

Note

ANALOG SOLUTIONS: E-DISCOVERY SPOILIATION SANCTIONS AND THE PROPOSED AMENDMENTS TO FRCP 37(E)

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ABSTRACT

The ever-increasing importance of digital technology in today's commercial environment has created several serious problems for courts operating under the Federal Rules of Civil Procedure's (FRCP) discovery regime. As the volume of discoverable information has grown exponentially, so too have the opportunities for abuse and misinterpretation of the FRCP's outdated e-discovery rules. Federal courts are divided over the criteria for imposing the most severe discovery sanctions as well as the practical ramifications of the preservation duty as applied to electronically stored information. As a result, litigants routinely feel pressured to overpreserve potentially discoverable data, often at great expense.

At a conference at the Duke University School of Law in 2010, experts from all sides of the civil-litigation system concluded that the e-discovery rules were in desperate need of updating. The subsequent four years saw a flurry of rulemaking efforts. In 2014, a package of proposed FRCP amendments included a complete overhaul of Rule 37(e), the provision governing spoliation sanctions for electronically stored information. This Note analyzes the proposed Rule and argues that the amendment will fail to accomplish the Advisory Committee's goals because it focuses too heavily on preserving the trial court's discretion in imposing sanctions and focuses too little on incentivizing efficient and cooperative pretrial discovery. The Note concludes by

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offering revisions and enforcement mechanisms that would allow the new Rule 37(e) to better address the e-discovery issues identified at the Duke Conference.

INTRODUCTION

In 2003, the Office of Federal Housing Enterprise Oversight (OFHEO) opened an investigation into the accounting and financial practices of the Federal National Mortgage Association (Fannie Mae).¹ The preliminary investigation report, which found that Fannie Mae “had departed from generally accepted accounting principles in order to manipulate its reported earnings and inflate executive compensation,” prompted several private civil suits that became a single multidistrict litigation in the United States District Court for the District of Columbia.² Parties to the civil suit served the OFHEO with a third-party subpoena to produce more than thirty categories of documents related to the investigation and the OFHEO agreed to provide the electronically stored information (ESI) voluntarily, apparently not comprehending the true volume of data requested.³ The OFHEO missed multiple production deadlines and the district court ultimately held the agency in contempt, despite the fact that the OFHEO had spent approximately \$6 million—more than 9 percent of the agency’s annual budget—responding to the request.⁴ The D.C. Circuit affirmed, holding that “[t]he sanction was a proper exercise of the district court’s contempt power because it coerced compliance with the stipulated order and compensated the individual defendants for the delay they suffered.”⁵ After dedicating nearly a tenth of its total budget to a single production request, the court forced the OFHEO to produce all responsive documents—including those withheld for privilege—at its own cost.⁶

In modern civil litigation, the OFHEO’s experience is hardly an outlier.⁷ The central role of computers and electronic storage systems in today’s business environment (and society at large) has driven

1. *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 816 (D.C. Cir. 2009).

2. *Id.*

3. *Id.* at 817.

4. *Id.* at 817–18.

5. *Id.* at 823.

6. *Id.* at 818.

7. *See infra* notes 55–59 and accompanying text.

exponential growth in the volume of ESI,⁸ which in turn has increased costs and delays in the pretrial discovery process.⁹ One major company estimated that costs related to ESI production in a “midsize” case can range from \$2.5 million to \$3.5 million.¹⁰ The costly nature of production, sometimes a result of abuse of the procedural rules for discovery, has often spurred amendments to the Federal Rules of Civil Procedure.¹¹ These issues came to the forefront once again in May 2010 when the Civil Rules Advisory Committee (the Advisory Committee or Committee) held a conference at the Duke University School of Law (the Duke Conference or Conference) to address “the issues of cost and delay in the federal civil-litigation system.”¹² Participants voiced concerns that “the system can be abused so that the goals of Rule 1 are not achieved . . . [and] discovery can be used for impermissible purposes such as increasing the burdens of litigation to gain an unjustified advantage”¹³ Pursuant to the Duke Conference’s recommendations, the Advisory Committee proposed a package of amendments that included a wholesale revision of Federal Rule of Civil Procedure 37(e)¹⁴ barely a decade into that rule’s existence.¹⁵ Initial versions of the amendments

8. See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 564 (2010) (noting that “99 percent of the world’s information is now generated electronically”).

9. For an empirical study of ESI-related disputes and sanctions motions, see generally Dan H. Willoughby, Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 790–91 (2010) (noting an empirical study found that there was a significant increase in sanctions motions and awards in cases involving e-discovery between 2004 and 2010 and claiming that ESI-related sanctions “are at an all-time high”).

10. See *infra* notes 60–61 and accompanying text.

11. See, e.g., William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978) (“There is a very real concern in the legal community that the discovery process is now being overused. Wild fishing expeditions . . . seem to be the norm.”).

12. John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 538 (2010).

13. *Id.* Rule 1 states that the purpose of the FRCP is “to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1.

14. Rule 37(e) was initially adopted as Rule 37(f) but redesignated as Rule 37(e) without change in 2007. FED. R. CIV. P. 37 advisory committee’s note to 2007 amendment.

15. The amendments package was approved by the Supreme Court in April 2015 and is under congressional review. If approved by Congress, the amendments will go into effect on December 1, 2015. See Ross M. Gotler, *Supreme Court Adopts Amendments to Federal Rules, Many Impacting E-Discovery Practice, to Become Law on December 1, 2015*, LEXOLOGY (Apr. 30, 2015), <http://www.lexology.com/library/detail.aspx?g=5b631e63-87f2-4020-a4ba-8aec9ed89e51> [<http://perma.cc/X4V5-Y3FG>] (“Unless Congress acts to the contrary, the amendments will become law on December 1, 2015.”). Up-to-date information as to the status of the amendments

were sweeping in scope and focus, but subsequent changes have unfortunately stripped some of the proposals' most promising elements in the name of preserving trial courts' discretion in the sanctions process.

The current version of Rule 37(e), adopted in 2006, provides a safe harbor from sanctions for the innocent loss of ESI resulting from the standard operation of data-storage systems.¹⁶ The rule itself is deceptively concise: "Absent 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."¹⁷ The Advisory Committee hoped Rule 37(e) would protect parties from sanctions for "the routine alteration and deletion of information that attends ordinary use [of computer systems]."¹⁸ Instead, federal courts have developed a variety of standards for ESI-spoliation sanctions.¹⁹ As a result, many potential litigants feel pressure to engage in "massive and costly over-preservation" to mitigate the risk of judicial sanctions when litigation does arise.²⁰ Overpreservation was one of several ESI-related problems that prompted the Duke Conference to conclude that the existing Rule 37(e) "has not proved to be much of a safe harbor."²¹

In the four years since the Duke Conference, the Advisory Committee has held numerous hearings and promulgated multiple amendment proposals for public comment. The current rules package, approved by the Judicial Conference Advisory Committee on Civil Rules (the Judicial Conference) and submitted to the Congress for review in April 2015, contains an amendment to Rule

package can be found on the U.S. Courts' website. See *Pending Rules Amendments*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/pending-rules-amendments> [<http://perma.cc/4HYD-MA2B>] (listing rules currently pending review).

16. See 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, *FEDERAL PRACTICE & PROCEDURE* § 2284.1 (3d ed. 2014) (discussing courts' limits on imposing sanctions under 37(e)).

17. FED. R. CIV. P. 37(e).

18. FED. R. CIV. P. 37(e) advisory committee's note to 2006 amendment.

19. See *infra* Part I.B.1.

20. ADVISORY COMM. ON CIVIL RULES, U.S. COURTS, ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE – APRIL 2014, at 370 [hereinafter 2014 AGENDA BOOK], <http://www.uscourts.gov/file/15486/download> [<http://perma.cc/4HYD-MA2B>].

21. Memorandum from Gregory P. Joseph to the Honorable John G. Koeltl 2 (May 11, 2010) [hereinafter 2010 E-Discovery Panel Memorandum], <http://www.uscourts.gov/file/document/e-discovery-panel-executive-summary> [<http://perma.cc/4HYD-MA2B>].

37(e) that would entirely replace the existing rule and, according to the Advisory Committee, provide more detailed guidance regarding permissible remedies for lost ESI.²² The proposed amendment requires courts to find “intent to deprive another party of the [electronically stored] information’s use”²³ before imposing severe sanctions of dismissal or an adverse inference.²⁴ Absent such a finding, courts “may order measures no greater than necessary to cure the prejudice” resulting from the lost ESI.²⁵

This Note analyzes the strengths and weaknesses of the proposed Rule 37(e) and argues that the amendment fails to address the perceived discovery issues because it focuses too heavily on preserving the trial court’s discretion in imposing sanctions and too little on incentivizing efficient and cooperative pretrial discovery. In its current state, the rules package is a missed opportunity that apparently results from a problematic misperception of what actually drives costly litigation. As this Note argues, the amendment package would benefit from greater attention to the role of interparty conduct and cooperation in preventing excessive cost and delay. The parties themselves have the best knowledge of both their claims and their internal electronic storage systems, meaning they are uniquely situated to develop workable and efficient ESI obligations early in the course of a case. Furthermore, a stringent judicial standard for imposing severe sanctions could create perverse incentives for parties in crafting internal preservation protocols. Thus, the Advisory Committee’s goals would be better served by revising the proposals to clearly explain the ESI preservation obligation and better incentivize cooperative resolution of e-discovery disputes during, and perhaps prior to, litigation.²⁶ Even if the proposed amendments take effect as they currently stand, courts would benefit from limiting emphasis on bad-faith intent in ESI destruction and focusing instead on encouraging parties to cooperatively develop comprehensive case-management plans with the help of data-system experts.²⁷

22. Memorandum from Judge David G. Campbell to Judge Jeffrey Sutton, at Rules App. B-14 (June 14, 2014) [hereinafter 2014 Rules Memorandum], <http://www.uscourts.gov/file/18218/download> [<http://perma.cc/54K4-6CUQ>].

23. *Id.* at Rules App. B-57.

24. An adverse inference either permits or requires the jury to assume the missing data was damaging to the party that lost it.

25. *Id.*

26. *See infra* Part III.B.1.

27. *See infra* Part III.B.2.

