E-DISCOVERY REALPOLITIK: WHY RULE 37(E) MUST EMBRACE SANCTIONS

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Federal Rule of Civil Procedure 37(e), detailing the consequences of the loss of electronically stored data to be produced in discovery, offers little guidance as to what constitutes sanctionable activity. This uncertainty directly translates into added costs and burdens in the e-discovery process. In response to these concerns, proposed amendments to Rule 37(e) were drafted in 2013 with the intent of decreasing the costs of discovery, in part by decreasing the prevalence of sanctions.

This Note argues that the Proposed Rule 37(e)'s attempt to decrease sanctions will not be effective; furthermore, that such a result is not desirable. Proposed Rule 37(e) offers no improvements upon the current 2006 rule, and an effective Rule 37(e) must use sanctions as a tool to develop a unified culpability requirement and delineate and clarify sanctionable conduct and encourage cooperation in the discovery process. This Note recommends that Rule 37(e) must undergo a paradigm shift: it must embrace sanctions as a tool rather than as a liability. It is only then that the Rule can reduce E-discovery costs.

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"Speak softly and carry a big stick; you will go far."[1]

I. INTRODUCTION

Many hoped that the 2006 version of Federal Rule of Civil Procedure 37(e) would deliver on its promise to deliver a zone of protection for parties who lost or discarded data in good faith.[2] Anne Thomas was one of them.[3] As part of her job, Thomas stored critical information about her employer's business transactions on a USB flash drive.[4] She made no backups.[5] Unfortunately for Thomas, her USB drive failed

1. THEODORE ROOSEVELT, THE WISDOM OF THEODORE ROOSEVELT 9 (Donald J. Davidson ed., 2003).

2. *See* Mark S. Sidoti et al., *Safe Harbor? Getting to "Good Faith" Under New Rule 37(f)*, FOR THE DEFENSE, Jan. 2008, at 52, *available at* http://dritoday.org/articles/2008/01_January/FTD-0801-SidotiDuffyEtish.pdf.

3. *See* Wilson v. Thorn Energy, LLC, No. 08 Civ. 9009, 2010 WL 1712236, at *2 (S.D.N.Y. Mar. 15, 2010).

4. *Id.*

5. *Id.*

shortly after the information it contained became relevant to a lawsuit.[6] Thomas sought help and reported the loss to both the company accountant and defense counsel.[7] She also retained a consultant to help restore the data, but it was too late—the consultant could only retrieve scattered pieces of the data.[8] After holding on to the broken USB drive for several months, Thomas discarded it.[9] In response, the plaintiff moved for sanctions.[10] As part of the company's defense, it asserted the "safe harbor" provision Federal Rule of Civil Procedure Rule 37(e).[11] This rule holds that a court may not sanction a party for "failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."[12] Surely, the company argued, there would be protection for Thomas.[13] After all, she had not lost the information on the flash drive with a culpable state of mind.[14] Yet, the court disagreed and imposed sanctions for spoliation.[15]

Anne Thomas's experience demonstrates that the protection provided by Rule 37(e) is indeterminate, and the rule itself offers little to no guidance up front as to what constitutes sanctionable activity.[16] This uncertainty directly translates into added costs and burdens in the e-discovery phase.[17] In particular, this ambiguity instills a fear of sanctions, which causes companies to adopt costly "keep everything" approaches that retain massive amounts of data in case it should prove relevant later on.[18]

In response to these concerns about Rule 37(e)'s vitality, the Judicial Conference Advisory Committee on Bankruptcy and Civil Rules released preliminary drafts of the proposed amendments to Rule 37(e) ("Proposed Rule 37(e)") on August 15, 2013.[19] Proposed Rule 37(e) was created with the intent of decreasing the costs of the discovery and preservation of electronically stored information ("ESI").[20] Like its pre-

