was unrecoverable:

"JELD-WEN has failed to show that Pierce's lost ESI cannot be replaced or restored. This factor does not require that JELD-WEN 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…

"Here, JELD-WEN could have taken the obvious step of seeking a forensic examination.

"…The Court is ill-equipped to decide the restoration question without such evidence, which is unobtainable at this extremely late date in the litigation."

As a result, the court denied defendant's motion despite all of the dramatic proof of ill-intent.

This was not a unique outcome, as can be seen by *FiTeq Inc. v. Venture Corp.*, No. 13-cv-01946 (N.D. Cal. Apr. 28, 2016). There, the court denied plaintiff's motion in limine for a spoliation instruction to the jury for emails deleted by the defendant's executive vice president. Once again, the moving party had failed to show that the deleted ESI was unrecoverable. Indeed, because the executive's emails, it turned out, were discovered from his old computer as well as obtained and produced from the email accounts of others, they were duplicative of other produced ESI.

Once again, an incompetent spoliator stood in the way of Rule (37)(e) sanctions. And as more and more information moves to the cloud—where it can be backed up, stored, and replicated across dozens, if not hundreds, of machines in dozens, if not hundreds, of versions—we may be reaching a point where the true loss of ESI is incredibly rare.

"And as more and more information moves to the cloud—we may be reaching a point where the true loss of ESI is incredibly rare."

Finding Spoliation, But Not Prejudice

If there is any part of the sanctions regime that has changed the least, it would be the requirement to show prejudice to the party deprived of the lost ESI. Long before the 2015 amendments, the aggrieved party needed to show that they suffered some sort of disadvantage by being deprived of the lost ESI. Of course, proving the crucial importance of ESI that no longer exists is not always an easy task. Indeed, going all the way back to the case that many believe sparked the movement towards eDiscovery, *Zubulake v. UBS*, the court focused on only one lost email that could be identified with certainty—and only in the fifth of five opinions.[29]

That difficulty continues well into the present, as parties that cannot prove the specific intent needed to prevail under Rule 37(e)(2) can find themselves derailed by the requirements of (e)(1). For example, in *Brewer v. BNSF Ry.*, No. cv-14-65 (D. Mont. Feb. 27, 2018), the defendant railroad admitted that, while they sent litigation hold notices to custodians, they did not take any other actions to preserve emails or other documents. The plaintiff sought severe sanctions as a result of this admission. But that was not enough for the court:

"Mr. Brewer seems to argue that failing to meet a preservation obligation is in itself so prejudicial that dispositive sanctions are the only appropriate remedy."

Despite various mistakes by the defendant, the plaintiff simply could not prove what, if anything, was actually missing—and thus how it might have damaged his case. As a result, sanctions were unavailing.

Similarly, the lack of prejudice shielded a defendant biotech company from sanctions in *Eshelman v. Puma Biotechnology, Inc.*, No. 7:16-cv-18 (E.D. N.C. June 7, 2017). Here, the plaintiff sought adverse jury instructions due to the defendants' failure to preserve web browser and search history logs relating to the preparation of an alleged defamatory investor presentation. However, the plaintiff was unable to specify what this missing ESI would have shown. As the court explained:

"In order to impose a sanction under Rule 37(e)(1), the court must have some evidence regarding the particular nature of the missing ESI in order to evaluate the prejudice it is being requested to mitigate."

While further discovery might have helped demonstrate prejudice, the court found that:

"Based on what has been presented to the court at this point, it is difficult to gauge the amount of prejudice to Eshelman due to the lost ESI and what type of remedy would be no greater than necessary to cure that prejudice."

As well, the deprived parties were unable to show prejudice due to the lack of preservation of potentially important ESI in *Best Payphones, Inc. v. New York*, Nos. 1-CV-3924, 1-CV-8506, 3-CV-0192 (E.D.N.Y. Feb. 26, 2016). In a series of cases extending back all the way to the late 1990's, the plaintiff payphone business claimed that various New York regulators deliberately drove his company into bankruptcy.

Yet, despite the ongoing litigation, the plaintiff admittedly failed to implement a legal hold to preserve substantial ESI, including bank statements, revenue reports, and emails with potential third-party buyers for his business. Such information could have shown the value of his business and potential other causes of its decline. The court found that while this ESI likely should have been preserved, there was no proof of any prejudice from its loss. The fact that defendants could have obtained similar information from subpoenas they could have, but chose not to, sent to third parties did not impress the court:

"Defendants' decision not to pursue obvious non-party discovery leads is not a reason to grant the serious spoliation sanctions requested."

Eshelman, Brewer, and *Best Payphones* are not unique cases. For a growing number of litigations, prejudice stands as a significant barrier to sanctions, even when the spoliation of ESI has been found.

KEY CASES:

Brewer v. BNSF Ry., No. cv-14-65 (D. Mont. Feb. 27, 2018)

Eshelman v. Puma Biotechnology, Inc., No. 7:16-cv-18 (E.D. N.C. June 7, 2017)

Best Payphones, Inc. v. New York, No. 01-cv-3924 (E.D.N.Y. Feb. 26, 2016)

29. *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 426-427 (S.D.N.Y. 2004) ("At least one e-mail has been irretrievably lost; the existence of that e-mail is known only because of oblique references to it in other correspondence... Zubulake has only been able to present concrete evidence that this one e-mail was irretrievably lost...").

Proving Intent to Deprive—Or, More Often, Not

The final high hurdle in obtaining sanctions is proving intent to deprive. Prior to the 2015 amendments, some circuits had adopted divergent approaches to spoliation sanctions and intent. The Third, Seventh, Eighth, and Tenth Circuits, for example, required a showing of bad faith before harsh sanctions could be imposed.[30] The Second Circuit and the D.C. Circuit, however, did not.[31]

The Second Circuit, in particular, operated under permissive precedents like *Residential Funding Corp. v. DeGeorge Financial*, 306 F.3d 99 (2d Cir. 2002). Under *Residential Funding*, severe sanctions for eDiscovery wrongdoings could be applied when a party acted with gross negligence or even, potentially, mere ordinary negligence.

The Advisory Committee specifically sought to put an end to the use of the severest sanctions for anything less than clearly-proven bad faith, citing *Residential Funding* directly. In the Notes to the 2015 amendments to FRCP 37(e), the Committee writes:

"This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp*. that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."[32] [33]

Not only were terminating sanctions expressly limited, but the lesser, yet still severe, adverse jury instructions were to be circumscribed as well:

"Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference."

With the 2015 revisions, the harshest spoliation sanctions were now locked behind the wall of intent. Yet, the Rule and the Notes conspicuously fail to define one key point: what, exactly, is "intent?"

Thus, while the new Rule does create the uniform standard sought by the Advisory Committee, the question remains as to what that standard actually means. As Craig Ball, an attorney, frequent special master, and a leading eDiscovery expert, has pointed out, intent is a difficult issue to prove:

"Proving intent is one of the harder things trial lawyers do. Short of the rare Perry Mason moment when a party confesses intent …, lawyers must resort to evidence that illuminates the intent of a specific person or corporation or that of a reasonable person or corporation similarly situated in terms of what he, she or it would have thought, anticipated or known."[34]

Because such "Perry Mason" confessions rarely occur in real life, some of the courts that have had to answer the question of what is sufficient to show intent have instead turned to rather circumstantial forms of proof—sometimes admittedly so.

KEY CASES:

O'Berry v. Turner, Archer Daniels Midland, Nos. 7:15-cv-00064-HL, (M.D. Ga., April 27, 2016)

Alabama Aircraft Industries, Inc. v. Boeing Co., No. 2:11-cv-03577 (N.D. Ala. Mar. 9, 2017)

Decker v. Target Corp., No. 1:16-cv-00171 (D. Utah Oct. 10, 2018)

30. See, e.g., *United States v. Nelson*, 481 F. App'x 40, 42 (3d Cir. 2012) (noting that "where there is no showing that the evidence was destroyed in order to prevent it from being used by the adverse party, a spoliation instruction is improper").

31. See *Grosdidier v. Broad. Bd. of Governors, Chairman*, 709 F.3d 19, 27 (D.C. Cir. 2013) (noting that "the spoliation inference was appropriate in light of the duty of preservation notwithstanding the fact that the destruction was negligent").

32. See Fed. R. Civ. P. 37(e) *supra* note 6.

33. As Judge David G. Campbell, U.S. District Judge in the District of Arizona and Chair of the Federal Rules Advisory Committee during the 2015 revision process told Logikcull just days after the amendments went into effect, "We are hoping that these rule changes help through Rule 37(e) in bringing some level of uniformity of how you deal with the loss of information. We hope Rule 37(e) will reduce the amount of side litigation that occurs over loss of ESI and sanctions." See Robert Hilson, *Judge David Campbell: Predictive Coding Rarely Proposed, Rarely Used*, Closing the Loop (2015), *available at:* https://blog.logikcull.com/judge-david-campbell-federal-rules-predictive-coding-part-2

34. Craig Ball, *Inquiring Into Intent: FRCP 37(e) Opens the Door*, Ball in Your Court (2017), *available at:* https://craigball.net/2017/04/19/inquiring-into-intent-frcp-37e-opens-the-door/

Finding Intent in Circumstantial Forms of Proof

"Courts seem willing to infer intent, particularly when defendants fail to follow their own preservation rules."

