

A SAFE HARBOR FROM SPOILIATION SANCTIONS: CAN AN AMENDED FEDERAL RULE OF CIVIL PROCEDURE 37(E) PROTECT PRODUCING PARTIES?

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Discovery plays a crucial role in modern litigation, but imposes many costs both apparent and hidden. On its face, discovery requires corporate litigants to spend money on the retention, review, and production of relevant evidence. However, the rules governing discovery—especially those governing sanctions for spoliation of evidence—also create externalities that are borne by the parties and society alike. Specifically, the threat of sanction for failure to preserve relevant information causes potential litigants to engage in costly over-preservation of electronically stored information (“ESI”). This problem is further amplified by a circuit split regarding whether severe sanctions can be imposed for merely negligent spoliation, which creates additional incentives to over-preserve.

In response, the Judicial Conference proposed a rewritten version of Federal Rule of Civil Procedure 37(e), which creates a safe harbor from severe sanctions for parties that take reasonable steps to preserve relevant ESI. However, as this Note argues, the proposed Rule will not be successful in creating a uniform national standard governing when judges may issue severe sanctions because (1) it does not limit judges’ inherent power to sanction parties notwithstanding the Federal Rules and (2) it contains a loophole that could be

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used to issue a type of severe sanctions, adverse inference jury instructions, where the spoliating party was only negligent. This Note suggests two alterations to the Committee Note that accompanies the proposed Rule 37(e) in order to effectively limit judges' inherent power and reserve adverse inference instructions for parties that recklessly or intentionally destroy relevant ESI. These changes are likely to establish a truly uniform standard for spoliation sanctions in federal courts and could cause states to adopt similar rules, which would go even further towards creating true national uniformity and remedying the problem of over-preservation.

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I. INTRODUCTION

Discovery is an essential aspect of litigation—whether civil or criminal—that allows parties to obtain the information necessary to support their claims or defenses.¹ In the abstract, discovery serves a truth-seeking function;² however, one problem that impairs this function is the destruction or spoliation of relevant evidence.³ When relevant evidence is lost or destroyed, judges seek to restore the evidentiary balance and, if warranted, impose punitive sanctions on the party that destroyed or lost the evidence. In federal civil litigation, discovery is governed by the Federal Rules of Civil Procedure (“FRCP,” “Federal Rules,” or “Rules”), specifically Rules 1, 16, 26–37, and 45. Rule 37 addresses sanctions for a variety of discovery-related violations, but contains a safe harbor in subsection (e) for parties that lose electronically stored information (“ESI”)⁴ as a result of the good faith operation of an electronic information system.⁵ Rule 37(e) was adopted as part of the 2006 Amendments to the FRCP, but in the nine years since its adoption, many judges, practitioners, and academics have come to believe that Rule 37(e) is ineffective, which led to the

¹ See, e.g., THE SEDONA CONFERENCE®, SEDONA CONFERENCE® GLOSSARY: E-DISCOVERY AND DIGITAL INFORMATION MANAGEMENT 13 (4th ed. 2014) (defining “[d]iscovery” as “[t]he process of identifying, locating, preserving, securing, collecting, preparing, reviewing and producing facts, information and materials for the purpose of producing/obtaining evidence for utilization in the legal process”).

² See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 214 (S.D.N.Y. 2003).

³ “Spoliation is the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation or audit.” THE SEDONA CONFERENCE®, *supra* note 1, at 43.

⁴ ESI is “information that is stored electronically, regardless of the media or whether it is in the original format in which it was created, as opposed to stored in hard copy (i.e., on paper).” *Id.* at 15.

⁵ FED. R. CIV. P. 37(e). See *infra* Parts II.A (discussing electronically stored information) & II.B (discussing Rule 37(e)).

proposal of an entirely rewritten Rule that is currently pending before the Supreme Court.⁶

The Rules governing discovery and sanctions for spoliation have a significant effect on the *ex ante* conduct of businesses that have potential litigation exposure,⁷ which creates a problematic sequence of events. The Federal Rules do not actually apply until a complaint is filed,⁸ yet in order to comply with the discovery process detailed in the Rules, businesses must identify and preserve documents that could be relevant in future litigation before a complaint is filed.⁹ However, because of a circuit split over whether Rule 37(e) permits severe, sometimes case-dispositive, sanctions (such

⁶ See *Judicial Conference Receives Budget Update, Forwards Rules Package to Supreme Court*, U.S. CTS., <http://news.uscourts.gov/judicial-conference-receives-budget-update-forwards-rules-package-supreme-court> (Sept. 16, 2014), *archived at* <http://perma.cc/KF9F-FX2K>; *infra* Part I.C.2 (discussing growing concerns about effectiveness of Rule 37(e) safe harbor).

⁷ See WORKING GRP. ON ELEC. DOCUMENT RETENTION & PROD. (WG1), THE SEDONA CONFERENCE®, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 90 (2d ed. 2007) [hereinafter THE SEDONA PRINCIPLES] (indicating that FRCP is a “source of guidance for judges, counsel, and clients facing electronic discovery”) (emphasis added). The Sedona Conference® is a nonprofit research and educational institute that studies the law and policy of antitrust law, complex litigation, and intellectual property. See *About Us*, SEDONA CONF., <http://thesedonaconference.org/aboutus> (last visited Feb. 28, 2015), *archived at* <http://perma.cc/S53S-UCBF>. The Sedona Conference® has multiple Working Groups, including Working Group 1, which is dedicated to developing principles and best practice recommendations for retention and production of ESI in civil litigation. See *The Sedona Conference® Working Group Series*, SEDONA CONF., <http://thesedonaconference.org/wgs> (last visited Feb. 28, 2015), *archived at* <http://perma.cc/PWR5-2CJG>. Working Group 1 publishes *The Sedona Principles*, which has been cited by courts in cases involving ESI and influenced the 2006 Amendments to the FRCP as well as the current proposed amendments. THE SEDONA PRINCIPLES, *supra* note 7, at 90.

⁸ See FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts”); FED. R. CIV. P. 3 (“A civil action is commenced by filing a complaint with the court.”).

⁹ See *infra* Part II.B.2.c (describing discovery obligations of parties before litigation begins).

as an adverse inference jury instruction) when parties negligently delete relevant information before litigation has commenced, businesses over-preserve information to avoid subsequently being sanctioned for negligently losing a relevant document.¹⁰ Over-preservation imposes large costs on companies with litigation exposure and, since many of the potential actions for which a company retains documents are never litigated, it can be an inefficient use of the company's resources.¹¹

This Note examines whether the proposed amendment to Rule 37(e) will be effective in remedying the defects of the current Rule, specifically: (1) the imprecise language used in key parts of the Rule; (2) the circuit split over what level of culpability is required before a court may impose severe sanctions for spoliation under the Rule; and (3) the incentives that the Rule creates for parties to engage in costly and inefficient over-preservation of documents. In addition to addressing whether the proposed Rule will be an effective safe harbor, this Note considers whether it will succeed in changing how parties, especially companies that may be subject to the jurisdiction of different state and federal circuit courts, retain electronically stored information in anticipation of future litigation. Part II of this Note examines the reasons for adopting Rule 37(e) in 2006, the problems the Rule created, and the four-year process of amending it that culminated in the proposal of an entirely rewritten Rule. Part III identifies the goals of the proposed Rule and analyzes whether it will in fact achieve those goals. Finally, Part IV suggests an alteration to the Committee Note that accompanies the proposed Rule that would allow the proposed Rule to better achieve those goals that it can realistically accomplish.

¹⁰ See *infra* Part II.B.2.b (describing circuit split and why companies over-preserve).

¹¹ See *infra* Part II.B.2.c (explaining costs imposed by over-preservation and why it is inefficient).

II. THE 2006 AMENDMENTS TO THE FRCP AND THE PROCESS OF AMENDING RULE 37(E)

Part II of this Note provides a background on the differences between electronically stored information and physical documents in the context of discovery, the problems with Rule 37(e), and the rulemaking process that resulted in the approval of, among other things, a proposed amendment to Rule 37(e) by the Judicial Conference, the principal policy-making body of the United States Courts, on September 16, 2014.¹²

¹² The Rules Enabling Act provides the framework for adopting Rules to govern civil procedure. Rules Enabling Act, 28 U.S.C. §§ 2072–74 (2013). It states that “[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure” provided that those rules do not “abridge, enlarge or modify any substantive right.” *Id.* § 2072 (a), (b). The rulemaking process is delegated to the Judicial Conference, which is composed of the Senior Circuit Judges and a judge elected from each district court for a three- to five-year term. *See How the Rulemaking Process Works*, U.S. CTS., <http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx> (last visited Feb. 28, 2015), *archived at* <http://perma.cc/TWK6-WW6D>; *Membership*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/JudicialConference/Membership.aspx> (last visited Feb. 28, 2015), *archived at* <http://perma.cc/9JJ7-N5H8>. Within the Judicial Conference is the Committee on Rules of Practice and Procedure (the “Standing Committee”). *How the Rulemaking Process Works*, *supra* note 12. Within the Standing Committee are five advisory committees on Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules to “carry on a continuous study of the operation and effect” of Federal Rules. *Id.* (quoting 28 U.S.C. § 331 (2013)). In order for a Rule to become binding, it must be approved by an Advisory Committee and sent to the Standing Committee for publication and public comment. *Id.* After the public comment period, the relevant Advisory Committee can “discard, revise, or transmit the amendment as contemplated to the Standing Committee.” *Id.* The Standing Committee then reviews the Rules proposed by the Advisory Committee and transmits the proposed Rule to the Judicial Conference, which then can recommend the Rule to the Supreme Court. *Id.* The Supreme Court considers the proposed Rule, and if it concurs, it promulgates the Rule, which then takes effect the next December unless Congress enacts legislation to reject, modify, or defer it. *Id.*

A. The Differences Between Electronically Stored Information and Physical Documents in the Context of Discovery

Over the past few decades the process of discovery in civil litigation has changed dramatically due to the rise of ESI and electronic discovery (“e-discovery”).¹³ E-discovery does not differ in theory from discovery of other materials; however, it poses different practical challenges. E-discovery is a subset of the discovery process, which also includes interrogatories, requests for admission, requests for production of (non-electronic) documents and things, physical and mental examinations, and depositions.¹⁴ Prior to the 2006 Amendments to the FRCP, both e-discovery and discovery of other materials were governed by the same Rules.¹⁵ However, in litigation, paper documents and ESI are retained, stored, and produced very differently. These differences can be generally grouped into two categories: issues of quantity and issues of access.

1. Issues of Quantity

First, because many communications are now conducted via email, text messages, and Internet chats—as opposed to over the phone or in person—larger quantities of such conversations are being preserved.¹⁶ This increase in

¹³ E-discovery is “[t]he process of identifying, locating, preserving, collecting, preparing, reviewing, and producing Electronically Stored Information (ESI) in the context of the legal process.” THE SEDONA CONFERENCE®, *supra* note 1, at 15.

¹⁴ *See id.* at 13 (definition of “discovery”). *See generally* FED. R. CIV. P. 26–37.

¹⁵ *See* Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 172 (2006) (Prior to the 2006 Amendments, “[t]he handful of reported decisions on electronic discovery disputes analogized the situation to conventional discovery disputes.”).

¹⁶ *See* THE SEDONA PRINCIPLES, *supra* note 7, at 2; John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 564 (2008) (“Modern computer systems have exponentially increased the number of documents that companies create

recorded exchanges requires companies and their attorneys to spend more time reviewing documents to determine what needs to be retained and produced in subsequent litigation.¹⁷

Second, because of the ease of using electronic communication, many records of conversations that are either irrelevant to the business of a company or contain informal language are created on a daily basis.¹⁸ Although most documents are not retained in the ordinary course of business, when a company is put on notice that it must preserve relevant documents for future litigation, lawyers must expend additional effort separating unresponsive and irrelevant communications.¹⁹ Furthermore, litigators and company employees must decipher unconventional abbreviations or phrases when reviewing ESI prior to production, which imposes additional costs on the company.²⁰

Third, because of the ways in which documents are circulated via email, redundant copies of a single document are retained and stored.²¹ This further increases the volume of electronic documents relative to paper documents. Since most discovery requests ask for all relevant documents, including all versions of any relevant document, the sheer number of copies created by circulating, subsequently editing, and saving the documents on different employees'

and retain in the normal course of business.”); Withers, *Electronically Stored Information*, *supra* note 15, at 174 (“[T]he way we use computers increasingly as our primary communication tools effectively replac[es] the telephone, postal service, and even face-to-face meetings and private conversation.”).

¹⁷ See Beisner, *supra* note 16, at 564–65.

¹⁸ Informal language includes, *inter alia*, abbreviations, slang, and shorthand names that give rise to linguistic ambiguities and make it harder for reviewing attorneys to understand documents. *Id.* at 566.

¹⁹ *Id.*

²⁰ See *id.* (discussing costs of informal and unconventional language). However, some of the problems that ESI presents can be cheaply avoided by the use of predictive coding and text searches. Philip J. Favro, *Getting Serious: Why Companies Must Adopt Information Governance Measures to Prepare for the Upcoming Changes to the Federal Rules of Civil Procedure*, 20 RICH. J.L. & TECH. 5 paras. 53–55 (2014), <http://jolt.richmond.edu/v20i2/article5.pdf>, archived at <http://perma.cc/UJ7A-467R>.

²¹ See, e.g., Beisner, *supra* note 16, at 568–69.

computers can pose problems with locating every version of a document.²² This is in addition to the challenges of identifying which documents are responsive to a request. Furthermore, some electronic documents change over time without human action, which results in many versions of such documents that are never in a final form.²³

Finally, electronic documents, unlike paper documents, have metadata,²⁴ which contains additional information about each document.²⁵ When such metadata is deemed relevant, the quantity of information that must be reviewed and produced increases substantially.

2. Issues of Access

First, when a paper document is thrown away, it is gone forever (unless there are other copies stored elsewhere); however, the same is not true for electronic documents.²⁶ When a user “deletes” an electronic document, it remains on the computer’s hard drive, but is not accessible to the user.²⁷

²² *Id.*

²³ See THE SEDONA PRINCIPLES, *supra* note 7, at 3 (listing examples of such dynamic content).