The Note proceeds in three parts. Part I provides an overview of e-discovery procedure and spoliation law under the Federal Rules of Civil Procedure (FRCP), including the issues that led to the development of both Rule 37(e) and the current package of proposed amendments. Part II examines in detail the four proposals promulgated since the Duke Conference, including the amendments currently under congressional review. Finally, Part III analyzes the merits of the proposed amendment and argues for revisions, enforcement methods, and alternative approaches that will help give effect to the Advisory Committee's stated goals.

I. BACKGROUND OF THE FRCP DISCOVERY RULES AND RULE 37(E)

District Judge Lee Rosenthal, a former chair of the Advisory Committee on the Federal Rules of Procedure, provides an apt characterization of the history of the FRCP discovery rules: "Since their inception in 1938, the rules of discovery have been revised with what some view as distressing frequency. And yet the rulemakers continue to hear that the rules are inadequate to control discovery costs and burdens."²⁸ Indeed, Rules 26 through 37 have experienced a number of revisions since 1938, often in response to the perception that discovery abuses were preventing the Rules from accomplishing their stated purpose of "secur[ing] the just, speedy, and inexpensive determination of every action and proceeding."²⁹

Like previous reform movements,³⁰ the current amendments reflect the general feeling that "the system can be abused so that the goals of Rule 1 are not achieved."³¹ Although the symptoms identified at the Duke Conference are relatively new, the diagnosis and treatment are not: the civil-litigation system is inefficient and flawed, and the rules of procedure must change accordingly.³² The discovery

28. 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).

29. FED. R. CIV. P. 1.

30. See, e.g., *supra* note 11 and accompanying text.

31. Koeltl, *supra* note 12, at 538 ("[D]iscovery can be used for impermissible purposes such as increasing the burdens of litigation to gain an unjustified advantage for the plaintiffs or defendants.").

32. *Id.* at 544 (noting that Conference participants identified e-discovery as a particularly problematic source of litigation costs and "reached a consensus that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure").

rules' history shows that both the current and proposed versions of Rule 37(e) largely emphasize the role of the judiciary and the Rules themselves in addressing issues of cost, delay, and abuse.

This Part provides the background necessary to understand the discovery rules' structure and the role of Rule 37(e). Section A discusses the history of the rules governing discovery procedure and the development of the original version of Rule 37(e). Section B examines (1) Rule 37(e)'s application in the context of spoliation case law and (2) the issues identified at the Duke Conference that led to the current amendment process.

A. *History of the FRCP Discovery Rules*

1. *1938–2006.* Prior to the adoption of the FRCP in 1938, pretrial discovery at common law was “extremely limited.”³³ Professor Stephen Subrin characterizes the early common-law litigation process “not as a rational quest for truth, but rather a method by which society could determine which side God took to be truthful or just.”³⁴ The discovery rules of the time support his interpretation. Litigants could not submit interrogatories or depose anyone besides the opposing party (even then only in the presence of the judge), and parties could not even reach discovery without “independently stat[ing] facts to substantiate the claims set forth in the complaint.”³⁵ Courts were vehemently opposed to the proverbial “fishing expedition[]” and, in general, “discovery opportunities were spotty and incomplete.”³⁶

In crafting a set of rules that commentators have come to view as a discovery revolution,³⁷ the FRCP drafters intended to create a system through which parties could “obtain the fullest possible knowledge of the issues and facts before trial.”³⁸ Under the FRCP, parties enjoy “broader discovery rights than any state or federal

33. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 B.C. L. REV. 691, 694 (1998).

34. *Id.* at 695.

35. Beisner, *supra* note 8, at 554–55.

36. Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 159 (1999).

37. Beisner, *supra* note 8, at 558 (“[T]he drafters of the 1938 Federal Rules radically expanded both the scope of permissible discovery and the tools parties could use to obtain it” thus going “further than any single jurisdiction’s discovery provisions.”).

38. *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

jurisdiction” offered under the pre-1938 common law.³⁹ This radical expansion of the discovery process reflected the drafters’ belief that liberal pretrial discovery would be more cost-effective and efficient because parties would focus discovery efforts on the issues and claims the opposition actually planned to litigate.⁴⁰

In the decades following 1938, the Advisory Committee broadened the discovery rules with a series of amendments until “[p]arty-controlled discovery reached its high-water mark in the 1970 amendments.”⁴¹ Among other revisions, the 1970 amendments removed the judicial-permission requirement for most depositions and explicitly authorized the unlimited use of discovery methods.⁴² Unsurprisingly, parties availed themselves of these broad rights to an extent that commentators came to view as abusive,⁴³ and in 1983 the pendulum swung back toward active judicial case management with a series of reforms that the Advisory Committee chairman and drafter of the amendments called a “180-degree shift” in discovery procedure.⁴⁴ The 1983 amendments, strengthened by further changes in 1993⁴⁵ and 2000,⁴⁶ required judges to more actively control the process by holding discovery conferences⁴⁷ and limiting burdensome production requests⁴⁸ in proportion to the desired information’s importance.⁴⁹ As the substance of these amendments suggests, the

39. Rosenthal, *supra* note 28, at 232.

40. See Beisner, *supra* note 8, at 556–57 (“[T]he drafters concluded that . . . [m]utual self-interest, coupled with a desire to avoid wasting clients’ time and money, would minimize discovery disputes and lead to the expeditious exchange of relevant information.”).

41. Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 749 (1998).

42. Rosenthal, *supra* note 28, at 233.

43. See *supra* note 11 and accompanying text.

44. ARTHUR R. MILLER, FED. JUD. CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 33 (1984).

45. See FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment (adding, *inter alia*, paragraphs (1)–(4) of subdivision (a)).

46. See FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment (implementing, *inter alia*, national uniformity in disclosure practices).

47. FED. R. CIV. P. 16 advisory committee’s note to 1983 amendment.

48. FED. R. CIV. P. 26(b); FED. R. CIV. P. 26(b) advisory committee’s note to 1983 amendment.

49. See Rosenthal, *supra* note 28, at 235 (“The combination of discovery conferences and the direction to curtail disproportionate discovery required judges to undertake some managerial action in most cases and encouraged judicial involvement even when not required.”).

Advisory Committee felt that district judges were best positioned to rein in abusive discovery practices.

Overall, the history of the FRCP discovery rules reveals the consistent theme that, from the drafters' perspective, adjusting the degree of judicial oversight most effectively addresses inefficient and wasteful pretrial discovery conduct. As scholars have noted, however, the record of these amendments in practice shows that this approach is often largely ineffective.⁵⁰ The 2006 amendment that produced the current Rule 37(e), which was never circulated for public comment,⁵¹ reflects a continuation of this attitude toward procedural reform.

2. *The 2006 E-Discovery Amendments.* Before examining the history of Rule 37(e) in practice, it is helpful first to understand the factors that led to the creation of ESI-specific discovery rules in 2006. This Subsection lays out the issues identified by the Advisory Committee in dealing with ESI and the Committee's stated goals during the development of the Rule 37(e) safe harbor.

a. *The Unique Challenges of ESI.* Rule 37(e) became part of the FRCP in 2006 through a package of amendments intended to address the unique issues presented by ESI's prevalence in modern civil litigation.⁵² As computer systems became central to business operations toward the end of the twentieth century, judges struggled to apply the discovery rules developed prior to the computer revolution.⁵³ Some courts initially treated ESI exactly the same as paper documents—that is, by allowing liberal electronic discovery—but critics of this approach observed that “a literal, unyielding approach to electronic data can be devastatingly expensive” in ways

50. See, e.g., Beisner, *supra* note 8, at 563 (“These reforms, though well intentioned, failed to stem the delay and excessive costs that have become the hallmarks of pretrial discovery.”); Rosenthal, *supra* note 28, at 236 (“Although the debate over the change in the scope of discovery [in 2000] was passionate, it too was perceived as having little effect on practice.”).

51. Gregory P. Joseph, *Electronic Discovery and Other Problems 4* (2010) (unpublished manuscript) (on file with the *Duke Law Journal*).

52. See WRIGHT ET AL., *supra* note 16, § 2284.1 (“Rule 37(e) [was] adopted as Rule 37(f) in the 2006 package of amendments to deal with discovery of electronically stored information.”).

53. See Jonathan M. Redgrave & Ted S. Hiser, *The Information Age, Part I: Fishing in the Ocean, A Critical Examination of Discovery in the Electronic Age*, 2 SEDONA CONF. J. 195, 203–05 (2001) (“The trend in case law seems to indicate that as courts become more familiar with electronic data discovery, there is a corresponding increase in the propensity to grant liberal discovery into computer systems and files.”).

that the production of physical documents could never be.⁵⁴ It became clear that the digital age had brought with it “a staggering volume of potentially discoverable information,” and existing discovery rules did not provide effective guidance for courts and parties.⁵⁵

The Duke Conference’s findings provide a comprehensive summary of the unique discovery issues implicated by ESI. Though the Duke Conference featured discussion of a wide variety of procedural topics, ESI preservation and production were primary emphases due to concerns that abusive e-discovery practice was the true culprit in creating excessive litigation costs and delays. Indeed, if Duke Conference participants agreed on one point, it was that the unprecedented volume of ESI has substantially changed the nature of discovery in civil litigation.⁵⁶

At the Duke Conference, contributors identified several attributes of ESI that tend to increase the cost of conducting discovery in the digital age. The advent of electronic data systems has generally made recordkeeping more efficient and cost-effective for businesses; for a variety of reasons, however, ESI can result in greater costs than physical documents in the litigation context. The most obvious reason is volume: when companies can store terabytes of data on hard drives, backup tapes, and cloud storage systems, the pool of potentially discoverable documents grows exponentially.⁵⁷ Reviewing such voluminous records for responsiveness poses serious challenges. Litigants must first load the ESI onto special databases where attorneys can code and filter individual documents for relevance, a process that often entails costly restoration of older data from backup

54. *Id.* at 206; *see also id.* at 207 (“Litigation concerns should not dictate the purpose of business communication and data storage systems or else we will have truly allowed the tail to wag the dog.”).

55. Emily Burns, Michelle Greer Galloway & Jeffrey Gross, *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201, 202 (2008).