When it comes to finding intent to deprive under for the purposes of Rule 37(e)(2), a minority of courts are willing to infer bad faith from circumstantial evidence, as the following cases illustrate.

In *O'Berry v. Turner, Archer Daniels Midland*, Nos. 7:15-cv-00064-HL (M.D. Ga., April 27, 2016), for example, a seemingly run-of-the-mill traffic accident case ran into a series of mistakes in properly preserving the defendant's driver's log about the accident. That log turned out to be a critical piece of ESI for the plaintiff's case. Defendant's former loss control manager testified as to the many steps he took to preserve the log—and the many missteps that followed. Yet, despite the long list of mistakes made, plaintiff could not show any intentional act to deprive it of the log. That didn't dissuade the court from finding intent all the same:

"All of these facts, when considered together, lead the Court to conclude that the loss of the at-issue ESI was beyond the result of mere negligence. Such irresponsible and shiftless behavior can only lead to one conclusion—that ADM… acted with the intent to deprive Plaintiff of the use of this information at trial."

In *Alabama Aircraft Industries, Inc. v. Boeing Co.*, No. 2:11-cv-03577 (N.D. Ala. Mar. 9, 2017), a joint venture deal between a small, local corporate plaintiff and the global aircraft manufacturing giant went south. Boeing was subsequently accused of using the plaintiff's own proprietary information to compete against it in a solo bid.

Once again, the big corporate defendant lost key ESI through a series of acts that could easily be called negligent, though perhaps grossly so. While these were troubling examples of misfeasance, they did not appear to be, even taken all together, actual malfeasance showing "intent." Yet the judge had "little trouble" finding that the defendant acted in bad faith and determined that this "unexplained, blatantly irresponsible behavior" led him to conclude that defendant acted with intent to deprive.

In *Moody v. CSX Transportation*, 271 F.Supp.3d 410 (W.D.N.Y. 2017), a personal injury case brought by a pedestrian injured in a train yard, the "black box" recorder of the movements of and the warnings issued (or not) from the locomotive involved became

critical ESI. Preserving that black-box ESI required downloading three files from the device to a laptop and then uploading it to a central archive. Unfortunately, one of the files was missing, making the ESI on the archive unreadable. The defendant compounded this problem by failing to quality control check the archive and to preserve the original laptop with the files when the custodian left the company.
Again, while all of these actions were inarguably negligent, even taken together they don't show signs of intent. Despite this, the judge, citing to *Alabama Aircraft Industries v. Boeing*, refused to believe that intent was not present:

"...this Court still concludes that defendants' actions presented sufficient circumstantial evidence from which to infer that they intended to deprive [plaintiff] of the relevant data."

Even in some more recent cases, courts seem willing to infer intent, particularly when defendants fail to follow their own preservation rules. And when employees act questionably, some courts are willing to impute those actions onto corporate defendants and infer intent. For example, in *Decker v. Target Corp.*, No. 1:16-cv-00171 (D. Utah Oct. 10, 2018), a personal injury case by a plaintiff who tripped and fell over an allegedly unattended stocking cart, the defendant's employees failed to properly preserve the complete video of the area of the store because they did not think that it was "relevant." While Target had a policy that required the employees to preserve 20 minutes of tape from before and after such incidents, here the employees testified that they did not know of any such policy before they deleted the video. The court evaluated the actions of the employees, not as individuals, but as agents of the corporation:

"Were the court to evaluate their actions individually, the court would not conclude they acted in bad faith. But these employees were not acting as individuals, they acted as agents of Target, and the court concludes that Target has acted in bad faith in regards to the evidence."

"When employees act questionably, some courts are willing to impute those actions onto corporate defendants and infer intent."

Refusing to Infer Intent

"The dominant approach now is for courts to require clear proof of actual intent to deprive."

The willingness of courts to infer intent and bad faith from circumstantial evidence appears to be, in general, abating. A more recent case involving Target illustrates this point. In *Freidig v. Target Corp*., No. 17-cv-827 (W.D. Wis. Dec. 19, 2018), the court faced a fact pattern and claims of spoliation strikingly similar to *Decker*—and came to opposite conclusions. Here, the plaintiff alleged that she fell as a result of a water puddle near the checkout register, which required her to prove under the applicable state law that the hazard had been present for some time beforehand. Once again, Target failed to preserve the video recording of the area for the 20 minutes beforehand in accordance with company policy.

Were those acts enough to show intent? Not this time. Even though the court found that "Target's decision [not to preserve the video] is especially baffling because it was in direct violation of its preservation policy," and despite citing to four prior cases showing similar problems, including *Decker*, the court could not find any intent to deprive. While the court was willing to limit certain testimony by Target's employees under Rule 37(e)(1), it refused to enter severe sanctions under (e)(2).

In fact, the dominant approach now is for courts to require clear proof of actual intent to deprive. The courts also seem particularly willing to question any failures by the deprived party to obtain such proof through direct questioning of the spoilating party or its agents. The following cases provide a brief overview of how federal courts are treating these issues today:

- *Jackson v. Haynes & Haynes*, No. 2:16-cv-01297 (N.D. Ala. Jul. 26, 2017): being "negligent and irresponsible in maintaining the information" is "not sufficient to show an intent to deprive."
- *Basra v. Ecklund Logistics, Inc*., No. 8:16-cv-832017 (D. Neb. Mar. 31, 2017): "although [the] defendant's record-keeping [was] less than meticulous," the plaintiffs did not establish that the defendant had destroyed evidence with specific intent to deprive.
- *Goldrich v. City of Jersey City*, No. 15-885 (D.N.J. July 25, 2018): "To make this finding that a Captain in the Jersey City Police Department lied repeatedly under oath requires some degree of affirmative evidence of the same that defendants have not proffered. Defendants were given the opportunity to depose those close to plaintiff, such as his wife, who could have provided direct evidence of spoliation if she were aware of any but did not."
- *Porter v. City of San Francisco*, No. 16-cv-03771 (N.D. Cal. Sept. 05, 2018): The court refused to infer that a critical phone recording was erased with intent by defendants because it was destroyed under a regular records policy and not "under pressure to produce."
- *Worldpay, US, Inc. v. Haydon*, No. 17-cv-4179 (N.D. Ill. Nov. 14, 2018): "It is not obvious, however, that an intent to shut down an e-mail account equates to an intent to ensure that the information on it is permanently deleted, such that it would never be accessible to anyone again. Nor is it clear, even assuming that [defendant's employee] intended to delete the information permanently, that she did so for the purpose of hiding adverse information."

Rule 37(e) and Inherent Authority: Two Competing Sanctions Powers

Despite the changes to Rule 37(e), there remains significant debate as to whether courts retain their "inherent authority" to issue sanctions against discovery misconduct. In the past, inherent authority has been something of an all-purpose catch-all for the courts to issue severe sanctions. Continued reliance on inherent authority, some worry, could undermine the uniform sanctions regime established by Rule 37(e).

Indeed, the Federal Rules Committee sought to avoid just that. In the Committee Notes to the 2015 amendments, the Rules Committee made clear its intent to eliminate judges' inherent authority with regard to spoliation sanctions:

> New Rule 37(e) replaces the 2006 rule. It 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.[35]

However, as clear as the Notes may seem to be, there are those who have disagreed, including the highly-esteemed former Chief Magistrate Judge James Francis of the Southern District of New York.

In *CAT3 LLC v. Black Lineage, Inc*, No. 14 Civ. 5511 (S.D.N.Y. Jan. 12, 2016), Judge Francis explicitly defended his inherent authority to enter sanctions in exactly the manner that the Rules Committee sought to foreclose. In that case, the court was asked to grant sanctions as a result of the plaintiff's allegedly altering emails in a trademark infringement case. After considering whether Rule 37(e) adequately covered the situation, Judge Francis went on to state that he believed that he still had inherent authority to issue sanctions as appropriate:

> If, notwithstanding this reasoning, Rule 37(e) were construed not to apply to the facts here, I could nevertheless exercise inherent authority to remedy spoliation under the circumstances presented.

While he recognized that the Rules Committee had explicitly removed the inherent authority power, Judge Francis cited to a 1991 US Supreme Court case that was part of a line of precedent going all the way back to 1812:

> [The US Supreme Court] in *Chamber v. NASCO, Inc*., 501 U.S. 32, 43 (1991)] stated that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct."

Indeed, some question whether the Rules Committee and the Congressional rulemaking process can alter a power presumably inherent to the judicial branch without violating the separation of powers doctrine.[36]

"Rule 37(e) therefore forecloses reliance on inherent authority."