²⁴ Metadata is “[t]he generic term used to describe the structural information of a file that contains data about the file, as opposed to describing the content of a file.” THE SEDONA CONFERENCE®, *supra* note 1, at 29.

²⁵ THE SEDONA PRINCIPLES, *supra* note 7, at 3–4. (discussing metadata and the challenges that it presents for e-discovery).

²⁶ *Id.* at 3; Withers, *Electronically Stored Information*, *supra* note 15, at 174 (“[T]he action of ‘deleting’ an electronic file does little more than change the name and eliminate reference to it in the operating system’s list of active files . . .”). Furthermore, “deleting” a document on one system has no effect on the other locations where that document is stored. *Id.*

²⁷ Michael R. Nelson & Mark H. Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrine of Spoliation to Electronic Discovery*, 12 RICH. J.L. & TECH. 14, para. 2 (2006), <http://jolt.richmond.edu/v12i4/article14.pdf>, archived at <http://perma.cc/N5N8-QE4Y> (“Deleted data remains on a computer’s hard drive until the space on the drive is overwritten by newly generated files. It is possible to recover this data after deletion, although such efforts typically require the retention of a forensic computer professional.”).

Although some documents may be retained on disaster backup tapes,²⁸ the process of recovering such documents is often very costly and the cost can disproportionately outweigh the benefit gained from recovering documents on a backup tape.²⁹

Second, electronic documents are sometimes unreadable when they are separated from the computer system on which they were generated.³⁰ ESI can only be accessed via a computer³¹ and often requires the particular operating system or version of the software on which it was created.³² Since an “operating system and application software becomes outdated and unavailable after only a few years,” this leads to an additional impediment when access to ESI is necessary for litigation years after the ESI was created.³³ This is especially true for data on backup tapes, which contain all of the files from the computers that were backed up in no particular order and without a directory.³⁴

Finally, because multiple people edit electronic files, versions of the same file may be stored on multiple computers, email and cloud servers, external storage drives,

²⁸ A backup tape is a “[m]agnetic tape used to store copies of Electronically Stored Information, for use when restoration or recovery is required.” THE SEDONA CONFERENCE®, *supra* note 1, at 3.

²⁹ See Beisner, *supra* note 16, at 565 (“Restoring backup tapes for review can easily cost millions of dollars.”); Nelson & Rosenberg, *supra* note 27, para. 2.

³⁰ See THE SEDONA PRINCIPLES, *supra* note 7, at 4 (describing how comprehending electronic data may be dependent on the environment in which it was created).

³¹ Withers, *Electronically Stored Information*, *supra* note 15, at 176 (“While most paper-based information can be read and understood by reasonably well educated human beings, all electronically stored information must be rendered intelligible by the use of technology . . .”).

³² See Withers, *Electronically Stored Information*, *supra* note 15, at 178 (noting that “data stored on outmoded systems” requires that those systems be restored before the data can be accessed).

³³ Withers, *Electronically Stored Information*, *supra* note 15, at 175.

³⁴ Beisner, *supra* note 16, at 565; Withers, *Electronically Stored Information*, *supra* note 15, at 176.

mobile devices, and backup tapes.³⁵ This mitigates the difficulty of locating all versions of a document since, even if a custodian permanently deletes a file, it can often be found somewhere else. Furthermore, this lessens the prejudicial effect of losing ESI relative to losing paper documents.

B. The 2006 Amendments

1. The Reasons for the 2006 Amendments

Given the significant differences between paper and electronic documents in the context of preservation and production in litigation, physical documents and ESI should be treated differently under the FRCP. This recognition led to a movement to amend the FRCP.³⁶ In 1999, almost immediately after the Judicial Conference passed a package of Rule amendments, the Discovery Subcommittee met to discuss electronic discovery—an issue that was raised, but not discussed during the process of formulating the rules package that had just been approved.³⁷

Among the Rules that were added in 2006 was Rule 37(e), which was intended to create a safe harbor from sanctions for spoliation of ESI under certain circumstances.³⁸ The decision to adopt Rule 37(e) “reflect[ed] a concern that the threat of sanctions in those circumstances unfairly impacts primary conduct—the way in which users of electronically stored information manage their storage and retention of

³⁵ THE SEDONA PRINCIPLES, *supra* note 7, at 5; Kenneth J. Withers, *Risk Aversion, Risk Management, and the “Overpreservation” Problem in Electronic Discovery*, 64 S.C. L. REV. 537, 539 (2013).

³⁶ *See* Withers, *Electronically Stored Information*, *supra* note 15, at 173.

³⁷ *See id.* at 192.

³⁸ FED. R. CIV. P. 37(e). Current Rule 37(e) was originally numbered Rule 37(f), but it was moved to its current location in the Federal Rules by a 2007 “style amendment,” which did not otherwise alter the text in any way. *See* H.R. DOC. NO. 110-27, at 530–31 (2007) (comparing 37(f) under the 2006 amendment with 37(e) under the 2007 amendment and stating that the changes were intended to be stylistic only). For the sake of consistency, the Rule will be referred to as Rule 37(e) throughout this Note.

information.”³⁹ The “clear intention of the Advisory Committee in adopting Rule 37([e])” was to provide a safe harbor “when the party is acting in good faith.”⁴⁰ The decision to employ good faith as the standard that a litigant must meet in order to qualify for immunity from sanctions for spoliation of ESI was a middle road between a negligence standard (which would not offer enough protection because the negligence of a single employee during the retention and production of ESI could result in sanctions) and a recklessness standard (which would give producing parties too much leeway and could protect conduct that should be sanctionable).⁴¹ The purpose of the Rule was to reduce the burdens imposed by retention, review, and production of documents on parties required to produce ESI in litigation.⁴²

2. Controversy Over Rule 37(e)

Shortly after the passage of the 2006 Amendments, academics, practitioners, and judges began to express concern that Rule 37(e) did not actually reduce the threat of sanctions, except in rare situations.⁴³ Criticisms of the Rule fell into two general categories. First, the Rule uses language that is not precisely defined, essentially gutting its

³⁹ Thomas Y. Allman, *Rule 37(f) Meets Its Critics: The Justification for a Limited Preservation Safe Harbor for ESI*, 5 NW. J. TECH. & INTELL. PROP. 1, 1 (2006).

⁴⁰ *Id.* at 14–15.

⁴¹ *Id.* at 12.

⁴² *Id.* at 1.

⁴³ See Thomas Y. Allman, *Inadvertent Spoliation of ESI After the 2006 Amendments: The Impact of Rule 37(e)*, 3 FED. CTS. L. REV. 25, 26 (2009) (“[M]any commentators have characterized Rule 37(e) as ‘illusory’ and a ‘safe’ harbor in name only.”); Philip J. Favro, *Sea Change or Status Quo: Has the 37(e) Safe Harbor Advanced Best Practices for Records Management?*, 11 MINN J.L. SCI. & TECH. 317, 334 (2010) (arguing that relying on Rule 37(e) safe harbor is an ineffective strategy for management concerned about litigation and document retention); Withers, *Electronically Stored Information*, *supra* note 15, at 107 (“[Rule 37(e)] fell far short of that [sic] the original proponents had wanted, and the Advisory Committee Chair, Judge Lee Rosenthal, emphasized on several occasions that this could no longer be called a ‘safe harbor.’”).

effectiveness. Second, because of the inherent power of judges to sanction parties and different common law standards for imposing sanctions among the circuits, Rule 37(e) was inconsistently enforced by courts in different circuits—and, in some instances, within the same circuit. This led to the related criticism that the Rule unduly favors parties requesting ESI.

a. The Language of Rule 37(e) Is Imprecise

Critics of Rule 37(e) focused on two imprecise phrases, which, they argued, led to the ineffectiveness of the Rule as a safe harbor.⁴⁴ First, the Rule states that it applies “absent exceptional circumstances.”⁴⁵ However, Rule 37(e) fails to define or describe “what exceptional circumstances might warrant the imposition of sanctions.”⁴⁶ Although this language was included to give judges the “flexibility” to sanction parties whose failure to produce ESI results in “serious prejudice,”⁴⁷ its inclusion gave judges so much flexibility that they were able to circumvent the Rule entirely.⁴⁸ Allowing judges to sanction parties in “exceptional circumstances” has allowed them to ignore the culpability requirement imposed by Rule 37(e) and render the safe harbor almost entirely ineffective.⁴⁹

⁴⁴ See, e.g., Withers, *Electronically Stored Information*, *supra* note 15, at 208.

⁴⁵ FED. R. CIV. P. 37(e).

⁴⁶ Beisner, *supra* note 16, at 591.

⁴⁷ See Allman, *supra* note 39, at 6 (quoting Memorandum from Honorable Lee H. Rosenthal, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure to Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 85, 89 (May 27, 2005), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf>, archived at <http://perma.cc/7QFX-4UEZ>).

⁴⁸ See Nicole D. Wright, Note, *Federal Rule of Civil Procedure 37(e): Spoiling the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 818 (2009) (suggesting that courts have used this language to justify sanctioning parties without reference to their level of culpability).

⁴⁹ See *infra* Part II.B.2.c (discussing how judges were able to get around the culpability requirement of Rule 37(e)).

Second, some courts have misinterpreted what constitutes “routine, good-faith operation.”⁵⁰ In addition to the phrase being vague,⁵¹ some courts have read a section of the Committee Note to the 2006 Amendments as creating a mandatory rule, where in fact it only suggests a permissible rule.⁵² The Committee Note states: “Good faith in the routine operation of an information system may involve a party’s intervention to modify or suspend certain features of that routine operation to prevent loss of information When a party is under a duty to preserve information . . . intervention in the routine operation of an information system is one aspect of what is often called a ‘litigation hold.’”⁵³ Some courts interpreted this statement to mean that issuing a litigation hold is a “*required* indic[um] of good faith.”⁵⁴ As a result, “any deletion of relevant data is, by definition, not in good faith.”⁵⁵ This renders the Rule 37(e) safe harbor entirely ineffective because parties only need the safe harbor when data is accidentally or negligently deleted; however, since accidental or negligent deletion is considered to be evidence of bad faith, there is no situation in which the safe harbor would actually protect a party that deletes evidence.⁵⁶

⁵⁰ FED. R. CIV. P. 37(e).

⁵¹ Beisner, *supra* note 16, at 591.

⁵² See Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 SEDONA CONF. J. 217, 227 (2010). See also Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., 685 F. Supp. 2d 456, 476–77 (S.D.N.Y. 2010) (stating that failure to implement a litigation hold is “at a minimum, grossly negligent”), *abrogated by* Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 162 (2d Cir. 2012) (rejecting “the notion that a failure to institute a ‘litigation hold’ constitutes gross negligence per se”); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

⁵³ Fed. R. Civ. P. 37(e) advisory committee’s note.

⁵⁴ Withers, *Risk Aversion*, *supra* note 35, at 563.

⁵⁵ *Id.* at 564 (quoting Robert Hardaway et al., *E-Discovery’s Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 566 (2011)).

⁵⁶ Not all circuits have read the Committee Note in this way. See, e.g., Chin, 685 F.3d at 162. However, some circuits have held that any deletion of data after a party is put on notice that it has a duty to preserve relevant

b. Discord Among the Circuits With Regard to the Proper Standard of Culpability

Another problem with Rule 37(e) is that different courts have come to different conclusions about the level of culpability that must be present to warrant the imposition of sanctions for spoliation of ESI.⁵⁷ This resulted in part because of the different common law standards for sanctions and in part because the inherent power that judges possess to sanction parties enabled them to continue to impose sanctions based on these common law standards, notwithstanding the explicit requirement of good faith in Rule 37(e).⁵⁸

A bare majority of the federal circuit courts—including the Fifth,⁵⁹ Sixth,⁶⁰ Seventh,⁶¹ Eighth,⁶² Eleventh,⁶³

documents constitutes bad faith, which exacerbates the discord among the circuits discussed in Part II.B.2.c, *infra*.

⁵⁷ See Allman, *supra* note 52, at 224 (“Reliance on ad hoc inherent power to articulate the duty to preserve has resulted in contradictory rulings and different formulaic approaches in different Circuits.”); Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure to Judge Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice and Procedure B-14 (June 14, 2014) [hereinafter June 2014 Advisory Committee Memo], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf>, archived at <http://perma.cc/CF6B-GM6B>. See also Victor Stanley Inc. v. Creative Pipe, 269 F.R.D. 497, 516–17, 542–53 (D. Md. 2010) (containing table listing standard for imposing spoliation sanctions in each circuit).

⁵⁸ See *Adkins v. Wolever*, 554 F.3d 650, 653 (6th Cir. 2009) (finding that “it is within a district court’s inherent power to exercise broad discretion in imposing sanctions based on spoliated evidence”).

⁵⁹ See, e.g., *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005); *Vick v. Tex. Emp’t Comm’n*, 514 F.2d 734, 737 (5th Cir. 1975). See also *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 617 (S.D. Tex. 2010).

⁶⁰ See, e.g., *Adkins v. Wolever*, 692 F.3d 499, 504–05 (6th Cir. 2013) (requiring only “a showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or *negligently*”) (emphasis added); *but see Global Technovations, Inc. v. Onkyo U.S.A. Corp.*, 431 B.R. 739, 782 (Bankr. E.D. Mich. 2010) (noting that some courts within the Sixth Circuit have begun to require more than negligence, but

Federal,⁶⁴ and D.C.⁶⁵ Circuits—require a showing that the producing party acted in bad faith before severe sanctions, such as an adverse inference or dismissal of a case, can be imposed.⁶⁶ In addition, the Third Circuit requires bad faith for the most severe sanctions (such as dismissal of the action with prejudice or an adverse instruction);⁶⁷ however, within some districts in the Third Circuit, only negligence is required for a judge to order an adverse inference against the

concluding that it was bound by Sixth Circuit precedent requiring bad faith before imposing an adverse inference).

⁶¹ See, e.g., *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008).

⁶² See, e.g., *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 746 (8th Cir. 2004); *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 461 (8th Cir. 2013).

⁶³ See, e.g., *Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1294 (11th Cir. 2003); *Abrams v. Ciba Specialty Chem. Corp.*, No. 08-0068-WS-B, 2010 WL 1257679, at *2 n.5 (S.D. Ala. Mar. 23, 2010).