56. *See, e.g.,* Beisner, *supra* note 8, at 563 (“The advent of electronic discovery has significantly raised the stakes in discovery abuse.”); Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 785 (2010) (“[I]n cases in which the defendant was both a producing and requesting party with respect to ESI, costs were approximately 17 percent higher than in cases without electronic discovery.”).

57. For example, in 2005 ExxonMobil submitted a report to the Standing Committee claiming that its U.S.-based servers alone contained more than 500 terabytes of data. If preserved in physical copies, this figure would represent approximately 250 billion typewritten pages, or a single stack of pages nearly 16,000 miles high. Letter from Charles A. Beach, Coordinator, Corp. Litig., ExxonMobil Corp., to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure (Feb. 11, 2005), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/e-discovery/04-CV-002.pdf> [<http://perma.cc/QT8K-VZDQ>].

tapes and hard drives.⁵⁸ Even with technologically advanced search functions that have made it easier to sift through electronic documents, the very nature of electronic communication can make such searches increasingly complex because “[t]he casual milieu of email and other electronic communications . . . gives rise to linguistic ambiguities that further complicate the reviewer’s task.”⁵⁹ It should thus come as no surprise that Duke Conference contributors identified ESI as a primary cost driver in litigation, with one major company estimating that the cost of producing one gigabyte of data falls between \$5,000 and \$7,000.⁶⁰ Given that a “midsize” case typically involves 500 gigabytes of data,⁶¹ commentators were justifiably concerned that “[t]he rising costs associated with electronic discovery threaten to drive all but the largest cases out of the system.”⁶²

b. The Development of Rule 37(e). In the early 2000s both the American Bar Association and the Judicial Conference recognized the need to develop ESI-specific guidelines,⁶³ and the 2006 amendments implemented several important changes to e-discovery procedure. For example, the amendments created specific provisions governing the discovery of ESI identified as “not reasonably accessible”⁶⁴ and directed parties to address ESI issues at the Rule 26 discovery conference.⁶⁵ Perhaps the most important change, however, was the addition of the Rule 37(e) safe harbor from sanctions for lost ESI.⁶⁶ As the 2006 amendments’ Committee Note (2006 Committee Note) explains, Rule 37(e) provides a safe harbor against sanctions

58. See Beisner, *supra* note 8, at 565 (2010) (“The harsh reality is that the costs of producing electronic documents far exceed those of producing paper documents.”).

59. *Id.* at 566.

60. See INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES 5 (2008), (discussing the litigation costs of ESI), http://iaals.du.edu/images/wygwam/documents/publications/EDiscovery_View_Front_Lines2007.pdf [<http://perma.cc/ABW9-JUJB>].

61. *Id.*

62. Beisner, *supra* note 8, at 567; see also Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 355 (2008) (identifying the four attributes of ESI cited by the Advisory Committee as its reasons for adopting an ESI-specific amendment).

63. See Burns et al., *supra* note 55, at 202–03 (describing the “[t]wo simultaneous developments [that] occurred in the early 2000s to address the discovery of ESI in litigation”).

64. FED. R. CIV. P. 26(b)(2)(B).

65. FED. R. CIV. P. 26(f)(3)(C).

66. FED. R. CIV. P. 37(e).

for a party that loses discoverable ESI “without culpable conduct on its part.”⁶⁷ Prompted by the concern that courts too readily imposed sanctions for innocent failures to produce ESI,⁶⁸ the provision addressed a preservation issue unique to electronic materials. Unlike physical documents—the spoliation of which would typically require a conscious decision to destroy evidence—ESI can be inadvertently overwritten or destroyed in the course of automatic processes “essential to . . . the ordinary operation of computer systems.”⁶⁹

Although subsection (e) is among the shortest provisions of Rule 37, several of its phrases merit close examination. First, the Rule limits itself by providing a safe harbor only from sanctions imposed “under these rules,”⁷⁰ preserving the trial court’s long-recognized ability to sanction parties under its own inherent powers.⁷¹ The 2006 Committee Note makes this limitation explicit,⁷² creating a loophole through which courts have justified sanctions that might otherwise be inappropriate under the 37(e) safe harbor.⁷³ As discussed below, this is one source of confusion the Advisory Committee hopes to resolve in the current amendments package.⁷⁴

Another key internal limitation in Rule 37(e) lies in the phrase “electronically stored information lost as a result of the routine . . . operation of an electronic information system.”⁷⁵ According to the 2006 Committee Note, “routine” refers to “the ways in which such systems are generally designed, programmed, and implemented to meet the party’s technical and business needs.”⁷⁶ Thus, the provision

67. FED. R. CIV. P. 37(e) advisory committee’s note to 2006 amendment.

68. WRIGHT ET AL., *supra* note 16, § 2281.

69. FED. R. CIV. P. 37(e) advisory committee’s note to 2006 amendment.

70. FED. R. CIV. P. 37(e).

71. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (“It has long been understood that ‘[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,’ powers ‘which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.’” (alteration in original) (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812))).

72. *See* FED. R. CIV. P. 37(e) advisory committee’s note to 2006 amendment. (“The protection provided by Rule 37([e]) applies only to sanctions ‘under these rules.’ It does not affect other sources of authority to impose sanctions or rules of professional responsibility.”).

73. *See, e.g., Nucor Corp. v. Bell*, 251 F.R.D. 191, 196 n.3 (D.S.C. 2008) (“Rule 37(e)’s plain language states that it only applies to sanctions imposed under the Federal Rules of Civil Procedure (e.g., a sanction made under Rule 37(b) for failing to obey a court order), [sic] Thus, the rule is not applicable when the court sanctions a party pursuant to its inherent powers.”).

74. *See infra* notes 153–155.

75. FED. R. CIV. P. 37(e).

76. FED. R. CIV. P. 37(e) advisory committee’s note to 2006 amendment.

precludes spoliation sanctions for “the alteration and overwriting of information, often without the operator’s specific direction or awareness.”⁷⁷ This language reflects the Committee’s understanding that ESI systems almost always incorporate automatic overwriting functions crucial to the efficient operation of the network, an attribute that distinguishes ESI from physical documents.⁷⁸ Accordingly, the reference to “routine operation” establishes a presumption that data-destruction protocols implemented to meet legitimate business needs fall within the Rule 37(e) safe harbor.⁷⁹

As the majority of sophisticated litigants employ “routine” ESI retention systems, most Rule 37(e) disputes tend to turn on whether the party’s use of its systems constitutes “good-faith operation.”⁸⁰ Whereas the “routine” nature of a document management system implicates the design and function of the system itself, the “good-faith” element focuses on the party’s conduct in using (or suspending) the system in anticipation of litigation.⁸¹ On this point, the 2006 Committee Note instructs that “[g]ood faith . . . may involve a party’s intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation.”⁸² Though no finding of intent is explicitly required to negate good faith, the purpose of this element is to prevent parties from “exploit[ing] the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.”⁸³ This has become the critical determination for courts applying Rule 37(e), and the ambiguity

77. *Id.*

78. *See* WRIGHT ET AL., *supra* note 16, § 2284.1 (“For reasons unrelated to the availability of information for use in litigation, such a system may often alter or destroy information. This characteristic of electronic information systems has no direct parallel in regard to hard-copy materials.”).

79. *Cf.* *S. New Eng. Tel. Co. v. Global NAPs, Inc.*, 251 F.R.D. 82, 93 (D. Conn. 2008) (holding that defendant’s conscious decision to use the “wash with bleach” feature of its document retention system—as opposed to the “default mode”—did not constitute “routine, good-faith operation”).

80. *See infra* note 118.

81. *See* WRIGHT ET AL., *supra* note 16, § 2284.1 (“One feature of good faith design of a computer information system would be to comply with any pertinent obligations to preserve information within the control of the party.”).

82. FED. R. CIV. P. 37(e) advisory committee’s note to 2006 amendment.

83. *Id.*

surrounding the implied-culpability requirement was one of the primary issues driving the current amendment process.⁸⁴

B. Rule 37(e) in Practice

Though Rule 37(e) may have initially appeared to be a simple method of ensuring that parties would not be liable for the innocent loss of ESI, the safe harbor provision's history since 2006 shows that the provision's protections have proven largely ineffective. Post-2007 spoliation case law suggests that Rule 37(e) suffers from two crucial points of ambiguity: the lack of a clear preservation obligation and the varying standards applied to the phrase "routine, good-faith operation."⁸⁵ When parties cannot be sure what preservation standards the court will employ, they will logically overpreserve at great cost to both physical resources and human capital. Furthermore, a problematic circuit split developed as to the culpability required for the most severe sanctions of adverse inferences and default judgments.⁸⁶ After a thorough examination of these issues, the Duke Conference concluded that Rule 37(e) required substantial revision to provide parties with clear, workable guidelines for ESI preservation and production.

1. *Threshold Issues and the Problem of "Good Faith."* Rule 37, the trial court's proverbial "stick" for enforcing the FRCP discovery rules, offers district court judges a variety of curative measures. Its enumerated sanctions are not exclusive but rather "flexible, selective, and plural" and district courts may "use as many and as varied sanctions as are necessary to hold the scales of justice even."⁸⁷ This broad discretion has produced varying standards for the circumstances under which sanctions are appropriate and the type of sanctions that should apply, and a circuit split on the criteria for reviewing the imposition of sanctions.⁸⁸ District judges have

84. See *infra* Part II.A.3.

85. FED. R. CIV. P. 37(e).

86. See *infra* notes 118–119 and accompanying text.

87. WRIGHT ET AL., *supra* note 16, § 2284.

88. See, e.g., *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990) (implementing a five-factor test for reviewing sanctions of dismissal or default); *Mut. Fed. Sav. & Loan Ass'n v. Richards & Assocs., Inc.*, 872 F.2d 88, 92 (4th Cir. 1989) (articulating a four-factor test that includes "whether the noncomplying party acted in bad faith" but no criteria regarding the public interest in resolving cases on the merits). For a comprehensive survey of Rule 37 standards of review, see generally WRIGHT ET AL., *supra* note 16, § 2284 nn.36–38 and accompanying text.

traditionally refused to order sanctions until the offending party has a chance to cure the prejudice, but over the past thirty years courts have become increasingly willing to look to sanctions for their deterrent effects.⁸⁹

Before considering sanctions, the court must first determine that the lost information should have been preserved.⁹⁰ Although the common-law duty to preserve evidence is fairly developed in spoliation case law,⁹¹ this threshold issue presents unique challenges in the context of ESI. Computer-system architects—especially those who develop large corporate networks—typically implement automatic-destruction software for outdated files, and thus the “should have been preserved” issue will often turn on when (or if) a party implemented a litigation hold on its ESI systems.⁹² As Judge Shira Scheindlin noted in her famously comprehensive set of opinions on electronic-discovery spoliation issued in *Zubulake v. UBS Warburg LLC*,⁹³ the litigation hold is “only the beginning” of a party’s ESI-preservation obligations.⁹⁴ Counsel must remain actively engaged in ESI preservation throughout discovery and take reasonable “affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.”⁹⁵ This rigorous standard for ESI preservation makes sense given that electronic files, unlike physical evidence, can be permanently destroyed if the custodian simply neglects to halt the document-management system’s standard deletion processes.