KEY CASES:

CAT3 LLC v. Black Lineage, Inc., No. 14-cv-5511 (S.D.N.Y. Jan. 12, 2016)

Hsueh v. N.Y. Dep't of Fin. Servs., No. 15 Civ. 3401 (S.D.N.Y. Mar. 31, 2017)

Sosa v. Carnival Corp., No. 18-20957 (S.D. Fla. Dec. 4, 2018)

35. Committee Note to Fed. R. Civ. P. 37(e), *available at:* https://www.law.cornell.edu/rules/frcp/rule_37.
36. See James C. Francis IV & Eric P. Mandel, *Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction*, 17 Sedona Conf. J. 613 (2016).

The persistence of inherent authority has even, obliquely, made its way to the Supreme Court. The United States Supreme Court in *Goodyear Tire & Rubber Co. v. Haeger*, __ U.S. __, 137 S.Ct. 1178 (2017) addressed the imposition of sanctions imposed under inherent authority, but left open more questions than it answered. The case involved an RV crash blamed on a tire blow out, part of a series of accidents and resulting lawsuits across the country involving this particular type of tire. The plaintiff's attorney sought discovery of the heat testing results for the tires, but he was told that none existed. After the case settled, the plaintiff's attorney read a newspaper article discussing heat test results produced in another case, leading him—and the Chief Judge of the District of Arizona—to conclude that the defendant and its attorneys had all clearly lied. She exercised her inherent authority to issue sanctions for $2.7 million, nearly all of the attorneys' fees in the case.

In a short, unanimous opinion, the Supreme Court implicitly approved the court's reliance on inherent authority. (Though it reversed the result because the sanctions must be compensatory rather than punitive.) Because *Goodyear* did not involve spoliation and the use of Rule 37(e) was inapplicable, it appears unlikely that the case has resolved the issue whether the 2015 amendments foreclosed its use when Rule 37(e) could be applied.

Indeed, former Advisory Committee member, U.S. District Court Judge Paul W. Grimm, recently told a reporter that inherent authority was a complicated issue:

"37(e) didn't take action to make inherent authority unavailable… In the Advisory Note, the Committee explained it had crafted a rule that was intended to have the tools necessary to make decisions about spoliation of ESI so that courts did not need to resort to inherent authority. You couldn't say to yourself that I don't like the fact that with 37(e) you can't get specific serious sanctions, and so I'm going to use inherent authority instead."[37]

The Advisory Committee Note, Judge Grimm positied, sought to prevent inherent authority from being used to circumvent 37(e)—rather than removing inherent authority to grant spoliation sanctions altogether. Under such an interpretation, inherent authority still exists to fill the spaces where Rule 37(e) does not apply.

Some courts have come to similar conclusions, such as in *Hsueh v. N.Y. Dep't of Fin. Servs.*, No. 15 Civ. 3401 (S.D.N.Y. Mar. 31, 2017). There, the court applied inherent authority to award sanctions only after finding that Rule 37(e) did not apply in that case.

However, much of the concern over whether inherent authority is still viable may be misplaced. Inherent authority does not give a judge broad discretion to enter sanctions whenever they see fit, but instead can only apply, as explained in detail by Southern District of Florida Magistrate Judge Jonathan Goodman in *Sosa v. Carnival Corp.*, No. 18-20957 (S.D. Fla. Dec. 4, 2018), when "crucial" evidence was lost "in bad faith."

Sosa, which involved a battle over admittedly-spoliated closed-circuit television footage of a slip-and-fall incident on a cruise ship, shows just how difficult (and confusing) the requirements of inherent authority can become. In that case, the plaintiff tried to pin the disappearance of the critical footage on the defendant, seeking sanctions under the court's inherent authority, described by Judge Goodman in the following folksy terms:

"'Where there's smoke, there's fire' is a well-known idiom; it means that when there is an indication of something bad, then the indication is usually correct… Sosa contends that the lost CCTV footage, together with other factors, is circumstantial evidence (i.e., the smoke) of Carnival's bad faith (i.e., the fire), which entitles her to an adverse inference jury instruction or an order striking some of Carnival's affirmative defenses."

In contrast, Judge Goodman ascribed defendant's position that Rule 37(e) forgave its errors to a rather different set of aphorisms:

"Carnival denies that it acted in bad faith or that there is any evidence of bad faith. Carnival claims that it simply does not know how or why the CCTV footage went missing…

"Carnival's views on the sanctions motion could be described as invoking two other colloquialisms: (1) 'C'est la vie' ('that's life,' or 'that's how things happen') and (2) 'stuff happens.' In other words, Carnival's perspective is that life is full of unpredictable events and that bad results sometimes occur for no particular reason."

37. Tera Brostoff, *Reports of Death of Inherent Judicial Authority Exaggerated?* Bloomberg News (Nov. 16, 2016), *available at* https://www.bna.com/reports-death-inherent-n57982082834.

"The position Sosa urges is strategically intriguing, to say the least, as Sosa would likely stand a better chance of obtaining meaningful relief under Rule 37. "

As the judge describes it, the confusion over inherent authority created the situation where "each side, in short, is encouraging a legal standard for spoliation that is more advantageous to its opponent."

> The position Sosa urges is strategically intriguing, to say the least, as Sosa would likely stand a better chance of obtaining meaningful relief under Rule 37. That is because (1) the inherent-authority doctrine she invokes always requires bad faith, while Rule 37 authorizes some relief for the loss of electronically stored information without bad faith, and (2) sanctions imposed under the inherent-authority doctrine are permitted only when the missing evidence is "crucial" to the movant's case, while Rule 37 does not require the prejudice to reach that level.
>
> Nevertheless, that is Sosa's position.

Yet, the defendant, too, had found itself in a conundrum:

> But Carnival has embraced a legal position that is also strategically curious... Carnival is advocating for Rule 37, which permits Sosa to obtain some relief in the absence of bad faith and even if the lost footage is not crucial to her case.
>
> Nevertheless, that is Carnival's position.

After many pages of careful consideration of the rule and its various questions to be answered, along with the Advisory Committee Notes and several hypotheticals on the potential impact of rulings either way, the court decided that it simply could not decide; there was insufficient evidence. Thus, the court gave plaintiff the choice: 1. Present all evidence about the loss of the CCTV evidence, and if the jury found that defendant intended to deprive her of that evidence, argue that the jury should make a presumption against the defendant; or 2. Prevent the defendant from discussing the CCTV evidence and instead have the court mention it along with the fact that is unavailable.

The *Sosa* court's non-resolution almost perfectly reflects the state of the law on inherent authority, one that is undetermined and contentious. But regardless where the jury lands on the question of inherent authority, the debate may be more theoretical than practical.

Despite invocations of inherent authority, these discussions remain largely dicta, as courts have almost universally found Rule 37(e) sufficient to protect the integrity of the judicial process thus far.

Conclusion

If this is not the end of sanctions, it may be the beginning of the "de-risking" of discovery.

For years legal professionals have been told, over and over and over, that the biggest thing to fear in eDiscovery is not fear itself, but sanctions. For many, that fear has held them back from recognizing the true costs of eDiscovery: overly-expensive technology and under-efficient processes. For attorneys in private practice, this fear has led them to outsource their discovery processes to expensive vendors, or avoid eDiscovery altogether. For in-house counsel, fear over sanctions has been a barrier to streamlining processes, internalizing expertise, and reducing costs. It has created conflict with more risk-averse outside counsel and led to bloated processes and the proliferation of overpreservation. This is why corporate legal leaders like Mira Edelman have praised the 2015 Rules revisions as "freeing."

Whereas the fear of eDiscovery sanctions has held back innovative legal professionals in the past, the changes instituted by the new rules may now allow us to move beyond fear and to begin finding new solutions to the many discovery problems that remain.

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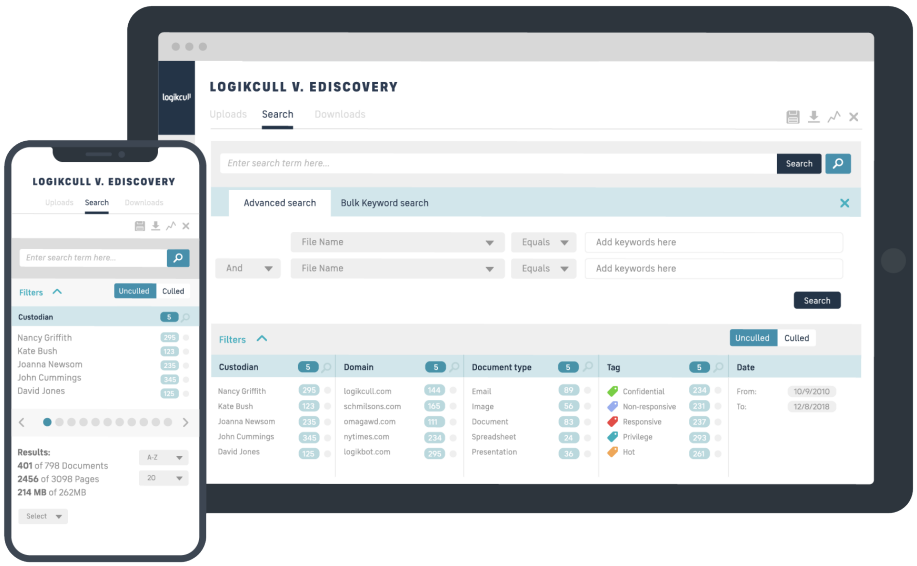

