



# DISCOVERING FLAWS: AN ANALYSIS OF THE AMENDED FEDERAL RULE OF CIVIL PROCEDURE 37(E) AND ITS IMPACT ON THE SPOILIATION OF ELECTRONICALLY STORED EVIDENCE

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## I. INTRODUCTION

The legal community has not been immune to developments brought about by modern technology, nor to the intricate issues that have arisen in its wake.<sup>1</sup> Lawyers, George Paul and Jason Baron eloquently opined that: “[L]awyers must understand that information, as a cultural and technological edifice, has profoundly and irrevocably changed.”<sup>2</sup> Over ninety-percent of all corporate information is electronic, with North American businesses exchanging over 2.5 trillion e-mails per year.<sup>3</sup> Less than one-percent of all communications will ever appear in paper form.<sup>4</sup> Though the heightened acceptance and adoption of e-discovery techniques has spawned great advantages to the discovery process, such embracement is not without its problems.<sup>5</sup> For example, the costs associated with the preservation of electronically stored information (ESI) and e-discovery continue to rise; some projections estimate discovery costs as being between fifty and ninety percent of the total litigation costs in a given case.<sup>6</sup>

To date, the Federal Rules of Civil Procedure have been revised with what some view as “distressing frequency” since

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<sup>1</sup> Nicole D. Wright, *Federal Rule of Civil Procedure 37(e): Spoiling the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 793-94 (2009).

<sup>2</sup> George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?* 13 RICH. J.L. & TECH. 1 (2007).

<sup>3</sup> William P. Barnette, *Ghost in the Machine: Zubulake Revisited and Other Emerging E-Discovery Issues Under the Amended Federal Rules*, 18 RICH. J. L. & TECH. 1, 2 (2012), <http://jolt.richmond.edu/v18i3/article11.pdf>.

<sup>4</sup> *Id.*

<sup>5</sup> Robert A. Weninger, *Electronic Discovery and Sanctions for Spoliation: Perspectives from the Classroom*, 61 CATH. U. L. REV. 775, 775-76 (2012).

<sup>6</sup> See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation*, 60 DUKE L.J. 547, 549 (2010) (citing H.R. REP. NO. 104-369, at 37 (1995) (Conf. Rep.) (“[D]iscovery cost accounts for roughly eighty percent of total litigation costs in securities fraud cases.”)).

their adoption,<sup>7</sup> and rule-makers continue to hear that the rules are inept.<sup>8</sup> As one commentator starkly noted, prior to 2006, the last time the Federal Rules of Civil Procedure were amended to acknowledge modern technology was 1970, when the words “data and data compilations” were added to Rule 34.<sup>9</sup> Moreover, courts are slow to adapt and remain perplexed as to how to best reconcile the massive data storage capabilities of contemporary electronic information systems within traditional spoliation notions and parameters.<sup>10</sup> As a result of the lack of guidance regarding ESI, the mounting volume of data generated by modernized computer systems,<sup>11</sup> and the concern of high-priced sanctions for non-compliance, parties are frequently preserving too much data. This over-preservation is creating severe logistical and financial burdens on those involved.

Thus, in a bid to address such expenditures and promote coherence across the federal circuits, the Supreme Court and Congress approved amending the Federal Rules of Civil Procedure. The new rule, Rule 37(e), took effect on December 1, 2015.<sup>12</sup> Rule 37(e) requires “reasonable steps” to be taken to

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<sup>7</sup> The Federal Rules of Civil Procedure were first authorized by the Supreme Court on June 19, 1934, transmitted to Congress by the Attorney General on January 3, 1938, and the Rules became effective on September 16, 1938. See FED. R. CIV. P. with Forms, <http://www.uscourts.gov/file/rules-civil-procedure> (last visited Oct. 21, 2016).

<sup>8</sup> Scott M. O’Brien, *Analog Solutions: E-Discovery Spoliation Sanctions and the Proposed Amendments to FRCP 37(E)*, 65 DUKE L. J. 151, 156 (2015) (citing Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 228 (2010)).

<sup>9</sup> Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 2006*, 116 YALE L.J. POCKET PART 167, 167 (2006).

<sup>10</sup> Lloyd S. van Oostenrijk, *Paper or Plastic?: Electronic Discovery and Spoliation in the Digital Age*, 42 HOUS. L. REV. 1163, 1170-71 (2005).

<sup>11</sup> See, e.g., Lee H. Rosenthal et al., *Managing Electronic Discovery: Views from the Judges*, 76 FORDHAM L. REV. 1, 2 (2007) (“It is apparent that this explosion of information now subject to discovery has created special challenges.”).

<sup>12</sup> FED. R. CIV. P. 37(e). See Amii N. Castle, *Avoiding Curative Measures Under Amended Federal Rule of Civil Procedure 37(e): Issue a Litigation Hold, Especially When ESI is Involved*, 71 J. MISS. B. 304, 304-06 (2015), <http://www.mobar.org/twocolumntemplate.aspx?id=2147485746>.

preserve ESI and it also contains curative measures in the event of loss or destruction of ESI.<sup>13</sup> Subsection (e)(1) of the Rule relates to “lost or destroyed ESI when the party did not intend to deprive the other side of the ESI,” whereas subsection (e)(2) pertains to when a party *has* acted with the intent to deprive a party of ESI.<sup>14</sup> The Rule applies standards to federal court proceedings, to the exclusion of state law, and “rulings based on a courts’ inherent authority.”<sup>15</sup>

This note will address the recent amendment to the Federal Rules of Civil Procedure Rule 37(e), some of the case law since its adoption, as well as the implications to the changes for lawyers, judges and large corporation alike. Part I explains the spoliation doctrine and its difficulties within the realm of ESI. Part II illustrates the law prior to the Rule’s amendment, its challenges, as well as the road to reform and public commentary. Part III discusses the features of the newly adopted Rule 37(e). Part IV relates to the impact of Rule 37(e) on attorneys, judges and businesses. Part V analyzes the implications of the new rule and voices criticism of its shortcomings.

## II. THE SPOILIATION DOCTRINE

### A. *The Duty to Preserve*

“Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”<sup>16</sup> The duty to preserve evidence has long been acknowledged at modern law, and can arise from statutory authority, local, state

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<sup>13</sup> Castle, *supra* note 12, at 304. See FED. R. CIV. P. 37(e).

<sup>14</sup> Castle, *supra* note 12, at 304-05. See FED. R. CIV. P. 37(e)(1) & (e)(2).

<sup>15</sup> Mark W. McInerney & Thaddeus E. Morgan, *Amendments to Federal Rules of Civil Procedure Effective December 1, 2015*, 94 MICH. B.J. 14, 15 (2015). See also Castle, *supra* note 12, at 305-07.

<sup>16</sup> West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

or federal procedural rules—even the court itself;<sup>17</sup> as well as ethical standards relating to a lawyer’s professional responsibilities.<sup>18</sup> Lawyers and clients alike have an affirmative duty to preserve evidence that could potentially be relevant: lawyers possess a heightened duty as officers of the court “to preserve potential evidence, advise clients of the existence and content of letters requesting preservation of data and information, temporary restraining orders, orders of preservation and potential penalties for failing to comply.”<sup>19</sup>

For non-litigation parties, the duty is implicated, for example, when a party is served with a subpoena, or when a statutory or contractual duty to preserve information exists.<sup>20</sup> Conversely, for parties to a lawsuit or government investigation, the duty is triggered when evidence is the subject of discovery or a complaint.<sup>21</sup> Great difficulties arise, however, in the pre-litigation context, “when lawyers and their clients must divine what may be relevant to litigation not yet occurring.”<sup>22</sup> The court in *Willard v. Caterpillar*,<sup>23</sup> encapsulated the dilemma, noting that,

[T]he wrongfulness of evidence destruction is tied to the temporal proximity between the destruction

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<sup>17</sup> See *Danis v. USN Commc’ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at \*30 (N.D. Ill. Oct. 23, 2000) (“The Court’s authority to sanction a party for the failure to preserve and/or produce documents is both inherent and statutory.”).

<sup>18</sup> Carole S. Gailor, *In-Depth Examination of the Law Regarding Spoliation in State and Federal Courts*, 23 J. AM. ACAD. MATRIM. L. 71, 71-72 (2010).

<sup>19</sup> *Id.* at 75. See MODEL RULES OF PROF’L CONDUCT R. 3.4 (2015) (instructing attorneys to inform clients of the duty to preserve potentially relevant documents when litigation is probable).

<sup>20</sup> See Paul G. Lannon, Jr., *Practice Tips: The Duty to Preserve Electronic Evidence: When It Is Triggered and How to Satisfy It*, 51 BOS. B.J. 13 (2007); Gailor, *supra* note 18, at 73.

