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Experience, Not Logic: Adapting Spoliation Doctrine to the Brave New World of Digital Documents

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I. INTRODUCTION

The adversarial system requires full discovery as an essential element of a fair and accurate litigation process.¹ The parties to litigation must be able to review the entire universe of relevant, and potentially relevant, evidence.² Not surprisingly, spoliation—the destruction of evidence with a culpable state of mind—is an anathema to the most fundamental principles governing litigation procedure and in turn may warrant harsh sanctions.³

The doctrines governing how courts respond to spoliation are well

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1. See Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 892 (2009) (describing importance of discovery in litigation).

2. See Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 598 (2002) (observing aim of discovery to settle disputes based on facts revealed instead of concealed facts).

3. See Lauren R. Nichols, Note, *Spare the Rod, Spoil the Litigator? The Varying Degrees of Culpability Required for an Adverse Inference Sanction Regarding Spoliation of Electronic Discovery*, 99 KY. L.J. 881, 881 (2011) (outlining problematic nature of spoliation and potential for sanction).

established.⁴ But these venerable rules were mostly devised for a discovery process that involved the production of paper documents.⁵ Given these origins, the rules defining when the destruction of documents reflected culpable conduct were based on presumptions of how paper documents would be preserved and produced when a litigation matter arose.⁶

The information revolution that accompanied the dramatic expansion of computers to produce and store every kind of document forever transformed the discovery process.⁷ As computer use increased, the volume of information produced, stored, and made readily available in discovery has improved exponentially.⁸ Although advances in technology have made what used to be unimaginable amounts of data relatively cheap and easy to compile today, these same advances also have their drawbacks.⁹ Part of the information revolution also included the development of systems for the routine destruction of stored data.¹⁰

As data destruction became a necessary part of managing any form of digitized information, the rules governing spoliation had to change.¹¹ Specifically, the rules had to be adapted so courts could distinguish between the innocent destruction of data as an ordinary incident of maintaining a computer system and the culpable destruction of data to evade a discovery obligation in litigation.¹² In 2006, the Federal Rules of Civil Procedure (Federal Rules) were amended to facilitate this distinction, but the effect of these amendments was mixed.¹³ Ambiguities in the revised rules made it difficult for courts to reach reasonable, uniform conclusions about what kind of conduct constituted the culpable destruction of documents.¹⁴ Courts diverged on whether failing to take the most effective measures to preserve documents reflected the same culpability that had always been the object of the rules prohibiting spoliation

4. *See id.* at 881-82 (recognizing general agreement on spoliation definition and sanction range).

5. *See id.* at 883-83 (observing rules of discovery conceptually apply to all forms of discoverable materials).

6. *See* Ben Farrell, Note, *Spoliation in a Digital World: Proposing a New Standard of Culpability in Massachusetts for an Adverse Inference Instruction*, 14 SUFFOLK J. TRIAL & APP. ADVOC. 110, 112 (2009) (noting similarity of courts' treatment of electronic information and paper documents despite fundamental differences).

7. *See* Rachel K. Alexander, *E-Discovery Practice, Theory, and Precedent: Finding the Right Pond, Lure, and Lines Without Going on a Fishing Expedition*, 56 S.D. L. REV. 25, 25 (2011) (highlighting view of electronic discovery as emerging field of practice following advent of computerized information).

8. *See id.* at 26 (discussing "staggering" statistics surrounding e-mail traffic and storage of other business information).

9. *See id.* at 26-27 (noting decreased information storage costs due to advances in technology).

10. *See* Farrell, *supra* note 6, at 112-13 (describing need for comprehensive retention and destruction policy for vast quantities of information).

11. *See* Alexander, *supra* note 7, at 29 (noting several changes to Federal Rules of Civil Procedure to accommodate electronic discovery).

12. *See id.* at 32 (discussing additional safe harbor for information lost through routine operation of information system).

13. *See* Julia M. Ong, *Another Step in the Evolution of E-Discovery: Amendments of the Federal Rules of Civil Procedure Yet Again?*, 18 B.U. J. SCI. & TECH. L. 404, 416-17 (2012) (observing mixed results of 2006 amendments).

14. *See id.* at 417 (highlighting inconsistent application of amended Federal Rules).

and imposing sanctions for it.¹⁵

This Article examines the continuing effort by the drafters of the Federal Rules and the courts to determine how to regulate document destruction in the digital age. Part I of this Article reviews the basic problem of preserving digitized information.¹⁶ Part II considers how the courts traditionally treated breaches of the duty to preserve documents.¹⁷ In Part III, this Article examines how the Federal Rules were first amended to modify the method for imposing sanctions regarding the spoliation of digitized information.¹⁸ Part IV discusses cases in which courts struggled to implement the 2006 amendments to the rules against spoliation consistently.¹⁹ Finally, Part V reviews recently proposed modifications to the 2006 amendments, anticipating some of the problems that may arise with these proposed changes.²⁰ This Article concludes that the difficulty courts and drafters face in defining culpable destruction is an inevitable consequence of the constantly shifting technological circumstances surrounding the creation and storage of information. Although it may be unsatisfying to live with significant uncertainty about the rules governing spoliation, it may be a necessity, and developing a comprehensive, consistent body of case law may be more a matter of measured evolution than that of brilliant insight or invention.

II. THE PROBLEM OF PRESERVING ELECTRONICALLY STORED INFORMATION (ESI)

The digital revolution has transformed how individuals and entities create, collect, and store information.²¹ Computers make it possible to create and retain numerous versions of any kind of document as well as virtually all electronic communications, from e-mails to telephone calls.²² The digital age has fundamentally changed the ability to share and store large amounts of electronic information.²³ For example, inter-office communications, such as e-mails, are available for access at any computer within a company's network regardless of the physical location of the author or recipient.²⁴ This electronic storage allows information to be saved in multiple locations instead of filling

15. *See id.* at 417-18 (describing various reasons courts inconsistently apply amended Federal Rules).

16. *See infra* Part I.

17. *See infra* Part II.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Part V.

21. Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206, 207 (2001) (noting fundamental difference between electronic and hard-copy discovery).

22. *See* Allman, *supra* note 21, at 206 (highlighting dramatic way electronic methods changed retrieval and production of records); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 584-87 (2001) (delineating various retention and storage techniques for ESI).

23. Allman, *supra* note 21, at 206 (stressing increase in "sheer volume" of information digitally available).

24. *See id.* (observing increased number of locations where ESI maintained and stored).

up filing cabinets in hardcopy form.²⁵ Any event or transaction implicated in a litigation matter can be associated with an enormous and often overwhelming volume of this ESI.²⁶

The volume of ESI routinely created presents significant challenges in data management.²⁷ Although computerized storage is extensive, it does have its limits.²⁸ For companies that produce massive amounts of ESI, keeping all of these documents can be burdensome on a system.²⁹ As a result, most organizations have processes for cleaning up these files periodically, overwriting documents that are considered old, and making space for cases needed in the immediate future.³⁰

The process of creating backup copies and deleting old or unwanted data is often automated.³¹ These computer systems include a program or function that destroys “old” data while creating new backup copies.³² The information retained is often stored in an unorganized and unwieldy manner, sometimes making retrieval difficult.³³ In litigation, a significant risk is that of unintentional errors that lead to the destruction of evidence or—perhaps more accurately—failing to preserve evidence that could be relevant and discoverable.³⁴

Under the standards developed for document retention in a pre digital world, the automated destruction of ESI could lead to discovery sanctions.³⁵ If document retention standards are not adapted to the realities of the digital world, a large company regularly threatened with litigation will be required to “constantly review its backup tapes for documents that could, at some later point in the litigation process, be deemed relevant; and if the enterprise predicted incorrectly, it would risk imposition of severe sanctions.”³⁶ The expense of such a process could easily prove prohibitive because a careful review of unorganized backup tapes would require that knowledgeable individuals devote an enormous and unending number of hours to review

25. *See id.* (evaluating differences between electronic and hardcopy storage).