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average time to add a user

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Appendix A: Rule 37(e) Case Law Cheat Sheet

Case Name	Sanction Granted?	Rationale
Alabama Aircraft Industries, Inc. v. Boeing Co.	Yes	Although there is no direct evidence of an intent to deprive, "there is certainly sufficient circumstantial evidence for the court to conclude that [the Defendants] wished to conceal what information was on the computer. This type of unexplained, blatantly irresponsible behavior leads the court to conclude that the Defendants acted with the intent to deprive the [Plaintiff] with the use of this information..."
Basra v. Ecklund Logistics, Inc.	No	"The plaintiffs have not established that the defendant had destroyed evidence with an intent to suppress the truth." Therefore, an adverse jury instruction is not warranted.
Best Payphones, Inc. v. New York	No	The court finds that "although the Plaintiff was under a duty to preserve the evidence, and the Plaintiff acted negligently in failing to preserve that evidence, the Defendant was not prejudiced by the destruction."
Brewer v. BNSF Ry.	No	Because the plaintiff did not indicate what specific information he believes was withheld, "it is difficult to assess the actual prejudice, if any, he would suffer" as a result of the deletion. Although the Defendant's actions were negligent, "a court needs more than gross negligence to grant an adverse inference instruction."
Decker v. Target Corp.	Yes	"Were the Court to evaluate their actions individually, the Court would not conclude that they acted in bad faith. But these employees were not acting as individuals, they acted as agents of Target, and the Court concludes that Target has acted in bad faith in regards to the evidence."
Edelson v. Cheung	Yes	"This Court finds that Defendant's conduct was intended to deprive Plaintiff of the information contained in the e-mails in question...Defendant's testimony that he deleted the e-mails because his computer was 'acting sluggish' lacks credibility considering the timing in which he deleted [them]."
Eshelman v. Puma Biotechnology, Inc.	No	"[The moving party] 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.'"
FiTeq Inc. v. Venture Corp.	No	To prove spoliation of ESI, the moving party must first prove that the relevant information is permanently lost. Here, "the [moving party] has failed to prove that other responsive documents ever existed. Because [they] failed to offer persuasive evidence to show that the ESI was not 'restored or replaced through additional discovery...the Court denies" the sanction request.
Freidig v. Target Corp.	No	Although "[Plaintiff]'s decision [not to preserve the video] is especially baffling because it was in direct violation of its preservation policy," the court has no evidence of intent to deprive, and therefore cannot impose severe sanctions.
Goldrich v. City of Jersey City	Limited	"The Court finds circumstantial evidence alone to be an insufficient basis on which to find that plaintiff acted with the intent to spoliate relevant evidence."
HCC Ins. Holdings, Inc. v. Flowers	No	Though the failure to preserve ESI "represents an "erroneous breakdown of preservation policies [...] the record does not contain evidence suggesting that the failure to preserve the video was the result of bad faith or intent to deprive."
Hernandez v. Tulare Cty. Corr. Ctr.	No	Although "the Court is troubled by [the defendant]'s failure to preserve the relevant video," which represents an "erroneous breakdown of preservation policies [...] the record does not contain evidence suggesting that the failure to preserve the video was the result of bad faith or intent to deprive."
Hsueh v. N.Y. Dep't of Fin. Servs.	Yes	"Rule 37(e) applies only to situations where a party failed to take reasonable steps to preserve ESI; not to situations where, as here, a party intentionally deleted the recording." Instead, the court relies on inherent authority to impose sanctions.
Jackson v. Haynes & Haynes	No	Being "negligent and irresponsible in maintaining the information [is] not sufficient to show intent to deprive."
Living Color Enterprises., Inc. v. New Era Aquaculture, Ltd.	No	The court interprets the "intent to deprive" standard in Rule 37(e)(2) as similar to the Elevent Circuit's "bad faith" standard . Although the defendant "clearly had an obligation to retain the relevant text messages after this lawsuit was initiated," his actions were merely negligent "at worst."
Lokai Holdings LLC v. Twin Tiger USA LLC	No	While there is "some circumstantial evidence is suggestive of an intent to deprive, [the] evidence is not sufficiently compelling to justify the necessary finding."
Moody v. CSX Transp.	Yes	Even if the court accepted as credible the defendants' explanation for the loss of information, "the Court still concludes that defendants' actions presented enough circumstantial evidence from which to infer that they intended to deprive the [Plaintiff] of the relevant data."
Oracle America, Inc. v. Hewlett Packard Enterprise Co.	No	"[Because the moving party] has not shown that any ESI was lost [it] is not necessary to determine whether [Plaintiff] took reasonable steps to preserve evidence of what the remedy for the loss of any documents should be."
Ottoson v. SMBC Leasing & Finn., Inc.	Yes	The court finds that the plaintiff failed "to take any steps to preserve relevant evidence," which "satisfies the requisite level of intent required..." Further, because the "evidence [was] destroyed intentionally, such destruction is sufficient evidence from which to conclude that the missing evidence was unfavorable to that party."
Porter v. City of San Francisco	Yes	"[A]bsent any other credible explanation for [plaintiff's alteration of] the email addresses, it is more than reasonable to infer that the intention was to manipulate the digital information specifically for purposes of this litigation"
Simon v. City of New York	No	"Defendants' motion fails because they do not show that they suffered any prejudice as a result of the lost footage. Defendants assert that the lost video 'was the best evidence of the presence and location of [Rochester's] gun, as well as critical events that led to plaintiffs' arrest.' But that assertion is pure speculation."
Snider v. Danfoss, LLC.	No	"The court has very little evidence regarding the particular nature of the missing ESI. [...] It is pure speculation that the lost ESI would benefit Plaintiff under these circumstances."
Sosa v. Carnival Corp.	Defer	"The advisory committee's notes on the 2015 amendment to Rule 37 expressly contemplate a scenario where the court concludes that the intent findings be made by a jury."
Steves & Sons, Inc. v. JELD-WEN, Inc.	No	To prove spoliation of ESI, the moving party must first prove that the relevant information is permanently lost. This "does not requre that [the plaintiff] 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."
Wordplay, US, Inc. v. Haydon	No	While it is clear that the defendants shut down a subset of email accounts, "it is not obvious [that] an intent to shut down an email account equates to an intent to ensure that the information on it is permanently deleted, such that it would never be accessible to anyone again."

Appendix B: Rule 37(e) Cases and Outcomes, 2016-2018

Title	Sanction Type	Granted
Accurso v. Infra-Red Servs., Inc., 169 F. Supp. 3d 612 (E.D. Pa. 2016)	37(e)(2)	Denied
Adcox v. USPS, No. 15-9258-JWL-GEB (D. Kan. Nov. 22, 2016)	37(e)(1)	Granted in Part
Bagley v. Yale Univ., 315 F.R.D. 131 (D. Conn. 2016)	37(e)(1)	Granted in Part
Barnett v. Deere & Co., No. 2:15-CV-2-KS-MTP (S.D. Miss. Aug. 31, 2016)	Both	Denied
Barnett v. Deere & Co., No. 2:15-CV-2-KS-MTP (S.D. Miss. Nov. 14, 2016)	Both	Denied
Basra v. Ecklund Logistics, Inc. 8:16-cv-832017 (D. Neb. Mar. 31, 2017)	Both	Denied
Best Payphones, Inc. v. City of New York, No. 1-CV-3934 (JG) (VMS) (E.D.N.Y. Feb. 26, 2016)	Both	Denied
Blumenthal Distrib., Inc. v. Herman Miller, Inc., No. E.D. CV 14-1926-JAK (SPx) (C.D. Cal. July 12, 2016)	37(e)(2)	Denied
BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc., 199 F. Supp. 3d 958, 119 U.S.P.Q.2d 1665 (E.D. Va. 2016)	Both	Granted
Brackett v. Stellar Recovery, Inc., No. 3:15-cv-00024 (E.D. Tenn. Feb. 24, 2016)	37(e)(1)	Denied
Brown Jordan Int'l, Inc. v. Carmicle, No. 0:14-CV-60629-ROSENBERG/BRANNON (S.D. Fla. Mar. 01, 2016)	37(e)(2)	Granted
Cahill v. Dart, No. 13-cv-361 (N.D. Ill. Dec. 02, 2016)	37(e)(2)	Granted in Part
Cat3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488 (S.D.N.Y. 2016)	Both	Granted in Part
Cohn v. Guaranteed Rate, Inc., 318 F.R.D. 350 (N.D. Ill. 2016)	37(e)(2)	Granted in Part
Core Labs. LP v. Spectrum Tracer Servs., LLC, No. CIV-11-1157-M (W.D. Okla. Mar. 07, 2016)	Both	Granted in Part
DVComm, LLC v. Hotwire Commc'ns, LLC, No. CIVIL ACTION NO: 14-5543, 2016 BL 44999 (E.D. Pa. Feb. 16, 2016)	37(e)(2)	Denied
DVComm, LLC v. V. Hotwire Commc'ns, LLC, No. CIVIL ACTION NO: 14-5543, 2016 BL 31856 (E.D. Pa. Feb. 03, 2016)	37(e)(2)	Granted
EPAC Techs., Inc. v. Thomas Nelson, Inc., No. 3:12-CV-00463 (M.D. Tenn. Jan. 27, 2016)	Both	Granted
Ericksen v. Kaplan Higher Educ., LLC, No. RDB-14-3106 (D. Md. Feb. 22, 2016)	37(e)(1)	Granted in Part
Feist v. Paxfire, Inc., No. 11-CV-5436 (LGS) (RLE) (S.D.N.Y. Aug. 29, 2016)	37(e)(1)	Granted
First Am. Title Ins. Co. v. Northwest Title Ins. Agency, LLC, No. 2:15-cv-00229 (D. Utah Aug. 31, 2016)	Both	Denied
First Fin. Sec., Inc. v. Freedom Equity Grp., LLC, No. 15-cv-1893-HRL (N.D. Cal. Oct. 07, 2016)	37(e)(2)	Granted in Part
FiTeq Inc. v. Venture Corp., No. 13-cv-01946-BLF (N.D. Cal. Apr. 28, 2016)	Both	Denied
Freidman v. Phila. Parking Auth., No. 14-6071 (E.D. Pa. Mar. 10, 2016)	37(e)(2)	Denied
FTC v. DIRECTV, Inc., No. 15-cv-01129-HSG (MEJ) (N.D. Cal. Dec. 21, 2016)	37(e)(1)	Granted in Part