As discussed above,⁹⁶ Rule 37(e) provides a safe harbor “to help companies escape sanction when their systems automatically caused

89. WRIGHT ET AL., *supra* note 16, § 2284.

90. See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 430 (S.D.N.Y. 2004) (holding that the party seeking sanctions for spoliation must establish, *inter alia*, “that the destroyed evidence was ‘relevant’ to the party’s claim or defense”).

91. See, e.g., *Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) (holding that the duty to preserve is “an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation”); *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 588 (D. Minn. 2005) (“The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation.”).

92. See *Zubulake*, 229 F.R.D. at 431 (“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”).

93. *Id.* at 422.

94. *Id.* at 432.

95. *Id.*

96. See *supra* Part I.A.2.b.

the destruction of ESI even though they were under a duty to preserve.”⁹⁷ Under the safe-harbor provision, a party should be safe from sanctions so long as it lost ESI through the “routine, good-faith operation” of its preservation systems.⁹⁸ Unfortunately, the 2006 Committee Note provides little guidance as to the meaning of “good faith” and courts have developed varying approaches that often conflate the “good faith” and “should have been preserved” determinations.⁹⁹

In *Columbia Pictures Industries v. Bunnell*,¹⁰⁰ plaintiffs sought spoliation sanctions for defendants’ failure to produce their website’s server log data, which automatically stored a site visitor’s information for approximately six hours before deleting it permanently.¹⁰¹ The court found that defendants would have an obligation to preserve the server log data going forward but declined to impose sanctions under the Rule 37(e) “good faith” provision because defendants had neither refused a specific request for the data nor violated a preservation order.¹⁰² Though the court couched its decision in the Rule 37(e) safe harbor, the opinion suggests this decision turned not on “good faith” but rather on the lack of a preservation obligation.¹⁰³

Doe v. Norwalk Community College,¹⁰⁴ decided shortly after the 2006 amendments, illustrates an even narrower interpretation of the Rule 37(e) “good faith” provision. In *Doe*, the plaintiff sought sanctions for spoliation of emails and documents allegedly scrubbed from the defendant’s computer system after the plaintiff had filed her

97. Burns et al., *supra* note 55, at 217.

98. FED. R. CIV. P. 37(e).

99. See, e.g., *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 682 (7th Cir. 2008) (upholding denial of motions for sanctions due to defendant’s lack of bad faith in destroying backup tapes prior to receiving demand letter from plaintiffs); *Connor v. Sun Trust Bank*, 546 F. Supp. 2d 1360, 1376–77 (N.D. Ga. 2008) (finding bad faith in defendant’s affirmative deletion of “undisputedly relevant” emails that “may have existed at the time the duty to preserve arose”); *Alexander v. Fed. Bureau of Investigation*, 541 F. Supp. 2d 274, 305 (D.D.C. 2008) (refusing to impose sanctions due to lack of “clear and convincing evidence that [defendants] acted in bad faith, with an intent to mislead this Court”).

100. *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093, 2007 WL 2080419 (C.D. Cal. May 29, 2007).

101. *Id.* at *2–3, *13.

102. *Id.* at *14.

103. See *id.* (holding that defendants’ failure to retain the data was based in good faith due to the absence of “a specific request by defendants [sic] to preserve Server Log Data present solely in RAM and . . . a violation of a preservation order”).

104. *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372 (D. Conn. 2007).

complaint but before her initial discovery request for the data.¹⁰⁵ The district court imposed an adverse-inference sanction and refused to apply the Rule 37(e) safe harbor, holding that “in order to take advantage of the good faith exception, a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business.”¹⁰⁶ Critical to the court’s reasoning was its finding that the “defendants failed to suspend [their system] at any time” after litigation commenced, suggesting that a failure to implement a litigation hold after the filing of a complaint precludes a finding of good faith under Rule 37(e).¹⁰⁷

These rulings show how the Rule 37(e) safe-harbor provision has proven difficult to enforce in light of the confusion surrounding the duty to preserve ESI.¹⁰⁸ Though the Advisory Committee may have hoped the rule would provide some protection for litigants who innocently lose ESI in the course of business, the ambiguity of “routine, good-faith operation” has led courts to interpret the safe harbor narrowly, relying primarily on the common-law duty to preserve.¹⁰⁹ As a result, potential litigants face the difficult choice of either preserving all ESI at great cost or risking severe spoliation sanctions when litigation does indeed arise.

2. *The Duke Conference and the Road to Reform.* In May 2010, the Advisory Committee held the Duke Conference to address concerns that “the costs and delays in the federal civil-litigation system were impeding rather than promoting the goals of Rule 1.”¹¹⁰ The Conference prompted “an extraordinary outpouring of empirical research, scholarly commentary, and thoughtful input” on the state of the civil-litigation system and directly led to the current amendment process.¹¹¹ Discovery procedure was a central topic at the conference,

105. *Id.* at 375.

106. *Id.* at 378.

107. *Id.*

108. *See* Burns et al., *supra* note 55, at 217 (“[I]f the party cannot avail itself of the safe harbor because it had a duty to preserve data in the first instance, then Rule 37 does little to change the state of the pre-existing common law.”).

109. *See, e.g.,* Oklahoma *ex rel.* Edmonson v. Tyson Foods, No. 05-CV-329, 2007 WL 1498973, at *6 (N.D. Okla. May 17, 2007) (warning that parties “should be very cautious in relying upon any ‘safe harbor’ doctrine as described in new Rule 37([e])”).

110. Koeltl, *supra* note 12, at 538–39.

111. *Id.*

and contributors identified discovery as a primary source of excessive cost in modern litigation.

Two specific issues from the Duke Conference provide important context for understanding the current FRCP amendments package. First, conference participants argued that the ubiquity of ESI in modern litigation exacerbates the discovery process's inefficiencies and significantly contributes to rising costs.¹¹² As discussed above, contributors unanimously agreed that ESI presents unique discovery challenges compared to physical evidence and thus merits distinct, careful treatment under the FRCP.¹¹³ Second, experts identified discovery sanctions' uncertain criteria as a major source of confusion and cost before and during litigation.¹¹⁴ The Conference leaders recommended substantial revisions to the FRCP, starting the reform process that would lead to the current package of amendment proposals.

Aside from the specific discovery problems created by the increasing prevalence of ESI, the primary discovery-related concern at the Duke Conference was the issue of spoliation sanctions. Given the increased costs associated with ESI production, some contributors felt that the threat of severe sanctions had become a "nuclear weapon that [could] be used to force large organizations to settle frivolous cases."¹¹⁵ A comprehensive empirical study presented at the Duke Conference found that sanctions motions and awards in cases involving e-discovery had significantly increased between 2004 and 2010; as a result, the authors claimed, ESI-related sanctions "[were] at an all-time high."¹¹⁶

Conference commentators criticized Rule 37(e)'s purported safe harbor, with one study finding that only two cases per year had met the safe harbor's requirements since 2006 and that courts "ha[d] not shown a propensity to give the safe harbor broad and ready application."¹¹⁷ Particularly problematic was the circuit split on the required culpability for the severe sanctions of adverse inferences and

112. See Beisner, *supra* note 8, at 564–70 (discussing numerous ways in which electronic discovery "significantly" increases the costs of discovery); Koeltl, *supra* note 12, at 540 ("It is plain that, although the cost of discovery in the median case may be reasonable . . . , the costs in high-stakes litigation can be enormous.").

113. See *supra* Part I.A.2.a.

114. See *supra* Part I.B.

115. Beisner, *supra* note 8, at 571.

116. Willoughby et al., *supra* note 9, at 790–91.

117. *Id.* at 826–27.

dismissal. In the Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits, such sanctions required a finding of wrongful intent or “bad faith” in the destruction or overwriting of data.¹¹⁸ In contrast, the First, Second, Third, Fourth, Sixth, Ninth, and D.C. Circuits held that bad faith may be relevant, but mere negligence in destroying ESI can merit severe sanctions when significant prejudice is shown.¹¹⁹ In the absence of a uniform culpability standard for discovery sanctions, parties feel pressure to overpreserve ESI at great cost to minimize the risk of facing sanctions for negligent data loss. Analysis of the Rule 37(e) amendments proposed since the Duke Conference shows that this confusion over sanctions standards was among the most pressing issues facing the Advisory Committee.¹²⁰

The findings and testimony presented at the Duke Conference led its participants to several important conclusions. First, there was

118. See, e.g., *Bracey v. Grondin*, 712 F.3d 1012, 1020 (7th Cir. 2013) (“Simply establishing a duty to preserve evidence or even the negligent destruction of evidence does not automatically entitle a litigant to an adverse inference instruction in this circuit.”); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (“The adverse inference must be predicated on the bad faith of the party destroying the records.”); *Rimkus Consulting Grp. v. Cammarata*, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010) (“As a general rule, in this circuit, the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of ‘bad faith.’” (quoting *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005))).