<sup>21</sup> See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (“The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation.”); Gailor, *supra* note 18, at 74.

<sup>22</sup> Lannon, *supra* note 20, at 13; Gailor, *supra* note 18, at 73.

<sup>23</sup> 40 Cal. App. 4th 892 (Cal. Ct. App. 1995).

and the litigation interference and the foreseeability of the harm to the nonspoliating litigant resulting from the destruction. There is a tendency to impose greater responsibility on the defendant when its spoliation will clearly interfere with the plaintiff's prospective lawsuit and to impose less responsibility when the inference is less predictable.<sup>24</sup>

### *B. Spoliation Guidance and Rules*

The Federal Rules of Civil Procedure have not been traditionally viewed as the exclusive source of guidance in the area of spoliation. State rules, as well as lawyering guidelines, have provided much needed instruction and counseling. For example, the Sedona Principles encourage discovery requests to be “as clear as possible, while responses and objections to discovery should disclose the scope and limits of the production,”<sup>25</sup> thereby promoting clarity, predictability and transparency, as well as keeping the proceeding moving forward. Another body leading the charge for attorney awareness in the area is the California State Bar's Standing Committee for Professional Responsibility and Conduct. The Committee lays down nine fundamental e-discovery skills required to achieve e-discovery technological competence.<sup>26</sup> These skills include understanding and analyzing a client's systems and storage, performing data searches, collecting responsive ESI in a manner that preserve the integrity of the ESI and producing responsive, non-privilege ESI in a recognized and appropriate manner.<sup>27</sup>

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<sup>24</sup> *Id.* at 922-23.

<sup>25</sup> See THE SEDONA PRINCIPLES (SECOND EDITION): BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (2ed. 2007), <https://thesedonaconference.org/publication/The%20Sedona%20Principles>.

<sup>26</sup> See Hon. Joy Flowers Conti & Richard N. Lettieri, *E-Discovery Ethics: Emerging Standards of Technological Competence*, 62 FED. L. 28, 30 (2015).

<sup>27</sup> *Id.* at 31-32.

### *C. The Unique Nature of ESI and Its Impact on the Spoliation Doctrine*

Though the common law duty to preserve evidence is reasonably developed through case law, the “preservation threshold” issue presents unique challenges in the context of ESI.<sup>28</sup> As Judge Shira Scheindlin noted in her famously comprehensive analysis of electronic discovery spoliation in *Zubulake v. UBS Warburg*,<sup>29</sup> the litigation hold is “only the beginning” of a party’s ESI-preservation obligations.<sup>30</sup> The landscape of ESI has stressed the legal system and indeed, it is becoming prohibitively expensive for lawyers even to search through information.<sup>31</sup> “Electronic data can be—and, in some cases, is intended to be—ephemeral.”<sup>32</sup> Hence, “[w]hen attempting to manage the overwhelming amount of digital information, an organization must decide what information it values and therefore preserve and what information it can destroy in the interest of maintaining an efficient operating system.”<sup>33</sup> Dynamic databases with unique abilities to add, modify and remove data can prove extremely difficult in terms of both preserving and producing evidence.<sup>34</sup> Furthermore, the subject data may be scattered among hundreds or thousands of storage, management, and communications systems and devices. In addition, the potential relevance of the data in these sources may not be readily apparent, thereby requiring specific content analysis.<sup>35</sup>

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<sup>28</sup> O’Brien, *supra* note 8, at 165.

<sup>29</sup> 229 F.R.D. 212 at 422 (S.D.N.Y. 2003).

<sup>30</sup> O’Brien, *supra* note 8, at 165 (citing *Zubulake*, 229 F.R.D. at 432).

<sup>31</sup> Paul & Baron, *supra* note 2, at 1-2.

<sup>32</sup> Beisner, *supra* note 6, at 569.

<sup>33</sup> Maria Perez Crist, *Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information*, 58 S.C. L. REV. 7, 9 (2006).

<sup>34</sup> Beisner, *supra* note 6, at 569.

<sup>35</sup> Kenneth J. Withers, *Risk Aversion, Risk Management, and the “Overrepresentation” Problem in Electronic Discovery*, 64 S.C. L. REV. 537, 538 (2013).



Finally, with the advancement of technology in the area of data storage capabilities, the price of storage has decreased exponentially.<sup>36</sup> However, with more data being effortlessly saved, the volume of information to be preserved, protected and produced during litigation has grown. “With junior associates . . . billing at over \$200 per hour, the cost to review that same single gigabyte of data can exceed \$30,000 in reviewing fees.”<sup>37</sup> The court in *Rowe Entertainment v. The William Morris Agency*<sup>38</sup> noted this phenomenon, commenting, “discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.”<sup>39</sup> As an individual matter, the “effort and expense associated with electronic discovery [is] so excessive that, regardless of a case’s merits, settlement is frequently the most fiscally prudent course.”<sup>40</sup> These booming cost margins are a central factor in the push for spoliation reform, as well as investment in other means of preservation and deletion technology.<sup>41</sup>

#### D. Addressing Spoliation and ESI

Baron suggests that “[t]he challenge facing the legal profession today is not a matter of dealing with discovery abuse or excessiveness *per se*, at least not to the extent that e-discovery

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<sup>36</sup> Rachel K. Alexander, *E-Discovery Practice, Theory and Precedent: Finding the Right Pond, Lure, and Lines Without Going on a Fishing Expedition*, 56 S.D. L. REV. 25, 26 (2011) (“For instance, in 1990, it cost an average of \$20,000 to store a typical gigabyte of electronic information, but the cost to store the same amount of information today is less than a dollar.”).

<sup>37</sup> *Id.* at 26.

<sup>38</sup> 2002 WL 63190 (S.D.N.Y. Jan. 16, 2002).

<sup>39</sup> *See id.*

<sup>40</sup> Beisner, *supra* note 6, at 550.

<sup>41</sup> The rise in popularity of internet applications such as Snapchat and Vaporsteam, with short-lived, self-destructing communication technology, is just one example of an attempt to prevent preservation capabilities altogether. This situation will be discussed further in part V.

is considered the culprit to blame.”<sup>42</sup> He states, “the greater challenge is how best to reasonably, not perfectly, manage the exponentially growing amount of ESI caught in, and subject to, modern-day discovery practice.”<sup>43</sup> His answer lies principally in culture change, including fostering cooperation strategies, “combined with savvier exploitation of a range of sophisticated software and analytical techniques.”<sup>44</sup>

The majority of state courts have the duty to “realign the scales of justice when one or more litigants becomes critically impaired by the loss of evidence.”<sup>45</sup> Courts have offered different opinions, however, about the best way to fix these sorts of situations.<sup>46</sup> Notably, in the highly contentious *Apple v. Samsung*<sup>47</sup> opinion, the Magistrate commented on the lack of uniformity in the law regarding spoliation sanctions stating, “[t]here is not complete agreement about whether spoliation sanctions are appropriate in any given instance, and, more specifically, whether an adverse inference instruction is warranted.”<sup>48</sup>

Simply stated, “since its inception . . . pretrial discovery has been one of the most divisive and nettlesome issues in civil litigation.”<sup>49</sup> “Plaintiffs’ attorneys routinely burden defendants with costly discovery requests and engage in open-ended

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<sup>42</sup> Jason R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on ‘Information Inflation’ and Current Issues in E-Discovery Search*, 17 RICH. J.L. & TECH. 9, para. 5 (2011).

<sup>43</sup> *Id.* (citing Patrick Oot et al., *Mandating Reasonableness in a Reasonable Inquiry*, 87 DENV. U. L. REV. 533, 534-35, 545 (2010)).

<sup>44</sup> *See id.* at para. 5.

<sup>45</sup> Cecilia Hallinan, *Balancing the Scales After Evidence is Spoiled: Does Pennsylvania’s Approach Sufficiently Protect the Injured Party?* 44 VILL. L. REV. 947, 949 (1999) (citing *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1998)).

<sup>46</sup> *Id.* at 949.

<sup>47</sup> *See Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132 (N.D. Cal. 2012).

<sup>48</sup> *Id.* at 1138.

<sup>49</sup> Beisner, *supra* note 6, at 549-50.