⁶⁴ See, e.g., *Eaton Corp. v. Appliance Valves Corp.*, 790 F. 2d 874, 878 (Fed. Cir. 1986).

⁶⁵ See, e.g., *Wyler v. Korean Air Lines Co.*, 928 F.2d 1167, 1174 (D.C. Cir. 1991); *D'Onofrio v. SFX Sports Grp., Inc.*, No. 06-687 (JDB/JMF), 2010 WL 3324964, at *10 (D.D.C. Oct. 11, 2012).

⁶⁶ Severe sanctions are all sanctions except those that are curative in nature (e.g., ordering additional discovery, allowing subpoenas to third parties who have copies of lost or deleted documents, cost shifting, requiring the spoliating party to pay reasonable expenses, including attorneys' fees). Severe sanctions include, but are not limited to: evidentiary sanctions, presumption that the lost information was unfavorable to the spoliating party, an adverse inference jury instruction, striking a pleading, or dismissal of a claim, counter-claim, or the case. The attempt to differentiate curative measures from sanctions has been challenged by some commenters who argue that, in practice, there is often no difference between the effect of curative measures and sanctions. See Response from Working Grp. 1 Steering Comm., The Sedona Conference®, to the Comm. on Rules of Practice and Procedure, U.S. Courts, regarding the Request to Bench, Bar and Public for Comments on Proposed Rules 9 (Nov. 26, 2013) [hereinafter Sedona Conference Comment], <http://www.regulations.gov/contentStreamer?objectId=090000648149ab2d&disposition=attachment&contentType=pdf>, archived at <http://perma.cc/98JE-LECX>.

⁶⁷ See, e.g., *Bensel v. Applied Pilots Ass'n*, 263 F.R.D. 150, 152 (D.N.J. 2009).

producing party.⁶⁸ On the other hand, there are a substantial number of circuits—including the First,⁶⁹ Second,⁷⁰ Fourth,⁷¹ Ninth,⁷² and Tenth⁷³ Circuits—that do not require bad faith for a judge to issue certain severe sanctions, including adverse inference jury instructions.

⁶⁸ See Ahunanya Anga, *Electronic Data Discovery Sanctions: The Unmapped, Unwinding, Meandering Road, and the Courts' Role in Steadying the Playing Field*, 50 SAN DIEGO L. REV., 621, 642 (2013) (noting that there is a split within the Third Circuit between the District of New Jersey, the Middle District of Pennsylvania, and the Eastern District of Pennsylvania regarding when an adverse inference is warranted). See e.g., *Miles v. Elliot*, No. 94-4669, 2011 WL 857320, at *5 (E.D. Pa. Mar. 10, 2011) (requiring willful conduct for adverse inference); *Paris Bus. Prods., Inc. v. Genisis Techs., LLC*, No. 07-0260, 2007 WL 3125184, at *3 (D. N.J. Oct. 24, 2007) (requiring only negligence for adverse inference).

⁶⁹ See, e.g., *U.S. v. Laurent*, 607 F.3d 895, 902–03 (1st Cir. 2010) (noting that “ordinarily, *negligent* destruction would not support the logical inference that the evidence was favorable to the defendant,” but that “unusual circumstances or even other policies might warrant exceptions”).

⁷⁰ In the Second Circuit, discovery sanctions may be imposed on a party that breached its obligation “not only through bad faith or gross negligence, but also through ordinary negligence.” *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002). See also, *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 214 (S.D.N.Y. 2003) (holding that courts may impose adverse inference where party is merely negligent). However, this is not a mandatory rule: “a finding of gross negligence merely permits, rather than requires, a district court to give an adverse inference instruction.” *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012).

⁷¹ See, e.g., *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001) (“[E]ven when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case.”); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995).

⁷² See, e.g., *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (“[A] finding of ‘bad faith’ is not a prerequisite to [an adverse inference instruction].”); *Karnazes v. Cnty. of San Mateo*, No. C 09–0767, 2010 WL 2672003, at *2 (N.D. Cal. Jul. 2, 2010) (holding that gross negligence leading to the destruction of ESI is sufficient to warrant an adverse inference).

⁷³ See *Hartfield v. Wal-Mart Stores, Inc.*, 335 Fed. App'x 796, 804 (10th Cir. 2009) (“The party seeking sanctions for spoliation need not show that the other party acted in bad faith.”).

The fact that different circuits use different standards for the imposition of severe sanctions causes companies that operate in—or are subject to the jurisdiction of—multiple circuit courts to over-preserve ESI. Such companies fear that if they are sued in a jurisdiction that utilizes a negligence standard, their good faith actions might nonetheless be viewed as negligent and they could be subject to sanctions.⁷⁴ That a party who acts in good faith, though negligently, could be sanctioned, incentivizes parties to over-preserve ESI *ex ante* rather than risk incurring the consequences of being sanctioned for their conduct. The uncertainty caused by this circuit split is unfair to litigants⁷⁵ and the resulting over-preservation of ESI imposes massive costs for large companies that are subject to the jurisdiction of different circuit courts.⁷⁶

⁷⁴ See, Withers, *Risk Aversion*, *supra* note 35, at 543, 546; Robert D. Owen, *Restoring the Balance: An Expanded Proposal Concerning Preservation*, 11 *Digital Discovery & e-Evidence Rep.* (BNA) 451 at 2 (Nov. 10, 2011), http://www.sutherland.com/portalresource/lookup/poid/Z1t019NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEn8JCo0!fileUpload.name=/Owen-BNA_Digital_Discovery.pdf, *archived at* <http://perma.cc/SXL2-QD52>; June 2014 Advisory Committee Memo, *supra* note 57, at B-14; Letter from David M. Howard, Corporate Vice President, Deputy Counsel, Microsoft Corp., to Honorable David G. Campbell, Chair, Advisory Comm. on Civil Rules 6 (August 31, 2011) [hereinafter Microsoft Letter] (discussing, in a letter Microsoft submitted for the Discovery Committee’s mini-conference held in Dallas on September 9, 2011 Microsoft’s process of document retention including the scale of documents retained and costs of doing so.).

⁷⁵ See Owen, *supra* note 74, at 2 (“The current judge-made regimen produces different outcomes in different jurisdictions, leading to confusion and unfairness.”).

⁷⁶ These costs are a combination of storage, collection, processing, review, and production. For each gigabyte of ESI, the median cost, from collection to production, is \$17,507. See Withers, *Risk Aversion*, *supra* note 35, at 545 (citing NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 88 (2012)). Microsoft—though not necessarily representative since its business creates a large amount of ESI—stated that on average it preserves 787.5 gigabytes of information for each matter in which it has a litigation hold. See Microsoft Letter, *supra* note 74, at 3. Based on the median cost of

In addition, there are instances where courts have either ignored or misinterpreted the plain meaning of Rule 37(e).⁷⁷ Some courts have held that where spoliation of ESI occurred before the litigation commenced, Rule 37(e) does not apply.⁷⁸ This interpretation is buttressed by the qualification that Rule 37(e) only applies to sanctions “under these rules,” the negative implication of which is that where the parties’ conduct is not governed by the FCRP—because, for instance, a complaint has yet to be filed—Rule 37(e) does not apply and judges are free to rely on their inherent common law powers. Furthermore, some courts have held that since Rule 37(e) is a safe harbor from sanctions for failure to follow a discovery order, it does not apply to conduct that occurs before litigation is commenced (because there is no discovery order).⁷⁹ These interpretations allow courts to sanction parties under their inherent authority, thus entirely circumventing the Rule 37(e) safe harbor and the requirement of bad faith.⁸⁰

Although the proliferation of different standards in different circuits is a problem in and of itself, it also gives rise to a related problem, namely that uncertainty regarding the standards for sanctions for spoliation can impose an unfair burden on producing parties.

preservation, this amounts to \$13,786,762.50 in total preservation costs per potential matter (of which Microsoft has 329), for a total preservation cost of *over \$4.5 billion* for all presently identified potential matters.

⁷⁷ Allman, *supra* note 52, at 221, 226 (“Under the current regime [spoliation sanctions] are routinely imposed without guidance from Rule 37.”).

⁷⁸ *See, e.g.*, Nucor Corp. v. Bell, 251 F.R.D. 191, 196 n.3 (D.S.C. 2008) (holding that Rule 37(e) “is not applicable when the court sanctions a party pursuant to its inherent powers”).

⁷⁹ *See* Withers, *Risk Aversion*, *supra* note 35, at 564 (citing Nucor, 251 F.R.D. at 196 n.3).

⁸⁰ *See* Nucor, 251, F.R.D. at 196 n.3; Withers, *Risk Aversion*, *supra* note 35, at 565.

c. Rule 37(e) Tends to Favor Parties Requesting ESI

Experience has shown that the Rule 37(e) tends to favor parties requesting ESI for several reasons. First, producing parties over-preserve because they do not know where they might be sued and do not want to expose themselves to severe sanctions in a jurisdiction that only requires negligence for such sanctions.⁸¹ This imposes significant costs on companies that have litigation exposure, but no reciprocal costs on potential litigants.⁸² In addition, since many litigation holds relate to cases that never materialize, companies waste money and employee time on unnecessary preservation of documents.⁸³

Relatedly, under the current Rule, once a potential defendant “reasonabl[y] anticipat[es] . . . litigation,” it must take affirmative steps to preserve all relevant documents lest a court sanction the defendant for failure to do so.⁸⁴ Since the potential plaintiff is the party responsible for initiating an action, it can put a potential defendant on notice, and thus force the defendant to retain documents, without incurring any legal exposure itself if it eventually decides not to file a complaint.⁸⁵ Thus, this system allows a potential plaintiff to

⁸¹ See *supra* note 74 and accompanying text (describing how the fear of sanctions drives over-preservation).

⁸² See *supra* note 76 and accompanying text (describing costs of over-preservation). See also Daniel Long Sockwell, Note, *Deterring Discovery-Driven Data Deletion*, 2014 COLUM. BUS. L. REV. 548, 562 (2014) (stating that the costs of finding relevant documents for retention “imposes a cost on defendants regardless of whether the data is ever used in trial”).

⁸³ See Sockwell, *supra* note 82, at 564 (noting that “when deciding what documents to retain,” companies consider the possibility that a document may be used in litigation “[e]ven though this ‘litigation cost’ may be only hypothetical”); June 2014 Advisory Committee Memo, *supra* note 57, at B-14 (“Many entities described spending millions of dollars preserving ESI for litigation that may never be filed.”); Microsoft Letter, *supra* note 74, at 3–5 (describing Microsoft’s preservation policy and the resources it consumes).

⁸⁴ See Withers, *Risk Aversion*, *supra* note 35, at 550.

⁸⁵ See Owen, *supra* note 74, at 5–6. Although plaintiffs also have a duty to preserve ESI in anticipation of litigation, unless the defendant has

cause a potential defendant to expend large sums of money on retention efforts.⁸⁶ This favors potential plaintiffs who do not have to spend money on preservation and who can use the fact that the potential defendant will have to spend money on preservation as a bargaining tool in settlement talks.⁸⁷ Furthermore, since sanctions against large, publicly traded companies can have negative effects beyond the case in which they are sanctioned (such as reputational harm and loss of investor confidence), those companies will be overly

a counter-claim to which the ESI is relevant, there is no way for a plaintiff to be held accountable for spoliation if they decide not to file a complaint. *See* FED. R. CIV. P. 11 (stating that parties can only be sanctioned in conjunction with “presenting to the court a pleading, written motion, or other paper”); FED. R. CIV. P. 37 (describing sanctions for abuse of the discovery process, which necessarily post-dates the filing of a complaint). Ten states recognize an independent tort action for spoliation of evidence, which provides some opportunity for defendants to hold accountable plaintiffs that fail to preserve ESI. However, in order for a party to become aware that another party spoliated evidence, there usually must be a preceding action in which that evidence was relevant. *See Spoliation of Evidence in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C. 1, <http://www.mwl-law.com/wp-content/uploads/2013/03/spoliation-of-laws-in-all-50-states.pdf> (last updated Apr. 22, 2013), *archived at* <http://perma.cc/9T6Y-KM4V> (discussing availability of tort action for spoliation in every state).

⁸⁶ Although this conclusion may not apply with the same force in certain circumstances—i.e., where both parties have roughly equivalent quantities of information in their possession—this does not alter the fact that a potential plaintiff can cause a potential defendant to spend money on preservation of related documents and then not file a lawsuit. Thus, while Rule 37(e) does not favor requesting parties as much in such circumstances, it still gives many potential plaintiffs an advantage over potential defendants prior to the litigation being commenced. This is significant both because such a potential plaintiff can, intentionally or unintentionally, cause the potential defendant to waste money and because this tactic can create leverage for settling grievances outside of the formal litigation process. *See* Beisner, *supra* note 16, at 570 (“Counsel now recognize that electronically stored information is useful not only as a litigation tool, but also as a litigation tactic.”).

⁸⁷ *See id.*; Owen, *supra* note 74, at 5–6. *See also supra* note 76 (discussing costs related to collection, retention, review, and production of ESI).

conservative in their document retention programs, which is unproductive and inefficient.⁸⁸

C. The Process of Writing, Debating, and Proposing the Newly Written Rule 37(e)

1. Duke Conference on Civil Litigation

In 2010, a group of over 200 academics, practitioners, and judges convened at Duke Law School for a Conference on Civil Litigation. The purpose of the conference was to “explore the current costs of civil litigation, particularly discovery and e-discovery, and to discuss possible solutions.”⁸⁹ One concern expressed at the conference was that courts were misinterpreting the standard that must be met for a party to avail itself of the Rule 37(e) safe harbor.⁹⁰ Based on this concern, multiple participants at the conference proposed amending Rule 37(e) to clarify, *inter*

⁸⁸ See Owen, *supra* note 74, at 3; Memorandum from Honorable David G. Campbell, Chair Advisory Comm. on Fed. Rules of Civil Procedure to Honorable Mark R. Kravitz, Chair Standing Comm. on Rules of Practice and Procedure 3 (Dec. 2, 2011) [hereinafter Dec. 2011 Advisory Committee Memo], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2011.pdf>, archived at <http://perma.cc/558W-XD7F> (noting that at the 2011 Dallas Conference many commenters expressed a “great concern about the reputational effect of sanctions”).