119. See, e.g., *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012) (“[A] finding of gross negligence merely permits, rather than requires, a district court to give an adverse inference instruction.”); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (“The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.”); *Zest IP Holdings v. Implant Direct Mfg.*, No. 10–0541, 2013 WL 6159177, at *9 (S.D. Cal. Nov. 25, 2013) (denying terminating sanctions but granting an adverse inference instruction when “[d]efendants were at least negligent in not implementing a litigation hold”); *SJS Distrib. Sys. v. Sam’s East*, No. 11–CV–1229, 2013 WL 5596010, at *5 (E.D.N.Y. Oct. 11, 2013) (“In order to remedy the evidentiary imbalance created by the destruction of evidence, an adverse inference may be appropriate, even in the absence of a showing that the spoliator acted in bad faith.”); *Food Serv. of Am. v. Carrington*, No. CV–12–00175, 2013 WL 4507593, at *22 (D. Ariz. Aug. 23, 2013) (“[A] finding of bad faith is not a prerequisite’ to an imposition of an adverse inference.” (quoting *Glover v. BIC*, 6 F.3d 1318, 1329 (9th Cir. 1993))); *Woodard v. Ford Motor Co.*, No. 1:11–cv–3092, 2013 WL 3024828, at *4 (D. Ore. June 13, 2013) (“A finding of prejudice need not be based on bad faith by the spoliating party: even if a plaintiff was minimally culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case.”); *Gatto v. United Air Lines, Inc.*, No. 10–cv–1090, 2013 WL 1285285, at *4 (D.N.J. Mar. 25, 2013) (granting an adverse inference and holding that “so long as the evidence is relevant, the offending party’s culpability is largely irrelevant”); *Montoya v. Orange Cnty. Sheriff’s Dep’t.*, No. 11–1922, 2013 WL 6705992, at *13 (C.D. Cal. Dec. 18, 2013) (granting an adverse inference instruction despite “no suggestion of bad faith or deliberate destruction of evidence”).

120. See *infra* Part II.A.3.

“substantial agreement” on “the need for [even more] active judicial management of litigation.”¹²¹ As several commentators observed, contention and distrust between parties tends to increase costs in pretrial disputes;¹²² thus, the Duke Conference called for a greater degree of court involvement in discovery procedure “as a way of assuring that proceedings are conducted in such a way that their costs are proportionate to the stakes of the litigation.”¹²³ In a similar vein, Conference participants observed that rule changes “can only go so far to curb abuse” and stressed the importance of cooperation between parties in ensuring cost-effective and efficient litigation.¹²⁴ According to the Duke Conference, the solution to out-of-control cost and delay lies in a combination of active, thorough case management and a substantial change in the culture of civil litigation between opposing parties.

But the Conference’s most important conclusion was perhaps the “consensus that a rule addressing preservation (spoliation) [of ESI] would be a valuable addition to the Federal Rules of Civil Procedure.”¹²⁵ Although there was some disagreement as to whether a rule change could effectively address discovery abuse,¹²⁶ the Duke Conference’s E-Discovery Panel (the E-Discovery Panel or Panel) ultimately recommended that the Duke Conference’s Standing Committee (the Standing Committee) develop an ESI-specific preservation rule.¹²⁷ The Panel suggested a set of important elements for such a rule, including a “trigger” point for the duty to preserve

121. Koeltl, *supra* note 12, at 542.

122. See, e.g., Lee & Willging, *supra* note 56, at 784 (“Contention among the parties also increases costs, at least for defendants.”); Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 178 (2013) (“The adversary character of civil discovery, with substantial reinforcement from the economic structure of our legal system, promotes practices that systematically impede the attainment of the principal purposes for which discovery was designed.”).

123. Koeltl, *supra* note 12, at 542.

124. *Id.* at 545; see also The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 331 (2009) (“[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.”).

125. Koeltl, *supra* note 12, at 544.

126. Compare Lee & Willging, *supra* note 56, at 768 (arguing that “there is scant evidence that alternative discovery rules would result in lower costs or shorter processing times in any predictable fashion”), with Joseph, *supra* note 51, at 7 (calling for rules “to define and circumscribe the pre-litigation duty to preserve [ESI]”).

127. 2010 E-Discovery Panel Memorandum, *supra* note 21, at 1.

ESI and a clear standard for discovery sanctions.¹²⁸ These recommendations became the starting point for the amendment process that produced the package of proposals currently before Congress.

II. THE AMENDMENT PROCESS AND THE DEVELOPMENT OF THE CURRENT PROPOSALS

Armed with an “unprecedented array”¹²⁹ of empirical findings and scholarly commentary, the Advisory Committee left the Duke Conference with the impression that the federal civil-litigation system works fairly well but could be improved in several important respects. The Advisory Committee acknowledged the widespread concern that courts were not applying the FRCP discovery rules consistently and confusion over preservation obligations and sanctions—exacerbated by the ever-increasing prevalence of ESI—had made the discovery process inefficient and costly.¹³⁰ Furthermore, the Committee felt that judges “must be considerably more involved in managing each case from the outset” in order to develop and enforce the appropriate scope of discovery on a case-by-case basis.¹³¹ Finally, and perhaps most importantly, the Committee noted that simply amending the FRCP is likely “not sufficient to make meaningful improvements” to the overall state of the civil-justice system.¹³² In its Report to the Chief Justice following the Duke Conference, the Advisory Committee neatly summarized its goals for the impending amendment process: “What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management.”¹³³

This Part analyzes the amendment process thematically rather than chronologically. The context of the separate issues the Advisory Committee sought to address illuminates how the proposed amendments have developed throughout the notice-and-comment process. After laying out the specific questions facing the Advisory

128. *Id.* at 5–7.

129. JUDICIAL CONF. ADVISORY COMM. ON CIVIL RULES, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 1, <http://www.uscourts.gov/file/reporttothechiefjusticepdf> [<http://perma.cc/H7T9-C99C>].

130. *Id.* at 3–4.

131. *Id.* at 4.

132. *Id.*

133. *Id.*

Committee in its attempt to fix Rule 37(e), Section A discusses the various ways in which the early rule proposals answered each question and tracks the development of the Committee's approach. Section B examines the amendment in its current form as submitted to Congress in April 2015.

A. *Early Efforts*

Drawing on the recommendations of the Duke Conference, the Advisory Committee developed its Rule 37(e) amendment proposals with several important questions in mind: (1) whether the rule should apply to ESI or to all forms of evidence, (2) whether the rule should set out its own duty to preserve or continue to rely on the common-law duty, (3) how best to resolve the circuit split regarding the required culpability for severe sanctions, and (4) whether to include a nonexclusive list of factors for judges to weigh when considering sanctions. Analysis of these four issues shows how the Committee, initially ambitious in its reform efforts, gradually pared down its proposals over time.

Since the Duke Conference, the Advisory Committee has published four versions of the proposed Rule 37(e): two in January 2013 (Primary 2013 Proposal¹³⁴ and Alternative 2013 Proposal¹³⁵), one in April 2014 (Penultimate Proposal¹³⁶), and the version presently under congressional review (Current Proposal or Proposal¹³⁷). This Section analyzes the first three proposals, which the Committee produced after extensive hearings and Committee meetings between 2010 and 2013.¹³⁸ Though the Committee's early attempts were perhaps slightly overambitious, they contained several important elements that, unfortunately, did not survive in the current package of amendments.

134. For the full text of the Primary 2013 Proposal, see ADVISORY COMM. ON CIVIL RULES, U.S. COURTS, ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE – APRIL 2013, at 152–53 [hereinafter 2013 AGENDA BOOK], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf> [<http://perma.cc/679G-5KHP>].

135. For the full text of the Alternative 2013 Proposal, see *id.* at 160–61.

136. For the full text of the Penultimate Proposal, see 2014 AGENDA BOOK, *supra* note 20, at 383–84.

137. For the full text of the Current Proposal, see *infra* Part II.B.

138. See 2013 AGENDA BOOK, *supra* note 134, at 143 (discussing the creation of the proposals after multiple Committee meetings).

1. *Confining the Rule to ESI.* As a threshold matter, the Committee had to decide whether the new Rule 37(e) should be limited to ESI or whether it should apply to all types of discoverable evidence. The current version of Rule 37(e) applies only to ESI, yet the Primary 2013 Proposal contained no such restriction and would have applied whenever “a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation.”¹³⁹ In its explanatory materials the Committee provided little justification for the decision to apply the rule to all types of discoverable information, observing simply that “[t]he amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts.”¹⁴⁰ Evidently this was a point of serious disagreement, and “[a]fter considerable discussion” the Committee decided to publish the Alternative 2013 Proposal, which was mostly identical to the Primary 2013 Proposal but would apply only when “a party failed to preserve discoverable electronically stored information that should have been preserved in the anticipation or conduct of litigation.”¹⁴¹ Proponents of the Alternative 2013 Proposal 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.”¹⁴² These Committee members concluded that the traditional common-law standards for physical evidence do not make sense for ESI.¹⁴³

This viewpoint evidently won out, and the Committee became “firmly convinced that a rule addressing the loss of ESI in civil litigation is greatly needed.”¹⁴⁴ Thus the Penultimate Proposal, like the Alternative 2013 Proposal, applied only when “a party failed to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation.”¹⁴⁵ As the 2006

139. *Id.* at 152.

140. *Id.* at 154.

141. *Id.* at 150, 160–61.

142. *Id.* at 150.

143. *Id.* at 150–51.

144. 2014 AGENDA BOOK, *supra* note 20, at 370.

145. *Id.* at 383.

Committee Note explained, this decision followed extensive comments regarding the unique challenges of ESI preservation and testimony that “the explosion of ESI will continue and even accelerate.”¹⁴⁶ Accordingly, the Committee concluded that “[t]he need for broad trial court discretion in dealing with these challenges will likewise increase.”¹⁴⁷ As with the other key issues discussed below, the approach to this question shows the Advisory Committee’s tendency to start with sweeping reforms and gradually narrow its focus over subsequent proposals.