“fishing expeditions” in the hope of coercing a quick settlement.”<sup>50</sup> Technology advances and more developed searching methods have made it easier to review electronic documents.<sup>51</sup> “Discovery of computer-based information costs more, consumes more time, and ‘creates more headaches’ than conventional, paper-based discovery.”<sup>52</sup>

Moreover, issues relating to the vast range of ESI have prompted grave need of reform. As the Advisory Committee noted in its Report on Rules of Practice and Procedure,

Significant amounts of ESI will be created and stored not only by sophisticated entities with large IT departments, but also by unsophisticated person whose lives are recorded on their phones, tablets, eye glasses, cars, social media pages, and tools not even presently foreseen. Most of this information will be stored somewhere in the ‘cloud,’ complication the preservation task.<sup>53</sup>

The various forms of electronic data are intricate and have distinct implications for discovery. For example, active or online data is electronic information readily available and accessible to the user which may include, “word processing documents, spreadsheets, databases, e-mails, electronic calendars and contact managers, system files, and software files.”<sup>54</sup> “Near-line data consists of a robotic storage library that uses robotic arms to access the media, for example, on optical disks.” “Embedded data or metadata which is computer-

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<sup>50</sup> *Id.* at 549.

<sup>51</sup> O’Brien, *supra* note 8, at 161.

<sup>52</sup> Beisner, *supra* note 6, at 550. See Kenneth J. Withers, *The Real Cost of Virtual Discovery*, FED. DISCOVERY NEWS, Feb. 2001, at 3.

<sup>53</sup> JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF ADVISORY COMMITTEE ON CIVIL RULES, I.B. RULE 37(E): FAILURE TO PRESERVE ESI 38 (2014). See also Favro, *infra* note 96.

<sup>54</sup> Amy Longo et al., *Current Trends in Electronic Discovery*, ALI-ABA COURSE OF STUDY, TRIAL EVIDENCE IN THE FEDERAL COURTS: PROBLEMS AND SOLUTIONS 3 (2005), <http://files.ali-aba.org/files/coursebooks/pdf/Clo44-ch17.pdf>.

generated ‘data about the data,’ ([for example], last access date, creation date, identity of author and subsequent editors, etc.), including hidden text.”<sup>55</sup> And finally, replicant data or file clones, which “are copies automatically made and saved to a user’s hard drive; for example, when a word-processing program periodically saves copies of an open document as a precaution against a system failure.”<sup>56</sup>

### III. PRE-REFORM

#### A. Pre-Reform Case Law

The case of *Smith v. Hillshire*<sup>57</sup> methodically examines the issues concerning email spoliation and ESI. The defendant filed a motion to compel the plaintiff to produce “[a]ll documents constituting or relating to communications by and between [plaintiff] and any third party, person entity or organization regarding alleged retaliation at Hillshire and/or any other allegations raised in [their] complaint.”<sup>58</sup> The defendant asserted that the plaintiff had referred to responsive emails in other documents but did not produce said emails.<sup>59</sup> The defendant was then informed that plaintiff had not saved the emails.<sup>60</sup> The court emphasized that preservation cannot be “selective” and that “saving only the evidence supporting a theory of livability and impeding the examination of another theory” would not be permitted.<sup>61</sup> Using its discretion, the court ordered the plaintiff to recover the deleted information as well as give the defendant a “specific and detailed account of the

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Smith v. Hillshire Brands*, No. 13-2605-CM, 2014 WL 2804188 (D. Kan. June 20, 2014).

<sup>58</sup> *Id.* at 2.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

steps he takes to recover the communication and progress he makes.”<sup>62</sup>

Another case that demonstrates the complexities of spoliation in the ESI context is *Peskoff v. Faber*,<sup>63</sup> which turned on the obligation to turn off automatic deletion features. Magistrate Judge Facciola commented: “Faber’s not turning the automatic deletion feature off once informed of pending litigation may serve as a premise for additional judicial action, including sanctions.”<sup>64</sup> The court continued that it was a “legitimate exercise of discretion” to call for Farber’s participation in a process to figure out whether the deleted emails could be salvaged, since Faber could have reasonably anticipated that Peskoff would sue him.<sup>65</sup>

Largely, the majority of courts tended to use some variation of the test laid out in *Zubulake v. UBS Warburg*<sup>66</sup> for determining whether to grant an adverse inference spoliation instruction. That test instructed that:

A party seeking an adverse inference instruction (or other sanctions) based on the spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind; and (3) that the evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.<sup>67</sup>

After examining these factors, courts would then consider all available sanctions and determine the most appropriate.

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<sup>62</sup> *Id.*

<sup>63</sup> 244 F.R.D. 54 (D.D.C. 2007) (memorandum opinion).

<sup>64</sup> *Id.* at 66.

<sup>65</sup> *Id.*

<sup>66</sup> 244 F.R.D. 212 (S.D.N.Y. 2003).

<sup>67</sup> *Id.* at 220.

## B. The Road to Reform

Increased tensions regarding the rapidly increasing cost and delay in civil litigation discovery prompted two attempts over the last decade to reform the federal rules. The 2006 amendment to Rule 37(e) works to provide a safe harbor for parties that had mistakenly destroyed documents that were being requested by another party.<sup>68</sup> Rule 37(e) provided that, “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”<sup>69</sup>

In its criticism of the 2006 amendment, the Committee on Rules of Practice and Procedure stated that,

This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. 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.<sup>70</sup>

“Rule 37(e) has been met with intellectual disdain since its enactment in 2006 is putting it mildly.”<sup>71</sup> Furthermore, “some courts have completely ignored the clear implications of Rule

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<sup>68</sup> Wright, *supra* note 1, at 793.

<sup>69</sup> FED. R. CIV. P. 37(e).

<sup>70</sup> COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 318 (2014), <http://www.uscourts.gov/rulespolicies/archives/agendabooks/committee-rules-practice-and-procedure-may-2014>.

<sup>71</sup> Thomas Y. Allman, *Inadvertent Spoliation of ESI After the 2006 Amendments: The Impact of Rule 37(e)*, 3 FED. CTS. L. REV. 26, 26 (2009).

37(e)— namely that it applies after the duty to preserve has arisen, . . . thereby rendering the rule largely superfluous.”<sup>72</sup>

Given the indeterminateness and breadth of the rule, courts developed a variety of standards for electronically stored information spoliation sanctions. In the Third Circuit, for example, the determination of an appropriate sanction for spoliation rested solely with the discretion of the court,<sup>73</sup> ranging from “dismissal of a claim or granting judgment in favor of the prejudiced party, suppression of evidence, an adverse inference, fines, and attorneys’ fees and costs.”<sup>74</sup> Further, “[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turns depends on whether what was done— or not done— was proportional to that case and consistent with clearly established applicable standards.”<sup>75</sup> Considerations included,

[T]he degree of fault of the party who altered or destroyed the evidence; the degree of prejudice suffered by the opposing party; and whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.<sup>76</sup>

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<sup>72</sup> *Id.* (citing Andrew Hebl, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. ILL. U. L. REV. 79, 103-04 (2008)).

<sup>73</sup> First Senior Fin. Grp. LLC v. Watchdog, 2014 WL 1327584, at \*10 (E.D. Pa. Apr. 3, 2014).

<sup>74</sup> *Id.*

<sup>75</sup> Pettit v. Smith, 45 F. Supp. 3d 1099, 1107 (D.C. Ariz. 2014) (quoting Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)) (emphasis in original); see also THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE (2nd ed., Nov. 2007), <http://www.thesedonaconference.org/content/miscFiles/Guidelines.pdf> (“Electronic discovery burdens should be proportional to the amount in controversy and the nature of the case.”).

<sup>76</sup> Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d. Cir. 1994).

### C. Public and Committee Commentary

In an effort to promote greater uniformity in the means by which federal courts respond to lost ESI, “a panel at the Duke Conference unanimously recommended the time has come for such a rule.”<sup>77</sup> Following the recommendation, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published the proposed amendments to the Federal Rules of Civil Procedure for comment over a six-month period beginning in August 2013.<sup>78</sup> The central concern, according to the Advisory Committee, was “discovery be[ing] used for impermissible purposes such as increasing the burdens of litigation to gain an unjustified advantage for the plaintiffs or defendants.”<sup>79</sup> The call for reform reflected the general feeling that “the system can be abused so that the goals of Rule 1<sup>80</sup> are not achieved.”<sup>81</sup>

Following the commentary period, the Advisory Committee became “firmly convinced that a rule addressing the loss of ESI in civil litigation is greatly needed.”<sup>82</sup> The Committee explained

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<sup>77</sup> ADVISORY COMM. ON CIVIL RULES MEMO, *supra* note 53, at 35. See Memorandum from Judge David G. Campbell to Judge Jeffrey Sutton, at Rules App. B-65 (June 14, 2014), <http://www.uscourts.gov/file/18218/download> [<http://perma.cc/54K4-6CUQ>].