⁸⁹ See Allman, *supra* note 52, at 217. Prior to the conference, multiple papers were submitted outlining the problems with discovery generally, and with Rule 37(e) in particular, some of which were published in the sixtieth volume of the *Duke Law Journal*. See, e.g., Beisner, *supra* note 16; Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflection on Experience*, 60 DUKE L.J. 597 (2010); John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537 (2010). All of the papers from the Duke Conference as well as summaries of the panels and the Report to the Chief Justice can be found online. *2010 Civil Litigation Conference*, U.S. CTS., <http://www.uscourts.gov/RulesAndPolicies/rules/archives/projects-rules-committees/2010-civil-litigation-conference.aspx> (last visited Feb. 18, 2015), archived at <http://perma.cc/77YJ-JB2Z>.

⁹⁰ Allman, *supra* note 52, at 221–22.

alia, under what circumstances a judge may issue sanctions for spoliation of ESI.⁹¹

Some commenters suggested that Rule 37(e) did not need to be amended, but rather that the law should be allowed to develop on its own.⁹² One reason for amending the FRCP instead of allowing the law to develop is that there is no Supreme Court case on preservation. Furthermore, circuit court cases are rare because there is no interlocutory appeal for discovery issues and the requirements for an appellate court to issue a writ of mandamus to a lower court are difficult to meet.⁹³ As such, the law is largely developed by district courts, which are unsuited for this task because decisions are made on a case-by-case basis with little information about how the decision will affect third parties.⁹⁴

⁹¹ JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES AND THE COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE ON THE 2010 CONFERENCE ON CIVIL LITIGATION 8–9 (2010) [hereinafter REPORT TO THE CHIEF JUSTICE], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Report%20to%20the%20Chief%20Justice.pdf>, archived at <http://perma.cc/SHJ5-JLTE>. See also Allman, *supra* note 52, at 221–22 (noting that the American Bar Association Special Committee and Lawyers for Civil Justice suggested addressing this issue).

⁹² See, e.g., JOSEPH GARRISON, PROPOSAL TO IMPLEMENT A COST-EFFECTIVE AND EFFICIENT PROCEDURAL TOOL INTO FEDERAL LITIGATION PRACTICE 3 (2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Joseph%20Garrison,%20Proposal%20to%20Implement%20a%20Cost-Effective%20and%20Efficient%20Procedural%20Tool.pdf>, archived at <http://perma.cc/D8YX-4Y25>.

⁹³ See 28 U.S.C. §1292(a), (b) (listing situations where interlocutory appeals are appropriate); *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (noting that a writ of mandamus “is not to be used as a substitute for appeal . . . even though hardship may result” and is only “appropriately issued . . . where there is a ‘usurpation of judicial power’ or a clear abuse of discretion”); 16 Fed. Prac. & Proc. Juris. § 3935.3 (3d ed.) (“Mandamus has been used as a tool of nearly-last resort . . .”).

⁹⁴ See Owen, *supra* note 74, at 3.

2. Subsequent Activities of the Discovery Subcommittee

Shortly after the Duke Conference, the Rules Committee assigned the Discovery Subcommittee the task of developing possible amendments to the FRCP.⁹⁵ The Discovery Subcommittee identified two general categories of rules: “front end” preservation rules, including conditions for the trigger and scope of the duty to preserve, and “back end” rules governing sanctions for spoliation.⁹⁶ The Discovery Subcommittee abandoned the idea of a preservation rule and decided to focus on crafting a sanctions rule.⁹⁷ Nonetheless, the Committee Note to the proposed Rule 37(e) incorporates the common law preservation standard by stating that the Rule applies to discoverable information that “should have been preserved in the anticipation or conduct of litigation.”⁹⁸

The Discovery Subcommittee chose to revise Rule 37(e) by taking into account the harm caused and the spoliating party’s level of culpability in determining the appropriate sanction.⁹⁹ The two alternative ways to implement this policy were to (1) bar sanctions so long as the producing party acted in good faith, or (2) require the party seeking sanctions to show that the producing party acted with a specified level of culpability.¹⁰⁰ After multiple conferences and an extended discussion among experts, practitioners, members of the

⁹⁵ See REPORT TO THE CHIEF JUSTICE, *supra* note 91, at 12; June 2014 Advisory Committee Memo, *supra* note 57, at B-2.

⁹⁶ See Thomas Y. Allman, *Preservation Uncertainty Revised: Addressing Spoliation by Rulemaking*, 51 THE ADVOC. (TEX.) 25, 26 (2011).

⁹⁷ See June 2014 Advisory Committee Memo, *supra* note 57, at B-15 (“The Subcommittee ultimately concluded that a detailed rule specifying the trigger, scope, and duration of a preservation obligation is not feasible.”).

⁹⁸ Comm. on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Civil Procedure: Request for Comment*, U.S. CTS. 319 (Aug. 2013) [hereinafter *2013 Request for Comment*], <http://www.regulations.gov/#!documentdetail;d=usc-rules-cv-2013-0002-0001>, archived at <http://perma.cc/WLX3-CU4V>.

⁹⁹ Allman, *supra* note 96, at 28.

¹⁰⁰ *Id.* at 28.

business committee, and members of the judiciary, the Discovery Subcommittee chose the latter option.¹⁰¹ On May 8, 2013, the Advisory Committee on Civil Rules wrote to the Standing Committee and proposed that a package of Rules, including a revised Rule 37(e), be submitted for public comment.¹⁰²

3. The 2013 Proposed Amendment

a. The Proposed Amendment

On August 15, 2013, the package of proposed amendments to the FRCP, including the rewritten Rule 37(e) (“2013 Proposed Amendment”), was submitted to the public for comment.¹⁰³ The 2013 Proposed Amendment contains two parts—the first establishing the requisite levels of culpability required for curative measures and sanctions and the second listing factors to be considered in assessing a party’s conduct.¹⁰⁴

b. Comments on the 2013 Proposed Amendment

The package of Rules published for comment in August of 2013 generated 2,343 public comments, 287 of which

¹⁰¹ See Robert A. Wenninger, *Electronic Discovery and Sanctions for Spoliation: Perspectives from the Classroom*, 61 CATH. U. L. REV. 775, 803–04 (2012).

¹⁰² See Memorandum from Honorable David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure to Honorable Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Practice and Procedure 1 (May 8, 2013) [hereinafter May 2013 Advisory Committee Memo].

¹⁰³ REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 10 (2014) [hereinafter MAR. 2014 STANDING COMMITTEE REPORT] (stating that the proposed amendments were published for public comment on August 15, 2013), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST03-2014.pdf>, archived at <http://perma.cc/99X7-CQ2G>; 2013 Request for Comment, *supra* note 98, at 314.

¹⁰⁴ See *Proposed Amendment to Rule 37(e)* [hereinafter 2013 Proposed Amendment], in 2013 Request for Comment, *supra* note 98, at 314–17 (containing the text of the proposed amendment to Rule 37(e)).

discussed the 2013 Proposed Amendment.¹⁰⁵ In addition to these comments, the Advisory Committee held three public hearings at which more than 120 members of the public and the bar testified.¹⁰⁶ The comments and testimony on the 2013 Proposed Amendment revealed multiple concerns.

One poignant criticism was that the use of the term “willful” as a standard of culpability in subsection (e)(2) is unclear and encompasses deliberate, but innocent, actions.¹⁰⁷ Furthermore, this ambiguity could present an avenue for judges to retain the negligence standard for conduct warranting sanctions. Another criticism was that the 2013 Proposed Amendment allows judges to issue severe sanctions without a showing that the producing party acted in bad faith so long as the piece of evidence that was destroyed “irreparably deprived” a party of the opportunity to prove a claim or defense.¹⁰⁸ Since the “irreparably deprived” standard is malleable, commenters were concerned that judges could use this as another way to circumvent the requirement of bad faith before imposing sanctions, thus defeating the purpose of the Rule.¹⁰⁹ Additionally, the concept of irreparable deprivation is not as salient in the context of e-discovery as it is in the production of physical evidence since there are often multiple sources for a single document.¹¹⁰ A third criticism was that the list of non-exclusive factors in (e)(2) assessing the party’s conduct has

¹⁰⁵ Comments to Proposed Amendments to the Federal Rules of Civil Procedure, REGULATIONS.GOV, <http://www.regulations.gov#!docketBrowser;rpp=25;po=0;dct=PS;D=USC-RULES-CV-2013-0002> (last visited Feb. 18, 2015) (search “37(e)”) (listing all public comments related to Rule 37(e)).

¹⁰⁶ MAR. 2014 STANDING COMMITTEE REPORT, *supra* note 103, at 10–11.

¹⁰⁷ See Withers, *Risk Aversion*, *supra* note 35, at 556–57 (discussing varying interpretations of the term “willful” used by different courts); Robert D. Owen, *Resolved: A National Preservation Rule Must Require Bad Faith Before Sanctions Can be Ordered*, 14 Digital Discovery & e-Evidence Rep. (BNA) 111, at 4–5 (2014) (compiling criticisms of the 2013 Proposed Amendment).

¹⁰⁸ See *2013 Proposed Amendment*, *supra* note 104, at 315.

¹⁰⁹ See Owen, *supra* note 107, at 5–6.

¹¹⁰ See *supra* Part II.A.2 (describing how ESI often is stored in multiple locations).

several problems. Commenters identified multiple defects including: (1) that (e)(2) diverts attention from the central requirement of bad faith; (2) that these factors are supposed to determine whether a party is acting in bad faith, but many of them do not relate to bad faith at all; (3) that the factors are not tightly written and could lead to confusion and inconsistency among district courts; and (4) that courts might give the factors undue weight and exclude other important factors from consideration.¹¹¹

4. The Newly Proposed Rule

In response to the comments that it received, the Discovery Subcommittee proposed a largely rewritten version of Rule 37(e) (the “proposed Rule”). The proposed Rule states:

(e) Failure to Preserve Electronically Stored Information.

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

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation, may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.¹¹²

¹¹¹ See Owen, *supra* note 107, at 6–7.

¹¹² See *Proposed Rule 37(e)* [hereinafter *Proposed Rule*], in June 2014 Advisory Committee Memo, *supra* note 57, at B-56 to -57.

The proposed Rule responds to the comments on the 2013 Proposed Amendment in numerous ways. First, it explicitly states that the proposed Rule only applies to ESI, thus mitigating concerns about the irreparable deprivation exception in the 2013 Proposed Amendment.¹¹³

Second, a judge can order curative measures under (e)(1) only if it is shown that a party “failed to take reasonable steps to preserve” ESI *and* the deprivation prejudiced another party.¹¹⁴ However, even in such circumstances, a judge can only order measures “no greater than necessary to cure the prejudice.”¹¹⁵ By implication, this means that a court may not impose the more serious sanctions listed in (e)(2) absent a showing that the spoliating party “acted with the intent to deprive another party of the information’s use in the litigation.”¹¹⁶ This requirement limits the discretion of judges imposing sanctions for failure to produce ESI and addresses the concern that judges could use expansive interpretations of the proposed Rule to avoid the safe harbor. Furthermore, this change highlights the decision to require judges to exhaust all curative measures before resorting to sanctions and brings the proposed Rule in line with the traditional rationale behind such sanctions—that only intentional conduct supports the presumption that the lost evidence would have been prejudicial to the party that lost it.¹¹⁷ Finally, the intent requirement is a response to the criticism that “willful” is an insufficient culpability standard.

¹¹³ See June 2014 Advisory Committee Memo, *supra* note 57, at B-15 to -16 (describing reasons why the Discovery Subcommittee decided to limit the Rule to ESI).

¹¹⁴ *Proposed Rule*, *supra* note 112, at B-56 to -57.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at B-57.

¹¹⁷ See Sedona Conference Comment, *supra* note 66, at 13; June 2014 Advisory Committee Memo, *supra* note 57, at B-17. See also W. Grayson Lambert, *Keeping the Inference in the Adverse Inference Instruction: Ensuring the Instruction is an Effective Sanction in Electronic Discovery Cases*, 64 S.C. L. REV. 681, 698–99 (2013). An adverse inference is appropriate when a party intentionally destroyed relevant evidence because “the spoliator knows litigation is pending and makes a conscious, deliberate decision to destroy certain evidence. That decision is made

Finally, the proposed Rule discards the (e)(2) list of factors but explicitly retains one factor from the 2013 Proposed Amendment—37(e)(2)(B): “the reasonableness of the party’s efforts to preserve the information.”¹¹⁸ The proposed Rule retains this factor by requiring the court to determine whether the spoliating party took “reasonable steps” to preserve the ESI.¹¹⁹ In addition, while the proposed Rule does not explicitly contain the other factors from (e)(2) of the 2013 Proposed Amendment, the Committee Note explains that many of these factors should be considered in determining the reasonableness of the producing party’s

presumably because the evidence is harmful to the spoliator’s case and the spoliator does not want the evidence to come before the jury.” *Id.* at 699. However, when the spoliation is a result of negligent actions, the spoliating party “does not demonstrate a conscious decision to keep evidence away from the jury because the evidence was harmful to its case,” and thus, there is no nexus between the destruction of evidence and it being adverse to the spoliating party. *Id.* at 700.

It is important to note that there are two different kinds of adverse inference instructions, but only one type qualifies as a sanction and satisfies the historical rationale for a judge to issue an adverse inference as a punishment. *Mali v. Fed. Ins. Co.*, 720 F.3d 387, 391–94 (2d Cir. 2013). The first type of adverse inference instruction is an instruction that the jury *should* draw an inference against a party based on that party’s conduct during discovery. *Id.* at 392. Such an instruction is punitive in nature and requires the judge to make findings supporting the instruction. *Id.* This sort of instruction is a quintessential example of a sanction. See *Mali*, 720 F.3d at 392; BLACK’S LAW DICTIONARY 1541 (10th ed. 2014) (defining a “sanction” as “[a] penalty or coercive measure that results from failure to comply with a law, rule, or order”). The second type of adverse inference is “one that simply explains to the jury . . . that a jury’s finding of certain facts *may (but need not)* support a further finding that other facts are true.” *Mali*, 720 F.3d at 393 (emphasis added). Such an instruction is not a punishment and therefore not a sanction, but rather “is simply an explanation to the jury of its fact-finding powers.” *Id.* Throughout this Note, the former, punitive type of adverse inference will be called an “adverse inference” or a “mandatory adverse inference.” The latter type of adverse inference will be called a “permissive adverse inference.” Although this is the terminology utilized in this Note, many judicial opinions conflate or confuse the two different types of instructions.