Appendix B: Rule 37(e) Cases and Outcomes, 2016-2018

Title	Sanction Type	Granted
G.P.P., Inc. v. Guardian Prot. Prods., Inc., No. 1:15-cv-00321-SKO (E.D. Cal. July 08, 2016)	Both	Granted in Part
Glob. Material Techs., Inc. v. Dazheng Metal Fibre Co., No. 12 CV 1851 (N.D. Ill. Sept. 13, 2016)	37(e)(2)	Granted
GN Netcom, Inc. v. Plantronics, Inc., No. 12-1318-LPS (D. Del. July 12, 2016)	37(e)(2)	Granted
Gonzalez-Bermudez v. Abbott Labs. PR Inc., 214 F. Supp. 3d 130 (D.P.R. 2016)	37(e)(2)	Denied
Hashim v. Ericksen, No. 14-CV-1265 (E.D. Wis. Oct. 22, 2016)	37(e)(2)	Denied
Horn v. Tuscola County, No. 13-14626 (E.D. Mich. Nov. 08, 2016)	Both	Denied
In re Ethicon, Inc. (Taylor v. Ethicon, Inc.), No. 2327(S.D. W. Va. Oct. 06, 2016)	Both	Denied
In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig. (Bennett v. Ethicon, Inc.), No. 2327 (S.D. W. Va. Oct. 06, 2016)	Both	Denied
In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig. (Shively v. Ethicon, Inc.), No. 2327 (S.D. W. Va. Oct. 06, 2016)	Both	Denied
InternMatch, Inc. v. Nxtbigthing, LLC, No. 14-cv-05438-JST (N.D. Cal. Feb. 08, 2016)	37(e)(2)	Granted
Keim v. ADF Midatlantic, LLC, No. 12-CV-80577-MARRA/MATTHEWMAN (S.D. Fla. Dec. 05, 2016)	37(e)(1)	Denied
King v. Hamblen Cty. Bd. of Educ., No. 2:14-CV-00249-JRG (E.D. Tenn. June 08, 2016)	37(e)(1)	Denied
Konica Minolta Bus. Sols., U.S.A. Inc. v. Lowery Corp., No. 15-cv-11254 (E.D. Mich. Aug. 31, 2016)	Both	Denied
Kramer v. Ford Motor Co., No. 12-1149 (SRN/FLN) (D. Minn. Feb. 03, 2016)	37(e)(1)	Granted in Part
Learning Care Grp., Inc. v. Armetta, 315 F.R.D. 433 (D. Conn. 2016)	37(e)(2)	Granted
Lexpath Techs. Holdings, Inc. v. Welch, No. 13-cv-5379-PGS-LHG (D.N.J. Aug. 30, 2016)	37(e)(2)	Granted
Living Color Enters., Inc. v. New Era Aquaculture, Ltd., No. 14-cv-62216-MARRA/MATTHEWMAN (S.D. Fla. Mar. 22, 2016)	37(e)(2)	Denied
Marshall v. DentFirst, P.C., 313 F.R.D. 691 (N.D. Ga. 2016)	37(e)(2)	Denied
Marten Transp., Ltd. v. Plattform Adver., Inc., No. 14-cv-02464-JWL-TJJ (D. Kan. Feb. 08, 2016)	Both	Denied
Martinez v. City of Chicago, No. 14-cv-369 (N.D. Ill. June 29, 2016)	37(e)(2)	Denied
Matthew Enter., Inc. v. Chrysler Grp. LLC, No. 13-cv-04236-BLF (N.D. Cal. May 23, 2016)	37(e)(1)	Granted
McFadden v. Wash. Metro. Area Transit Auth., 168 F. Supp. 3d 100 (D.D.C. 2016)	Both	Denied
McIntosh v. United States, No. 14-CV-7889 (KMK) (S.D.N.Y. Mar. 31, 2016)	Both	Denied
McQueen v. Aramark Corp., No. 2:15-CV-492-DAK-PMW (D. Utah Nov. 29, 2016)	37(e)(1)	Granted
Muhammad v. Mathena, No. 7:14cv00529 (W.D. Va. Dec. 12, 2016)	37(e)(1)	Granted

Appendix B: Rule 37(e) Cases and Outcomes, 2016-2018

Title	Sanction Type	Granted
Newman v. Gagan, LLC, No. 2:12-CV-248-JVB-PRC (N.D. Ind. May 10, 2016)	37(e)(1)	Granted in Part
NuVasive, Inc. v. Madsen Med., Inc., No. 13cv2077 BTM(RBB) (S.D. Cal. Jan. 26, 2016)	Both	Denied
O'Berry v. Turner, No. 7:15-CV-00064-HL (M.D. Ga. Apr. 27, 2016)	37(e)(2)	Granted
Orchestrate HR, Inc. v. Trombetta, 178 F. Supp. 3d 476 (N.D. Tex. 2016)	Both	Denied
Palmer v. Allen, No. 14-cv-12247 (E.D. Mich. Sept. 28, 2016)	Both	Denied
Richard v. Inland Dredging Co., No. 6:15-0654 (W.D. La. Sept. 29, 2016)	Both	Denied
Roberson v. USAA Cas. Ins. Co., No. Case No: 5:15-cv-454-Oc-30PRL (M.D. Fla. Sept. 22, 2016)	37(e)(1)	Denied
Saller v. QVC, Inc., No. 15-2279 (E.D. Pa. July 29, 2016)	Both	Denied
SEC v. CKB168 Holdings, Ltd., No. 13-CV-5584 (RRM) (RLM) (E.D.N.Y. Sept. 28, 2016)	37(e)(2)	Denied
SEC v. CKB168 Holdings, Ltd., No. 13-CV-5584 (RRM) (E.D.N.Y. Feb. 02, 2016)	Both	Denied
Sec. Alarm Fin. Enters., LP v. Alarm Prot. Tech., LLC, No. 3:13-cv-00102-SLG (D. Alaska Dec. 06, 2016)	37(e)(1)	Granted
Shaffer v. Gaither, No. 5:14-cv-00106-MOC-DSC (W.D.N.C Sept. 01, 2016)	37(e)(2)	Denied
Shaffer v. Gaither, No. 5:14-cv-00106-MOC-DSC (W.D.N.C Dec. 16, 2016)	37(e)(2)	Denied
Stinson v. City of New York, No. 10 Civ. 4228 (RWS), 2016 BL 1650, 2016 US Dist Lexis 868, 2016 WL 54684 (S.D.N.Y. Jan. 02, 2016), Court Opinion	37(e)(2)	Granted in Part
Terral v. Ducote, No. 15-2366 Section P (W.D. La. Sept. 19, 2016)	Both	Denied
Thomas v. Butkiewicus, No. 3:13-CV-747 (JCH) (D. Conn. Apr. 29, 2016)	Both	Granted in Part
Thomley v. Bennett, No. 5:14-cv-73 (S.D. Ga. Feb. 08, 2016)	Both	Denied
Thurmond v. Bowman, No. 14-CV-6465W (W.D.N.Y. Mar. 31, 2016)	37(e)(2)	Denied
United States v. Woodley, No. 15-cr-20007 (E.D. Mich. Apr. 18, 2016)	37(e)(2)	Denied
Virtual Studios, Inc. v. Stanton Carpet Corp., No. CIVIL ACTION FILE NO.: 4:15-CV-0070-HLM (N.D. Ga. June 23, 2016)	Both	Granted in Part
Whalen v. CSX Transp., Inc., No. 13 Civ. 3784 (LGS)(HBP) (S.D.N.Y. Sept. 29, 2016)	37(e)(1)	Denied
Wichansky v. Zowine, No. CV-13-01208-PHX-DGC (D. Ariz. Mar. 22, 2016)	Both	Denied
Abdelgawad v. Mangieri, No. 14-1641 (W.D. Pa. Dec. 22, 2017)	Both	Denied
Adams v. City of Hayward, No. 14-cv-05482-KAW (N.D. Cal. Jan. 27, 2017)	37(e)(2)	Denied
Agility Pub. Warehousing Co. v. DOD, No. 14-1064 (JDB) (D.D.C. Mar. 30, 2017)	Both	Denied