26. *See Redish, supra* note 22, at 589 (describing likelihood of ESI resulting in increased number of documents produced during discovery).

27. *See id.* at 584-85 (explaining different levels of preservation and difficulty retrieving such data).

28. *See id.* at 585-86 (discussing problems of limited backup and processes for storing backup tapes).

29. *Redish, supra* note 22, at 585-86 (noting burdens placed on companies with large volume of ESI).

30. *See id.* (observing need for automated processes deleting and overwriting ESI).

31. *See id.* (comparing automated backup to backup through other means).

32. *See id.* at 586 (describing automated backup of data).

33. *Redish, supra* note 22, at 585 (evaluating shortcomings of backup tapes). The disorganized manner in which information is stored on backup tapes makes retrieval of a singular document very difficult. *Id.* Therefore, systems that rely on backup tapes are most often used only under emergency circumstances, with intervention by computer experts. *Id.*

34. *See Michael R. Nelson & Mark H. Rosenberg, A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery*, 12 RICH. J.L. & TECH. 14, ¶ 4 (2006) (noting concerns with regard to preservation of ESI).

35. *See id.* ¶¶ 4-5, 58 (demonstrating detrimental effect of automatic deletion).

36. *Redish, supra* note 22, at 623.

processes.³⁷ Additionally, total and indefinite retention of ESI would result in significantly increased costs for the equipment necessary to store such information and the physical space allocated to that equipment.³⁸

Because of the perils of applying outdated document retention rules, there have been repeated efforts to amend the Federal Rules, particularly Rule 37, to create a more flexible imperative that accounts for the difficulties of preserving ESI.³⁹ These efforts have attempted to identify what constitutes culpable conduct in document retention policies and practices.⁴⁰ But the identification of what is wrongful has not proven to be easy.⁴¹

III. SPOILIATION SANCTIONS AND THE REGULATION OF DISCOVERY

Courts have broad authority to regulate how parties preserve and produce evidence.⁴² “A federal court has three sources for its power to sanction breaches of the duty to preserve” documents for discovery: first, the specific provisions of the Federal Rules, including Rules 26(g), 37(b)(2), and 37(c)(1); second, 28 U.S.C. § 1927; and finally, the court’s inherent power.⁴³ Under these provisions court sanctions include fines, attorney’s fees and costs, defaults, case dismissal, exclusion of witnesses, and fact establishment.⁴⁴

“Spoliation” is the term describing the wrongful destruction of documents that relate to a litigation matter. Through court rules and its own inherent authority to assure fair litigation, a court may impose sanctions upon parties responsible for spoliation.⁴⁵ A court can impose sanctions when discoverable material was destroyed and “the party or its counsel knew or should have known [the material] was relevant to pending, imminent, or reasonably foreseeable litigation.”⁴⁶ Such sanctions may take several forms, from an award of attorney’s fees to a default judgment in favor of the innocent party.⁴⁷ But the most commonly imposed spoliation sanction is the spoliation inference, “the oldest and most venerable remedy’ for the spoliation of evidence.”⁴⁸

37. See Nelson & Rosenberg, *supra* note 34, ¶ 15 (observing excessive document preservation as enormous and expensive burden).

38. Redish, *supra* note 22, at 623 (commenting on costs and burdens associated with physical equipment required for total, indefinite retention).

39. See Nelson & Rosenberg, *supra* note 34, ¶¶ 49-51 (discussing proposed changes to Rule 37).

40. See *id.* ¶ 61 (advocating rule change allowing safe harbor for routine computer operations).

41. See *id.* ¶¶ 49-51 (examining failure of proposed Rule 37 changes).

42. Greenwood v. Point Meadows Place Condo. Ass’n, No. 3:10-cv-1183-J-34TEM, 2011 WL 5358682, at *1 (M.D. Fla. Nov. 7, 2011) (noting discretion of trial court to issue discovery orders).

43. See Clayton L. Barker & Philip W. Goodin, *Discovery of Electronically Stored Information*, 64 J. MO. B. 12, 18 (2008); see also 28 U.S.C. § 1927 (2012) (authorizing court sanctions for counsel “unreasonably and vexatiously” extending proceedings); FED. R. CIV. P. 26(g); FED. R. CIV. P. 37(b)(2); FED. R. CIV. P. 37(c)(1).

44. Barker & Goodin, *supra* note 43, at 18 (describing potential sanctions).

45. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 3.1 (1989).

46. *Id.*

47. See Barker & Goodin, *supra* note 43, at 18 (describing various forms of sanctions).

48. Nelson & Rosenberg, *supra* note 34, ¶ 7 (quoting Jonathan Judge, Comment, *Reconsidering*

The spoliation inference allows an unfavorable inference of fact “against a litigant who has destroyed documents relevant to a legal dispute.”⁴⁹ This rule can be characterized either as a regulation of discovery practice or as a rule of evidence.⁵⁰ Regardless of how it is characterized, the spoliation inference is a powerful instrument for assuring litigants’ full and fair access to all relevant evidence.

As a general rule, imposing the spoliation sanction requires finding the party who destroyed the evidence possessed a culpable state of mind.⁵¹ In the context of spoliation, culpable states of mind can range from negligence to recklessness to intentional conduct; sometimes, courts hold a party strictly liable for spoliation.⁵² Usually, however, spoliation sanctions require some level of intentional conduct.⁵³ Writing before the dawn of the digital age, prominent commentators noted that most authorities required some level of intentional destruction prior to issuing a spoliation inference.⁵⁴

Negligence is ordinarily the minimal level of culpability. When a party is “subjectively unaware” that a relevant document will be routinely destroyed according to a standard document retention policy, the destruction of the document is often viewed as negligence in the spoliation context.⁵⁵ This state of mind describes a situation where the party tried to comply with an obligation to preserve relevant evidence, but nevertheless failed to preserve documents because of subjectively unintentional ignorance.⁵⁶

Sanctions for spoliation can be fatal to a party’s case.⁵⁷ In cases dealing

Spoliation: Common-Sense Alternatives to the Spoliation Tort, 2001 WIS. L. REV. 441, 444 (2001)).

49. GORELICK ET AL., *supra* note 45, § 2.1.

50. *See id.*

51. *United Med. Supply Co., v. United States*, 77 Fed. Cl. 257, 266 (2007) (discussing state of mind spectrum in spoliation context, including negligence). Some courts require a showing of bad faith before applying sanctions, while others require proof of intentional conduct. *Id.* at 266. Representing the other side of the spectrum, some courts merely require a showing of fault ranging from negligence to bad faith, with the level of sanctions dependent on where they fall within that range. *Id.*

52. *Id.* at 266-67.

53. *See, e.g., Vick v. Tex. Emp’t Comm’n*, 514 F.2d 734, 737 (5th Cir. 1975); *INA Aviation Corp. v. United States*, 468 F. Supp. 695, 700 (E.D.N.Y. 1979), *aff’d*, 610 F.2d 806 (2d Cir. 1979); *Universe Tankships, Inc. v. United States*, 388 F. Supp. 276, 286 (E.D. Pa. 1974), *aff’d*, 528 F.2d 73 (3d Cir. 1975); *Dow Chem. Co. (U.K.) v. S.S. Giovannella D’Amico*, 297 F. Supp. 699, 703 (S.D.N.Y. 1969).