6. *See id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at *3.
12. FED. R. CIV. P. 37(e).
13. *See Wilson*, 2010 WL 1712236, at *3.
14. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for an Entry of an Order Finding Defendants in Contempt and for Sanctions Pursuant to Fed. R. Civ. P. 37 and Local Rule 83.9 at 1–2, *Wilson*, 2010 WL 1712236 (No. 1:08-cv-09009-FM).
15. *Wilson*, 2010 WL 1712236, at *4.
16. *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, 900–01 (2011).
17. Kenneth J. Withers, *Risk Aversion, Risk Management, and the "Overpreservation" Problem in Electronic Discovery*, 64 S.C. L. REV. 537, 545–46 (2013) [hereinafter Withers, *Risk Aversion*].
18. *Id.*
19. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 3 (2013) [hereinafter PROPOSED RULE 37(e)], *available at* http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf.
20. *Id.* at 271.

decessor, the proposed rule attempts to decrease costs by decreasing the prevalence of sanctions.[21] It does this by imposing three onerous requirements on the use of sanctions.[22] First, sanctions are not warranted "in all but very exceptional cases in which failure to preserve 'irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.'"[23] Second, sanctions are only allowed if the court finds that the failure to preserve was "willful or in bad faith."[24] Third, the Proposed Rule 37(e) asserts, curative measures should be used by courts in lieu of sanctions.[25]

This Note argues that Proposed Rule 37(e)'s attempt to decrease sanctions will not be effective for three reasons. First, sanctions for ESI spoliation are very rare—any attempt to decrease ESI spoliation sanctions would be futile.[26] Second, the curative measures espoused by proposed Rule 37(e) will not decrease sanctions, as they are simply sanctions by another name.[27] Third, like its predecessor, courts will continue to ignore Proposed Rule 37(e) because the courts have inherent powers to sanction unscrupulous conduct.[28]

Even if Proposed Rule 37(e) was effective in decreasing sanctions, such a result is not desirable. Sanctions can play a major role in enforcing the provisions of a new Rule 37(e) and result in a significant reduction in costs. This Note identifies three areas where sanctions can play a role in driving down e-discovery expenses. First, sanctions can enforce a unified culpability requirement. The Advisory Committee formulated Proposed Rule 37(e) with the intent to establish a uniform culpability standard for sanctionable conduct.[29] Because Proposed Rule 37(e) repeats the mistakes of the 2006 Rule 37(e), this effort will be ineffective.[30] To move forward, Rule 37(e) must clearly delineate what specific culpability is sanctionable.[31] Once this is accomplished, the courts could use sanctions as a toll to police this uniform culpability requirement, which will, in turn, promote clear expectations and decrease e-discovery costs.[32]

Second, Rule 37(e) can use sanctions to promote cooperation among parties.[33] Such an approach has already been field tested by the Seventh Circuit in its Electronic Discovery Pilot Program, which has

21. *Id.* at 272.
22. *Id.* at 318–22.
23. *Id.* at 272.
24. *Id.*
25. *Id.* at 272.
26. *See infra* Part IV.C.1.
27. *See infra* Part IV.C.2.
28. *See infra* Part IV.C.3.
29. PROPOSED RULE 37(e), *supra* note 19, at 272 ("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.").
30. *See infra* Part IV.
31. *See infra* Part V.B.
32. *See infra* Part V.B.
33. *See infra* Part V.C.

generated high praise.[34] This Note bases its formulation of a new Rule 37(e) on the Pilot Program's findings that imposing a duty of cooperation among parties reduces the ability of malevolent parties to request disproportionate amounts of ESI.[35] Sanctions in this context could serve as a great incentive to engage in good faith cooperation, which would also lower e-discovery costs.[36]

Third, sanctions can be beneficial in enforcing explicit ground rules set forth by a new Rule 37(e).[37] As demonstrated by the Seventh Circuit's Pilot Program, it is important for any new Rule 37(e) to specifically limit the scope of discoverable information.[38] By expressly delineating the scope of discovery up front, parties will be less pressured to adopt expensive "keep everything" approaches.[39] Sanctions here will enforce compliance with these guidelines, and thereby increase discovery efficiency.[40]

Structurally, this Note proceeds in four additional parts. Part II offers a brief overview of ESI and e-discovery and sketches three problems associated with them. The first is that e-discovery is expensive. The second is that spoliation of ESI may yield irreparable prejudice to a party's case. Finally, the third problem is that overpreservation and "keep everything" approaches are counterproductive and costly.