¹¹⁸ 2013 Proposed Amendment, *supra* note 104, at 316.

¹¹⁹ Proposed Rule, *supra* note 112, at B-56 to -57.

actions.¹²⁰ The proposed Rule also incorporates the existing standard (“the routine, good-faith operation of an electronic information system”) as “a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information.”¹²¹

Notably, the proposed Rule does not attempt to create a duty to preserve, as some attendees at the Duke Conference suggested it should.¹²² Rather, the proposed Rule governs under what circumstances a judge may issue sanctions for spoliation of ESI and adopts the duty to preserve as it has been established by case law.¹²³

5. Adoption of the Proposed Amendments

After the thorough rulemaking process described above, on April 11, 2014 the Advisory Committee on Civil Procedure unanimously adopted the final package of amendments to the FRCP, including proposed Rule 37(e).¹²⁴ On September 16, 2014, the Judicial Conference adopted the proposed amendments and forwarded them to the Supreme Court for consideration.¹²⁵ If the Court approves the proposed amendments, they will go into effect on December 1, 2015 unless Congress enacts legislation to the contrary.¹²⁶

¹²⁰ See June 2014 Advisory Committee Memo, *supra* note 57, at B-16; *Committee Note to Proposed Rule 37(e)* [hereinafter *Committee Note*] in June 2014 Advisory Committee Memo, *supra* note 57, at B-58 to -67.

¹²¹ FED. R. CIV. P. 37(e); *Committee Note*, *supra* note 120, at B-61.

¹²² See *infra* Part II.C.2 (discussing proposal to define the duty to preserve in the text of the Rules).

¹²³ See June 2014 Advisory Committee Memo, *supra* note 57, at B-15; *Committee Note*, *supra* note 120, at B-59 (“Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve.”).

¹²⁴ See June 2014 Advisory Committee Memo, *supra* note 57, at B-1.

¹²⁵ See *Judicial Conference Receives Budget Update, Forwards Rules Package to Supreme Court*, *supra* note 6.

¹²⁶ *Id.*

III. WHETHER THE PROPOSED RULE 37(E) WILL ACTUALLY ACHIEVE ITS GOALS

Part III of this Note examines whether the proposed Rule will achieve the goals for which it was proposed. First, Part III.0 determines what goals the Judicial Conference (and its subsidiary bodies, the Standing Committee and the Discovery Subcommittee) sought to achieve by proposing a rewritten Rule 37(e). Next, Part III.0 evaluates whether these goals will actually be achieved.

A. The Goals of the Judicial Committee in Proposing a New Rule 37(e)

The main legal goal of the proposed Rule 37(e) is to create national uniformity with regard to the level of culpability required to impose the severe sanctions for spoliation of ESI listed in subsection (e)(2).¹²⁷ Within this overarching goal, the proposed Rule seeks (1) to abrogate *Residential Funding*¹²⁸ and related cases holding that severe sanctions can be imposed where the spoliating party was merely negligent and (2) to remove judges' inherent power to

¹²⁷ See *Proposed Rule*, *supra* note 112, at B-57 (listing the three serious sanctions that courts may only impose for parties who intentionally deprive another party of ESI). It is generally very difficult, if not impossible, to divine the intent of a collective body because not all of its members may have had the same intentions. See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intent' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes."). Although Easterbrook's article discusses legislatures, the same principle applies to all collective bodies. Given the extensive and consistent documentation of the purpose for amending Rule 37(e) over the course of four years in various groups, this inability to divine a collective body's intent does not present a challenge to determining the goals for the proposed Rule 37(e).

¹²⁸ *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002), is the leading case in the Second Circuit that holds that severe sanctions (including an adverse inference) may be imposed on parties who negligently delete ESI. See *supra* note 70 (listing cases on requisite culpability for sanctions in the Second Circuit).

sanction parties for spoliation of ESI.¹²⁹ In addition to these legal goals, the main policy goal¹³⁰ of the proposed Rule is to influence the *ex ante* conduct of parties and reduce the incentives to over-preserve ESI.¹³¹

1. Creating National Uniformity

At the Duke Conference, it became clear to the E-Discovery Panel that there was a need for uniform standards to govern sanctions for spoliation.¹³² This concern was shared by the America Bar Association Special Committee, which proposed that federal courts “adopt a uniform standard to address when sanctions may be imposed for the deletion of ESI after a duty to preserve ESI has attached.”¹³³ As the Discovery Subcommittee deliberated the best way to frame a new version of Rule 37(e), it constantly tried to find a way to

¹²⁹ Owen, *supra* note 107, at 6 (noting “the Committee’s intent to overrule *Residential Funding*, displace inherent power, and achieve national uniformity”).

¹³⁰ Although this policy goal could be characterized as legal because it is the goal of a legal rule, this Note classifies creating national uniformity as a legal goal because it is aimed at changing the legal framework for dealing with sanctions for spoliation of ESI in civil cases. This Note classifies the goal of affecting *ex ante* conduct as a policy goal because its aim is to affect how people operate outside of the litigation context.

¹³¹ See June 2014 Advisory Committee Memo, *supra* note 57, at B-14 (stating that one of the goals of resolving the circuit split is to “reduc[e] a primary incentive for overpreservation”).

¹³² See Memorandum from Gregory P. Joseph to Honorable John G. Koeltl on Executive Summary: E-Discovery Panel, Duke Conference on Civil Litigation 2 (May 11, 2010) [hereinafter E-Discovery Panel, Executive Summary], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/E-Discovery%20Panel,%20Executive%20Summary.pdf>, archived at <http://perma.cc/8445-YEKQ>.

¹³³ Allman, *supra* note 52, at 221 (citing SPECIAL COMM. OF THE AM. BAR ASS’N SECTION OF LITIG., CIVIL PROCEDURE IN THE 21ST CENTURY SOME PROPOSALS 12 (2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Litigation%20Section,%20Civil%20Procedure%20in%20the%2021st%20Century.pdf>, archived at <http://perma.cc/R69V-T7WJ>).

create a uniform standard.¹³⁴ When the 2013 Proposed Amendments were released to the public, the accompanying memo stated that “[a] central objective of the proposed new Rule 37(e) is to replace the disparate treatment of preservation/sanctions issues in different circuits by adopting a single standard.”¹³⁵ The Advisory Committee Memo circulated with the proposed Rule states that “resolving the circuit split with a more uniform approach to lost ESI . . . has been recognized by the Committee as a worthwhile goal.”¹³⁶ Furthermore, this memo states that the “primary purpose” of subsection (e)(2) is “to eliminate the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI.”¹³⁷ Finally, the Committee Note that accompanies the proposed Rule states the same goal of creating a uniform, national standard.¹³⁸

a. Abrogating Residential Funding

In order to create national uniformity, proposed Rule 37(e) must make it clear that sanctions, as opposed to less draconian curative measures, can only be used where the spoliating party acts with the requisite level of culpability. Otherwise, judges might use the reasoning of *Residential*

¹³⁴ See, e.g., Dec. 2011 Advisory Committee Memo, *supra* note 88, at 2 (recognizing that one issue facing the Discovery Subcommittee was that “there are significant differences among the circuits on what conduct can lead to sanctions for failure to preserve”); Memorandum Considered by Subcommittee During Conference Call, Nov. 28 Conference Call Issues After Nov. 2 Committee Meeting Redraft of 37(e), Discovery Subcommittee 9, 12 (Nov. 28, 2012) [hereinafter Nov. 2012 Conference Call Notes] (“The goal of amended 37(e) is to achieve uniformity in the federal courts in their handling of failures to preserve.”), *reprinted in* Memorandum from Honorable David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure to Honorable Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Practice and Procedure (Dec. 5, 2012) [hereinafter Dec. 2012 Advisory Committee Memo]; June 2014 Advisory Committee Memo, *supra* note 57, at B-14.

¹³⁵ *2013 Request for Comment*, *supra* note 98, at 272.

¹³⁶ June 2014 Advisory Committee Memo, *supra* note 57, at B-14.

¹³⁷ *Id.* at B-17.

¹³⁸ See *Committee Note*, *supra* note 120, at B-65.

Funding to justify sanctioning parties that were merely negligent.¹³⁹ Thus, subsection (e)(2) is a direct response to *Residential Funding* and seeks to cabin serious sanctions to situations where the producing party kept ESI from the requesting party with the intent to deprive another party of that information's use in litigating one of its claims or defenses.¹⁴⁰ In addition, the Committee Note accompanying the proposed Rule 37(e) explicitly states that it “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.”¹⁴¹ Although the rejection of such cases is the first step in creating a national standard, it is also necessary to circumscribe judges' inherent power to sanction parties.

b. Removing the Courts' Inherent Power to Sanction Parties

One of the failings of Rule 37(e) is that judges are able to circumvent its vague language by resorting to their inherent power to sanction parties. In *Chambers v. NASCO, Inc.*, the Supreme Court held that federal judges, under their inherent authority, have “the ability to fashion an appropriate sanction for conduct which abuses the judicial process.”¹⁴² Furthermore, the Court stated that “the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct.”¹⁴³ Since Rule 37(e) only applies to “sanctions under these rules,” it does not in any

¹³⁹ See Nov. 2012 Conference Call Notes, *supra* note 134, at 10 (“[T]he goal is to displace *Residential Funding*.”); 2013 Request for Comment, *supra* note 98, at 272 (“The proposed rule therefore rejects *Residential Funding* . . .”).

¹⁴⁰ 2013 Request for Comment, *supra* note 98, at 272. See also THOMAS Y. ALLMAN, THE CIVIL RULES PACKAGE AS APPROVED BY THE JUDICIAL CONFERENCE (SEPTEMBER 2014) 18 (2014).

¹⁴¹ See Committee Note, *supra* note 120, at B-65.

¹⁴² *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991).

¹⁴³ *Id.* at 49. See also *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

way limit courts' ability to resort to its innate powers when sanctioning parties.¹⁴⁴ Learning from the problems created by Rule 37(e), in crafting the proposed Rule the Advisory Committee sought to create a Rule that would prevent judges from relying on their inherent powers to circumvent the requirements of the proposed Rule.¹⁴⁵

2. Reducing Over-Preservation

Although the motivating legal reasons for the Judicial Conference's decision to rewrite Rule 37(e) are to create national uniformity by abrogating *Residential Funding* and removing judges' inherent power to sanction parties, another significant reason for amending Rule 37(e) is the effect of discovery on individuals in society. More specifically, one of the motivating purposes of Rule 37(e) is to affect the *ex ante* conduct of parties and reduce the incentive to over-preserve ESI.¹⁴⁶ Over-preservation of ESI can impose huge costs on parties, and many companies preserve information relating to potential future cases that never materialize.¹⁴⁷ Thus, over-preservation is inefficient and should be discouraged.¹⁴⁸

B. The Proposed Rule Will Not Achieve the Goals for Which It Was Proposed

Since the goals of (1) creating a uniform, national standard, (2) overruling *Residential Funding* and similar cases, and (3) curtailing the inherent power of judges to sanction parties for spoliation of ESI are so closely

¹⁴⁴ See 2013 Request for Comment, *supra* note 98, at 272.

¹⁴⁵ See Dec. 2011 Advisory Committee Memo, *supra* note 88, at 17 (stating that “[i]f a sanctions rule gets it right on the level of culpability for different sanctions, the *Chambers* . . . concept of inherent authority would likely not be a serious threat”).

¹⁴⁶ See June 2014 Advisory Committee Memo, *supra* note 57, at B-14 (stating that one of the goals of resolving the circuit split is to “reduc[e] a primary incentive for overpreservation”).

¹⁴⁷ See *supra* notes 74–76 (discussing costs of over-preservation).

¹⁴⁸ Over-preservation is inefficient because it “seldom return[s] value to the parties.” Withers, *Risk Aversion*, *supra* note 35, at 546.

intertwined, this Note discusses them simultaneously. Furthermore, this discussion is based on the underlying presumption that the lack of a uniform, national standard causes companies to over-preserve ESI, often at great cost.¹⁴⁹

1. The Proposed Rule Will Not Be Successful in Creating a Truly National Standard

The proposed Rule will not be effective in changing the *ex ante* behavior of parties because companies must still prepare to be sued in state courts that use different standards, and thus will continue to over-preserve ESI.¹⁵⁰ Since the FRCP only govern civil actions in federal courts, state courts are not required to adopt the FRCP and may continue to utilize standards different from those employed in federal courts.¹⁵¹ Although the FRCP tend to be highly influential on state courts,¹⁵² there is no guarantee that all—or even any—states would adopt a safe harbor provision that parallels the Federal Rule.¹⁵³ Moreover, since cases on

¹⁴⁹ See *supra*, Part II.B.2.c.

¹⁵⁰ See Letter from Kelly Kubacki et al., Kroll Ontrak, to Honorable David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure 10 (Aug. 31, 2011) [hereinafter Kroll Ontrak Letter], http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Comments/Kroll%20Ontrack.pdf, archived at <http://perma.cc/A25J-9GG4>.

¹⁵¹ In addition to the different standards for spoliation used by state courts, some states also have an independent tort action for spoliation of discoverable information. See *supra* note 85 (noting that ten states have an independent tort of spoliation). Since the Federal Rules cannot amend any substantive right, including the availability of a tort action, the Discovery Subcommittee emphasized that “[t]he rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.” June 2014 Advisory Committee Memo, *supra* note 57, at B-58 to -59. Thus, such actions would continue to exist even if every state were to adopt the text of the Proposed Rule.

¹⁵² See Allman, *supra* note 96, at 25–26. Allman notes that “[v]ariants of Rule 37(e) have been adopted by most of states which have modeled their e-discovery rules on the 2006 Amendments.” *Id.* n.16 (citing THOMAS Y. ALLMAN, STATE E-DISCOVERY TODAY: AN ASSESSMENT AND UPDATE OF RULEMAKING 41–44 (2011)).