2. *The Duty to Preserve.* The other significant threshold issue was whether the new ESI rule should, as advocated by the chairman of the Duke Conference E-Discovery Panel, “specify the point in time when the obligation to preserve information” attaches.¹⁴⁸ As discussed above, the current rule’s reliance on the common-law preservation duty has led to a variety of standards among the circuit courts and has sometimes swallowed the “routine, good-faith” element.¹⁴⁹ Although the Duke Conference participants may have hoped that the Committee would take this reform process as an opportunity to clarify the duty to preserve ESI, the Committee members ultimately decided that such a task was simply too involved and case specific for the FRCP to resolve.¹⁵⁰

Despite the E-Discovery Panel’s calls for clarification on the duty to preserve, the Advisory Committee declined to address the issue in its 2013 proposals. It was not until the promulgation of the Penultimate Proposal in April 2014 that the Committee declared that the new Rule 37(e) would “not itself create a duty to preserve” but rather would “take[] the duty as it is established by case law.”¹⁵¹ Claiming that “case law is well developed and fairly consistent in this area,” the Committee explained that there was no need for an ESI-specific duty because “[t]he massive scope of electronic information . . . means that ample information for effective litigation often remains available even when it is not possible to know with certainty what information was contained in the lost source.”¹⁵²

146. *Id.* at 371.

147. *Id.*

148. 2010 E-Discovery Panel Memorandum, *supra* note 21, at 5.

149. *See supra* Part I.B.1.

150. 2014 AGENDA BOOK, *supra* note 20, at 372–73.

151. *Id.* at 370.

152. *Id.* at 372–73.

Implicit in this somewhat-tautological justification is the Advisory Committee's view that the duty to preserve is not as important in ESI-spoilation cases because alternative sources are often available for the lost information. As a result, none of the proposals promulgated to date have attempted to define the duty to preserve ESI and have instead opted to continue relying on the non-uniform, common-law duty.

3. *Curative Measures and Severe Sanctions: Resolving the Circuit Split.* In each of the early rule proposals the Advisory Committee sought to bifurcate the sanctions determination into two circumstances: those that merit severe sanctions (adverse inferences and dismissal) and those that justify only "curative measures"¹⁵³ (for example, ordering additional discovery or permitting the introduction at trial of evidence of the lost ESI). These changes represent the most significant aspect of the amendment process, as Duke Conference participants identified the circuit split on the required culpability for severe sanctions as the primary source of uncertainty surrounding ESI-preservation obligations.¹⁵⁴ First, the Advisory Committee took definitive steps to "foreclose[] reliance on inherent authority or state law to impose litigation sanctions"¹⁵⁵ by eliminating the "under these rules" loophole that currently allows courts to avoid the Rule 37(e) safe harbor.¹⁵⁶ Having isolated the sanctions power to the FRCP, the Committee set out to provide definitive guidelines for severe sanctions and curative measures.

On this issue, the 2013 proposals were again the most sweeping and, as the Advisory Committee discovered, problematically complicated. For example, under the Primary 2013 Proposal the court, after determining that the party failed to preserve discoverable information, would have the power to:

- (A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

153. *Id.* at 373.

154. *See supra* notes 117–120 and accompanying text.

155. 2013 AGENDA BOOK, *supra* note 134, at 155.

156. As discussed above, courts have used the phrase "under these rules" to justify imposing sanctions based on inherent power regardless of the applicability of Rule 37(e). *See supra* notes 70–73 and accompanying text.

(B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the failure:

- (i) caused substantial prejudice in the litigation and was willful or in bad faith; or
- (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the action and was negligent or grossly negligent.¹⁵⁷

The Committee Note accompanying this proposal clarifies the Advisory Committee's approach. Absent a finding of bad faith or substantial prejudice, subdivision (A) authorizes only "measures that are not sanctions"—that is, curative orders that do not involve a default judgment or adverse inference instruction.¹⁵⁸ These less severe options, such as ordering additional discovery or permitting the introduction of evidence of the lost information at trial, reflect the Committee's view that courts "should employ the least severe sanction" necessary to mitigate the effects of the loss.¹⁵⁹

Subdivision (B) further partitions the court's analysis based on the party's degree of culpability, authorizing the most severe sanctions only upon one of two further findings. First, the court must determine that "the loss of information caused substantial prejudice in the litigation."¹⁶⁰ If, as is often the case with ESI, substitute evidence is available from other sources, the court would be limited to the curative measures available under subdivision (A). Alternatively, the court must conclude that "the party that failed to preserve did so willfully or in bad faith . . . with reference to the factors identified in Rule 37(e)(2)."¹⁶¹ A narrow exception to the "bad faith" requirement lies in subdivision (B)(ii), which permits severe sanctions for negligent loss of evidence only in those "extremely rare" cases "in which the only evidence of a critically important event has been lost."¹⁶²

The Alternative 2013 Proposal modifies these standards slightly by eliminating the negligence exception so the rule would instead read as follows:

157. 2013 AGENDA BOOK, *supra* note 134, at 152.

158. *Id.* at 155.

159. *Id.* at 157.

160. *Id.* at 156.

161. *Id.*

162. *Id.* at 157.

- (A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and
- (B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the failure caused substantial prejudice in the litigation and was willful or in bad faith.¹⁶³

Aside from limiting the rule to ESI, this is the only significant difference between the two 2013 proposals. The change reflects some Advisory Committee members' concerns that a negligence exception might allow severe sanctions for ESI "lost through an Act of God" and even "swallow the rule" by giving courts the ability to impose default judgments or adverse inferences for mere negligence.¹⁶⁴

Once again, proponents of the Alternative 2013 Proposal prevailed and the Penultimate Proposal omitted the negligence exception and allowed severe sanctions "only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation."¹⁶⁵ As the Advisory Committee explained, this decision indicates its conclusion that "permitting an adverse inference for negligence creates powerful incentives to overpreserve, often at great cost."¹⁶⁶ Thus, the Committee evidently decided that the best course was to "preserve[] broad trial court discretion to cure prejudice caused by the loss of ESI,"¹⁶⁷ limiting the court's power only by bifurcating the determination into "curative measures" and "sanctions."¹⁶⁸

4. *The List of Factors.* Perhaps the best example of the Advisory Committee gradually eliminating a major element of the proposed amendments is its treatment of the nonexclusive list of factors for the court to weigh when considering sanctions. The list first appeared in the Primary 2013 Proposal:

- (2) *Factors to be considered.* In determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, whether the failure was

163. *Id.* at 161.

164. *Id.* at 150.

165. 2014 AGENDA BOOK, *supra* note 20, at 383.

166. *Id.* at 379.

167. *Id.* at 376.

168. *Id.* at 373.

willful or in bad faith, and whether the failure was negligent or grossly negligent, the court should consider all relevant factors, including:

- (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;
- (B) the reasonableness of the party's efforts to preserve the information;
- (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party engaged in good-faith consultation about the scope of preservation;
- (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and
- (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.¹⁶⁹

As the Committee Note to this subdivision makes clear, the enumerated factors are “not exclusive; other considerations may bear on these decisions . . . [and] the court's focus should be on the reasonableness of the party's conduct.”¹⁷⁰ The Committee Note also provides a detailed explanation of each factor, at several points instructing courts to be “sensitive to the party's sophistication” when evaluating discovery conduct.¹⁷¹ Particularly notable in these factors is the theme of encouraging parties to engage in “meaningful discussion of the appropriate preservation regime” so as to “resolve issues concerning preservation before presenting them to the court.”¹⁷²

Following the comment period for the 2013 proposals, the Committee acknowledged that “[t]he value of any list of factors has been vigorously debated, and the wisdom of several of the factors also has been questioned.”¹⁷³ This was, it seems, the beginning of the end for the list of relevant factors. The Penultimate Proposal was the last to contain the list, and even then in shortened form and in brackets so as to denote the disagreement within the Advisory Committee:¹⁷⁴

- (4) In applying Rule 37(e), the court should consider all relevant factors, including:
 - (A) the extent to which the party was on notice that litigation was

169. 2013 AGENDA BOOK, *supra* note 134, at 152–53.

170. *Id.* at 158.

171. *Id.*

172. *Id.* at 159.

173. 2014 AGENDA BOOK, *supra* note 20, at 373.

174. *Id.*

likely and that the information would be relevant;
(B) the reasonableness of the party's efforts to preserve the information;
(C) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and
(D) whether, after commencement of the action, the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.¹⁷⁵

In the accompanying materials, the Committee explained the arguments for and against the inclusion of the factors. Opponents expressed concerns that the list might be mistaken as exclusive, "may become a routine set of items to be checked off . . . without sufficient care," or may have been expressed poorly.¹⁷⁶ Those in favor of the factors stressed that they could provide valuable guidance to courts making this complex determination, "particularly when acting in an environment that changes as rapidly as practices change in the electronic storage of information."¹⁷⁷ Ultimately, the Advisory Committee decided to publish the list in brackets so as to invite comment on whether "it may be better to address the factors only in the Committee Note" as opposed to the text of the rule.¹⁷⁸

Though the details of these individual proposals are primarily useful as context for the development of the language in the current rules package, the amendment process's general theme is important. The Committee started with a comprehensive, highly detailed rule that would provide the clearest possible guidance for courts and slowly pared down its language in the name of preserving trial court discretion. As discussed below, this increasingly conservative approach produced a rule proposal that will likely struggle to address the serious issues raised by Duke Conference participants.

B. The Current Proposal

Four years of hearings, conferences, proposals, and commentary came to a head in June 2014 when the Advisory Committee submitted its latest package of FRCP amendments to the Standing Committee, which adopted the amendments and passed them on for

175. *Id.* at 383–84.

176. *Id.* at 380.

177. *Id.*

178. *Id.* at 373.

review by the Judicial Conference and the Supreme Court.¹⁷⁹ Compared to the early attempts, the Current Proposal is remarkably concise:

(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION.

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

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

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

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

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

(C) dismiss the action and enter a default judgment.¹⁸⁰

Like the previous two attempts, the Current Proposal is explicitly limited to ESI. Similarly, in the Current Proposal the Committee reaffirmed its commitment to relying on the common-law duty to preserve. Having concluded that “a detailed rule specifying the trigger, scope, and duration of a preservation obligation is not feasible,” the Committee instead opted simply to “craft a rule that addresses actions courts may take when ESI that should have been preserved is lost.”¹⁸¹ The accompanying Committee Note provides scarce guidance regarding the common-law duty, observing simply that courts “should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant” and that a duty to preserve “may in some instances be triggered or clarified by a court order.”¹⁸²

As with the early proposals, the Advisory Committee's primary goal appears to be eliminating the circuit split on culpability

179. The Supreme Court approved the amendments, which will take effect December 1, 2015 unless Congress rejects them. *See supra* note 15.

180. 2014 Rules Memorandum, *supra* note 22, at Rules App. B-56 to -57.