54. *See GORELICK ET AL., supra* note 45, § 2.8 (observing nearly unanimous prerequisite of intent for spoliation inference).

55. Rena Durrant, Note, *Developments in the Law: Electronic Discovery, VII. Spoliation of Discoverable Electronic Evidence*, 38 LOY. L.A. L. REV. 1803, 1818 (2005) (outlining negligence standard in context of spoliation).

56. *See id.* (explaining lawsuits put party on notice). Because the party “was on notice that the evidence was potentially relevant to the litigation,” unsuccessful attempts to procure missing evidence did not eliminate the party’s negligence. *Id.*

57. T. Patrick Gumkowski, Comment, *Protecting the Integrity of the Rhode Island Judicial System and Assuring an Adequate Remedy for Victims of Spoliation: Why an Independent Cause of Action for the Spoliation of Evidence Is the Solution*, 10 ROGER WILLIAMS U. L. REV. 795, 810 (2005) (discussing potential severity of sanctions and effect on litigation). Courts are often hesitant to impose sanctions such as issue

with the discovery of hard-copy documents, when courts have deemed a party negligent regarding its discovery obligations, these courts have been willing to instruct the jury to infer that unpreserved evidence would have reflected negatively on the spoliating party; this instruction is known as the spoliation inference.⁵⁸ A showing of negligence has also supported imposition of more traditional monetary sanctions or a heightened burden of proof.⁵⁹

IV. DEVELOPMENT OF THE FEDERAL RULES GOVERNING PRESERVATION OF ESI

The rules for spoliation sanctions that applied to paper document discovery could not be so easily adapted to the digitized world of ESI.⁶⁰ It was difficult to translate the principles determining culpability to a context in which decisions about retaining documents were made in a very different fashion.⁶¹ Thus, revision in the rules for spoliation sanctions was necessary to account for the automation of much of the process of storing and preserving documents.⁶² The regulation of discovery had to account for computerized systems for managing documents.⁶³

Beginning in the early 2000s, after commentary and criticism from scholars, jurists, and practicing attorneys, changes to the federal discovery rules were proposed to address the unique problems ESI posed.⁶⁴ In drafting the rule amendments, the Judicial Conference Advisory Committee (Committee) recognized that electronic information systems routinely modify and delete information as a necessary business function and that suspending these necessary business functions can be prohibitively burdensome and expensive.⁶⁵

preclusion or dismissal with prejudice because a party with strong arguments on the merits of a case may not be able to prove the prima facie elements. *See id.* Many courts, therefore, will impose lesser sanctions when possible. *See id.*

58. *See, e.g.,* *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 157 (4th Cir. 1995) (upholding adverse inference instruction for destruction or loss of evidence); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (pointing to court's "broad discretionary power to permit" adverse inference from spoliation of evidence); *Welsh v. United States*, 844 F.2d 1239, 1248 (6th Cir. 1988) (noting forceful inference of negligence may lead to directed verdict), *overruled by* *Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009).

59. *See, e.g.,* *Langley ex rel. Langley v. Union Elec. Co.*, 107 F.3d 510, 514 (7th Cir. 1997) (employing heightened burden of proof in response or spoliation); *SDI Operating P'ship v. Neuwirth*, 973 F.2d 652, 653-54 (8th Cir. 1992) (opting to strike expert witness list in response to unintentional destruction of evidence); *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 n.2 (9th Cir. 1992) (highlighting unavailability of sanctions absent bad faith or willful conduct).

60. *See* *Nelson & Rosenberg, supra* note 34, ¶ 53 (proposing mitigating risk of sanction for ordinary document retention systems).

61. *See id.* ¶ 4 (noting "very nature of electronic data" compels routine deletion of it).

62. *See id.* (acknowledging routine, automated data deletion even when preserved on back-up tapes).

63. *See* *Nelson & Rosenberg, supra* note 34, ¶ 48 (demonstrating challenge of fairly regulating ESI).

64. *See* JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, AGENDA E-18, 22 (Sept. 2005) (discussing review of proposed amendments to Federal Rules).

65. *See id.* at 33 (observing burden and expense of suspending routine storage and deletion of ESI). The Committee explicitly recognized that "suspending or interrupting" automated features that overwrite older files

The Committee acknowledged the destruction of ESI could not be treated according to the same standards that had long governed the destruction of non-digital documents.⁶⁶ The Committee, therefore, attempted to reconcile the inherent imbalance in treating spoliation of ESI in the same way as spoliation of traditional evidence.⁶⁷

The first draft of these amendments shaped a negligence standard for imposing spoliation sanctions, requiring a party to try to preserve ESI when it knew or should have known the ESI might be discoverable evidence in a dispute.⁶⁸ The draft rule on ESI read:

Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:

- (1) *the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and*
- (2) *the failure resulted from loss of the information because of the routine operation of the party's electronic information system.*⁶⁹

According to the original version of the rule, a party could *only* avoid sanctions if it reasonably attempted to preserve existing information that could be requested in discovery.⁷⁰ The Committee noted this standard was “essentially a negligence test.”⁷¹

This version of the rule was not presented in isolation, however. A footnote to the proposed rule provided an alternative version that established a different level of culpability, one providing for sanctions only when the destruction of

“can be prohibitively expensive and burdensome . . . in ways that have no counterpart in managing hard-copy information.” *Id.* It further acknowledged that large organizations that do not recycle backup tapes, “even for short periods” of time, would have to spend hundreds of thousands of dollars to maintain the tapes and continue routine operations. *Id.* In addition to prohibitive costs, the Committee noted that “the most robust electronic information systems” are unable to retain such voluminous amounts of ESI without regularly purging some of the stored information. *Id.*

66. *See id.* at 34 (commenting on “troublesome area distinctive of electronic discovery”).

67. Redish, *supra* note 22, at 620 (highlighting inherent differences between destruction of ESI and traditional evidence, with exception of willful destruction).

68. *See* Brian C. Dalrymple & Daniel Harshman, *Electronic Discovery: What You Need To Know and What It May Cost If You Don't*, NIXON PEABODY LLP (Oct. 27, 2004), http://www.nixonpeabody.com/files/LA_03182005.pdf [<http://perma.cc/B8JV-WZ7C>] (quoting Rule 37 at subparagraph (f)). After the 2007 revision to the Federal Rules, Rule 37(f) was denominated as Rule 37(e). *Disability Rights Council v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 146 n.7 (D.D.C. 2007) (explaining rule change to avoid confusion).

69. Dalrymple & Harshman, *supra* note 68, at 11 (emphasis added).

70. Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 82 (July 25, 2005) [hereinafter *Advisory Comm. July 2005 Memorandum*] (discussing proposed Federal Rules amendments and drafting Rule 37(e)'s “good faith” culpability standard).

71. *Id.*

ESI was the product of intentional or reckless conduct:

A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless:

- (1) the party *intentionally or recklessly* failed to preserve the information; or
- (2) the party violated an order issued in the action requiring the preservation of the information.⁷²

These two versions prompted extensive public comment.⁷³ Those who favored imposing sanctions only for intentional or reckless conduct argued that including a standard based on negligent conduct was superfluous, and they argued that a rule without protection for the negligent loss of information would only prevent conduct that would not be sanctioned prior to writing the new rule.⁷⁴

There was also significant opposition to the version of the rule requiring a higher level of culpability for spoliation sanctions.⁷⁵ The primary argument against such a standard focused on the difficulty of proving intentional or reckless conduct by a litigant who allowed an automated information system to continue purging information.⁷⁶ They further argued that additional discovery regarding the discovery process itself might be needed to prove such "difficult subjective issues."⁷⁷ Proponents of this argument were concerned that the footnote version would allow culpable spoliation to go unsanctioned.⁷⁸

After this commentary, the drafters proposed a final version that took an intermediate position, adopting a standard for evaluating culpability that fell between the two previous forms.⁷⁹ That standard is the good-faith standard present in the rule, which reads: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, *good-faith*

72. Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 32-33 n.** (Aug. 3, 2004) (emphasis added) (setting out original proposed amendments, including Rule 37(e) before adoption of "good faith" standard).