¹⁵³ THE SEDONA PRINCIPLES, *supra* note 7, at 10 (stating that one year after adoption of the 2006 Amendments “[i]t is by no means certain that

spoliation at the state level are not as widely reported as their federal counterparts, potential litigants are likely to be uncertain about their obligations under state rules, and thus, more likely to over-preserve rather than take the risk of not complying with state requirements.¹⁵⁴

The obvious counterargument to this concern is that while the Federal Rules necessarily cannot affect states' rules of procedure, they can create a national standard among *federal* courts.¹⁵⁵ The Judicial Conference decided to move in a slow and deliberate manner in proposing new Rules governing e-discovery rather than attempt to fix all of the Rules' problems at once.¹⁵⁶ Thus, it could be argued that the goal of the proposed Rule is not to create a truly national standard (i.e., a standard followed by every court in the country), but rather to use the Federal Rules to create uniformity in the federal courts, which would be an improvement over the current situation. Furthermore, since

the 2006 amendments to the Federal Rules will be adopted in the majority of states"). In particular, those states that decided not to adopt current Rule 37(e) seem very unlikely to adopt any future version of the Rule.

¹⁵⁴ See Anga, *supra* note 68, at 641 (noting that "sanction rulings have failed to give potential litigants adequate warning of sanctionable conduct beyond the widely known and quoted seminal cases because states and circuits are divided by their own definitions of what constitutes sanctionable conduct"). Potential litigants who face the reputational stain of being sanctioned for spoliation (because, for instance, they are a publically traded company) are especially likely to choose to over-preserve rather than risk being sanctioned where there is any uncertainty about the standard for sanctions. See *supra* note 88 and accompanying text (discussing reputational harm of sanctions).

¹⁵⁵ See *Committee Note*, *supra* note 120, at B-65 ("[Rule 37(e)] is designed to provide a uniform standard *in federal court* for use of these serious measures when addressing failure to preserve electronically stored information.") (emphasis added); Nov. 2012 Conference Call Notes, *supra* note 134, at 9 ("The goal of amended 37(e) is to *achieve uniformity in the federal courts* in their handling of failures to preserve.") (emphasis added).

¹⁵⁶ See Memorandum from Honorable Mark R. Kravitz, Chair Advisory Comm. on Fed. Rules of Civil Procedure to Honorable Lee H. Rosenthal, Chair Standing Comm. on Rules of Practice and Procedure 26 (May 2, 2011) [hereinafter May 2011 Advisory Committee Memo], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2011.pdf>, archived at <http://perma.cc/P938-9EKZ>.

most of the parties that over-preserve under the current Rule are large companies that operate in multiple jurisdictions, such companies could avail themselves of the uniform federal standard by removing their case to federal court so long as they meet the requirements of 28 U.S.C. § 1332 for federal diversity jurisdiction.¹⁵⁷ Therefore, while the proposed Rule 37(e) will not create true uniformity, it could allow most of the parties that currently over-preserve ESI to worry less about being sued in a court that sanctions parties for negligent loss of ESI. Although this may not entirely change *ex ante* behavior, it will likely factor into the cost-benefit analysis of companies that are subject to the jurisdiction of multiple circuit courts and could potentially result in less over-preservation.¹⁵⁸ Moreover, while the FRCP cannot change states' rules of procedure, a change to the FRCP often influences states' rules.¹⁵⁹ Thus, the proposed Rule could achieve the goal of national uniformity among federal courts and has the potential to influence states' rules of procedure.

The argument that the goal of the proposed Rule is limited to creating national uniformity among federal courts, and thus, that it will succeed in achieving its goals, is compelling. However, it overlooks two things. First, while achieving national uniformity among federal courts was one of the goals for amending Rule 37(e), it was only one of the overarching reasons for proposing a new Rule. Though the new Rule 37(e) was proposed in part to resolve a circuit split, it was also intended to influence the *ex ante* conduct of

¹⁵⁷ See 28 U.S.C. § 1441 (2012) (removal of civil actions to federal court).

¹⁵⁸ See Owen, *supra* note 107, at 7 (“Adopting proposed Rule 37(e) is not a complete solution to overpreservation . . . but the Committee has heard testimony that the rule will permit conscientious companies to preserve less.”).

¹⁵⁹ See Kroll Ontrak Letter, *supra* note 150, at 10 (noting that “if a federal rule is implemented and proves to be successful in reducing costs and issues related to preservation, states may see the benefits of moving swiftly to enacting these changes on the state level,” but also noting that state adoption of Federal Rule of Evidence 502 has been very slow and “only a small handful of states have enacted this rule on the state level”).

parties and reduce the amount of wasteful over-preservation that parties engage in. As discussed in Part III.0.0 *infra*, parties will likely still over-preserve ESI even with a uniform standard for spoliation sanctions in federal courts. Second, as discussed in Part III.0.0, *infra*, it is not clear that the proposed Rule will be effective in creating a uniform standard among federal courts.

2. The Effect of the Lack of National Uniformity on Companies

The lack of uniformity has a pronounced effect on publicly traded firms, the majority of which are incorporated in New York and Delaware.¹⁶⁰ Neither state requires bad faith or intentional destruction of evidence to warrant severe sanctions, including adverse inferences. Thus, any company that is incorporated or has its principal place of business in New York or Delaware is vulnerable to suit in a jurisdiction that allows severe sanctions for reckless, or even some forms of negligent, conduct.¹⁶¹

¹⁶⁰ As of 2000, 57.75% of all publicly traded firms are incorporated in Delaware with an additional 3.46% incorporated in New York. Lucian Arye Bebchuck & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 391 tbl.2 (2003). For Fortune 500 firms, 59.45% are incorporated in Delaware and 5.94% are incorporated in New York. *Id.* Furthermore, of those firms that went public between 1996 and 2000, 67.86% chose to incorporate in Delaware and 1.09% chose to incorporate in New York. *Id.*

¹⁶¹ The federal diversity jurisdiction statute states that district courts have original jurisdiction in civil actions where (1) “the matter in controversy exceeds the sum or value of \$75,000” and (2) the action is between, *inter alia*, “citizens of different states.” 28 U.S.C. § 1332(a) (2012). The statute further states that “[f]or the purposes of this section . . . a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated *and* of the State or foreign state where it has its principal place of business” *Id.* § 1332(c) (emphasis added). Furthermore, an action brought in state court may only be removed to federal court where the district court “embracing the place where such action is pending” would “have original jurisdiction” over the claim. 28 U.S.C. § 1441 (2012). Thus, any corporation that is incorporated in or has its principal place of business in, for example, New York would not be able to remove a case filed by a citizen of New York in a New York state court—

In New York, gross negligence is “sufficient to presume relevance” and satisfy the requisite level of culpability for an adverse inference jury instruction.¹⁶² Although the presumption of relevance can be rebutted “[i]f the spoliating party demonstrates to a court’s satisfaction that there could not have been any prejudice to the innocent party . . . a lesser sanction might still be required.”¹⁶³ In addition, a party may be sanctioned “when the destruction of evidence is merely negligent” so long as the party seeking spoliation sanctions proves relevance.¹⁶⁴ The 2013 case *Strong v. City of New York* held that “[i]f warranted, an adverse inference charge at trial may be an appropriate additional sanction” for *negligent* erasure of audiotapes.¹⁶⁵ A year later, the Appellate Division stated that sanctions may be awarded for gross negligence or negligence if the requesting party can prove relevance.¹⁶⁶ Thus, parties litigating in New York state courts can be sanctioned for grossly negligent or negligent spoliation if the party requesting sanctions can show that the lost ESI was relevant. Furthermore, the severe sanction of an adverse inference instruction is a permissible

unless the case involved a federal question, 28 U.S.C. § 1331 (2012)—because there would be no diversity of citizenship.

¹⁶² *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 939 N.Y.S.2d 321, 331 (App. Div. 2012). New York law on sanctions for spoliation is entirely based on the common law since the New York Civil Practice Law and Rules (the state equivalent of the FRCP) provision on discovery sanctions only applies to refusals to comply with discovery orders or willful failures to disclose. *Strong v. City of New York*, 973 N.Y.S.2d 152, 156 (App. Div. 2013).

¹⁶³ *VOOM HD Holdings*, 939 N.Y.S.2d at 331 (citing *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs.*, 685 F. Supp. 2d 456, 468–69 (S.D.N.Y. 2010)).

¹⁶⁴ *Id.* The opinion does not state exactly what sort of sanctions can be used in cases of mere negligence, but this comment comes in the discussion of the requisite level of culpability for issuance of an adverse inference jury instruction.

¹⁶⁵ *Strong*, 973 N.Y.S.2d at 158.

¹⁶⁶ *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 987 N.Y.S.3d 350, 356 (App. Div. 2014); *Duluc v. AC & L Food Corp.*, 990 N.Y.S.2d 24, 26 (App. Div. 2014).

sanction—even where the spoliating party was merely negligent.

In Delaware, courts may issue an adverse inference “where a litigant intentionally or recklessly destroys evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item.”¹⁶⁷ In *Beard Research, Inc. v. Kates*, the Delaware Chancery Court described in detail the different types of discovery sanctions and the required level of culpability and prejudice for each.¹⁶⁸ To issue an adverse inference, there must be “a preliminary finding of intentional or reckless destruction of evidence.”¹⁶⁹ Although “the negligent destruction of evidence does not warrant drawing an adverse inference,” “negligence alone may be sufficient to support the imposition of monetary sanctions.”¹⁷⁰ However, an adverse inference may also be issued where the recklessness is “based on an error in judgment, a form of passive negligence,” so long as the party requesting sanctions proves that the “precise harm” that occurred was “reasonably apparent but consciously ignored in the formulation of the judgment.”¹⁷¹ Thus, Delaware courts generally require at least reckless conduct to issue an adverse inference, though concepts of negligence may sneak in under the guise of recklessness based on an error in judgment.

What is significant about the standards for sanctions used in New York and Delaware is that neither requires bad faith or intentional conduct before a court can impose a serious sanction, specifically an adverse inference. Furthermore, in both jurisdictions, negligent destruction of evidence is sufficient for some forms of sanctions. Thus, because over 60% of all U.S. publicly traded firms are

¹⁶⁷ *Sears, Roebuck and Co. v. Midcap*, 893 A.2d 542, 552 (Del. 2006).

¹⁶⁸ *See Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1189–94 (Del. Ch. 2009), *aff'd*, 11 A.3d 749 (Del. 2010).

¹⁶⁹ *Id.* at 1191 (internal quotations omitted).

¹⁷⁰ *Id.* at 1191, 1194.

¹⁷¹ *Id.* at 1191–92 (citing *Jardel v. Hughes*, 523 A.2d 518, 530 (Del. 1987)) (emphasis omitted).

incorporated in either Delaware or New York, a substantial proportion of such businesses will continue to over-preserve ESI out of fear of litigation in state court.¹⁷² Therefore, even if Rule 37(e) creates a uniform standard among federal courts, it is unlikely that the Rule will have much of an effect on the *ex ante* conduct of a large percentage of entities that currently over-preserve.

3. Regardless of True National Uniformity, the Proposed Rule May Not Be Successful in Creating Uniformity Among the Federal Circuit Courts

In addition to the problems associated with federal courts applying the Federal Rules when hearing a case based on their diversity jurisdiction, discussed in Part III.0.0 *supra*, it is likely that proposed Rule 37(e) will not be effective in creating uniformity among the federal courts. First, as a threshold matter, under proposed Rule 37(e) the court must determine that the ESI was lost “because a party failed to take reasonable steps to preserve it.”¹⁷³ However, it is not clear what constitutes “reasonable steps.” One commenter argues that “this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle.”¹⁷⁴ Given the lack of precision, it is likely that potential future parties will continue to over-preserve, at least until they see how courts will interpret this standard.¹⁷⁵ Although the Committee Note gives some insight into what constitutes “reasonable steps,” its guidance is minimal.¹⁷⁶ Given this ambiguity about what

¹⁷² See *supra* note 160.

¹⁷³ *Proposed Rule, supra* note 112, at B-56.

¹⁷⁴ Withers, *Risk Aversion, supra* note 35, at 553 (citing *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010)).

¹⁷⁵ *Id.* at 553–54.

¹⁷⁶ The Committee Note states that the standard set in the current Rule 37(e) (“routine, good faith operation of an electronic information system”) is among the indicia of reasonable steps and that reasonable steps require less than perfection. See *Committee Note, supra* note 120, at B-60 to -62. Furthermore, the Committee Note suggests that

constitutes “reasonable steps,” it is almost inevitable that courts will interpret it to mean different things, resulting in a lack of uniformity.

Second, while the Committee Note declares that proposed Rule 37(e) prohibits judges from using their inherent power to sanction parties for spoliation other than in accordance with the proposed Rule, nothing in the Rule explicitly requires this conclusion.¹⁷⁷ Current Rule 37(e) states that it applies to sanctions “under these rules,” which led some judges to conclude that it does not restrict their inherent power to sanction parties.¹⁷⁸ Since the proposed Rule omits this language, the Advisory Committee argues that it covers all possible sanctions for spoliation and thus forecloses judges from using their inherent power.¹⁷⁹ However, this structural change is not as forceful as it could be given that there are other ways that judges could justify using their inherent power to sanction parties before them.

Furthermore, the argument that the proposed Rule strips judges of their inherent power to sanction parties conflicts with *Chambers v. NASCO, Inc.* This case authorizes courts to use their inherent power to sanction parties notwithstanding the Federal Rules¹⁸⁰ and therefore poses an obstacle to any attempt to curtail the inherent power of federal judges to issue sanctions. It specifically states that such power cannot be preempted by procedural rules that contemplate sanctions for the same conduct and gives judges great discretion in determining what conduct warrants sanctions.¹⁸¹ However, a more recent case, *U.S. v. Aleo*, suggests that “a judge may not use inherent power to end-

proportionality is another factor to consider in evaluating whether a party took reasonable steps. *Id.*

¹⁷⁷ See *Committee Note*, *supra* note 120, at B-58.

¹⁷⁸ See FED. R. CIV. P. 37(e).

¹⁷⁹ See, e.g., Dec. 2012 Advisory Committee Memo, *supra* note 134, at 10.

¹⁸⁰ See *supra* notes 142–143 and accompanying text (discussing the holding in *Chambers* that judges have inherent authority to issue sanctions notwithstanding the FRCP).