<sup>78</sup> Nash E. Long, *Comment on Proposed Amendments to the Federal Rules of Civil Procedure on Discovery*, [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014\\_sac/2014\\_sac/the\\_proposed\\_amendments.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_sac/2014_sac/the_proposed_amendments.authcheckdam.pdf).

<sup>79</sup> See John G. Koeltl, *2010 Civil Litigation Review Conference, Introduction, Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 538 (2010); REPORT OF ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 53, at 35 (alteration in original).

<sup>80</sup> FED. R. CIV. P. 1

(Scope and Purpose: These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding).

<sup>81</sup> See Koeltl, *supra* note 79, at 538.

<sup>82</sup> ADVISORY COMMITTEE ON CIV. RULES, *Agenda Book*, at 370 (Apr. 1, 2014), <http://www.uscourts.gov/file/15486/download>.



that this decision followed extensive comments regarding the particular challenges of ESI preservation and testimony that “the explosion of ESI will continue and even accelerate.”<sup>83</sup> Proponents of the change argued that ESI requires separate sanctions standards because, unlike physical evidence, “ESI tends to proliferate and usually can be found on many computers and servers, reducing the chance that its loss would have the same dire consequences as [would the] loss of the key piece of tangible evidence in a case.”<sup>84</sup> Thus, the Advisory Committee decided that “the need for broad trial court discretion in dealing with these challenges will likewise increase.”<sup>85</sup>

During its meeting in April, 2014, the Civil Rules Advisory Committee voted unanimously to recommend adoption of, among others, an amended Rule 37(e), and on April 29, 2015, the Supreme Court of the United States adopted and submitted to Congress the current set of pending amendments. The Advisory Committee emphasized that “the time had come for developing a rules-based approach to preservation and sanctions,”<sup>86</sup> given the continual expansion of electronically stored information.<sup>87</sup> The proposed amendment to Rule 37(e) sought to establish “some form of uniform federal rule regarding preservation obligations and sanctions . . . provid[ing] more significant protection against inappropriate sanctions.”<sup>88</sup>

As well as public commentary relating to the proposed changes, Chief Justice Roberts endorsed the recent amendments

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<sup>83</sup> *Id.* at 371.

<sup>84</sup> See *id.*; ADVISORY COMM. ON CIVIL RULES, U.S. COURTS, ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE 150 (2013), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV201304.pdf>.

<sup>85</sup> See ADVISORY COMMITTEE ON CIV. RULES, *supra* note 84, at 371.

<sup>86</sup> COMM. ON RULES OF PRACTICE AND PROCEDURE, <http://www.uscourts.gov/rulespolicies/archives/agendabooks/committee-rules-practice-and-procedure-june-2013>. See REPORT OF ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 53.

<sup>87</sup> REPORT OF ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 53, at 35.

<sup>88</sup> *Id.*

in his 2015 Year-End Report of Civil Procedure.<sup>89</sup> Roberts viewed the amendments as a positive step forward,<sup>90</sup> “[r]ecognizing the evolving role of information technology in virtually every detail of life, the amended rule specifically address the issue of electronically stored information.”<sup>91</sup> The Chief Justice’s caveat to the achievability of the rule’s developments and the goal of a “just, speedy, and inexpensive determination of every action and proceeding,”<sup>92</sup> rests on the “entire legal community, including the bench, bar, and legal academy, step[ping] up to the challenge of making a real change.”<sup>93</sup>

#### IV. THE NEWLY ADOPTED RULE 37(E)

##### *A. Introduction to the New Rule*

“Viewed holistically, the changes to Rule 37(e) are designed to usher in a new era of proportional discovery, increased cooperation, reduced gamesmanship, and more active judicial case management.”<sup>94</sup> The Advisory Committee established a set of requirements that must be satisfied before a court could impose sanctions for failing to preserve ESI.<sup>95</sup> The reasoning

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<sup>89</sup> See U.S. SUPREME CT., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2015), <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

<sup>90</sup> *Id.* at 9 (Chief Justice Roberts commented that, “The 2015 civil rules amendments are a major stride toward a federal court system”).

<sup>91</sup> *Id.* at 8.

<sup>92</sup> *Id.* at 9 (Justice Thomas was making a specific reference to the text of Rule 1 of the Federal Rules of Civil Procedure).

<sup>93</sup> *Id.*

<sup>94</sup> Philip J. Favro, *A Comprehensive Look at the Newly Proposed Amendments to the Federal Rules of Civil Procedure*, 26 UTAH B.J. 38, 38-41 (2013).

<sup>95</sup> See COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE 13-14, app. B-56 to B-57, app. B-61 to B-62, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf>.

behind this is to set up “safeguards” that require sanctions to be based upon set criteria, as well as discouraging the court from ruling in an arbitrary manner.<sup>96</sup>

[The] new Rule 37(e) . . . authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine whether measures should be used.<sup>97</sup>

“The prerequisites that a party must satisfy when moving for sanctions include” that the ESI “should have been preserved in the anticipation or conduct of litigation, relevant ESI was ‘lost’, the party charged with safeguarding the lost ESI ‘failed to take reasonable steps to preserve the information’, and that the lost ESI cannot be restored or replaced through additional discovery.”<sup>98</sup> The text of the newly adopted Rule 37(e) is as follows,

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 the information, and it cannot be restored or replaced through additional discovery, the court:

(1) Upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice;

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<sup>96</sup> See Philip J. Favro, *The New ESI Sanctions Framework Under the Proposed Rule 37(e) Amendments*, 5 EDDE J. 1, 3-4 (2014), <https://www.depo.com/wp-content/uploads/2013/11/esisanctions.pdf>.

<sup>97</sup> *Id.* (citing JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 53, at app. B-58 (emphasis added)).

<sup>98</sup> *Id.* at 7-8 (citing JUDICIAL CONFERENCE OF THE UNITED STATES., *supra* note 53, at app. B-56).

(2) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation,

(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.<sup>99</sup>

### *B. Analysis of Rule 37(e)*

As the Committee notes accompanying the text make clear, “[b]ecause the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party’s reasonable steps to preserve.”<sup>100</sup> Thus, if the information was outside the party’s control (in other words, a cloud service storing the information failed), the rule would not apply. An important caveat to this exception, however, is that a court “may need to assess the extent to which a party knew of and protected against such risks.”<sup>101</sup> Such a determination would likely affect a party’s reasonable preservation efforts as well as their intention to deprive another party of the information.

#### 1. Sanctions

Rule 37(e) seeks to promote a national standard that is applied uniformly to the issuance of sanctions relating to ESI

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<sup>99</sup> FED. R. CIV. P. 37(e).

<sup>100</sup> Webinar, Lawrence R. Ahern, III, TRAPS FOR THE UNWARY: NEW DISCOVERY RULES AND DEVELOPMENTS IN BANKRUPTCY PROCEDURE 28 (June 15, 2016), <https://aira.org/pdf/2016/webinar/061516/Traps%20for%20the%20Unwary%20Supplemental%20Webinar%20Materials.pdf>.

<sup>101</sup> See FED. R. CIV. P. 37(e) Advisory Committee’s notes to 2015 amendment.

spoliation.<sup>102</sup> Subdivisions (e)(1) and (e)(2) provide standalone guides for “curative measures” and “severe sanctions,” with “severe sanctions” being confined to cases involving ESI destruction with intent—“This reflects the Committee’s view that ‘the better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.’”<sup>103</sup>

The Rule’s primary focus appears to be on appropriateness of the sanction, with the Committee emphasizing that, “[t]he remedy should fit the wrong, and the severe measures authorized . . . should not be used when the information lost was relatively unimportant or lesser measures . . . would be sufficient to redress the loss.”<sup>104</sup> The “determinative axis” when deciding the suitability of sanctions rests on the degree of prejudice the spoliative effect had on the victimized party.<sup>105</sup> Such determination focuses on “the importance of actual prejudice as compared to the intent of the offending party.”<sup>106</sup>

## 2. Curative Measures

The amended rule replaces completely the “safe harbor” provision for preserving electronically stored information. In its place is a set of standards whereby the court may sanction or cure evidence preservation failures. “The change . . . place[s] limitations on an adverse inference jury instruction as a cure for negligent failure to preserve evidence, even though numerous states specifically permit it.”<sup>107</sup> The committee note explains

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<sup>102</sup> See Favro, *supra* note 96, at 1.

<sup>103</sup> O’Brien, *supra* note 8, at 180-81. See *id.* (citing Memorandum from Judge David G. Campbell to Judge Jeffrey Sutton, *supra* note 77).