73. See Andrew Hebl, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. ILL. U. L. REV. 79, 93 (2008) (commenting on substantial public discussion leading up to rule adoption).

74. See Advisory Comm. July 2005 Memorandum, *supra* note 70, at 82 (contending new rule provided little meaningful protection).

75. See *id.* (observing other commentators found proposed footnote too restrictive).

76. See *id.* (arguing intentional or reckless standard too difficult to prove).

77. *Id.*

78. See Advisory Comm. July 2005 Memorandum, *supra* note 70, at 82 (predicting lack of sanctions for culpable spoliation if negligence standard not included).

79. See *id.* at 82-83 (favoring intermediate standard).

operation of an electronic information system.”⁸⁰ Under this version of the rule, spoliation sanctions are precluded if the spoliating party acted in good faith and the information was lost as the result of the routine operation of a storage system.

This formulation of the rule begs the question: What is good faith? This question is difficult to answer based on the rule’s language and the realities of any computerized system that manages ESI. These difficulties are intensified when the custodian of ESI is a large business enterprise routinely and regularly involved in litigation.

The first aspect of this difficulty arises from the rule’s language—and a broader body of law governing discovery procedure—recognizing the existence of a duty to preserve evidence for litigation before litigation formally begins. Courts routinely acknowledge that the duty to preserve evidence arises when litigation is “reasonably foreseeable.”⁸¹ In addition, courts have held that the duty of preservation may even arise prior to the filing of a suit if a party should have known of the relevance of certain evidence to a potential lawsuit.⁸² This duty not only applies to admissible evidence relevant to a particular dispute but also to inadmissible evidence “reasonably calculated to lead” to admissible evidence through additional discovery.⁸³

Given the language of the original version of Rule 37(e) and because a duty to preserve evidence exists before any litigation formally commences, it is necessary to preserve information for litigation whenever a person or business enterprise contemplates using or creating any computerized system for managing ESI.⁸⁴ This computerized system must be adapted to preserve

80. Advisory Comm. July 2005 Memorandum, *supra* note 70, at 84 (emphasis added).

81. GORELICK ET AL., *supra* note 45, § 2.9 (asserting negative, pretrial inference of spoliation suggests litigant’s duty to preserve reasonably foreseeable useful evidence). “The notion that spoliation before trial gives rise to an adverse inference suggests the existence of a legal duty to preserve evidence. Some courts express this idea by stating that litigants have an *affirmative duty to preserve evidence* that is reasonably foreseeable to be used in a pending action.” *Id.* (emphasis added).

82. See *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (stressing duty to preserve “evidence relevant to future litigation”); *MOSAID Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004) (acknowledging duty to preserve evidence likely “requested in reasonably foreseeable litigation”); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (observing duty to preserve attaches when evidence possibly “relevant to future litigation”); *Lamarca v. United States*, 31 F. Supp. 2d 110, 127 (E.D.N.Y. 1998) (providing duty to preserve evidence “even in absence” of complaint if litigation likely to commence); *McGinnity v. Metro-N. Commuter R.R.*, 183 F.R.D. 58, 60 (D. Conn. 1998) (articulating duty to preserve upon likelihood of litigation); *Howell v. Maytag*, 168 F.R.D. 502, 505 (M.D. Pa. 1996) (requiring party with reasonable anticipation of litigation to preserve evidence); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (enunciating duty to preserve evidence likely requested in discovery).

83. *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984); see also *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (stressing need to preserve potentially relevant documents); *Arista Records, Inc. v. Sakfield Holding Co.*, 314 F. Supp. 2d 27, 34 (D.D.C. 2004) (explaining destruction of relevant evidence warrants inference of damaging material); *Procter & Gamble Co. v. Haugen*, 179 F.R.D. 622, 631 (D. Utah 1998) (affirming need to preserve evidence for potential litigation), *aff’d in part, rev’d in part*, 222 F.3d 1262 (10th Cir. 2000).

84. See *supra* note 83 and accompanying text (evaluating need to preserve any ESI likely to result in

information for whenever it might be needed. This need must be balanced alongside the fact that it is unreasonable and impossible for any person or entity to preserve all ESI indefinitely.⁸⁵ Accomplishing this balancing act is even more difficult for those routinely involved in litigation.⁸⁶ For such actors, the design of any computer system must include a protocol or policy that will make it possible to retain ESI that a duty to preserve evidence might cover.

A document retention policy that will facilitate the preservation of evidence significantly connected to a potential legal dispute is a necessary component for any system storing ESI.⁸⁷ Under the language of Rule 37(e), this policy must reflect a “good-faith” effort to comply with the duty to preserve evidence.⁸⁸ Determining when a document retention policy reflects good faith is difficult, however, especially because such policies must be formulated in advance and without respect to any dispute or potential litigation matter.⁸⁹ This leaves open questions as to whether a court could reasonably conclude that a document retention policy to preserve ESI was not developed and implemented in good faith if the policy did not adequately account for the possibility that a certain category of documents might require preservation for a certain period. And further, it remains unclear how a court would assess the adequacy of a document retention policy’s ability to anticipate future needs for document preservation.

V. PROBLEMS WITH THE ORIGINAL 37(E)

In application, the open ended or ambiguous provisions of the original version of Rule 37(e) proved problematic for federal courts. These problems can be organized into three distinct categories. First, it proved difficult for courts to consistently and objectively define the nature of the conduct that constituted “good faith.” Second, there was significant uncertainty about when a party’s duty to preserve documents would arise.⁹⁰ Third, courts did not universally rely on Rule 37(e) as the sole source of authority for regulating spoliation. Courts employed varying standards for determining when sanctions were appropriate and for determining what kind of sanctions should be imposed.

litigation).

85. See Redish, *supra* note 22, at 623 (emphasizing impracticality of indefinite document retention).

86. See *id.* (noting unique difficulties for commercial organizations regularly facing litigation).

87. See *id.* at 588 (observing essential role ESI plays in litigation).

88. Advisory Comm. July 2005 Memorandum, *supra* note 70, at 83 (proposing good-faith standard).

89. See *id.* (acknowledging good faith may require additional intervention after litigation has commenced). The Committee acknowledged a “litigation hold” may be needed to suspend an information system’s routine destruction of ESI. *Id.*

90. Courts agreed that the duty could arise before the formal initiation of litigation but did not agree about what kinds of pre-filing events triggered that duty.

A. Defining the Boundaries of Good Faith

Shortly after Rule 37(e) became effective, a District of Columbia district court considered whether a document retention policy was implemented in good faith.⁹¹ Although certain aspects of this ruling are straightforward and implicate no novelties associated with the preservation of ESI, the court's decision highlights problems that can arise in assessing the extent of good faith behind document retention policies.⁹² It also raises questions about how to determine what is included in a document retention policy.