181. *Id.* at Rules App. B-15; *see also id.* at Rules App. B-59 (“Rule 37(e) is based on this common-law duty [to preserve]; it does not attempt to create a new duty.”).

182. *Id.* at Rules App. B-59 to -60.

standards. Though the Current Proposal tightens the Rule's language, the overall effect is largely identical to that of the earlier efforts. Subdivisions (e)(1) and (e)(2) create separate standards for curative measures and severe sanctions, with the latter limited to cases in which a party destroys ESI with the intent to withhold it from the opposition. This approach, which explicitly "rejects cases . . . that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence," reflects the Committee's view that "[t]he 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."¹⁸³ Thus, the primary objective of subdivision (e)(2) is to resolve the circuit split regarding the degree of culpability required for the most serious sanctions.¹⁸⁴

Conspicuously absent from the Current Proposal, however, is the three initial proposals' list of factors. Not only were the factors struck from the Current Proposal itself, but the Committee Note also no longer contains the extensive guidelines that had appeared in the Committee Notes to the earlier proposals. The Current Proposal's accompanying memorandum does not explain this decision, which is surprising considering that the earlier Committee materials merely suggested moving the factors to the Committee Note and not eliminating them entirely.¹⁸⁵

Some of the new language could be read as a reincorporation of the factors. For example, one notable addition to the Current Proposal is the limiting phrase "[i]f [ESI] . . . is lost . . . because a party failed to take reasonable steps to preserve it."¹⁸⁶ This language addresses the concern that, given ESI's ever-increasing volume and complexity, "perfection in preserving all relevant electronically stored information is often impossible."¹⁸⁷ The Committee Note provides that courts must "be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts" and recognizes that in

183. *Id.* at Rules App. B-65.

184. *Id.* at Rules App. B-17.

185. *See, e.g.*, 2014 AGENDA BOOK, *supra* note 20, at 373 ("The list may help potential litigants make reasonable preservation decisions, may help counsel frame effective arguments, and may help courts to understand and respond to the arguments. On the other hand, it may be better to address the factors only in the Committee Note.").

186. 2014 Rules Memorandum, *supra* note 22, at Rules App. B-56.

187. *Id.* at Rules App. B-61.

some cases information “may be destroyed by events outside the party’s control.”¹⁸⁸ Accordingly, this phrase explicitly precludes sanctions “when the loss of information occurs despite the party’s reasonable steps to preserve [it].”¹⁸⁹ Thus, one could read this new phrase as a more succinct version of the factor that instructed the court to be cognizant of parties’ resources and sophistication when considering sanctions, but in any event the Current Proposal contains no actual “list of relevant factors” in any recognizable form.

Reading this amendment in conjunction with the initial proposals shows how the Advisory Committee gradually narrowed its focus to a few specific, attainable goals. First, the Current Proposal and accompanying Committee Note go to considerable lengths to resolve the circuit split on adverse-inference and default-judgment culpability requirements. Second, the Committee repeatedly stresses the importance of preserving the trial court’s broad discretion, scaling back any attempts at providing explicit guidelines and limiting district judges only by instructing them to “employ measures ‘no greater than necessary to cure the prejudice’” caused by the loss of ESI.¹⁹⁰ This approach leaves too much in the hands of the trial court, however, and will likely do little to prevent costly and inefficient overpreservation.

III. ANALYSIS OF THE PROPOSED RULE AND RECOMMENDATIONS FOR REVISION AND ENFORCEMENT

Although this package of amendments represents, on the whole, a significant improvement over the current e-discovery regime, the proposed Rule 37(e) will likely prove ineffective in accomplishing the Duke Conference’s goals due to the Advisory Committee’s unwillingness to provide more explicit guidelines for the district court’s determination of sanctions. This Part first discusses the strengths and weaknesses of the Current Proposal as it stands and then argues for specific revisions and enforcement approaches that would help effectuate the Advisory Committee’s stated objectives.

188. *Id.*

189. *Id.*

190. *Id.* at Rules App. B-63.

A. *The Merits of Proposed Rule 37(e) in the Context of the 2014 Rules Package*

1. *Strengths.* Compared to the current version of Rule 37(e), the Current Proposal contains several major revisions that should substantially benefit both litigants and district courts. At the most basic level, eliminating the phrase “under these rules” should have a much-needed limiting effect on ESI-spoilation sanctions by precluding resort to the court’s inherent power. This is a small change, but a critical one—by cabining the court’s sanctioning powers to the provisions of Rule 37(e), the amendment confines the court’s discretion to the FRCP standards and assures litigants that judges will not resort to jurisdiction-specific common-law criteria when considering a motion for sanctions.

Similarly, the “reasonable steps” provision of the Current Proposal should, over time, give parties confidence that their internally developed preservation protocols will insulate them from some discovery sanctions. The Committee Note provides that “‘reasonable steps’ . . . does not call for perfection.”¹⁹¹ Although the “reasonableness” of a party’s efforts is ultimately up to the discretion of the district court, the language in the Committee Note suggests that the Committee has rejected a line of cases that approaches strict liability on the theory that once the duty to preserve attaches, “failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent” and thus sanctionable.¹⁹² The Current Proposal instead creates a “proportionality” approach that is “sensitive to party resources.”¹⁹³ Although the Proposal would benefit from more specific guidance on the duty to preserve, this aspect of the Proposal is an important step toward clarifying preservation obligations and “discourag[ing] unfair allegations of preservation misconduct while simultaneously promoting compliance and reducing unnecessary overpreservation.”¹⁹⁴

Finally, the Current Proposal should effectively resolve the circuit split regarding culpability for severe sanctions. The Committee

191. *Id.* at Rules App. B-61.

192. Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 464 (S.D.N.Y. 2010).

193. 2014 Rules Memorandum, *supra* note 22, at Rules App. B-61.

194. THOMAS Y. ALLMAN, LAWYERS FOR CIVIL JUSTICE, THE CIVIL RULES PACKAGE AS PRESENTED TO THE JUDICIAL CONFERENCE (SEPT. 2014), at 17, <http://www.lfcj.com/uploads/3/8/0/5/38050985/2014commentsonrulepackageoct11.pdf> [<http://perma.cc/3FP9-DY7H>].

Note explicitly rejects *Residential Funding Corp. v. DeGeorge Financial Corp.*,¹⁹⁵ the leading case for the proposition that negligent loss of discoverable information is sufficient for the most serious of the discovery sanctions.¹⁹⁶ To the extent that it precludes reliance on this line of cases, the proposed Rule 37(e) will likely accomplish its goal of settling this dispute between the circuits.

2. *Weaknesses.* Despite the aforementioned improvements, the Current Proposal is lacking in several important respects that will prevent it from resolving the issues plaguing the civil-litigation system. The most significant weakness is the Proposal's continued reliance on the common-law duty to preserve information in anticipation or conduct of litigation.¹⁹⁷ This decision could severely undercut the Advisory Committee's hopes of creating uniform standards for Rule 37(e) sanctions, as it may perpetuate ambiguity with respect to this critical threshold issue by allowing individual courts to develop conflicting approaches to the duty to preserve ESI. By failing to establish uniform preservation standards, the Advisory Committee has missed an opportunity to address the problematic uncertainty afflicting the early stages of the sanctions process.

As noted above, Duke Conference participants stressed the importance of incentivizing cooperation between the parties as a means of reducing costly and inefficient discovery disputes.¹⁹⁸ Though initial proposals contained provisions directing courts to consider such cooperative efforts when ruling on a sanctions motion,¹⁹⁹ the Current Proposal seems to have scaled back its emphasis on cooperation almost completely. For example, the Proposal includes a provision that will amend Rule 1 to read "These rules should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action

195. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002).

196. See 2014 Rules Memorandum, *supra* note 22, at Rules App. B-65 ("[Subdivision (e)(2)] rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.").

197. See *id.* at Rules App. B-59 ("The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation . . .").

198. See *supra* note 124 and accompanying text.

199. See, e.g., 2013 AGENDA BOOK, *supra* note 134, at 153 (including as one of the Rule 37(e)(2) factors "whether the person who made [the discovery request] and the party engaged in good-faith consultation about the scope of preservation").

and proceeding.”²⁰⁰ In its Committee Note, however, the Committee explicitly provides that the Rule 1 amendment does not create a new basis for sanctions and admits that “a rule amendment alone will not produce reasonable and cooperative behavior among litigants.”²⁰¹ This language, coupled with the gradual elimination of provisions encouraging cooperation from the Rule 37(e) proposal, suggests that the Rule 1 amendment is largely aspirational. If interparty conduct has no explicit bearing on the court’s ability to impose sanctions, it is difficult to see how courts can effectively incentivize the degree of cooperation envisioned by the Duke Conference contributors.

B. Recommendations for Revision and Effective Enforcement

1. *Revision.* The Current Proposal was approved by the Supreme Court in April 2015 and is presently before Congress, which will either reject the Proposal or allow it to take effect on December 1, 2015. If the Advisory Committee has the opportunity to revisit the Current Proposal in the coming months, it would benefit from two primary revisions to the existing text. First, the Committee should scale back its explicit reliance on the common-law duty to preserve and provide at least some specific guidelines for the courts on this threshold issue. Second, it should reinstate the list of factors promulgated in the initial proposals with some additional clarifying language.

Although it may indeed be impractical to craft a comprehensive, uniform duty to preserve ESI in the FRCP, the new Rule 37(e) would benefit from some degree of guidance regarding the trigger and scope of the threshold duty. As attorney Gregory P. Joseph—chair of the E-Discovery Panel at the Duke Conference—observes, “the nebulous standard of common law . . . does not meaningfully inform the prospective litigant whether or when the duty has been triggered.”²⁰² Though the filing of a complaint or a written production request generally suffices as a trigger, the Current Proposal or its Committee Note should include nonexclusive examples of events that do or, perhaps more importantly, do not create a preservation obligation. For example, as Joseph suggests, the Committee Note could provide that actions such as “notifying an insurance company or indemnitor of

200. *Id.* at Rules App. B-13. The new text is in italics.