Appendix B: Rule 37(e) Cases and Outcomes, 2016-2018

Title	Sanction Type	Granted
Ainsworth v. Droz, No. 4:16-CV-04042-KES (D.S.D. Apr. 11, 2017)	37(e)(2)	Denied
Air Prods. & Chems., Inc. v. Wiesemann, No. 14-1425-SLR (D. Del. Feb. 27, 2017)	Both	Denied
Ala. Aircraft Indus., Inc. v. The Boeing Co., 319 F.R.D. 730 (N.D. Ala. 2017)	37(e)(2)	Granted
American Power, LLC v. Speedco, Inc., No. 1:15-cv-2091(M.D. Pa. Aug. 24, 2017)	Both	Denied
Aronstein v. Thompson Creek Metals Co., No. 15-cv-00204-RM-NYW (D. Colo. Apr. 27, 2017)	Both	Denied
Barbera v. Pearson Educ., Inc., No. 1:16-cv-2533-JMS-DML (S.D. Ind. Dec. 28, 2017)	37(e)(2)	Denied
Barcroft Media, Ltd. v. Coed Media Grp., LLC, No. 16-CV-7634 (JMF) (S.D.N.Y. Sept. 28, 2017)	Both	Denied
Barry v. Big M Transp., Inc., No. 1:16-cv-00167-JEO (N.D. Ala. Sept. 11, 2017)	Both	Granted in Part
Below v. Yokohama Tire Corp., No. 15-cv-529-wmc (W.D. Wis. Feb. 27, 2017)	Both	Granted in Part
Bouchard v. U.S.Tennis Ass'n, No. 15 Civ. 5920 (AMD) (LB) (E.D.N.Y. Sept. 05, 2017)	37(e)(2)	Denied
Carpenter v. All Am. Games, No. CV16-01768-PHX DGC (D. Ariz. Oct. 10, 2017)	37(e)(2)	Denied
Charles v. City of New York, No. 12-CV-6180 (SLT)(SMG) (E.D.N.Y. Feb. 07, 2017)	37(e)(1)	Denied
Christoffersen v. Malhi, No. CV-16-08055-PCT-JJT (D. Ariz. June 20, 2017)	Both	Granted in Part
Citibank, N.A. v. Super Sayin' Publ'g, LLC, No. 14-CV-5841 (SHS) (KNF) (S.D.N.Y. Jan. 17, 2017)	Both	Denied
Citibank, N.A. v. Super Sayin' Publ'g, LLC, No. 14-Cv-5841 (SHS) (S.D.N.Y. Mar. 01, 2017)	37(e)(2)	Denied
Cordoba v. Pulido, No. 12-cv-04857-SBA (SK) (N.D. Cal. July 21, 2017)	37(e)(1)	Granted in Part
Coyne v. Los Alamos Nat'l Sec., LLC, No. 15-cv-54 SCY/KBM (D.N.M. May 01, 2017)	37(e)(2)	Granted
Creative Movement & Dance, Inc. v. Pure Performance, LLC, No. 1:16-CV-3285-MHC, 2017 BL 400131 (N.D. Ga. July 24, 2017)	Both	Denied
Crow v. Cosmo Specialty Fibers, Inc., No. 3:15-cv-05665-RJB (W.D. Wash. Mar. 24, 2017)	Both	Denied
Distefano v. Law Offices of Barbara H. Katsos, PC, No. CV 11-2893 (PKC) (AKT) (E.D.N.Y. May 10, 2017)	37(e)(1)	Granted
Edelson v. Stephen Cheung, No. 13-5870 (JLL) (JAD) (D.N.J. Jan. 12, 2017)	37(e)(2)	Granted
EEOC v. GMRI, Inc., No. 15-20561-CIV-LENARD/GOODMAN (S.D. Fla. Nov. 01, 2017)	Both	Granted in Part
Emilio v. Sprint Spectrum LP, No. 11-CV-3041 (JPO)(S.D.N.Y. July 27, 2017)	Both	Denied
Eshelman v. Puma Biotechnology, Inc., No. 7:16-CV-18-D (E.D.N.C. June 07, 2017)	Both	Denied
Estate Vallina v. Cty. of Teller Sheriff's Office, No. 15-cv-01802-RM-STV (D. Colo. Mar. 28, 2017)	37(e)(2)	Denied

Appendix B: Rule 37(e) Cases and Outcomes, 2016-2018

Title	Sanction Type	Granted
Fitzpatrick v. Verheyen, No. 17-C-101 (E.D. Wis. Nov. 21, 2017)	37(e)(1)	Denied
Harper v. City of Dall., No. 3:14-cv-2647-M (N.D. Tex. Aug. 25, 2017)	37(e)(1)	Denied
HCC Ins. Holdings, Inc. v. Flowers, No. 1:15-cv-3262-WSD (N.D. Ga. Jan. 30, 2017)	Both	Denied
Hefter Impact Techs., LLC v. Sport Maska, Inc., No. Civil Action No. 15-13290-FDS (D. Mass. Aug. 03, 2017)	Both	Denied
Horn v. Tuscola County, No. 13-cv-14626 (E.D. Mich. Mar. 27, 2017)	37(e)(2)	Denied
Hsueh v. N.Y. Dep't of Fin. Servs., No. 15 Civ. 3401 (PAC) (S.D.N.Y. Mar. 31, 2017)	37(e)(2)	Granted
Hsueh v. N.Y. Dep't of Fin. Servs., No. 15 Civ. 3401 (PAC) (S.D.N.Y. Mar. 31, 2017)	37(e)(2)	Granted
Hulett v. City of Syracuse, 253 F. Supp. 3d 462 (N.D.N.Y. 2017), Court Opinion	37(e)(1)	Denied
Int'l Bus. Mach. Corp. v. Naganayagam, No. 15 Civ. 7991 (NSR) (S.D.N.Y. Nov. 21, 2017)	Both	Denied
Jackson v. Haynes & Haynes, P.C., No. Civil Action Number 2:16-cv-01297-AKK (N.D. Ala. July 26, 2017)	Both	Denied
Jaffer v. Hirji, No. 14-CV-2127 (KMK) (S.D.N.Y. Mar. 28, 2017)	Both	Denied
Jenkins v. Woody, No. 3:15cv355 (E.D. Va. Jan. 21, 2017)	37(e)(1)	Granted
Johnson v. Brennan, No. 4:16-02612 (S.D. Tex. Nov. 27, 2017)	Both	Denied
Johnson v. City of Bastrop, No. CIVIL ACTION NO. 15-2463 (W.D. La. Aug. 03, 2017)	Both	Denied
Kavanagh v. Refac Optical Grp., No. 15-4886 (JHR/JS) (D.N.J. Dec. 14, 2017)	Both	Denied
Legacy Data Access, LLC v. Mediquant, Inc., No. 3:15-cv-00584-FDW-DSC (W.D.N.C Dec. 04, 2017)	37(e)(2)	Granted
Leidig v. Buzzfeed, Inc., No. 16 Civ. 542 (VM) (GWG) (S.D.N.Y. Dec. 19, 2017)	37(e)(1)	Granted in Part
Linlor v. Polson, No. 1:17cv0013 (AJT/JFA) (E.D. Va. Dec. 06, 2017)	Both	Denied
Love v. City of Chicago, No. 09 C 03631 (N.D. Ill. Nov. 07, 2017)	Both	Denied
Montgomery v. Iron Rooster-Annapolis, LLC, No. RDB-16-3760 (D. Md. May 09, 2017)	37(e)(1)	Granted
Moody v. CSX Transp., Inc.,, 271 F. Supp. 3d 410 (W.D.N.Y. 2017)	37(e)(2)	Granted in Part
Morrison v. Charles J. Veale, MD, PC, No. 3:14-cv-1020-TFM (M.D. Ala. Jan. 25, 2017)	37(e)(2)	Granted
Mueller v. Swift, No. 15-cv-1974-WJM-KLM (D. Colo. July 19, 2017)	Both	Granted in Part
Muhammad v. Mathena, No. 7:14CV00529 (W.D. Va. Jan. 27, 2017)	Both	Granted in Part
N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs., No. No. 1:12-cv-00526 MV/GBW (D.N.M. Aug. 16, 2017)	37(e)(2)	Denied