In *Disability Rights Council of Greater Washington v. Washington Metro. Transit Authority*,⁹³ an advocacy group brought a disability discrimination claim against the Washington, D.C. Transit Authority (Authority), alleging the Authority had failed to provide adequate facilities for disabled persons.⁹⁴ The parties submitted a variety of discovery motions that the court decided together, including the Disability Rights Council's motion that implicated the Authority's document retention policies.⁹⁵ As part of its computer system, the Authority used an email-management program that automatically deleted emails after sixty days.⁹⁶ After the litigation began, the Authority did not disable this function or limit its effect.⁹⁷ Aggravating matters, the Authority admitted that, even after the litigation began, it knew about but did not use software available for programming overrides to stop automatic disposal of emails in accordance with a litigation hold.⁹⁸ The Authority had backup tapes that contained archived copies of the destroyed emails, and the Disability Rights Council moved to compel the Authority to organize the data on those backup tapes so the data could be searched by keyword for emails related to, and discoverable in, the litigation.⁹⁹ The Authority argued that restoring the data from the backup tapes and conducting searches of the tapes imposed an unreasonably expensive and burdensome obligation.¹⁰⁰ Although the Disability Rights Council did not bring its motion on Rule 37(e) grounds, the district court considered that rule and its attendant commentary in determining the

91. *Disability Rights Council v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 146 (D.D.C. 2007) (interpreting "new amendment to Rule 37").

92. *See id.* at 147 (discussing factors considered when ordering discovery from inaccessible sources).

93. 242 F.R.D. 139 (D.D.C. 2007).

94. *See id.* at 141 (discussing basis for discrimination claim).

95. *See id.* at 145.

96. *See id.* at 146.

97. *Disability Rights Council v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 146 (D.D.C. 2007) (noting plaintiff did not institute "litigation hold" after action commenced).

98. *See id.* at 146 n.8 (observing commercial availability of software to comply with obligation to preserve emails).

99. *See id.* at 147.

100. *See id.* The Authority further argued the backup tapes were neither "reasonably accessible" nor likely to contain relevant information. *See id.*

Authority's responsibilities in discovery.¹⁰¹

The district court began by recapitulating the Advisory Committee's discussion of good faith in the development and application of a document retention policy for Rule 37(e).¹⁰² Recognizing that Rule 37(e) applies specifically to evidence lost in the "routine operation of an information system," the court observed that the overarching duty to preserve might arise from other sources of law as well.¹⁰³ Rule 37(e), therefore, requires the good faith intervention of parties to preserve relevant ESI that would otherwise be purged by the automated functions of an information system when a litigation hold is necessary.¹⁰⁴

Accepting this conception of good faith, the district court concluded that the Authority should be compelled to organize and produce the data on the backup tapes because the Authority failed to act in good faith with regard to preserving emails.¹⁰⁵ Although the district court did not directly invoke the authority created by Rule 37(e) to impose sanctions, it clarified—in a vivid metaphor—that the Authority's failure to adequately manage its document deletion function was an instance of bad faith.¹⁰⁶

Other courts have followed the example of the *Disability Rights Council* Court. In *Peskoff v. Faber*,¹⁰⁷ the District of Columbia district court followed *Disability Rights Council*, and held that once a preservation obligation arises, "[t]he Advisory Committee comments to amended Rule 37[(e)] make it clear that any automatic deletion feature should be turned off and a litigation hold imposed."¹⁰⁸ The court further held that a failure to do so could support a finding of sanctions per se.¹⁰⁹ Consequently, failure to halt the automated purging feature of an information system could rise to the level of bad faith required to impose sanctions under the amended Rule 37(e).¹¹⁰

Another problem with applying the good-faith standard in the original version of Rule 37(e) is that it is not clear what constitutes a document

101. See *Disability Rights Council*, 242 F.R.D. at 146-47 (applying Rule 37(e) and its commentary to case at hand).

102. See *id.* at 146 (quoting FED. R. CIV. P. 37 advisory committee note to 2006 amendments).

103. See *id.* (acknowledging Rule 37(e) not sole authority bearing on duty to preserve). Common law doctrines, statutory and regulatory language, and court orders specific to a particular case also govern the duty to preserve. *Id.*

104. See *id.* (requiring party intervention to preserve relevant information potentially purged by standard retention policy).

105. See *Disability Rights Council v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 147 (D.D.C. 2007) (eliminating undue cost and burden exception where party "failed to preserve accessible information").

106. See *id.* (explaining rationale for imposing sanctions). The court compared the Authority's actions to "Leo Kosten's definition of chutzpah: '[T]hat quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan.'" *Id.*

107. 244 F.R.D. 54 (D.D.C. 2007).

108. *Id.* at 60 (citing *Disability Rights Council*, 242 F.R.D. at 146).

109. See *id.* (observing likelihood of sanctions absent amended rule under circumstances).

110. See *id.* (characterizing sanctions for failure to intervene in automated purging as not offensive to amended rule).

retention policy. How comprehensive must a document retention policy be for it to count as a part of the “routine operation” of a computer system? A Connecticut district court considered this question in *Doe v. Norwalk Community College*.¹¹¹

In *Norwalk Community College*, the plaintiff filed a complaint against a community college arising from Title IX of the Education Amendments of 1972, with state law claims for negligent retention and intentional infliction of emotional distress.¹¹² In discovery, the plaintiff made a forensic examination of the defendant’s computer system to assess when and how it had destroyed ESI and whether such destruction followed the defendant’s document retention policies.¹¹³ On the basis of that examination, the plaintiff moved for sanctions under Rule 37(e), contending the defendant failed to adequately comply with its duty to preserve ESI once it had notice of litigation.¹¹⁴ According to the plaintiff, a state-government-imposed general policy that required the retention of documents for two years governed the defendant, a public community college.¹¹⁵ Despite this policy, after the start of litigation, the hard drives of computers used by some employees had been scrubbed of all data, including significant data that was less than two years old.¹¹⁶ The defendant opposed the motion by contending that certain aspects of the statewide document retention policy did not apply and that part of the data destruction had been the product of hardware problems with particular devices.¹¹⁷ The defendant attempted to defend its handling of data by characterizing several instances of data destruction as isolated incidents, which the comprehensive two-year document retention policy did not govern; to frustrate the plaintiff’s discovery efforts, the defendant also denied any deliberate attempts to destroy data.¹¹⁸

The district court rejected the defendant’s attempts to redeem its decisions about document retention.¹¹⁹ It concluded the absence of a comprehensive litigation hold communicated to all appropriate employees was evidence of the absence of good faith.¹²⁰ The court held that the good-faith standard required the parties’ affirmative action to identify and preserve relevant documents.¹²¹ The assessment of what was and was not relevant could not be left up to

111. 248 F.R.D. 372 (D. Conn. 2007).

112. *Id.* at 374-75; *see also* 20 U.S.C. §§ 1681-1688 (2012) (codifying ban on discrimination practices).

113. *See Norwalk Cmty. Coll.*, 248 F.R.D. at 375 (describing computer system inspection).

114. *See id.* (seeking adverse inference against defendant for destroying ESI).

115. *See id.* at 376 (introducing retention policy).

116. *See id.* (observing policy not consistently followed).

117. *See Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372, 376 (D. Conn. 2007) (evaluating defendant’s justification for not preserving ESI).

118. *See id.* (proffering non-culpable reasons for ESI destruction).

119. *See id.* at 377 (finding defendant did not properly retain ESI in face of litigation).

120. *See id.* at 377-78 (stressing litigation hold importance).