Part III then discusses the 2006 Rule 37(e) and its underlying goal of offering a safe harbor for parties that spoliate[41] ESI in good faith. Part III analyzes the problems associated with the 2006 Rule 37(e) and concludes that the current rule is inadequate, as it does not clearly define a culpability requirement and it is simply ignored by courts.

Part IV overviews the Proposed Rule 37(e) and its intended effects. These include decreasing sanctions, encouraging the use of curative measures, and creating a new basis of authority for the courts beyond their inherent authority. This Part argues that Proposed Rule 37(e) will have little efficacy because it offers no improvements upon the 2006 Rule 37(e).

Part V then recommends several adjustments to Rule 37(e). First, Rule 37(e) should recognize that sanctions are beneficial under the correct circumstances. Second, Rule 37(e) should use sanctions as a tool to develop a unified culpability requirement. Third, Rule 37(e) must delineate and clarify sanctionable conduct and encourage cooperation. Part V closes by proposing a new formulation of Rule 37(e). Part VI concludes.

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34. SEVENTH CIRCUIT ELECTRONIC DISCOVERY COMMITTEE, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: FINAL REPORT ON PHASE TWO MAY 2010–MAY 2012 (2010) [hereinafter PILOT PROGRAM], *available at* http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf.

35. *See infra* notes 114–20 and accompanying text.

36. *See infra* Part V.C.

37. *See infra* Part V.D.

38. *See infra* Part V.D.

39. *See* Withers, *Risk Aversion*, *supra* note 17, at 545–46.

40. *See infra* Part V.D.

41. "Spoliation" is defined as "[t]he intentional destruction, mutilation, alteration, or concealment of evidence." BLACK'S LAW DICTIONARY 1531 (9th ed. 2009).

II. BACKGROUND

A. ESI

Today's society creates more data than ever before.[42] In fact, the amount of ESI created every two days is roughly equivalent to the amount "created between the dawn of civilization and 2003."[43] A driving force behind this massive creation of data is the modern corporation. Today, virtually every corporate employee uses a computer to complete his or her daily tasks.[44] In fact, North American businesses "exchange over 2.5 trillion emails per year."[45] Thus, ESI is now commonplace in our professional and everyday lives.[46]

ESI is an umbrella term that describes many things. ESI is formally defined by Rule 34(a)(1)(A) as "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained . . . ."[47] This definition of ESI was drafted to be "broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments."[48] As a result, several different types of ESI have emerged.[49]

One form of ESI is "traditional" ESI.[50] This variety commonly includes computer files such as e-mail messages, word processing files, web pages, and electronic databases.[51] Traditional ESI is therefore the most intuitive variation of ESI because it is the "modern counterpart of paper

42. Dominic Basulto, *Welcome to the Hellabyte Era, As in a Helluva Lot of Data*, WASH. POST (Oct. 25, 2013), http://www.washingtonpost.com/blogs/innovations/wp/2013/10/25/welcome-to-the-hellabyte-era-as-in-a-helluva-lot-of-data/; *see also* John T. Yip, Comment, *Addressing the Costs and Comity Concerns of International E-Discovery*, 87 WASH. L. REV. 595, 595 (2012) ("In 2005, the total amount of ESI worldwide . . . was 130 exabytes. In 2011, [this figure] expanded to over 1800 exabytes, enough data to fill 57.5 billion 32GB Apple iPads.") (internal citations omitted).

43. Basulto, *supra* note 42.

44. Jacqueline Hoelting, Note, *Skin in the Game: Litigation Incentives Changing as Courts Embrace a "Loser Pays" Rule for E-Discovery Costs*, 60 CLEV. ST. L. REV. 1103, 1107 (2013).