Appendix B: Rule 37(e) Cases and Outcomes, 2016-2018

Title	Sanction Type	Granted
Nunnally v. District of Columbia, 243 F. Supp. 3d 55 (D.D.C. 2017)	37(e)(2)	Granted
OmniGen Research, LLC v. Yongqiang Wang, 321 F.R.D. 367 (D. Or. 2017)	37(e)(2)	Denied
Ottoson v. SMBC Leasing & Fin., Inc., 268 F. Supp. 3d 570 (S.D.N.Y. 2017)	37(e)(2)	Granted
RealPage, Inc. v. Enter. Risk Control, LLC, No. 4:16-CV-00737 (E.D. Tex. Aug. 03, 2017)	Both	Granted
Rhoda v. Rhoda, No. 14 Civ. 6740 (CM) (S.D.N.Y. Oct. 03, 2017)	37(e)(2)	Denied
Rivera v. Mathena, No. 7:16CV00346 (W.D. Va. Aug. 14, 2017)	Both	Denied
Robinson v. Renown Reg'l Med. Ctr., No. 3:16-cv-00372-MMD-WGC (D. Nev. May 24, 2017)	37(e)(2)	Denied
Ronnie Van Zant, Inc. v. Pyle, 270 F. Supp. 3d 656 (S.D.N.Y. 2017)	37(e)(2)	Granted
Rosa v. Genovese Drug Stores, Inc., No. 16 CV 5105 (NGG)(LB) (E.D.N.Y. Apr. 24, 2017)	37(e)(2)	Granted
Rosa v. Genovese Drug Stores, Inc., No. 16-CV-5105 (NGG) (LB) (E.D.N.Y. July 28, 2017)	37(e)(2)	Granted
Simon v. City of New York, No. 14-CV-8391 (JMF) (S.D.N.Y. Jan. 05, 2017)	37(e)(1)	Denied
Snider v. Danfoss, LLC, No. 15 C 4748 (N.D. Ill. Aug. 01, 2017)	Both	Denied
Snider v. Danfoss, LLC, No. 15 CV 4748 (N.D. Ill. July 12, 2017)	Both	Denied
Spencer v. Lunada Bay Boys, No. CV 16-02129-SJO (RAOx) (C.D. Cal. Dec. 13, 2017)	Both	Granted in Part
Storey v. Effingham County, No. CV415-149 (S.D. Ga. June 16, 2017)	37(e)(1)	Granted
Title Capital Mgmt., LLC v. Progress Residential, LLC, No. 16-21882-CV-WILLIAMS/TORRES (S.D. Fla. Sept. 29, 2017)	Both	Denied
TLS Mgmt. & Mktg. Servs. LLC v. Rodriguez-Toledo, No. 15-2121 (BJM) (D.P.R. Mar. 27, 2017)	37(e)(2)	Granted in Part
United States ex rel. Scutellaro v. Capitol Supply, Inc., No. 10-1094 (BAH) (D.D.C. Apr. 19, 2017)	37(e)(2)	Granted
United States v. Randall, No. 3:15cr75-DPJ-LRA (S.D. Miss. Mar. 22, 2017)	37(e)(2)	Denied
Wal-Mart Stores, Inc. v. Cuker Interactive, LLC, No. 5:14-CV-5262 (W.D. Ark. Jan. 19, 2017)	Both	Denied
Washington v. Rounds, No. PWG-16-320 (D. Md. Nov. 27, 2017)	Both	Denied
Whitney v. Kelly, No. 5:17CV00173 BSM/JTR (E.D. Ark. Aug. 07, 2017)	Both	Denied
Wooden v. Barringer, No. 1:16-CV-00378-WTH-GRJ (N.D. Fla. Nov. 06, 2017)	Both	Denied
Yoe v. Crescent Sock Co., No. 1:15-cv-3-SKL (E.D. Tenn. Nov. 14, 2017)	37(e)(1)	Granted
Youngevity Int'l Corp. v. Smith, No. 16-cv-704-BTM-JLB (S.D. Cal. Dec. 04, 2017)	37(e)(2)	Denied

Appendix B: Rule 37(e) Cases and Outcomes, 2016-2018

Title	Sanction Type	Granted
Zamora v. Stellar Mgmt. Grp., Inc., No. 3:16-05028-CV-RK (W.D. Mo. Apr. 11, 2017)	37(e)(2)	Denied
A.O.A. v. Rennert, No. 4:11 CV 44 CDP (E.D. Mo. Mar. 12, 2018)	37(e)(2)	Denied
Acosta v. Southwest Fuel Mgmt., Inc., No. CV 16-4547 FMO (AGRx) (C.D. Cal. Mar. 28, 2018)	37(e)(2)	Granted
Adidas Am., Inc. v. TRB Acquisitions LLC, No. 3:15-cv-2113-SI (D. Or. Oct. 05, 2018)	Both	Denied
Apex Colors, Inc. v. Chemworld Int'l Ltd., No. 2:14-CV-273-PRC (N.D. Ind. Oct. 05, 2018)	Both	Denied
Ball v. George Wash. Univ., No. 17-cv-0507 (DLF) (D.D.C. Sept. 27, 2018)	Both	Denied
BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc., No. 15 C 10340 (N.D. Ill. Apr. 04, 2018)	37(e)(1)	Granted
Brewer v. BNSF Ry., No. CV 14-65-GF-BMM-JTJ (D. Mont. Feb. 27, 2018)	Both	Denied
Brewer v. BNSF Ry., No. CV-14-65-GF-BMM-JTJ (D. Mont. May 02, 2018)	Both	Denied
Bush v. Lumileds, LLC, No. 16-11761 (E.D. Mich. Sept. 25, 2018)	Both	Denied
Cameron D. v. Arab City Bd. of Educ., No. 4:17-cv-00022-ACA (N.D. Ala. Sept. 26, 2018)	37(e)(1)	Denied
Canada v. Rountree, No. 2:13cvl3 (E.D. Va. Feb. 16, 2018)	Both	Granted in Part
Clarion Brands, LLC v. Llorens Pharm. Int'l Div., Inc ., No. 14-6592 (E.D. Pa. June 05, 2018)	37(e)(1)	Denied
Davis v. Hinds County, No. 3:16-cv-674-DPJ-FKB (S.D. Miss. June 26, 2018)	Both	Denied
Davis v. Hinds County, No. 3:16-cv-674-DPJ-FKB (S.D. Miss. Sept. 27, 2018)	Both	Denied
Doe v. Torrington Bd. Educ., No. 3:15-cv-452 (MPS) (D. Conn. Sept. 20, 2018)	37(e)(2)	Denied
Dotson v. Edmonson, No. 16-15371 (E.D. La. Jan. 22, 2018)	Both	Denied
Dunlop v. Kim (In re Kim), No. 12-30363 VFP, 2018 BL 33087 (Bankr. D.N.J. Jan. 31, 2018)	Both	Granted
EPAC Techs., Inc. v. Harpercollins Christian Publ'g, Inc., No. 3:12-cv-00463 (M.D. Tenn. Mar. 29, 2018)	37(e)(1)	Granted
Epac Techs., Inc. v. Thomas Nelson, Inc., No. 3:12-cv-00463 (M.D. Tenn. May 14, 2018)	Both	Granted in Part
Experience Hendrix, LLC v. Pitsicalis, No. 17 Civ. 1927 (PAE) (S.D.N.Y. Nov. 27, 2018)	Both	Granted
Fishman v. Tiger Nat. Gas, Inc., No. C 17-05351 WHA (N.D. Cal. Nov. 20, 2018)	Both	Granted in Part
Folino v. Hines, No. 17-1584 (W.D. Pa. Nov. 14, 2018)	Both	Granted
Franklin v. Howard Brown Health Ctr., No. 17 C 8376 (N.D. Ill. Oct. 04, 2018)	37(e)(2)	Granted in Part
Freidig v. Target Corp., No. 17-cv-827-jdp (W.D. Wis. Dec. 19, 2018)	37(e)(1)	Granted