<sup>104</sup> See Favro, *supra* note 96, at 10.

<sup>105</sup> Zach Hutchinson, *License to Kill (Data): The Danger of an Empowered Rule 37(e)*, 27 GEO. J. LEGAL ETHICS 569, 571 (2014).

<sup>106</sup> *Id.*

<sup>107</sup> Elisabeth M. Stein, *Proposed Changes to Discovery Rules Loom*, 49 TRIAL MAG. 48 (2013).

that the range of permitted “curative measures” under Rule 37(e) is quite broad and can include prohibiting a party from presenting evidence on a particular issue, permitting a jury to hear testimony about the lost information or about the failure to preserve it, and even an instruction that allows a jury to consider the testimony about the lost information along with all the other evidence in reaching its decision.<sup>108</sup>

It is noteworthy that the draft committee highlighted that the amended Rule rejected the seminal Second Circuit case, *Residential Funding v. DeGeorge Fin.*,<sup>109</sup> which authorized the giving of adverse inference instruction on a finding of negligence or gross negligence. Specifically, the “intent to deprive” language of section (e)(2) was designed to reject the negligence standard used in *Residential Funding*.<sup>110</sup>

### 3. Adverse Inference

Balancing culpability against resultant prejudice is especially important in the context of the adverse inference instructions. An adverse inference either permits or requires the jury to assume the missing data was damaging to the party that lost it.<sup>111</sup> This particular type of sanction will only be imposed on a party as a consequence of an intentional act. Thus, for example, a party which utilizes a system for routine destruction for the purpose of eliminating information believed to be disadvantageous is not operating in “good faith.”<sup>112</sup>

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<sup>108</sup> See FED. R. CIV. P. 37(e) Advisory Committee’s notes to 2015 amendment, *supra* note 101. See also Jennifer H. Rearden & Goutam U. Jois, *Spoliation Standards Under the New Rule 37(e)*, LAW360 (Oct. 28, 2015, 11:26 AM), [http://www.gibsondunn.com/publications/Documents/Rearden-Jois-Spoliation-Standards-Under-The-NewRule%2037\(e\)-Law360-10-28-2015.pdf](http://www.gibsondunn.com/publications/Documents/Rearden-Jois-Spoliation-Standards-Under-The-NewRule%2037(e)-Law360-10-28-2015.pdf).

<sup>109</sup> 306 F.3d 99 (2d Cir. 2002).

<sup>110</sup> Scott Giordano, *FRCP Amendments: Breakdown of Newly Revised Rule 37(e)*, EXTERRO: E-DISCOVERY AND INFO. GOVERNANCE BLOG (Apr. 14, 2014), <http://www.exterro.com/blog/frcp-amendments-breakdown-of-newly-revised-frcp-37e/>.

<sup>111</sup> O’Brien, *supra* note 8, at 155 n.24.

<sup>112</sup> Allman, *supra* note 71, at 31.

#### 4. Bad Faith and Intent

Despite calls at the Duke Conference for the Committee to “take [the] time as an opportunity to clarify the duty to preserve ESI,”<sup>113</sup> —specifically to clarify the parameters of intent and bad faith—the Committee ultimately decided “that such a task was simply too involved and case specific for the FRCP to resolve.”<sup>114</sup> Thus, while it is clear that aggressive document destruction and intentional destruction of singled-out documents would be “entirely unacceptable for obvious reasons,”<sup>115</sup> difficulties remain as to how the seeking party demonstrates that the document is crucial when they have no access to it in the first place. In all likelihood, the documents at issue have never been seen by the requesting party. Given that “evaluation of prejudice from the loss of information necessarily includes an evaluation information’s importance in the litigation,”<sup>116</sup> this could prove problematic. While the amended Rule does seek to balance the inherent unfairness of this burden by allowing the judge the discretion “to determine how best to access prejudice in particular cases,”<sup>117</sup> it is unclear how effective this will be.

#### 5. Proportionality

“Instead of punishing parties that somehow failed to preserve every last e-mail that could conceivably be relevant, the rule essentially require[s] a common sense determination of the issues. . . .”<sup>118</sup> Referring to the concept of “proportionality”, the Committee notes that a party’s focus should be on the needs of the litigation at hand.<sup>119</sup> Thus, a litigant is not required to

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<sup>113</sup> O’Brien, *supra* note 8, at 174.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* (citing Letter from Martin H. Redish, Professor of Law and Pub. Policy, Northwestern Univ. Sch. of Law, to Lee Rosenthal, Judge, S.D. Tex., at 8 (Dec. 8, 2003)).

<sup>116</sup> *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, *supra* note 95, at 98.

<sup>117</sup> *Id.*

<sup>118</sup> *See* Favro, *supra* note 96, at 8-9.

<sup>119</sup> *Id.* at 5, 13.

comply with unreasonably burdensome preservation requests, and may take cost into consideration when selecting a means of preservation, so long as the forms of preservation are otherwise consonant.<sup>120</sup> The Committee also urged “that counsel become familiar with their client’s information systems and digital data—including social media—to address these issues.”<sup>121</sup> Such familiarity would promote transparency and predictability for all sides.

## V. THE IMPACT OF REVISED RULE 37(E)

### A. Rule 37(e)’s Impact on Lawyers

Under Rule 1.1 of the Model Rules of Professional Conduct, attorneys are obliged to competently represent their clients, requiring the appropriate “legal knowledge, skill, thoroughness and preparation reasonably necessary for [the] representation.”<sup>122</sup> The commentary relating to Rule 1.1 was recently amended, underscoring that in order “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.”<sup>123</sup> Yet, in an ever-changing and ever-adapting field, this obligation can prove incredibly taxing, especially to the older generation of legal professionals.

Nowadays, parties are encouraged to discuss electronic discovery in advance of meeting with the judge. The Standing Committee stressed “the importance of discussing these topics

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<sup>120</sup> MICHAEL R. ARKFELD, ARKFELD’S BEST PRACTICES GUIDE: ESI PRETRIAL DISCOVERY - STRATEGY AND TACTICS (2016). See also Nash E. Long, *The Proposed Amendments to the Federal Rules of Civil Procedure on Discovery*, A.B.A. SEC. OF ADMIN. L. & REG. PRAC. (2014), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014\\_sac/2014\\_sac/the\\_proposed\\_amendments.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_sac/2014_sac/the_proposed_amendments.authcheckdam.pdf).

<sup>121</sup> *Id.*

<sup>122</sup> FED. R. CIV. P. 1.

<sup>123</sup> FED. R. CIV. P. 1. cmt. 1. See Conti & Lettieri, *supra* note 26, at 28-29 (“In September 2013, the American Bar Association amended the comments to Rule 1.1 . . . to link lawyer competence to expertise in technology.”).



early in the case, [in order] to identify disputes before costly and time-consuming searches and production occur.<sup>124</sup> Thus, at their initial meet and confer the parties should discuss not only the basic question of whether there will be discovery of ESI and what types of such information each party has, but also,

[W]hether the information to be discovered has been deleted or is available only on backup tapes or legacy systems; the anticipated schedule for production and the format and media of that production; the difficulty and cost of producing the information and reallocation of costs, if appropriate; and the responsibilities of each party to preserve ESI.<sup>125</sup>

“Logically, this creates an affirmative duty on outside counsel to investigate the document retention policies of their clients during the earliest stages of representation.”<sup>126</sup> Gallagher continues that even lawyers advising clients on the development of document retention policies, as well as in-house counsel charged with managing of such policies, have ethical responsibilities “to do so in a way that does not obstruct justice.”<sup>127</sup> Likewise, with the added opportunity to confer with

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<sup>124</sup> Joseph Gallagher, *E-Ethics: The Ethical Dimension of the Electronic Discovery Amendments to the Federal Rules of Civil Procedure*, 20 GEO. J. LEGAL ETHICS 613, 620 (2007).

<sup>125</sup> Barnette, *supra* note 3, at 40 (citing BARBARA J. ROTHSTEIN ET AL., *MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES* 1, 2-3 (2007), [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/\\$file/eldscpkt.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf)).

<sup>126</sup> Gallagher, *supra* note 124, at 617-18.