121. *See Norwalk Cmty. Coll.*, 248 F.R.D. at 378 (requiring affirmative action to benefit from good-faith exception).

individual employees; rather, central authority in the organization must drive this determination.¹²²

One problem with *Norwalk Community College* is that the good-faith requirement seems to have been interpreted as making negligence a basis for sanctions. In *Norwalk Community College*, it seemed as though the loss of ESI was attributable to a failure to implement a policy.¹²³ A party's failure to execute a policy is more attributable to negligence and less like the absence of good faith.¹²⁴

The *Norwalk Community College* decision is not the only one in which a court seems to import a negligence standard into the good-faith evaluation of the original version of Rule 37(e). A Colorado district court reached a similar conclusion about the necessity of having a comprehensive document retention policy as a part of the "routine operation" of a system for managing ESI and assuring that individual employees complied with that system.¹²⁵ In *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, the plaintiff alleged that the defendant infringed its trademark rights in the name "Profile" for animal feed.¹²⁶ During discovery, the plaintiff alleged that the defendant had not preserved all discoverable ESI after its duty of preservation arose.¹²⁷ The defendant asserted it had informed employees of the pending litigation and of the need to preserve documents related to the dispute, but it also acknowledged its failure to give those employees instructions about how to identify documents or about the specific steps necessary for preservation.¹²⁸ The district court held these efforts were not enough to comply with the requirement of good faith.¹²⁹ In its view, the defendant's actions were not sufficiently comprehensive and did not include adequate instructions to assure preservation of discoverable ESI.¹³⁰

122. *See id.* (admonishing defendant for lacking "one consistent, 'routine' system"). The dean testified that the two-year retention policy was not followed in cases of computers belonging to teachers that had left the college. *Id.* The college registrar explained that she was not informed of the pending litigation until days before her deposition and that she never conducted a records search. *Id.* Finally, the head of human resources testified that she had never heard of a "litigation hold" and was never asked to implement one. *Id.*

123. *See id.* (condemning failure to adhere to policy).

124. *See id.*

125. *See Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 629 (D. Colo. 2007) (outlining party's obligations with regard to document retention).

126. *See id.* at 616 (describing nature of complaint).

127. *See id.* at 624 (discussing timing and scope of litigation hold). In this case, the parties also disputed when the obligation to preserve evidence arose. *Id.*

128. *See Cache La Poudre Feeds*, 244 F.R.D. at 624-25 (explaining defendant instituted litigation hold, but simply accepted whatever materials employees provided). Employees were asked to search all materials relevant to the PROFILE brand. *Id.* Land O'Lakes' general counsel explained that the company simply trusted the employees' judgement regarding what should be turned over, and relied upon that judgment in concluding that it provided all relevant information to the opposing party. *Id.*

129. *See id.* at 629 (reiterating need to retain information on "continuing basis" and faulting "less than thorough" preservation).

130. *See id.* at 629-30 (explaining defendant's shortcomings in ESI preservation).

Courts in the Second Circuit have held that negligence in document retention can be sanctioned.¹³¹ These courts have relied on authority predating the original version of Rule 37(e) in holding that negligence can be a basis for spoliation sanctions. In *Sekisui American Corp. v. Hart*, a New York district court held that in implementing spoliation sanctions, negligence would be a sufficiently culpable state of mind.¹³²

The district court explained that the culpability factor merely requires that a party knowingly allowed the destruction of evidence, even if it was destroyed through the lowest standard of negligence.¹³³ Viewing an adverse inference instruction as “the necessary mechanism for restoring the evidentiary balance,” the court held that the instruction was needed primarily because the evidence was destroyed, rather than “any finding of moral culpability” by the destroying party.¹³⁴ The court, therefore, held that the adverse inference instruction needed to be examined on a case-by-case basis because the culpable destruction of evidence could land at various points along the “continuum of fault,” including negligence.¹³⁵

Given all of this, it seems as though the good-faith standard of the original version of Rule 37(e) found little consistent interpretation about what constitutes good faith. To put it another way, courts could not agree on whether good faith is the absence of bad faith or if it involved the highest standard of conduct: the absence of both bad faith and any negligence. The flexibility of this reading of the rule made it difficult for parties to predict how to fulfill their obligations to preserve evidence.

B. Determining When the Preservation Obligation Arises

Just as it was difficult for courts to agree about what the duty of preservation should entail, it has also been difficult for courts to agree on when that duty arises. The district court for the District of Columbia in *Peskoff* considered the parties’ obligations to preserve evidence before the actual commencement of litigation.¹³⁶ The court held that the defendant’s failure to turn off the automatic deletion feature *before* notice of litigation could not be sanctioned even as the parties’ relationship began to deteriorate.¹³⁷

But *Peskoff* leaves the answers to some questions unclear. If the duty to

131. See *Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494, 503-04 (S.D.N.Y. 2013) (permitting case-by-case inquiry including varying degrees of negligence).

132. See *id.* at 503 (suggesting adverse inference potentially appropriate due to negligent destruction).

133. See *id.* at 503-04 (accepting destruction by negligence as reason for sanctions).

134. See *id.* (rejecting need for intentionality to impose adverse inference instruction).

135. See *Sekisui Am. Corp.*, 945 F. Supp. 2d at 504 (retaining ability to impose sanctions for negligent destruction on case-by-case basis).

136. See *Peskoff v. Faber*, 244 F.R.D. 54, 61 (D.D.C. 2007) (examining duty to stop automatic deletion before litigation notice).

137. *Id.* at 60-61 (recognizing deterioration of prior relationship insufficient to impose obligation to preserve evidence).

preserve documents does not arise when the parties' relationship was deteriorating, and if that duty exists when the litigation formally begins, courts and litigants will still be called upon to precisely determine when the duty arises prior to litigation. This issue was brought to bear in *Oxford House, Inc. v. City of Topeka*.¹³⁸

In *Oxford House*, a Kansas district court held that the preservation duty arises when a party receives an explicit threat of litigation.¹³⁹ The court began its analysis noting that spoliation is at issue only when a party fails to preserve evidence when the threat of litigation is looking at the party "in the face."¹⁴⁰ It then concluded the obligation to preserve documents arose when the defendant received a demand letter from the plaintiff.¹⁴¹

Nevertheless, it is not at all clear how specific a demand letter must be in threatening litigation in order for it to give rise to a duty to preserve ESI. In *Cache LaPoudre Feeds*, the parties disputed when the defendant had been sufficiently placed on notice of the reasonable possibility of litigation.¹⁴² The plaintiff's outside counsel had written a letter to the defendant in June 2002, asserting that the defendant was violating the plaintiff's trademark rights and expressing hope for a negotiated settlement.¹⁴³ A year later, the plaintiff's outside counsel again wrote to the defendant, expressing hope for some negotiated resolution to the trademark rights dispute.¹⁴⁴ Despite these letters, the district court concluded that the defendant's obligation to preserve documents did not arise until February 2004, when the plaintiff filed its complaint.¹⁴⁵

C. Relying on Inherent Powers Instead of the Rule

Another area in which courts diverge on the question of how to sanction the failure to preserve documents is the source of the authority for imposing such sanctions. In *Nucor Corp. v. Bell*,¹⁴⁶ the plaintiff alleged that its former

138. No. 06-4004-RDR, 2007 WL 1246200, at *1 (D. Kan. Apr. 27, 2007).

139. *See id.* at *3 (observing notice to preserve commonly arises at first discovery request or filing of complaint).

140. *See id.* (reconciling need to preserve and knowledge of pending litigation).

141. *See id.* (stressing importance of demand letter to place party on notice of pending litigation). In the case at hand, the preserving party was unaware of pending litigation prior to receipt of a demand letter. *Id.* The court, therefore, was willing to take into account that relevant information may have been deleted "before the duty to preserve arose." *Id.*

142. *See Cache La Poudre Feeds, LLC, v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 622 (D. Colo. 2007) (describing non-litigious negotiations between parties).