Appendix B: Rule 37(e) Cases and Outcomes, 2016-2018

Title	Sanction Type	Granted
Fuhs v. McLachlan Drilling Co., No. 16-376 (W.D. Pa. Oct. 26, 2018)	Both	Denied
Gipson v. Mgmt. & Training Corp., No. 3:16-CV-624-DPJ-FKB (S.D. Miss. Feb. 06, 2018)	37(e)(2)	Denied
Goldrich v. City of Jersey City, No. 15-885 (SDW) (LDW) (D.N.J. July 25, 2018)	37(e)(1)	Granted
Goldrich v. City of Jersey City, No. 15-cv-885 (SDW) (LDW) (D.N.J. Sept. 19, 2018)	37(e)(2)	Granted
Greer v. Mehiel, No. 15-cv-6119 (AJN) (S.D.N.Y. Mar. 28, 2018)	Both	Denied
Harper v. City of Dallas, No. 3:14-cv-2647-M (N.D. Tex. Mar. 06, 2018)	Both	Denied
Hernandez v. Tulare Cty. Corr. Ctr., No. 1:16-cv-00413-EPG (PC) (E.D. Cal. Feb. 07, 2018)	Both	Denied
In re Abilify (Aripiprazole) Prods. Liab. Litig., No. 3:16-md-2734 (N.D. Fla. Oct. 05, 2018)	Both	Denied
In re Correra, 589 B.R. 76 (Bankr. N.D. Tex. 2018)	Both	Granted
In re Disposable Contact Lens Antitrust Litig., No. 3:15-md-2626-J-20JRK (M.D. Fla. Dec. 04, 2018)	Both	Denied
In re Premera Blue Cross Customer Data Sec. Breach Litig., No. 3:15-md-2633-SI (D. Or. Nov. 05, 2018)	37(e)(1)	Granted
Jackson v. E-Z-Go Div. of Textron, Inc., No. 3:12-CV-00154-TBR, 2018 BL 277690 (W.D. Ky. Aug. 03, 2018)	Both	Denied
KCI USA, Inc. v. Healthcare Essentials, Inc., No. 1:14CV549 (N.D. Ohio June 29, 2018)	37(e)(2)	Granted
Knight v. Boehringer Ingelheim Pharm., Inc., 323 F. Supp. 3d 837 (S.D. W. Va. 2018)	Both	Denied
Lavite v. Dunstan, No. 16-cv-882-DRH-RJD (S.D. Ill. Mar. 15, 2018)	Both	Denied
Lavite v. Dunstan, No. 3:16-cv-882-DRH-RJD (S.D. Ill. Feb. 15, 2018)	Both	Denied
Lebron v. Royal Caribbean Cruises, Ltd., No. 16-24687-CIV-WILLIAMS/SIMONTON (S.D. Fla. Aug. 08, 2018)	Both	Denied
Lee v. Horton, No. 17-cv-2766-JPM-tmp (W.D. Tenn. Sept. 04, 2018)	Both	Denied
Lee v. Horton, No. 2:17-cv-2766-JPM-tmp (W.D. Tenn. Sept. 25, 2018)	Both	Denied
Lokai Holdings LLC v. Twin Tiger USA LLC, No. 15cv9363 (ALC) (DF) (S.D.N.Y. Mar. 12, 2018)	37(e)(1)	Granted
Love v. Med. Coll. of Wis., No. 15-C-0650 (E.D. Wis. Nov. 20, 2018)	Both	Denied
Lovett v. Eaches, No. 1:17-cv-757 (S.D. Ohio Aug. 20, 2018)	37(e)(2)	Denied
Malone v. Weiss, No. 17-1694 (E.D. Pa. Aug. 01, 2018)	Both	Granted
Marshall v. Target Corp., No. 17-cv-00880-WYD-STV (D. Colo. July 19, 2018)	Both	Denied
Martinez v. White, No. 5:13-CV-053-TBR (W.D. Ky. Dec. 21, 2018)	37(e)(1)	Denied

Appendix B: Rule 37(e) Cases and Outcomes, 2016-2018

Title	Sanction Type	Granted
Mfg. Automation & Software Sys., Inc. v. Hughes, No. 2:16-cv-08962-CAS(KSx) (C.D. Cal. Apr. 30, 2018)	37(e)(2)	Denied
Monolithic Power Sys. Inc. v. Intersil Corp., No. C.A. No. 16-1125-LPS (D. Del. Nov. 19, 2018)	37(e)(2)	Denied
N.M. Oncology & Hematology Consultants, Ltd v. Presbyterian Healthcare Servs., No. Civ. No. 12-526 MV/GBW (D.N.M. Feb. 21, 2018)	37(e)(2)	Denied
Nutrition Distribution LLC v. PEP Research, LLC, No. 16cv2328-WQH-BLM (S.D. Cal. Dec. 04, 2018)	Both	Granted in Part
Nutrition Distribution LLC v. PEP Research, LLC, No. 16CV2328-WQH(BLM) (S.D. Cal. Aug. 09, 2018)	Both	Granted in Part
Oracle Am., Inc. v. Hewlett Packard Enter. Co., No. 16-cv-01393-JST (E.D.L) (N.D. Cal. Aug. 17, 2018)	Both	Denied
Philpot v. LM Communs. II of S.C., Inc., No. 5:17-CV-173-CHB (E.D. Ky. July 10, 2018)	37(e)(1)	Denied
Porter v. City of San Francisco, No. 16-cv-03771-CW (DMR) (N.D. Cal. Sept. 05, 2018)	37(e)(1)	Granted
Raby v. Tolly, No. 9:13-CV-120 (E.D. Tex. June 18, 2018)	37(e)(1)	Denied
Rivera v. Sam's Club Humacao, No. 16-2307 (ADC) (D.P.R. Sept. 28, 2018)	Both	Granted
Robinson v. Renown Reg'l Med. Ctr., No. 3:16-cv-00372-MMD-WGC (D. Nev. Mar. 23, 2018)	37(e)(1)	Granted
Russell v. Nebo Sch. Dist., No. 2:16-CV-00273- DS (D. Utah Sept. 26, 2018)	Both	Denied
Scalpi v. Amorim, No. 14-CV-2126 (KMK) (S.D.N.Y. Mar. 29, 2018)	37(e)(1)	Denied
Schmalz v. Village of North Riverside, No. 13 C 8012 (N.D. Ill. Mar. 23, 2018)	37(e)(1)	Granted
Schnider v. Providence Health & Servs., No. 3:15-cv-00038-SLG (D. Alaska Mar. 09, 2018)	37(e)(2)	Granted
Sinclair v. Cambria County, No. 3:17-cv-149 (W.D. Pa. Sept. 28, 2018)	37(e)(1)	Granted
Small v. Univ. Med. Ctr., No. 2:13-cv-0298-APG-PAL (D. Nev. July 31, 2018)	37(e)(1)	Granted in Part
Sosa v. Carnival Corp., No. 18-20957-CIV (S.D. Fla. Dec. 04, 2018)	Both	Granted in Part
Spencer v. Lunada Bay Boys, No. CV 16-02129-SJO (RAOx) (C.D. Cal. Feb. 12, 2018)	37(e)(1)	Granted
Stevens v. Ward, No. 3:17-cv-00093-MMD-WGC (D. Nev. Nov. 20, 2018)	Both	Denied
Steves & Sons, Inc. v. JELD-WEN, Inc., 327 F.R.D. 96 (E.D. Va. 2018)	Both	Denied
Syntel Sterling Best Shores Mauritius Ltd. v. Trizetto Grp., No. 1:15-cv-00211 (LGS) (SDA) (S.D.N.Y. Sept. 19, 2018)	37(e)(1)	Denied
Terrell v. Memphis Zoo, Inc., No. 17-cv-2928-JPM-tmp (W.D. Tenn. Aug. 08, 2018)	37(e)(2)	Denied
The Exp.-Imp. Bank of Korea v. ASI Corp., No. CV 16-2056-MWF (JPRx) (C.D. Cal. June 28, 2018)	37(e)(2)	Denied
Tipp v. Adeptus Health Inc., No. CV-16-02317-PHX-DGC (D. Ariz. Jan. 17, 2018)	Both	Denied

Appendix B: Rule 37(e) Cases and Outcomes, 2016-2018

Title	Sanction Type	Granted
TLS Mgmt. & Mktg. Servs., LLC v. Mardis Fin. Servs., Inc., No. 3:14-CV-00881-CWR-LRA (S.D. Miss. Jan. 29, 2018)	37(e)(2)	Granted
Trainer v. Cont'l Carbonic Prods., Inc., No. 16-cv-4335 (DSD/SER) (D. Minn. June 15, 2018)	Both	Denied
Ungar v. City of New York, No. 15-CV-6091 (E.D.N.Y. Nov. 01, 2018)	Both	Denied
United States ex rel. Schutte v. SuperValu, Inc., No. 11-3290 (C.D. Ill. July 12, 2018)	Both	Denied
Wall v. Mefford, No. 7:16cv00305 (W.D. Va. May 02, 2018)	Both	Denied
Washington v. Wal-Mart La. LLC, No. 16-1403 (W.D. La. May 17, 2018)	37(e)(2)	Denied
Watkins v. N.Y.C. Transit Auth., No. 16 Civ. 4161 (LGS) (S.D.N.Y. Feb. 13, 2018)	37(e)(2)	Denied
Waymo LLC v. Uber Techs., Inc., No. C 17-00939 WHA (N.D. Cal. Jan. 29, 2018)	Both	Denied
White v. United States, No. 4:15CV1252 SNLJ (E.D. Mo. May 16, 2018)	37(e)(1)	Granted in Part
White v. United States, No. 4:15CV1252 SNLJ (E.D. Mo. Jan. 09, 2018)	37(e)(1)	Denied
World Trade Ctr. Ass'n v. Port Auth. of N.Y. & N.J., No. 15 Civ. 7411 (LTS)(RWL) (S.D.N.Y. Apr. 02, 2018)	Both	Denied
Worldpay, US, Inc. v. Haydon, No. 17-cv-4179 (N.D. Ill. Nov. 14, 2018)	Both	Denied

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