201. *Id.*

202. Joseph, *supra* note 51, at 8.

potential liability” or “preparing an incident report or other steps taken in the ordinary course of business in anticipation of litigation” are sufficient to activate the preservation obligation.²⁰³ Furthermore, the Advisory Committee should follow the advice of the E-Discovery Panel and emphasize the importance of contractual duties in triggering the preservation obligation.²⁰⁴ It may seem obvious that contract provisions can create the duty, but the Advisory Committee could encourage parties to contract more carefully for their preservation obligations by highlighting the role of such provisions in the Rule or the Committee Note.

Furthermore, the common-law duty is problematic because it does not provide a clear scope of the preservation duty once it has attached. The Advisory Committee should revise its proposal to establish a baseline for the scope of the duty by specifying particular types of data that must be preserved (for example, the email records of named parties or top executives), leaving further requirements to the court’s discretion or party agreement on a case-by-case basis. District courts have previously held that, once triggered, the duty to preserve automatically applies to the ESI belonging to key employees.²⁰⁵ For example, in *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*²⁰⁶ the court found that the defendant had violated its duty to preserve ESI by failing to place a litigation hold on the hard drives of “employees who played a significant or decision-making role.”²⁰⁷ Courts may apply basic standards such as a “key employees” provision through reliance on the common-law duty, but Rule 37(e) would benefit from the addition of such examples on a nonexclusive basis. Though this measure would not prevent all spoliation disputes, it would at least provide a basic framework from which courts could develop a more predictable common-law duty.

Next, the Advisory Committee should reincorporate the list of relevant factors included in its initial proposals.²⁰⁸ Given the rapidly

203. *Id.* at 9.

204. *See* 2010 E-Discovery Panel Memorandum, *supra* note 21, at 5 (suggesting various triggers including a “contractual duty to preserve”).

205. *See, e.g., In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 194 (S.D.N.Y. 2007) (granting an adverse inference instruction and holding that “[r]elevant documents would include any e-mails between the directors, officers, managers, and employees regarding the company’s financial condition”).

206. *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007).

207. *Id.* at 629.

208. *See supra* Part II.A.4.

changing nature of electronic-storage technology, it seems unwise to discard this provision due to fears that litigants would mistakenly believe it to be a comprehensive list of important factors. The Advisory Committee could easily assuage these fears by simply stating that this list is nonexclusive and intended to provide both litigants and courts a helpful starting point in assessing preservation conduct. The Advisory Committee would be especially well advised to include a factor directing the court to consider the extent to which the offending party has complied with district-specific e-discovery guidelines and, more importantly, with any preservation standards developed in cooperation with the opposing party. This factor could incentivize proactive resolution of discovery disputes in two ways. First, it would encourage district courts to develop comprehensive case-management standards like those already in use in many districts nationwide.²⁰⁹ Second, incorporating the theme of party cooperation into discovery-sanctions criteria will remind parties that cooperating early to establish discovery protocols can help insulate both sides from sanctions if disputes do arise.²¹⁰

2. *Enforcement.* Should the proposed amendments package come into effect as it stands, however, certain enforcement standards would help courts achieve uniformity and encourage cost-effective, efficient litigation. In the context of proposed Rule 37(e)(2), courts should minimize their reliance on findings of bad faith or willfulness in determining whether severe sanctions are appropriate. Spoliation case law has shown that courts struggle to articulate clear criteria for intent to withhold discoverable material (especially ESI), and as a result they often conflate “good faith” analysis with the threshold duty-to-preserve issue.²¹¹ As the Current Proposal already leaves the duty-to-preserve question entirely in the hands of the trial court, attempts to discern “bad faith” will risk a continuation of the problems inherent in the current version of the Rule.

Instead of searching for evidence of bad-faith intent, courts should take a proactive approach to Rule 37(e) and work with

209. See *infra* notes 216–219 and accompanying text.

210. See Joy Flowers Conti & Richard N. Lettieri, *In re ESI Local Rules Enhance the Value of Rule 26(f) “Meet and Confer,”* 49 JUDGES’ J., no. 2, Spring 2010, at 29, 34 (“[W]hen a dispute about ESI arises, it usually happens later in the litigation and is likely to be the result of a failure of the parties to have adequate discussions early in the case about the costs and methods of ESI preservation . . .”).

211. See *supra* Part I.B.1.

litigants to create case-specific ESI-preservation guidelines, treating violations of these agreements as *prima facie* sanctionable conduct and tailoring the sanctions to the degree of prejudice shown. Under Rule 83, district courts may adopt local rules of practice that are not duplicative or contrary to provisions of the FRCP or other federal statutes.²¹² Since the 2006 e-discovery amendments, many districts have developed ESI-specific guidelines with varying degrees of detail.²¹³ For example, the Delaware Default Standard, adopted in at least three other districts,²¹⁴ limits requesting parties to ten “focused” electronic search terms, invokes cooperation as its guiding principle, and states that the Default Standard shall apply only if “the parties are unable to agree on the parameters and/or timing of discovery.”²¹⁵

In the absence of specific guidance from the FRCP, the district courts should require parties to implement comprehensive case-management plans like those already in use in several districts.²¹⁶ For example, the Northern District of California’s “Guidelines for the Discovery of Electronically Stored Information” contains a thirty-five-point ESI discovery checklist that instructs the parties to meet and discuss topics such as “[t]he ranges of creation or receipt dates for any ESI to be preserved” and “search method(s),” including specific words or phrases . . . that will be used to identify discoverable ESI.”²¹⁷ Plans like these serve the dual purposes of resolving discovery disputes as early as possible and encouraging party communication and cooperation throughout the case. Similarly, district courts should enlist the help of special masters with data-system expertise in the construction of these plans, particularly in the more complex (and

212. FED. R. CIV. P. 83(a)(1).

213. For a survey of the local rules enacted after the 2006 amendments, see generally Thomas Y. Allman, *Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-Discovery) Road*, 19 RICH. J. L. & TECH. 8, 25–29 (2013).

214. See *id.* at 25 (noting that both the “Western District of Washington and the Northern District of Illinois also incorporate adopted elements [from the Delaware Default Standard]” (footnotes omitted)).

215. See D. DEL. DEFAULT STANDARD FOR DISCOVERY, INCLUDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION 1 (Dec. 8, 2011), <http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf> [<http://perma.cc/X949-MS8V>].

216. See, e.g., Standing Order, In re: Pilot Project Regarding Case Mgmt. Techniques for Complex Civil Cases in the S. Dist. of N.Y., 11 Misc. 00388 (S.D.N.Y. Nov. 1, 2011) (assigning the case to a pilot case-management project reserved for specific categories of suits including class actions and multidistrict litigation).

217. CHECKLIST FOR RULE 26(F) MEET AND CONFER REGARDING ELECTRONICALLY STORED INFORMATION, U.S. DIST. COURT FOR THE N. DIST. OF CAL. 1–2, http://www.cand.uscourts.gov/filelibrary/1118/ESI_Checklist.pdf [<http://perma.cc/MWG5-SAKK>].

correspondingly more expensive) cases.²¹⁸ This approach should help to control ESI-related costs throughout litigation. As Judge Scheindlin notes, “[o]ne obvious advantage [to the use of special masters] is that all parties share the cost of one expert, rather than the duplicative costs associated with competing experts.”²¹⁹ Some districts already require or encourage parties to supply such experts. The District of Kansas, for example, suggests that parties designate an e-discovery liaison who is “knowledgeable about the technical aspects of e-discovery” and who “should be responsible for organizing each party’s e-discovery efforts to insure consistency and thoroughness.”²²⁰ Similarly, the Northern District of California’s e-discovery guidelines provide that parties “shall designate an e-discovery liaison who will . . . [b]e prepared to participate in e-discovery dispute resolution to limit the need for Court intervention.”²²¹ The regular use of e-discovery experts should, over time, result in more efficient ESI dispute resolution and also relieve some pressure on judges, who often have little familiarity with technologically advanced data-storage systems.²²²

When experienced litigants are involved, courts could also give weight to prior preservation agreements between the parties and allow previously negotiated preservation schemes to inform the scope of the duty. For example, sophisticated parties might agree at the outset of a business transaction that correspondence between certain employees will be preserved even in the absence of foreseeable litigation. For all such agreements and standing orders, the district court should treat violations as *prima facie* sanctionable conduct so that parties can confidently develop internal preservation protocols that will minimize the risk of discovery sanctions. Although these measures would not be sufficient to eliminate spoliation issues

218. On the increasingly common appointment of special masters in ESI-heavy cases, see generally Scheindlin & Redgrave, *supra* note 62.

219. *Id.* at 376.

220. David J. Waxse, *Advancing the Goals of a “Just, Speedy, and Inexpensive” Determination of Every Action: The Recent Changes to the District of Kansas Guidelines for Cases Involving Electronically Stored Information*, 26 REGENT U. L. REV. 111, 123 (2014).

221. GUIDELINES FOR THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION, U.S. DIST. COURT FOR THE N. DIST. OF CAL. 3, http://www.cand.uscourts.gov/filelibrary/1117/ESI_Guidelines.pdf [<http://perma.cc/8RXX-8N2A>].

222. For example, in a recent multidistrict pharmaceutical products-liability case, the Middle District of Florida appointed a special master to oversee the technical details of ESI production before any party alleged discovery misconduct or delay. See *In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 65255 (M.D. Fla. 2007).

entirely, they would encourage cooperative resolution of discovery disputes and, over time, reduce the need to engage in costly overpreservation.

CONCLUSION

If the history of the FRCP discovery rules tells us anything, it is that the process of amending the rules is a tricky one. It often takes years to appreciate the true effects of any one amendment, and the astonishingly rapid rate of technological development in the last quarter century has only made it more difficult for the Advisory Committee to develop clear, effective guidelines. The Proposal currently before Congress is, in several respects, a very strong effort; it resolves several key sources of ambiguity while preserving the trial court's ability to adjust its sanctions doctrine as the discovery landscape continues to change. Unfortunately, however, the Current Proposal reflects a problematic focus on the court's role in fixing the issues facing the civil-litigation system, and it is difficult to see the Proposal as a significant improvement on the existing Rule. Until the Advisory Committee proposes amendments that more effectively incentivize party cooperation throughout the pretrial process, litigants will continue to experience the costs, delays, and abusive discovery practices that have persisted since the advent of the FRCP.