45. William P. Barnette, *Ghost in the Machine:* Zubulake *Revisited and Other Emerging E-Discovery Issues Under the Amended Federal Rules*, 18 RICH. J.L. & TECH. 1, 2 (2012).

46. *See* BARBARA J. ROTHSTEIN ET AL., FED. JUDICIAL CTR., MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 1 (2d ed. 2012), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/$file/eldscpkt2d_eb.pdf ("Electronic information is ubiquitous.").

47. FED. R. CIV. P. 34(a)(1)(A).

48. FED. R. CIV. P. 34 advisory committee's note (2006); *see also id.* ("The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically.").

49. David J. Waxse, *The Technology and Law of the Form of Production of Electronically Stored Information*, 49 JUDGES' J. 33, 34 (2010) ("There are many different ways in which ESI is created and maintained, and, thus, there are many different types of ESI—from simple word processing documents to complex databases.").

50. Stuart B. Claire, *The Interplay Between Electronic Discovery and Computer Forensics*, *in* UNDERSTANDING THE LEGAL ISSUES OF COMPUTER FORENSICS: LEADING LAWYERS ON UNDERSTANDING REGULATIONS CONCERNING THE COLLECTION, PRESERVATION, AND ADMISSIBILITY OF ELECTRONIC EVIDENCE (2013), *available at* 2013 WL 3759821, at *5.

51. ROTHSTEIN ET AL., *supra* note 46, at 2.

documents."[52] As such, litigants are able to easily extract and interpret relevant evidence from traditional ESI.[53] Traditional ESI is also the least controversial, as there is little dispute that word-processing documents and emails, for instance, are discoverable.[54] Unsurprisingly, therefore, traditional ESI is the most commonly requested form of ESI in e-discovery.[55]

Another type of ESI is "metadata."[56] Metadata is best understood as "data about data,"[57] or hidden data about a particular data set that "describes how, when, and by whom it was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements, and media information)."[58] When a document is created by a particular program (such as Microsoft Word), the program automatically creates hidden information about that document, such as the date and time of its creation and who has last edited it.[59] As a result, it is possible to alter—and potentially spoliate—metadata by merely opening a file.[60]

A related form of ESI is "system ESI," or data that is automatically created by computer systems.[61] This type of ESI is usually created by a computer system as a temporary byproduct of digital information processing.[62] Importantly, this ESI is *not* consciously created, viewed, or transmitted by the computer user.[63] Nevertheless, system ESI "may be essential to the efficient operation of the information system and may be accessible to technicians and system administrators."[64] Also, even though it may be difficult to preserve, some courts have held that system ESI is discoverable. In *Colombia Pictures Industries v. Bunnell*, for instance, the court ordered the defendant to preserve and produce raw data stored in random access memory ("RAM").[65] Such a feat would have been incredibly difficult; unlike other types of computer memory, RAM is only a

52. *IT Glossary and Technical Terms*, PCRX.COM, http://www.pcrx.com/fr/resource_center/rc-glossary.aspx?let=C (last visited Mar. 8, 2015).

53. *See* ROTHSTEIN ET AL., *supra* note 46, at 3 (implying that, while metadata does not result in "printable text-based documents," traditional ESI will).

54. Kenneth J. Withers, *"Ephemeral Data" and the Duty to Preserve Discoverable Electronically Stored Information*, 37 U. BALT. L. REV. 349, 355 (2008) [hereinafter Withers, *Ephemeral Data*].

55. *See* Joedie, *The Top 12 File Types You'll See in eDiscovery (And How to Deal with Them)*, DISCOVERYBRAIN.COM (Aug. 4, 2011), http://discoverybrain.com/legal-technology/the-top-12-file-types-you%E2%80%99ll-see-in-ediscovery-and-how-to-deal-with-them/.

56. Marjorie A. Shields, Annotation, *Discoverability of Metadata*, 29 A.L.R. 6TH 167, 175–78 (2007).

57. *Id.*

58. *Id.* (internal citations omitted); Timothy D. Edwards, *Record Retention 101: How to Deal with Metadata*, 18 No. 10 WIS. EMP. L. LETTER 3, at 1, (Oct. 2009).