143. *See id.* (noting letter from plaintiff to defendant attempting to resolve trademark dispute).

144. *See id.*

145. *See id.* (concluding defendant "clearly" obligated to preserve evidence upon filing initial complaint). The court determined a request to preserve or "preservation letter" from the opposing party does not trigger the common law duty to preserve. *Id.* The court explained if such were the case, organizations would have to retain inexplicable amounts of records and information at any slight mention of "discontent." *Id.*

146. 251 F.R.D. 191 (D.S.C. 2008).

employee had stolen trade secrets, and in discovery, it also alleged that the defendant had spoliated evidence stored on a thumb-drive and laptop computer, which the defendant used during his employment.¹⁴⁷ Regarding the laptop, the defendant contended the good-faith provision of Rule 37(e) protected him because any loss of ESI on the laptop resulted from his continued use of the computer in an ordinary way until the litigation had formally begun and that any data loss resulted from overwriting that was a part of such ordinary use.¹⁴⁸ In rejecting this argument, the South Carolina district court concluded that the good-faith rule was beside the point when the court imposed sanctions under its inherent powers.¹⁴⁹

At least one other district court has agreed that its own inherent powers can supplement the Federal Rules to sanction spoliation when the text of the rules does not seem to directly apply.¹⁵⁰ These holdings also contribute to the potential for inconsistency in applying spoliation standards for the destruction of ESI. If this principle were followed widely, a court could choose to opt out of the regulatory regime imposed by the Federal Rules and sanction spoliation according to its own standards whenever it concluded that the rules were inadequate.

VI. THE PROPOSED 2014 AMENDMENTS TO RULE 37(E)

A. *Nature of and Reasons for the Proposed Amendments*

The uncertainties arising from the original formulation of Rule 37(e) have prompted calls for reform.¹⁵¹ This agitation for changing the rule led to the Committee's suggested amendments in 2014.¹⁵² These amendments seek to create a uniform standard for federal courts in determining what kind of culpability is required for spoliation sanctions and encourage courts to draw on a wide range of factors to fashion sanction awards that cure prejudice caused by

147. See *id.* at 193-94 (outlining plaintiff's complaint).

148. See *id.* at 196 n.3 (acknowledging defendant's safe-harbor argument under Rule 37(e)).

149. See *id.* (asserting court's inherent powers to impose sanctions). The court further commented that the safe-harbor provisions stated in the plain language of Rule 37(e) do not abrogate the court's inherent ability to impose sanctions on a particular party to a case. *Id.*

150. *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 611-12 (S.D. Tex. 2010) (discussing and applying court's inherent authority to issue spoliation sanctions).

151. See, e.g., 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) (pointing to "intellectual disdain" for previous amendments to Rule 37(e)); 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, 319 (2010) (noting prior amendments to Rule 37(e) resulted in discovery dispute increases); Alexander Nourse Gross, Note, *A Safe Harbor from Spoliation Sanctions: Can an Amended Federal Rule of Civil Procedure 37(e) Protect Producing Parties?*, 2015 COLUM. BUS. L. REV. 705, 717 (2015) (describing stakeholder concern over previous amendments to Rule 37(e)).

152. See JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, AGENDA E-19, app. at B-1 to B-2 (Sept. 2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf> [<http://perma.cc/S4YH-RF9T>] [hereinafter SEPT. 2014 REPORT] (summarizing amendments to Federal Rules).

less harmful forms of ESI spoliation.¹⁵³

The first significant proposed change to the language of Rule 37(e) is that it establishes specific factual prerequisites that must be established before a court can impose spoliation sanctions.¹⁵⁴ To impose sanctions, a party must show: ESI “should have been preserved in the anticipation or conduct of litigation”; the relevant ESI was lost; the party charged with safeguarding the lost ESI “failed to take reasonable steps to preserve” the information; and the lost ESI “cannot be restored or replaced through additional discovery.”¹⁵⁵ The purpose behind establishing these prerequisites is to assure that sanctions for any failure to preserve ESI are based on the designated criteria and not the more open-ended and potentially arbitrary use of a court’s inherent powers.¹⁵⁶

The third and fourth prerequisites place an emphasis on assessing preservation efforts in terms of reasonableness.¹⁵⁷ This modification in the approach for imposing sanctions means courts will no longer focus on whether a party conformed to some abstract standard in developing a document retention policy or in imposing a litigation hold. Rather, it now requires an assessment of conduct in light of the particular context and the needs and expectations of the parties regarding evidence.¹⁵⁸

In addition to these four prerequisites, a party that seeks the most severe sanctions available under Rule 37(e) must also demonstrate the alleged spoliator “acted with the intent” to keep relevant information from the receiving party “to deprive” the receiving party of useful information.¹⁵⁹ This requirement creates a standard of specific, bad-faith intent to ensure the most severe sanctions will be imposed only for the most flagrant violations of ESI preservation duties.¹⁶⁰ Given the language of the rule, the most severe sanctions would not be appropriate for negligent or even grossly negligent conduct.¹⁶¹ In a case like *Norwalk Community College* or *Cache La Poudre Feeds*, where a party was sloppy or careless in its preservation efforts, an adverse inference instruction should not be imposed under the proposed rule.

153. See *id.* at B-14 (lamenting circuit split with regard to imposing spoliation sanctions).

154. See *id.* at B-58 (enunciating need for specific measures court may employ).

155. *Id.* at B-56.

156. SEPT. 2014 REPORT, *supra* note 152, at B-58 (foreclosing “reliance on inherent authority” to determine sanctions).

157. See *id.* at B-61 to B-62 (emphasizing “reasonable steps” to preserve ESI sufficient to avoid most serious sanctions). The Advisory Committee placed particular emphasis on the cost to preserve evidence and on the party’s “sophistication with regard to litigation” when assessing the reasonableness of a party’s preservation efforts. *Id.*

158. See *id.* at B-61 (evaluating various factors to determine reasonableness). “This rule recognizes that ‘reasonable steps’ to preserve suffice; it does not call for perfection.” *Id.*

159. See *id.* at B-57 (requiring active intent for imposition of severe sanctions).

160. SEPT. 2014 REPORT, *supra* note 152, at B-64 to B-65 (stressing most severe sanctions appropriate only upon showing “intent to deprive another party” of information).

161. See *id.* at B-65 (explaining adverse-inference instruction inappropriate for negligent or grossly negligent conduct).

The proposed amendments to Rule 37(e) also specifically identify the severe sanctions that can be imposed. These measures are limited to: the dismissal of the case; entering default judgment; or an adverse inference instruction to the jury.¹⁶² A court could also presume that the lost ESI was unfavorable to the alleged spoliator.¹⁶³ But these sanctions are discretionary—not mandatory—even when a court finds loss of ESI is attributable to bad faith.¹⁶⁴ As the Committee cautions in the draft note, the sanction should be balanced against the injury, and the destruction of unimportant information should result in a lesser sanction as compared to significantly relevant evidence.¹⁶⁵

When the party seeking sanctions cannot establish that ESI was lost because of a specific “intent to deprive,” the court could then resort to curative measures under Rule 37(e)(1) to address prejudice resulting from losing the ESI.¹⁶⁶ The sanctions imposed in these circumstances must be proportional: “no greater than necessary to cure the prejudice” to the aggrieved party.¹⁶⁷ Although the text of the rule does not set forth the precise nature of such proportionate remedies, a Committee report and the draft Committee note suggest the remedies could include: precluding a party from presenting evidence; allowing the parties to discuss the destruction of evidence before the jury; a court instruction as to how to interpret the evidence; or excluding admissible evidence in order to “offset” the prejudicial effect of not presenting evidence that was destroyed.¹⁶⁸ Given this wide range of discretionary sanctions, a party could still obtain substantial relief for an opponent’s improper loss of ESI, even absent any finding that such loss was traceable to bad faith.