<sup>127</sup> *Id.* (citing Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 N.W. J. TECH. & INTELL. PROP. 171, 189 (2006) (“The duty to preserve potential evidence is essential to the court’s truth-seeking function, and the routine operations of computer systems cannot be allowed to obstruct justice.”). *See also* Patrick R. Grady, *Discovery of Computer Stored Documents and Computer Based Litigation Support Systems: Why Give Up More Than Necessary*, 14 J. MARSHALL J. COMPUT. & INFO. L. 523, 544-45 (1996) (noting that while the routine destruction of documents is permissible in the normal course of business, in-house counsel bears special burdens to make sure that a company’s preservation/destruction policies are not illegal, and therefore, unethical).

opposing counsel, little excuse remains for lawyers making grossly overbroad discovery requests— indeed they must “do a better job of articulating their focus—and do it early and often.”<sup>128</sup> Similarly, as one Judge opined, “[i]t is hard to overstate the importance and the degree of anxiety generated by electronic discovery in the world today.”<sup>129</sup> With accelerating developments in technology, it is increasingly difficult for judges to keep up. “Just as we think we understand [the problems of legacy data], the technology shifts and the issues present themselves in a distinct way that requires the analysis to change.”<sup>130</sup> Furthermore, the imposition of sanctions is in and of itself an arduous and time-consuming process. All told, it remains to be seen whether judges will be up for such a difficult challenge.

### *B. Rule 37(e)’s Impact on Professional Entities*

The electronic age has afforded major advancements in storage capacities, information retrieval, and the ability to keep records conveniently accessible for future use.<sup>131</sup> With such rapid growth, entities are scrambling to adapt and advance. These same advancements, however, have been an Achilles’ heel to the practice of law where e-discovery plays a central factor.<sup>132</sup> “In today’s electronic age, truth, as far as discovery is concerned, has become a moving target.”<sup>133</sup> Moreover, discovery is not

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<sup>128</sup> Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J. L. & TECH. 13, 16 (2006).

<sup>129</sup> See Symposium, *The Philip D. Reed Lecture Series: Panel Discussion: Managing Electronic Discovery: Views from the Judges*, 76 FORDHAM L.R. 1, 4 (2007) (citing comments by Hon. Lee H. Rosenthal).

<sup>130</sup> *Id.* at 11-12.

<sup>131</sup> Kenneth J. Withers, *The Real Cost of Virtual Discovery*, FED. DISCOVERY NEWS, 3 (2001).

<sup>132</sup> *Id.*

<sup>133</sup> Ahunanya Anga, *Electronic Data Discovery Sanctions: The Unmapped, Unwinding, Meandering Road, and the Courts’ Role in Steadying the Playing Field*, 50 S.D. L.R. 621, 638 (2013).

merely concerned with uncovering the truth, “but also about how much of the truth the parties can afford to disinter.”<sup>134</sup>

The revisions to Rule 37(e) plainly emphasize the need for companies to develop reasonable information retention policies, along with a workable litigation hold procedure.<sup>135</sup> The changes will also force companies to address discovery matters on an expedited timeframe.<sup>136</sup> As Favro notes, “[t]he truncated time periods for the service of a complaint and the issuance of a scheduling order mean parties would have less time to prepare for the commencement of discovery.”<sup>137</sup>

## VI. POST AMENDMENT CASE LAW

As of March 2015, there have only been a handful of cases interpreting the newly amended Rule 37(e).<sup>138</sup> A recent decision in the Eastern District of New York, *U.S. Securities and Exchange Commission v. CKB168*,<sup>139</sup> highlights the Rule’s effect on jury instructions relating to spoliation. Prior to the amendment, the court justified the allocation of sanctions

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<sup>134</sup> *Id.* (citing *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (internal quotes omitted)).

<sup>135</sup> See generally Mitchell Dembin & Philip J. Favro, *Changing Discovery Culture One Step at a Time*, L. TECH. NEWS (Dec. 5, 2013).

<sup>136</sup> Phillip J. Favro, *Getting Serious: Why Companies Must Adopt Information Governance Measures to Prepare for the Upcoming Changes to the Federal Rules of Civil Procedure*, 20 RICH. J. L. & TECH. 5, 33 (2014), (citing COMM. OF RULE OF PRAC. AND PROC. OF THE JUD. CONF. OF THE U.S., 113TH CONG., PRELIMINARY DRAFT OF PROPOSED AMEND. TO THE FED. RULES OF BANKR. AND CIV. PROC. 261 (Comm. Print 2013), <http://www.uscourts.gov/uscourts/rules/preliminarydraftproposedamendments.pdf>. “The case-management proposals reflect a perception that the early stages of litigation often take far too long. ‘Time is money.’ The longer it takes to litigate an action, the more it costs. And delay is itself undesirable.” *Id.* at n.1.

<sup>137</sup> *Id.*

<sup>138</sup> See Kevin Broughel et al., *New Rule 37(e) In Action: Lessons From First 3 Months*, LAW360 (Mar. 4, 2016, 10:12AM ET), <http://www.law360.com/articles/767086/new-rule-37-e-in-action-lessons-from-first-3-months>.

<sup>139</sup> SEC v. CKB168 Holdings, Inc., No. 13-CV-5584 (RRM), 2016 U.S. Dist. LEXIS 16533 (E.D.N.Y. Feb. 2, 2016).

against the defendants given the “sufficiently culpable state of mind” such that either (1) the absence of information was a result of gross negligence, or (2) the materials never existed, a fact that the defendants refused to confirm.<sup>140</sup> The Court granted two adverse inferences as sanctions against the defendants:

(1) From the fact that the [defendants] produced no evidence of any actual plans or preparations to take [the company] public, the jurors may infer that no such documents ever existed and that the [defendants] had no plan and made no preparations to take [the company] public.

(2) To the extent that the jurors find that any unproduced evidence ever existed, they may infer that the unproduced evidence would support the SEC's allegation that the [defendants] had no plan and made no preparations to go public.<sup>141</sup>

In light of the amendment to Rule 37(e), the court heard arguments as to whether it should adjust its allocated sanction. In modifying its ruling, the Court concluded that under the new Rule “a court may not now impose an adverse jury instruction as a sanction for the spoliation of ESI absent a showing of ESI ‘because a party failed to take reasonable steps to preserve it,’ as well as an ‘intent to deprive another party’ of use of that information.”<sup>142</sup> Thus, given that the record demonstrated a “strong likelihood that the material never existed”,<sup>143</sup> the Court denied the SEC’s amended motion for sanctions without prejudice.<sup>144</sup> The Court did however point out that, “in the event

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<sup>140</sup> *Id.* at 4.

<sup>141</sup> *Id.* at 5.

<sup>142</sup> *Id.* at 13 (citing FED. R. CIV. P. 37 (e)(2)).

<sup>143</sup> *Id.* at 13-14 (“The SEC notes further that, because the material it requested were never produced, it cannot know – assuming the materials existed – whether they existed as ESI, in hard copy or as a combination of both . . . It is thus unclear the extent to which Rule 37(e) would apply at all.”).

<sup>144</sup> CKB16, 2016 U.S. Dist. LEXIS 16533, at 14.

the case proceeds to trial, the SEC should be permitted to renew its motion for Rule 37 sanctions and to make the requisite showing of intent and loss of ESI based on the evidence adduced at trial.”<sup>145</sup>

Conversely, just a month prior in the Southern District of New York, the Court in *Stinson v. City of New York*<sup>146</sup> held that it was uncertain that the rule applied retroactively and since the motion was submitted before the amendment, it would not be “just and practicable” to apply the new Rule.<sup>147</sup> Hence, the already differing opinions demonstrate the proposition that need for further clarification of the amended rule is prevalent.

## VII. THE BOTTOM LINE: AN ANALYSIS OF RULE 37(E)

### A. A Shift Towards Favoring Sanctions

The seminal issue not yet addressed by the amendment to Rule 37(e) relates to the fact that courts are still under no obligation to order any type of sanction, even if the specific intent requirement is satisfied.<sup>148</sup> A study conducted by the Federal Judicial Center found that motions for sanctions based on spoliation of evidence are very uncommon— as low as 3.2% of cases involve this issue.<sup>149</sup> As one attorney noted, “you have a

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<sup>145</sup> *Id.*

<sup>146</sup> *Stinson v. City of New York*, No. 10 Civ. 4228 (RWS), 2016 WL 54684 (S.D.N.Y. Jan 5, 2016).

<sup>147</sup> *Id.* at \*5. See Broughel et al., *supra* note 138.

<sup>148</sup> See Favro, *supra* note 96, at 16. See also FED. R. CIV. P. R. 37(e) (amend.).