¹⁸¹ See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49–50 (1991).

run a cabined power.”¹⁸² The proposed Rule attempts to limit judges’ inherent power to sanction parties by cabining severe sanctions and limiting their use to situations where a party “acted with the intent to deprive another party of the information’s use in the litigation.”¹⁸³ By doing so, the proposed Rule seeks to “foreclose[] reliance on inherent authority or state law to determine when certain measures should be used.”¹⁸⁴ However, *Aleo* is a Sixth Circuit case and the cited language comes from Judge Sutton’s concurring opinion. Thus, although it may be persuasive, it is not binding on any court. Although *Chambers* is a Supreme Court case, it did not squarely address the issue of whether a judge can rely on his or her inherent power to end-run a cabined power. If circuit courts come to different conclusions about whether *Chambers* is controlling on this issue and some adopt the reasoning suggested by Judge Sutton in *Aleo* while others do not, this could lead to a circuit split similar to one that the proposed Rule is meant to remedy. Should this happen, the proposed Rule will be ineffective in creating a national standard for the federal courts and would have a minimal influence on the *ex ante* conduct of parties.

4. Judges Can Use Jury Instructions to “Put a Thumb on the Scale”

One final concern with the proposed Rule 37(e) is that the curative measures contemplated in (e)(1) could bleed into the more serious sanctions contemplated by (e)(2). The Committee Note states that “in an appropriate case, it may be that serious measures are necessary to cure prejudice” and that such measures may include “giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies.”¹⁸⁵ Thus, so long as the three conditions for (e)(1) are

¹⁸² U.S. v. *Aleo*, 681 F.3d 290, 310 (6th Cir. 2012) (Sutton, C.J., concurring).

¹⁸³ *Proposed Rule*, *supra* note 112, at B-57.

¹⁸⁴ *See Committee Note*, *supra* note 120, at B-58.

¹⁸⁵ *Committee Note*, *supra* note 120, at B-64.

met, a judge could instruct the jury that they may presume that lost evidence would have been harmful to the spoliating party's claims or defenses if they find other evidence persuasive.¹⁸⁶ Such an instruction is problematic because it could allow judges to “put a thumb on the scale,” which would cause the jury to interpret the permissive instruction as a mandatory adverse inference instruction.¹⁸⁷ This effect could significantly influence the jury's deliberation.¹⁸⁸

¹⁸⁶ The three conditions are (1) the ESI was “lost because a party failed to take reasonable steps to preserve it,” (2) the ESI “cannot be restored or replaced through additional discovery,” and (3) the loss prejudiced another party. *Proposed Rule*, *supra* note 112, at B-56 to -57. *See supra* note 117 (discussing permissive and mandatory adverse inference instructions).

¹⁸⁷ *See ALLMAN*, *supra* note 140, at 18.

¹⁸⁸ *See Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1219–20 (10th Cir. 2008) (noting that an adverse inference “brands one party as a bad actor” and “necessarily opens the door to a certain degree of speculation by the jury”); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 219–20 (S.D.N.Y. 2003) (“When a jury is instructed that it may infer that the party who destroyed potentially relevant evidence did so out of a realization that the evidence was unfavorable, the party suffering this instruction will be hard-pressed to prevail on the merits.”) (internal citations omitted). *See also* GORELICK ET AL., DESTRUCTION OF EVIDENCE § 2.4 (2014) (“Once a jury is informed that evidence has been destroyed, the jury's perception of the spoliator may be unalterably changed. Even if the judge gives a very narrow instruction regarding the effect to be given to the spoliation inference, a jury might consider such conduct so outrageous as to justify a verdict against the spoliator.”).

In re Actos (Pioglitazone) Products Liability Litigation is illustrative of the serious consequences that an adverse inference can have. No. 6:11–MD–2299, 2014 WL 2872299 (W.D. La. Jun. 23, 2014). In that case, the defendant put a litigation hold in place in 2002, but it was not until 2011 that the plaintiff filed a lawsuit, which was based on a completely different claim from that which had prompted the litigation hold. *Id.* at *1. In the interim, defendant lost files from forty-six custodians. *Id.* at *3. The judge informed the jury of this and gave them the following instruction: “you are free to infer those documents and files would have been helpful to the plaintiffs or detrimental to [the defendant], if you feel the evidence you have heard supports that inference.” *See* Judge's Instructions/Charge to the Jury at 6279:3–5, *In re Actos (Pioglitazone) Prod. Liab. Litig.*, No. 6:11–MD–2299, 2014 WL 2872299 (W.D. La. Apr. 7, 2014), 2014 WL 5429330, at *156. The jury returned a verdict in favor of the plaintiff and

Furthermore, a jury instruction “[comes] dressed in the authority of the court, giving it more weight than if merely argued by counsel.”¹⁸⁹ Although the Committee Note urges that “[c]are must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are [only] permitted under subdivision (e)(2),” it further notes that “much is entrusted to the court’s discretion.”¹⁹⁰

The Committee Note suggests that there are two types of adverse inferences, one of which (a permissive adverse inference) is appropriate if a party negligently destroys documents, while the other (a mandatory adverse inference) is reserved for parties that intentionally do so.¹⁹¹ The type of jury instruction endorsed by the Committee Note as appropriate under (e)(1) is a permissive adverse inference, which is supposed to be curative rather than punitive; however, as explained above, it could function as a mandatory adverse inference.¹⁹² This distinction is significant because such an instruction is permissible under (e)(1), which applies when a party merely fails to take reasonable steps to preserve ESI.¹⁹³ The reasonable steps standard is essentially a negligence standard; however, negligent conduct does not suggest that the information was

awarded \$1.45 million in compensatory damages and \$9 billion in punitive damages. Reading of the Verdict at 6343:23–45:8, In re Actos (Pioglitazone) Prod. Liab. Litig., No. 6:11–MD–2299, 2014 WL 2872299 (W.D. La. Apr. 7, 2014), 2014 WL 5429333, at *22022. At least one observer concluded that the “instruction from the judge regarding spoliation of evidence likely played an important role in the verdict.” James W. Huston et al., Morrison & Foerster LLP, *Client Alert: The Ghosts of Litigation Holds Past* (July 24, 2014), <http://www.mofo.com/~media/Files/ClientAlert/2014/07/140724GhostsLitigation.pdf>, archived at <http://perma.cc/AX4D-6DMS>.

¹⁸⁹ Arch Ins. v. Broan-Nutone, 509 F. App’x 453, 459 (6th Cir. 2012).

¹⁹⁰ Committee Note, *supra* note 120, at B-64.

¹⁹¹ See *supra* note 117 (discussing difference between a traditional, punitive adverse inference instruction and a permissive adverse inference instruction).

¹⁹² See *id.*

¹⁹³ Committee Note, *supra* note 120, at B-56.

harmful to the party that lost or destroyed it.¹⁹⁴ Thus, such actions do not warrant the inference that the information contained in a document was harmful to the party that negligently failed to preserve it. This is a serious concern that, if realized, could allow the holding of *Residential Funding* to survive the Rule amendment.

IV. ONE WAY TO BETTER ACHIEVE THE GOALS FOR AMENDING RULE 37(E)

This Part suggests two slight modifications to the Committee Note that could make the proposed Rule more successful in achieving its goals. Part IV.0 discusses how the proposed Rule is an improvement over the current Rule 37(e) and which of its intended goals can actually be accomplished via a Federal Rule amendment. Part IV.0 offers a way to ensure that the proposed Rule actually limits judges' inherent power to sanction parties by incorporating language from Judge Sutton's concurring opinion *Aleo* into the Committee Note. Part IV.0 discusses when a permissive adverse inference instruction should be allowed under subsection (e)(1) and suggests amending the Committee Note to limit such instructions to situations where a party recklessly destroys ESI. Finally, Part IV.0 discusses potential concerns with limiting permissive adverse inference instructions under (e)(1) to cases of reckless spoliation.

A. What the Proposed Rule Does and What It Can Accomplish

The proposed Rule is an improvement over the current Rule 37(e) for a variety of reasons. First, it clarifies that the Rule only applies to ESI, allowing for a more tailored solution to the particular challenges that ESI creates and avoiding the problems caused by applying inappropriate

¹⁹⁴ See *infra* note 214 and accompanying text (discussing rationale for inferring that intentionally destroyed documents were harmful to spoliating party).

standards to ESI.¹⁹⁵ Second, the proposed Rule aims to cure the defect caused by spoliation of ESI and only resorts to more serious sanctions when the resulting prejudice cannot be cured. Since the function of discovery is to determine the truth about what happened, the main function of sanctions is to remedy the imbalance caused by spoliation.¹⁹⁶ Only where the party that destroyed or lost information engages in sufficiently culpable behavior is a punitive sanction warranted.¹⁹⁷ Finally, although proposed Rule 37(e) is still somewhat ambiguous, it is not nearly as imprecise as the current Rule 37(e).

These improvements notwithstanding, the proposed Rule is unlikely to create a true national standard. The Federal Rules cannot force a parallel change to state rules of civil procedure, and thus, the proposed Rule is also unlikely to end over-preservation of ESI based on companies' fear that they may be sanctioned for negligent spoliation.¹⁹⁸ However, this is a goal that no Federal Rule can achieve on its own. Nonetheless, a new version of Rule 37(e) can achieve uniformity among the federal courts, which would be an accomplishment in light of the current circuit split and the resulting difficulties for parties with litigation exposure. Furthermore, an effective way to cause states to change their

¹⁹⁵ See Owen, *supra* note 107, at 5–6 (discussing problems with applying the intentional deprivation standard to ESI).

¹⁹⁶ See Zach Hutchinson, Note, *License to Kill (Data): The Danger of an Empowered Rule 37(e)*, 27 GEO. J. LEGAL ETHICS 569, 574–75 (2014).

¹⁹⁷ See *id.* at 576–77. Although there is no consensus on what constitutes sufficiently culpable behavior to warrant severe sanctions, historically the justification for giving an adverse inference jury instruction was that “when a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the destroying party.” June 2014 Advisory Committee Memo, *supra* note 57, at B-17. See also *supra* note 117 (discussing traditional reasons for issuing an adverse inference). This justification implies that the required level of culpability is something more than negligence.

¹⁹⁸ See *supra* Part III.B.1 (explaining why the proposed Rule cannot create true national uniformity and why companies will continue to over-preserve ESI).

rules of civil procedure is to demonstrate that a Rule works well in the federal courts.¹⁹⁹ Thus, if the proposed Rule is successful in creating a uniform, workable standard, it is much more likely that the states will adopt a parallel rule.²⁰⁰ And if a substantial number of states adopted a similar rule, it would substantially curb the unnecessary over-preservation of ESI.

The proposed Rule faces two main impediments to creating uniformity among the federal courts. First, although the removal of the “under these rules” language is likely to constrain judges’ inherent power to sanction parties, it will not be effective if judges find a way to rely on their inherent authority to circumvent the Rule.²⁰¹ Second, the ability of judges to issue a permissive adverse inference jury instruction where the spoliating party is merely negligent threatens to render the safe harbor ineffective—especially considering that such an instruction could be interpreted as a mandatory adverse inference.²⁰² Although the proposed Rule is an improvement to the current Rule 37(e), the changes discussed *infra* could prove more effective at creating uniformity among federal courts and potentially convince important states to adopt a similar rule.

B. Preventing Judges From Circumventing the Proposed Rule

It is important for any Rule limiting judges’ traditional powers to ensure that it is effective in doing so, or else judges can circumvent the limitation. The proposed Rule removes the troublesome “under these rules” language that has plagued current Rule 37(e), which is a good start;²⁰³ however,

¹⁹⁹ See Kroll Ontrak Letter, *supra* note 150, at 10.

²⁰⁰ *Id.*

²⁰¹ See *supra* Part III.B.3 (discussing whether the proposed Rule will be effective in limiting judges’ inherent power to sanction).

²⁰² See *supra* Part III.B.4 (discussing danger posed by allowing permissive adverse inferences under (e)(1)).

²⁰³ See *supra* Parts III.A.1.ii (discussing problems caused by “under these rules” language) & III.B.3 (effect of removing this language in the proposed Rule).

more can be done to ensure that it is effective at preventing judges from relying on their inherent authority to impose the severe sanctions listed in (e)(2) on negligent parties. One way to do so is to incorporate the language from *U.S. v. Aleo* into Rule 37(e). In Judge Sutton’s concurring opinion, he stated that “a judge may not use inherent power to end-run a cabined power.”²⁰⁴ Although adding this language to the text of the Rule itself would make the Rule cumbersome, it (or similar language) should be added to the Committee Note in its discussion of inherent power.²⁰⁵ Since the Supreme Court must approve the Committee Note, including this principle would give it weight when courts construe the Rule.²⁰⁶

Nevertheless, this may prove ineffective. First, because only the text of the Rule is controlling, placing this statement in the Committee Note rather than in the text of the Rule could suggest that the drafters intended it to be a non-mandatory aspect of the Rule. However, the Committee Note contains many important aspects of the proposed Rule, including what kinds of spoliation it applies to, the trigger for the duty to preserve, and what constitutes indicia of “reasonable steps.”²⁰⁷ Furthermore, courts routinely look to the Committee Note for guidance on how to implement and adhere to the Rules.²⁰⁸ Second, judges could justify sanctions

²⁰⁴ *U.S. v. Aleo*, 681 F.3d 290, 310 (6th Cir. 2012) (Sutton, C.J., concurring).

²⁰⁵ See *Committee Note*, *supra* note 120, at B-58.

²⁰⁶ See, e.g., *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988) (giving weight to the Advisory Committee’s views when construing FRCP 3).

²⁰⁷ See, e.g., *Committee Note*, *supra* note 120, at B-59 to -62 (discussing what kinds of evidence the proposed Rule applies to, when the duty to preserve is triggered, and how to evaluate whether a party took reasonable steps).

²⁰⁸ See, e.g., *Torres*, 487 U.S. at 315 (“We find support for our view in the Advisory Committee Note following Rule 3 Our conclusion that the Advisory Committee viewed the requirements of Rule 3 as jurisdictional in nature, although not determinative, is ‘of weight’ in our construction of the Rule.”); *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (citing an Advisory Committee Note to FRCP 56(e)) (Brennan, J., dissenting); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159–60 (1970) (same).

inconsistent with the Rule by arguing that their actions are not an end-run around a cabined power. This can be addressed by ensuring that the Committee Note explicitly states that the proposed Rule cabins the authority to issue the sanctions listed in subsection (e)(2) other than where a party destroys ESI with the intent to deprive another party of its use in the litigation.