B. Prospective Effect of the Proposed Amendments

If one reviews the proposed text of the amendments and the attendant commentary in light of the case law applying the prior version of Rule 37(e), it is easy to anticipate problems that may emerge in applying these amendments. Although the proposed amendments solve many of the problems associated with identifying the necessary level of culpability for imposing sanctions, there are still significant ambiguities about the conduct that can trigger sanctions.

The principle change in the language governing the standard of conduct is the reference to “reasonable steps to preserve” ESI in place of the concept of

162. *See id.* at B-57 (setting forth available sanctions).

163. *See id.*

164. *See* SEPT. 2014 REPORT, *supra* note 152, at B-67 (cautioning sanction use even upon finding intent to deprive information to other party).

165. *See id.* (indicating sanction for spoliation of evidence “should fit the wrong”).

166. *See id.* at B-57 (authorizing limited sanction use to cure prejudice of lost information).

167. *Id.*

168. *See* SEPT. 2014 REPORT, *supra* note 152, at B-64 (discussing possible avenues for proportionate remedies).

“good faith.”¹⁶⁹ A party who takes “reasonable steps to preserve” ESI cannot be sanctioned.¹⁷⁰ But the Committee provides little guidance on what constitutes “reasonable steps.” The draft note suggests sanctions may not be appropriate if ESI is destroyed because of forces outside of a preserving party’s control such as flood, fire, hackers, or viruses.¹⁷¹ But this is only a suggestion. The Committee note does not state equivocally that some force majeure defense would be absolute. It advises that courts should consider what kind of steps the party could have taken to prevent being subjected to such a circumstance.¹⁷² In a real sense, this invites the same retrospective inquiry that proved problematic in the “good faith” requirement: Courts will be in a position to second-guess a party’s efforts to anticipate problems and take prophylactic steps against them. In this respect, shifting the initial inquiry from “good faith” to “reasonableness” only changes the framework for the problem.

The force majeure problem could become especially difficult as more individuals and enterprises store their data in the “cloud.”¹⁷³ When a party outsources its data storage to another entity, it loses control. Even if it has a carefully drafted document retention policy that the cloud storage entity agrees to observe, there is no guarantee the policy will be followed.¹⁷⁴ If the entity with direct control over data storage fails in its obligations and destroys the party’s data, would that qualify as a force majeure? And if it did, what would constitute adequate preparations by the party to anticipate the data storage provider’s failures?

There is similar ambiguity in the note’s suggestion that proportionality standards should temper the range of “reasonable” preservation efforts.¹⁷⁵ On a purely theoretical level, it makes sense to claim that a court should not sanction losing a small amount of ESI or losing ESI concerning a minor issue in a case in the same way that it sanctions losing a large volume of data or losing data absolutely crucial to resolving the dispute.¹⁷⁶ But the concept of proportionality is amorphous and lends itself to highly subjective interpretation.¹⁷⁷ If the proposed amendments are proffered to impose more limits on a court’s discretion in determining when the loss of evidence warrants

169. *See id.* at B-61 (adopting reasonable-steps standard when evaluating ESI loss).

170. *See id.* (articulating reasonable steps, not perfection, sufficient to avoid sanctions).

171. *See id.* (considering potential for destruction outside party’s control).

172. SEPT. 2014 REPORT, *supra* note 152, at B-61 (contending courts may consider party’s knowledge and ability to protect against force majeure risks).

173. *See id.* (highlighting party’s lack of control over cloud data storage).

174. *See id.* (observing potential third-party cloud storage system failure).

175. *See id.* at B-61 to B-62 (enunciating proportionality as “factor in evaluating” reasonableness of preservation efforts).

176. *See* SEPT. 2014 REPORT, *supra* note 152, at B-67 (suggesting proportional sanction depending on importance and amount of material destroyed).

177. *See* Farrell, *supra* note 6, at 117 (noting various jurisdictional views of determining correct remedy in response to spoliation).

severe sanctions, the proportionality component contributes little to solving the problems arising from the original version of the rule.¹⁷⁸

Another concept in the proposed amendments may also evade firm definition: “intent to deprive.”¹⁷⁹ The draft Advisory Committee note provides some clarity by pointing out that “intent to deprive” does not apply to negligent or even grossly negligent conduct; there is still, however, plenty of room for interpretation.¹⁸⁰ The Committee report issued with the Rule 37(e) proposed amendments explains that the “intent requirement is akin to bad faith.”¹⁸¹ But the draft Advisory Committee note is not this specific. It indicates that the most serious sanctions under Rule 37(e)(2) are limited “to instances of intentional loss or destruction.”¹⁸² A party might well intentionally destroy data, without, however, intending to obstruct discovery in a pending or anticipated litigation matter. In this respect, “intentional” conduct could be less culpable than “bad faith” conduct. The invocation of the concept of “bad faith” merely seems like an inversion of the problem the concept of “good faith” posed in the original version of the rule.

VII. CONCLUSION

The problem of controlling spoliation in the digital world is a difficult one to manage. After considering how courts struggled to consistently apply the 2006 amendments to the Federal Rules and after projecting how courts may struggle to interpret the proposed 2014 amendments, it seems that there is no easy way to distinguish between the culpable destruction of ESI and destruction that is—if not innocent—not deserving of sanctions. This is because evaluating the culpability of any decision to destroy documents is highly contextual. Whether a particular course of conduct reflects an effort to undermine the litigation process or an effort to maintain efficiency in a computerized document storage system depends upon a variety of factors that will never be the same in any two cases. It is impossible to fashion a bright-line rule that will apply uniformly in every case.

Drafting any rule about spoliation means establishing a somewhat relativistic standard of conduct. In the first version of the spoliation rules for ESI, the standard of conduct turned on the concept of “good faith.” In the proposed 2014 amendments, the standard of conduct turns on the concept of “reasonableness.” Both are necessarily open-ended; their meanings will depend upon the totality of the facts and circumstances. This conceptualism

178. See Philip J. Favro, *The New ESI Sanctions Framework Under the Proposed Rule 37(e) Amendments*, 21 RICH. J.L. & TECH. 8, 19 (2015) (observing questions proposed 2014 amendments leave unanswered).

179. SEPT. 2014 REPORT, *supra* note 152, at B-64 to B-65 (forbidding severe sanctions absent intent to deprive information to opposing party).

180. See *id.* (attempting to clarify rule based on intentional loss or destruction instead of negligence).

181. *Id.* at B-17.

182. *Id.* at B-65.

means that courts will continue to reach varying conclusions about spoliation and the sanctions that should follow it. Uncertainty in this area of the law will continue to ferment.

Unfortunately, it seems as though this period of uncertainty is inevitable. There is no quick and easy way to conclusively define culpable document destruction in a world where technology for managing documents is constantly changing. Any rules or dispositive concepts that made sense in one context or at one time may be inapplicable in a new situation or after a new stage in the ongoing technological revolution. The problem of sanctioning spoliation may be one that can be solved only by the gradual evolution of the law and the accretion of a body of cases, not by a single brilliant insight. Once again, Justice Holmes was correct when he wrote, “[t]he life of the law has not been logic: it has been experience.”¹⁸³

183. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Am. Bar Ass’n ed., 2009) (1881).