<sup>149</sup> See EMERY G. LEE III, FED. JUDICIAL CTR., MOTIONS FOR SANCTIONS BASED UPON SPOILIATION OF EVIDENCE IN CIVIL CASES: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 4 (2011) (“I am not aware of any study that indicates that such motions are relatively common.”).

better chance of getting struck by lightning than getting sanctioned for failure to preserve.”<sup>150</sup>

It is urged that, in the words of John Motylinski, that Rule 37(e) must “undergo a paradigm shift”<sup>151</sup> and embrace sanctions as an essential tool.<sup>152</sup> A more rigid approach to the imposition of sanctions would likely incentivize cooperation among parties and promote a clearly delineated standard of conduct, assuring that parties are not surprised when it becomes time to engage in e-discovery.<sup>153</sup> Though some commentators are concerned that a more stringent judicial standard relating to sanctions could “create perverse incentives for parties in crafting internal preservation protocols,”<sup>154</sup> this is likely not the case. Promoting sharpened discovery plans as well as advocating for a deeper understanding of the standards in place could alleviate many of the problems that lead to spoliation cases in the first place. Such an approach would address both the causes and symptoms of the problems relating to ESI and spoliation.<sup>155</sup>

### *B. Hindsight Bias*

A further limitation of the amended Rule relates to timing. Rule 37(e) is triggered only in anticipation or conduct of litigation.<sup>156</sup> Thus, paradoxically, this could spur parties into destroying evidence prior to commencement of a lawsuit or

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<sup>150</sup> *Costs and Burdens of Civil Discovery: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 1, 136 (2011) (statement of William P. Butterfield, Partner, Hausfeld LLP).

<sup>151</sup> John E. Motylinski, *E-Discovery Realpolitik: Why Rule 37(E) Must Embrace Sanctions*, 4 U. ILL. L. REV. 1605, 1643 (2015).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See O’Brien, *supra* note 8, at 155.

<sup>155</sup> Such an approach would seem to go against the argument that, “While the threat of sanctions may be a deterrent, it tends to address the symptoms rather than the causes of the problem.” See William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 711 (1989).

<sup>156</sup> FED. R. CIV. P. 37(e).

discovery proceedings.”<sup>157</sup> In order to combat such potential abuse, courts must use their inherent authority in cases of pre-litigation destruction of evidence.<sup>158</sup> This issue was demonstrated in the recently decided case of *CAT3 v. Black Lineage*,<sup>159</sup> highlighting that “Rule 37 may not always have the last word in defining the range of sanctions available to a court.”<sup>160</sup> Thus, parties anticipating potential spoliation motions must remain cautious, as sanctions may still be a threat despite not falling within the scope of the newly amended Rule.<sup>161</sup>

### C. Relevancy: The Duty to Preserve What?

Rule 37(e) follows the common-law duty to preserve relevant information when litigation is reasonably foreseeable.<sup>162</sup> But what is considered ‘relevant’? The term has been broadly defined—if it “‘bears on’ or might reasonably lead to information that ‘bears on’ any material fact or issue in the action” then it is considered relevant.<sup>163</sup> Because of its broad nature, relevancy is determined on a case-by-case basis, and, fundamentally, “fishing expeditions” and unfettered discovery requests are

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<sup>157</sup> MARGARET KOESEL & TRACY TURNBULL, *SPOILIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION* 55 (Daniel Gourash, ed., 2d ed., 2000).

<sup>158</sup> The Federal Courts recognize a common law “duty to preserve” arising prior to the commencement of a claim, and may assert such inherent powers to impose sanctions for the breach of that duty. *See generally* Joshua M. Koppel, *Federal Common Law and the Courts’ Regulation of Pre-Litigation Preservation*, 1 *STAN. J. COMPLEX LITIG.* 171 (2012).

<sup>159</sup> *CAT3 LLC v. Black Lineage, Inc.*, 2016 WL 154116 (S.D.N.Y. Jan. 12, 2016).

<sup>160</sup> Broughel et al., *supra* note 138.

<sup>161</sup> *Id.*

<sup>162</sup> *See* FED. R. CIV. P. 37(E) Advisory Committee’s Note to 1970 amendment.

<sup>163</sup> *See* Agnieszka A. McPeak, *Social Media, Smartphones, and Proportional Privacy in Civil Discovery*, 64 *U. KAN. L. REV.* 235, 254 (2015) (citing *Dongguk Univ. v. Yale Univ.*, 270 F.R.D. 70, 72-73 (D. Conn. 2010)).

disallowed.<sup>164</sup> According to Rule 37(e)'s accompanying Committee Notes, "a *variety* of events may alert a party to the prospect of litigation," however these events often "provide only limited information" about such a prospect, thereby making the scope uncertain.<sup>165</sup> These comments reflect the desperate need for clearer, step-by-step boundaries, and again reflect the difficulties with hindsight bias. It is not enough to require attorneys to act proactively when you are not giving them the tools and knowledge to do so.

#### *D. Bad Faith: Shifting the Burden to the Spoliator*

"Even where consequences exist for the deletion of evidence, deleting parties will factor in the likelihood of such consequences coming to bear."<sup>166</sup> The burden is on the aggrieved to demonstrate both that the deletion occurred, that such deletion was relevant and necessary to their case, and/or that the deletion was with the intent to deprive.<sup>167</sup> This burden is in line with the Sedona Principles, which opines that, "Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."<sup>168</sup> But are they? Given that the possessory party is in control of the data pre-destruction, surely they are in a better position to assess the consequences and will have "the greatest motivation and ability to hide the ball."<sup>169</sup>

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<sup>164</sup> *Id.* at 255. See also, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 596 (2007) (Stevens, J., dissenting) (noting complaint was dismissed to protect defendants from potentially burdensome pretrial discovery).

<sup>165</sup> FED. R. CIV. P. 37(E) Advisory Committee's Notes (emphasis added).

<sup>166</sup> Hutchinson, *supra* note 105, at 573.

<sup>167</sup> *Id.* at 573-574. See also Non-Competition, Trade Secrets, Proprietary Information, and Duty of Loyalty Subcommittee, *Electronic Spoliation Sanctions: Delete at Your Own Risk*, at ERR Committee of the ABA Labor and Employment Law Section, Mar. 27, 2010, [http://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2010/2010\\_err\\_030.aucthecheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/2010_err_030.aucthecheckdam.pdf).

<sup>168</sup> THE SEDONA CONFERENCE, *supra* note 25, at ii no.6.

<sup>169</sup> Hutchinson, *supra* note 105, at 574.



One solution to this shortcoming, as some courts have adopted, is to “assume prejudice through bad faith” and shift the burden on the spoliator to defend.<sup>170</sup> It would not be entirely unreasonable to assume that a party intentionally hiding evidence (that it knows, or expects the other party to seek out) “did so because the evidence would have been harmful to the spoliator.”<sup>171</sup> Thus, if courts use a minimal prima facie showing of prejudice to create a rebuttable presumption, the burden would then shift to the spoliator.<sup>172</sup> Given that the spoliator is in the best position to know the contents of the evidence, and is best encouraged to investigate fully when the well-being of its case is on the line,<sup>173</sup> such a shift could prove to be compelling.

### *E. Limiting Courts’ Use of Their Inherent Powers*

Another apparent setback of Rule 37(e) is its desire to foreclose reliance on courts’ inherent powers and state law determinations when determining when certain measures should be used.<sup>174</sup> This aim is severely flawed as it limits the options available to courts, thereby promoting rigidity in an ever-changing area of law. In an attempt to promote transparency and clarity, the Rule fails to recognize the realities of the law that it is addressing, a law rife with ambiguity and lack of guidelines. Therefore, it is put forward that until the law is better developed and thorough, a broader mandate with references to sources like the Sedona Principles, will yield more effective results.<sup>175</sup>

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<sup>170</sup> *Id.* at 582.

<sup>171</sup> *Id.* at 582.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See FED. R. CIV. P. 37(E) Advisory Committee’s Note to 1970 amendment.

<sup>175</sup> See THE SEDONA PRINCIPLES, *supra* note 25. *But see* Hutchinson, *supra* note 105, at 570-71 (commenting on “variance in the law,” Hutchinson contends that parties are being forced to “over-preserve and adhere to the strictest district’s standards in order to ensure they will not receive sanctions for any district in which they brought to trial.”).

## F. Keeping Up with Technological Developments

Microsoft's General Counsel, Brad Smith, theorized that "the new definition of privacy means people don't want to keep information secret, but they do want to ensure that they control who they share information with [and] . . . [t]hey want to control what those people use the information for."<sup>176</sup> As follows, the consequences of these technological advances in the privacy sphere have a profound impact on the legal landscape.<sup>177</sup> Thus, in an Internet age where 'delete' no longer means 'gone forever,' the desire for short-lived communications has risen.<sup>178</sup> These innovative, self-destructing messages<sup>179</sup> will inevitably create complex issues in discovery disputes.<sup>180</sup> For example, the Internet app 'Vaporstream' is making a name for itself among corporate elites who wish to communicate discreetly with vanishing messages.<sup>181</sup> Applications like these are appearing one after another, showing no signs of slowing down.<sup>182</sup>

Commentary about developments in the area has generated much debate. How ought a court approach accountability in

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<sup>176</sup> Clinton T. Magill, *Discovery Snapchat: How Will Snapchat and Similar Self-Destructing Social Media Applications Affect Relevance And Spoliation Under the Federal Rules of Civil Procedure?* 9 CHARLESTON L. REV. 365, 366 (2015).