C. Ensuring that Parties Are at Least Reckless Before Allowing a Permissive Adverse Inference

An essential function of Rule 37(e) is to ensure that sanctions for spoliation of ESI are appropriate for the level of culpability exhibited by the party's actions and the level of prejudice caused by the loss of ESI.²⁰⁹ In the articles on Rule 37(e) and most of the reports and memoranda generated by the Judicial Conference and its subsidiary bodies, a consistent topic is the mental state that justifies imposing severe sanctions on parties who spoliates ESI.²¹⁰ A consensus emerged that in order for a judge to issue a severe sanction, such as a mandatory adverse inference, the party must have acted with the *intent* to deprive another party of the information's use in the litigation.²¹¹ On the other hand, where a party merely acts negligently (i.e., fails to take those steps that a reasonably prudent person would take), the judge may only impose curative measures.²¹² These curative

²⁰⁹ See Dec. 2012 Advisory Committee Memo, *supra* note 134, at 6.

²¹⁰ See, e.g., REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 23–24 (2013) [hereinafter SEPT. 2013 STANDING COMMITTEE REPORT], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2013.pdf>, *archived at* <http://perma.cc/RJK4-ND8H>; Lambert, *supra* note 117, at 690–97; Withers, *Risk Aversion*, *supra* note 35, at 554–57; Memorandum from Andrea L. Kuperman to Discovery Subcommittee on Rule 37(e) Case Law 4 (Aug. 24, 2012), *reprinted in* Dec. 2012 Advisory Committee Memo, *supra* note 134.

²¹¹ June 2014 Advisory Committee Memo, *supra* note 57, at B-17; *Committee Note*, *supra* note 120, at B-64 to -65.

²¹² *Committee Note*, *supra* note 120, at B-63 to -64.

measures merely attempt to restore the evidentiary balance, whereas sanctions have a punitive aspect.²¹³

Historically, the rationale for issuing an adverse inference has been that “when a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the destroying party.”²¹⁴ Mere negligence, on the other hand, does not support this inference.²¹⁵ In addition, loss of ESI can be cured much more easily than the loss of a physical document because it is likely to be stored in more than one place, and thus, its negligent destruction does not justify the severe sanction of an adverse inference.²¹⁶ In a minority of circuits, the rationale for an adverse inference is simply that “each party should bear the risk of its own negligence.”²¹⁷ However, the majority of Courts of Appeals and the Judicial Conference reject this reasoning and rely instead on the historical rationale.²¹⁸

These concepts of negligence and intentional action are familiar concepts of culpability, but the framework created

²¹³ See Hutchinson, *supra* note 196, at 580–81 (“[C]urative measures are generally targeted towards non-substantive relief, they are ill suited to serve the punitive function of sanctions in the same vein of adverse inferences, evidence preclusion, or summary judgment.”).

²¹⁴ June 2014 Advisory Committee Memo, *supra* note 57, at B-17.

²¹⁵ See, e.g., *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. Mere negligence in losing or destroying records is not enough *because it does not support an inference of consciousness of a weak case.*”) (internal citations omitted) (emphasis added); June 2014 Advisory Committee Memo, *supra* note 57, at B-18 (“[N]egligently lost information may have been favorable or unfavorable to the party that lost it—negligence does not necessarily reveal the nature of the lost information.”).

²¹⁶ See June 2014 Advisory Committee Memo, *supra* note 57, at B-18; *Committee Note*, *supra* note 120, at B-65.

²¹⁷ See, e.g., *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002).

²¹⁸ See *Committee Note*, *supra* note 120, at B-65; *supra* notes 59–65 and accompanying text (discussing the majority rule that an adverse inference is only warranted for bad faith conduct). See also *supra* note 117 (discussing historical rationale for an adverse inference).

by proposed Rule 37(e) is missing the intermediate mental state of recklessness. Since (e)(2) applies *only* where the party acts intentionally, via the canon of *expressio unius est exclusio alterius*, reckless spoliation must be covered by (e)(1). Furthermore, because the proposed Rule only sequesters the most severe measures in subsection (e)(2), intermediate sanctions, such as a permissive adverse inference, are available where the spoliating party is either negligent or reckless.

The ability of judges to issue a permissive adverse inference instruction when the spoliating party is merely negligent is troublesome.²¹⁹ Although a permissive instruction requires the jury make a predicate factual finding before it may infer that the lost information was prejudicial to the spoliating party, there is no fact that, if proved, could justify imposing an adverse inference on a party that negligently destroyed ESI.²²⁰ However, if the jury

²¹⁹ The Committee Note states: “Negligent or even grossly negligent behavior does not logically support [the necessary] inference [to justify an adverse inference instruction].” *Committee Note, supra* note 120, at B-65. The Committee Note further proclaims that the proposed Rule prohibits “any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it” under subsection (e)(1). *Id.* at B-66. However, it does not actually create an absolute bar to judges issuing all types of adverse inferences for negligent behavior and leaves the door open for judges to issue a permissive adverse inference instruction “[i]n an appropriate case.” *Id.* at B-64. *See also* Shira A. Scheindlin & Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Approach*, 83 *FORDHAM L. REV.* 1299, 1307 (2014) (“The most logical conclusion is that the new [Committee] Note still permits a *Mali*-type instruction [i.e., a permissive adverse inference jury instruction] to guide the jury’s consideration of spoliation evidence without requiring ‘intent to deprive.’”). The problem is that the case-dispositive effect that such an instruction can have far outweighs any potential curative effect and there is no reason to leave open an avenue for negligent parties to be subject to any form of an adverse inference instruction.

²²⁰ Lambert, *supra* note 117, at 700 (“A party who only negligently destroys evidence does not demonstrate a conscious decision to keep evidence away from the jury because the evidence was harmful to its case. Without a deliberate act expressing a ‘desire to suppress the truth,’

finds that the spoliating party was reckless (i.e., it finds that the party knew that there was a substantial and unjustified risk that their actions could deprive another party of information that they required to prove a claim or defense, but took that risk anyway), this finding could provide a nexus between the party's conduct and the inference that the lost information would have prejudiced their case.²²¹ Thus, in some circumstances, a permissive adverse inference may be warranted for reckless spoliation.

The proposed Rule can prevent judges from issuing any form of an adverse inference when the spoliating party is merely negligent by modifying the Committee Note. The section of the Committee Note that contemplates a permissive adverse inference for conduct falling in subsection (e)(1)²²² should be amended to state:

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as . . . giving the jury instructions to assist in its evaluation of such evidence. Only where

determining that the destroyed evidence was harmful to the spoliator is incredibly difficult, if not impossible.”).

²²¹ Reckless conduct occupies a gray area in the proposed Rule because reckless retention efforts are not “reasonable steps,” yet such conduct does not rise to the level of intentional conduct. However, based on the structure of the proposed Rule, reckless conduct must fall under (e)(1). Nonetheless, in certain cases, reckless conduct could indicate that the spoliating party either desired or was indifferent to the destruction of relevant ESI. Although the court should first try to remedy the prejudice caused by reckless spoliation, where the ESI cannot be recovered and the spoliation causes serious prejudice, the judge should have the option of giving the jury an opportunity to decide what to conclude from the act of reckless spoliation.

²²² *Committee Note, supra* note 120, at B-64. The concern is that an instruction as simple as telling the jury that one party lost relevant evidence that could not be replaced may cause the jury to draw an adverse inference against that party. *See GORELICK ET AL., supra* note 188. Such an instruction does not instruct or permit the jury to make this inference, and thus, it does not run afoul of the prohibition of such instructions outside of subsection (e)(2). *Committee Note, supra* note 120, at B-66. Nonetheless, it could have the effect of a permissive adverse inference instruction. *See supra* Part III.B.4.

the party responsible for the loss of relevant ESI, the loss of which prejudiced another party, was reckless in its retention of that ESI and where there is no adequate curative measure may the judge give the jury instructions to assist in its evaluation of whether the lost evidence was prejudicial to that party, including informing the jury that a party lost or destroyed relevant ESI.

This change will ensure that permissive adverse inference instructions can only be used where the jury could infer from the party's conduct that the lost information would have harmed their case. Since “[f]ear of sanctions drives the pressure for overpreservation, and the sanction for the loss of discoverable information that parties to litigation fear most is the adverse inference jury instruction,” limiting the use of adverse inference instructions could reduce the amount of over-preservation that parties currently engage in.²²³

D. Potential Concerns With Limiting Permissive Adverse Inference Instructions to Reckless Spoliation

One concern with the above suggestion is that the proposed Rule represents a decision by the Judicial Committee to move Rule 37(e) away from a tort regime; however, the addition to the Committee Note suggested by this Note in Part IV.C retains aspects of tort liability. After the heavy criticism that the 2013 Proposed Amendment received for the inclusion of “willful” as a standard of culpability, the Discovery Subcommittee shifted from a culpability-based approach to emphasizing curing the prejudice caused by spoliation and only requiring judges to consider culpability in a narrow class of situations.²²⁴ The aim was to ensure that curative measures were exhausted before courts resorted to sanctioning parties and that severe, often case dispositive, sanctions were reserved for parties

²²³ Withers, *Risk Aversion*, *supra* note 35, at 546.

²²⁴ See *supra* text accompanying note 99 (emphasizing prejudice in proposed Rule).

whose actions suggested that the lost ESI would have harmed them.²²⁵

Although the change suggested by this Note refers to concepts of negligence and recklessness, these culpability terms merely serve as proxies for scenarios in which there is a nexus between the spoliation and the likely contents of the lost ESI. First, while this Note explains subsection (e)(1) as a negligence standard, it does not suggest changing the standard embodied in the proposed Rule. Negligence is simply a substitute to determine whether a party will fail to meet the “reasonable steps” standard. Second, the sole reason for taking account of a party’s reckless spoliation is to establish a nexus between their destruction of ESI and the inference that the information contained in that ESI would have been prejudicial to their case. Here, again, this Note only suggests using recklessness as a proxy for situations where a reasonable jury could find that the party’s actions suggest that the information was harmful to their case. Furthermore, the only situation in which a judge or jury would consider whether a party was reckless is when that party lost ESI that was relevant to another party’s case, the ESI could not be replaced, the spoliation prejudiced another party, and no less draconian measure were sufficient to remedy the loss of information. Thus, the suggested change would only allow courts to resort to tort-like standards of culpability after all curative measures have been exhausted—just as the proposed Rule does. For these reasons, the suggested change does not borrow from concepts of tort liability any more than the proposed Rule does.

Another potential criticism of the change proposed by this Note is that the current Rule adequately differentiates between negligent and reckless conduct by requiring that the curative measure be proportional to the prejudice caused and no more onerous than necessary to cure the prejudice.²²⁶

²²⁵ See *supra* notes 117–120 (discussing how the proposed Rule prioritizes curative measures over sanctions).

²²⁶ See *Proposed Rule, supra* note 112, at B-57 (stating “upon finding prejudice to another party from loss of the information, [a judge] may order measures no greater than necessary to cure the prejudice”).

Thus, it could be argued that there is no need to specify that permissive adverse inferences should only be issued where the spoliation was reckless. Although these limits to judges' discretion are likely adequate in most cases, the *potential* for a judge to issue a permissive adverse inference where a party is merely negligent is problematic.²²⁷ This is especially true considering that many judges believe that such a measure may be warranted for negligent conduct.²²⁸ Since negligent conduct cannot support the inference that the lost information was harmful to the spoliating party, the Rule should leave no wiggle room for judges to exploit. Furthermore, because reckless spoliation may, in some cases, support such an inference,²²⁹ it is only natural to distinguish between the two levels of culpability in regard to a permissive adverse inference.

One related concern is that determining a party's level of culpability will force the court and parties to engage in discovery about discovery, which wastes time, money, and judicial resources. However, the proposed Rule requires courts to determine whether a party took reasonable steps to preserve ESI and whether a party intentionally spoliated ESI. As discussed above, the suggested changes would not change either of these standards. Furthermore, the court would only have to determine whether a party was reckless in the cases where the ESI was relevant, prejudicial, and irreplaceable and no curative measure was sufficient to remedy the loss of ESI. Although determining the mental state of the spoliating party in such cases would impose additional costs, such cases are likely to be rare.

²²⁷ See *supra* notes 219–220 and accompanying text (explaining why a permissive adverse inference is an inappropriate response to negligent spoliation).

²²⁸ See *supra* Part II.B.2.b (identifying circuits in which courts have issued an adverse inference for negligent spoliation).

²²⁹ See *supra* note 221 and accompanying text (explaining how reckless conduct could support an adverse inference).

V. CONCLUSION

In the nine years since the 2006 Amendments were adopted, it has become clear that Rule 37(e) is not an effective safe harbor. Although the proposed Rule 37(e) is a clear improvement over the current Rule, it also has numerous defects that will likely render it ineffective at realizing the goals it is supposed to achieve. However, the goals for an amended Rule 37(e) are lofty, and some of them are unrealistic. Given the inability of the FRCP to affect state rules of civil procedure, no Federal Rule can create a uniform national standard for when a judge can impose severe sanctions, especially punitive adverse inferences, on a party that spoliates ESI. Thus, the proposed Rule will fail to affect the *ex ante* conduct of potential litigants, especially businesses that operate in multiple states, who will continue their costly over-preservation of ESI.

Although it is impossible to completely address these concerns via the FRCP, if the Judicial Committee makes the changes suggested by this Note, the proposed Rule can accomplish a significant goal—creating a uniform standard among the federal courts for when a judge may issue severe sanctions. Uniformity may seem aspirational, but it can be accomplished through amendment of the Federal Rules. These suggested changes will ensure that judges cannot rely on their inherent power to circumvent the safe harbor created by Rule 37(e) and categorically prohibit judges from issuing adverse inference jury instructions where the spoliating party is merely negligent. With these two changes, the proposed Rule stands a good chance of being effective as a safe harbor from sanctions for negligent spoliation of ESI in the federal courts. And if the proposed Rule is successful in creating a uniform, federal standard, it is much more likely that states will adopt similar rules for spoliation sanctions. This, in turn, would substantially reduce the amount of costly over-preservation that parties currently engage in.