<sup>177</sup> *Id.*

<sup>178</sup> John G. Browning, *Burn After Reading: Preservation and Spoliation of Evidence in the Age of Facebook*, 16 SMU SCI. & TECH. L. REV. 273, 275, 306 (2013).

<sup>179</sup> For example, the application Snapchat facilitates self-destructing photos, videos, and other "chat" communications. See Larry Magid, *What is Snapchat and Why Do Kids Love It and Parents Fear It?* (May 1, 2013), <http://www.forbes.com/sites/larrymagid/2013/05/01/what-is-snapchat-and-why-do-kids-love-it-and-parents-fear-it/#589b22625512>; Magill, *supra* note 176.

<sup>180</sup> Magill, *supra* note 176, at 367.

<sup>181</sup> *Id.* at 307.

<sup>182</sup> *Id.* at 306-07. See, e.g., Jay Yarrow, *There's A New App That Lets People Send Self Destructing Messages. It Wants to Be Snapchat For Professionals*, BUS. INSIDER (Jan. 8, 2014, 10:47 AM), <http://www.businessinsider.com/confide-a-snapchat-for-professionals-2014-1>.

such cases and when can the use of these apps be considered routine, if ever? One author asserts that courts should consider a litigant that uses a self-destructing application in order to send possibly relevant information culpable at least by some degree.<sup>183</sup> The case of *In re Krause* did just this, rejecting the “routine operation” defense because of the debtor’s use of GhostSurf<sup>184</sup> on his computer.<sup>185</sup> When the Court ordered Krause to produce his hard drives as part of discovery, Krause instead installed and ran Ghostsurf on his computers, causing his files to be wiped cleaned—he disputed that the two hard drives on his computer had crashed previously and that he had been using Ghostsurf to protect his computers from viruses.<sup>186</sup> The court identified “no credible evidence” to support the claim<sup>187</sup> and entered a partial default judgment against him.<sup>188</sup>

All told, at the rate in which these types of Internet apps are being developed, courts must approach cases such as these on a flexible, case-by-case basis, mindful that traditional notions of discovery must at least strive to be followed.

### G. The Electronic Discovery Pilot Committee

One exciting development in attempting to bridge the gap between the tech world and the legal world is the Seventh Circuit’s Electronic Discovery Pilot Program Committee. Started in 2009, the Committee was founded by a group of judges, attorneys, academics and e-discovery experts in order to

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<sup>183</sup> Magill, *supra* note 176, at 401.

<sup>184</sup> GhostSurf technology boasts the ability not only to “delete your tracks, [but] it blocks your IP address with an anonymous browser.” See Jessica Stone, *GhostSurf Platinum 2013.41 Review*, TOP TEN REVIEWS (Mar. 3, 2016), <http://privacy-software-review.toptenreviews.com/ghost-surf-review.html>. The technology is designed to wipe data and files “as part of its protective and security functions.” Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH L.J. & TECH. 8, 18, n.68 (2006).

<sup>185</sup> *In re Krause*, 367 B.R. 740, 767 (Bankr. D. Kan. 2007).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

“provide guidance on how to streamline the discovery process . . . and how to resolve disputes regarding electronic discovery.”<sup>189</sup> The Committee highlights performance standards for attorneys, including familiarity with e-discovery provisions of the Federal Rules of Civil Procedure, awareness of relevant case law and publications, as well as familiarity with the Sedona Conference. Its goal is “to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while seeking to reduce the cost and burden of electronic discovery consistent with Rule 1 of the Federal Rules of Civil Procedure.”<sup>190</sup> Moreover, the Committee drafted a Model Discovery Plan and a Case Management Order by way of guidance, which is available free of charge on its website.<sup>191</sup>

### *H. Call for Further Reform and Proactivity*

Put simply, the Duke Conference participants’ call to stress the importance of incentivizing cooperation between parties in order to reduce inefficient and costly discovery disputes<sup>192</sup> cannot be ignored. “[A]ll stakeholders in the system...have an interest in establishing a culture of cooperation in the discovery process. Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge.”<sup>193</sup> Regrettably, no attempt was made by the Committee to detail how to preserve ESI— the rule merely addresses how a court ought to respond when there is a failure to preserve what should have been preserved. Overall, the Rule fails to provide

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<sup>189</sup> See SEVENTH CIR. E-DISCOVERY PILOT PROGRAM, *Statement of Purpose and Preparation of Principles* (2006), <http://www.discoverypilot.com> (“The goal of the Principles is to provide incentives for the early and informal information exchange on commonly encountered issues relating to evidence preservation and discovery, paper and electronic, as required by Federal Rule of Civil Procedure 26(f)(2).”).

<sup>190</sup> See *id.*

<sup>191</sup> See *id.*, at *Model Discovery Plan and Privilege Order*, <http://www.discoverypilot.com/content/model-discovery-plan-and-privilege-order>.

<sup>192</sup> O’Brien, *supra* note 8, at 170.

<sup>193</sup> The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 331-32 (2009).

proactive guidance and accountability, avoids clarifying intent and bad faith, and forecloses the court's inherent authority, thereby promoting rigidity. All in all, there remains a significant gap to be filled by further amendments and references to other sources of law.

## VIII. CONCLUSION

The drafters of the Federal Rules of Civil Procedure destined the advent of discovery to usher in a new age of concerted litigation. Nearly eighty years later, some believe that that vision "has become clouded and the framers' purpose is largely unfilled."<sup>194</sup>

While the amendments to the Federal Rules of Civil Procedure have spurred the litigation process to adapt to a drastically changing environment, in this author's opinion, there is still a lot more to be done. Though many question whether an attempt to provide specific ESI spoliation guidance is too rudimentary,<sup>195</sup> others opine that it is time "to at least provide a minimum of practical guidance to lawyers to help them meet their requirements under the applicable rules of professional conduct."<sup>196</sup> It is firmly attested that the latter approach is more favorable. Shifting the legal community's focus towards proactivity in facing this ever-developing challenge is certainly needed if Chief Justice Thomas' goal towards achieving a more "just, speedy and inexpensive determination of every action and proceeding" is to succeed.

Expressly, Rule 37(e) takes a realistic approach to the doctrine, and while not perfect itself, does not expect perfection in return. As Philip Favro comments, the rule "directs preservation questions away from the kaleidoscope of perfection that has unwittingly crept into electronic discovers'

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<sup>194</sup> William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 703-04 (1989).

<sup>195</sup> Victoria A. Redgrave et al., *Litigation, Technology & Ethics: Changing Expectations*, PRAC. L. J.: E- DISCOVERY BULL. (2014) ("[I]t would be an overstatement to assert that clear and final direct has developed. . .").

<sup>196</sup> Conti, & Lettieri, *supra* note 25, at 29.

jurisprudence.”<sup>197</sup> The Rule requires a “common-sense” determination based on “reasonableness.”<sup>198</sup> Thus, the focus is not on punishment against the party who failed to preserve the ESI, but on how to remedy the loss in order to keep the case moving forward.<sup>199</sup>

It cannot be overstated how difficult it is to balance, on the one hand total preservation as the safest course to order to ensure justice is not subverted through deletion of crucial data, but also, on the other, the economic inefficiency of such preservation— the increased costs of storage, collection, review and data production.<sup>200</sup> It is hoped that Rule 37(e)’s consideration of proportionality when addressing the reasonableness of preservation burden will alleviate this over-preservation burden.

To formally conclude, it is clear that lawyers and judges alike will continue to grapple with the challenges embedded in this intricate doctrine. Furthermore, the speed at which technology is advancing makes keeping pace inherently difficult. Thus, a call for more frequent reform must be encouraged, as well the promotion of investment in newly developed preservation techniques. Only then can the legal community’s goal of a “just, speedy, and inexpensive determination of every action and proceeding ever be achieved.”<sup>201</sup>

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<sup>197</sup> Philip J. Favro, *Getting The Big Picture on the New eDiscovery Amendments to the Federal Rules of Civil Procedure*, 29 UTAH B. J. 30, 33 (2016).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> See Hutchinson, *supra* note 105, at 570.

<sup>201</sup> FED. R. CIV. P. 1.