59. Shields, *supra* note 56, at 175–78.

60. ROTHSTEIN ET AL., *supra* note 46, at 3.

61. *See, e.g.*, Nucor Corp. *v.* Bell, 251 F.R.D. 191, 199 (D.S.C. 2008) (holding that the defendants engaged in spoliation by merely using a laptop after the duty to preserve attached).

62. Withers, *Ephemeral Data*, *supra* note 54, at 366.

63. *Id.*

64. *Id.*

65. No. CV 06-1093FMCJCX, 2007 WL 2080419, at *1 (C.D. Cal. May 29, 2008), *motion for review denied sub nom.* Columbia Pictures, Inc. v. Bunnell, 245 F.R.D. 443 (C.D. Cal. 2007).

temporary form of storage.[66] Computer systems automatically recycle the data found in RAM so it can reuse the space for other purposes.[67] In addition, the data in RAM is erased if the computer is shut down or restarted.[68] Therefore, parties may spoliate evidence by merely shutting down, using, or virtually doing *anything* to a computer after a duty to preserve attaches.[69]

The many types of ESI have been instrumental in creating a significant rift between traditionally discoverable documents.[70] While traditional ESI is the most analogous to the classic conception of discoverable material, metadata and system ESI push the boundaries of orthodox discovery doctrine.[71] Consequently, these new types of information have prompted a new subset of discovery: "e-discovery."[72]

B. E-Discovery

ESI is just as discoverable as traditional documents.[73] Just like traditional discovery, e-discovery typically begins when one of the parties in a lawsuit requests that the other party produce ESI that is relevant to the requesting party's claims or defenses.[74] When a party requests ESI from another party, the producing party generally pays the costs of preserving, finding, and delivering the ESI to the requesting party.[75]

It is at this point, however, that the major similarities between e-discovery and traditional discovery cease.[76] Indeed, there exist several key differences that separate e-discovery from the traditional forms of discovery.[77] First, the volume of ESI is almost always exponentially greater than that of paper information.[78] In *McNulty v. Reddy Ice Holdings, Inc.*, for example, the plaintiff requested approximately 2.6 million pages of paper documents.[79] While this may seem like an over-

66. *Id.* at *2 ("RAM is a form of temporary storage that every computer uses to process data.").

67. ROTHSTEIN ET AL., *supra* note 46, at 3.

68. Withers, *Ephemeral Data*, *supra* note 54, at 362. ("There is no dispute that email comes within the definition of a document under Rule 34; email has been routinely requested and produced in discovery for many years prior to the December 1, 2006 amendment to Rule 34 that explicitly incorporated electronically stored information within the scope of document discovery.").

69. *See* Nucor Corp. v. Bell, 251 F.R.D. 191, 198 (D.S.C. 2008) ("[D]ata in unallocated space is lost every time a computer is turned on or shut down, when a program is installed or de-installed, when a user runs a program, or virtually any time anything happens on a computer.").

70. *See* ROTHSTEIN ET AL., *supra* note 46, at 2–4.

71. *Id.*

72. Emily Burns et al., *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201, 227 (2008).

73. Yip, *supra* note 42, at 599.

74. *Id.* at 596 (citing FED. R. CIV. P. 26(b)).

75. *Id.*; *see also* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978) ("Under [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests . . . ."); Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 428–29 (S.D.N.Y. 2002).

76. Hoelting, *supra* note 44, at 1107–14.

77. *Id.* at 1108–10.

78. ROTHSTEIN ET AL., *supra* note 46, at 2; *see also* Withers, *Risk Aversion*, *supra* note 17, at 538.

79. 271 F.R.D. 569, 570 & n.1 (E.D. Mich. 2011).

whelming amount of discovery on its own, the amount of requested ESI was far more onerous—the plaintiff also requested approximately four terabytes[80] of ESI.[81] One terabyte of ESI roughly equates to 220 million pages of printed text.[82] Four terabytes, accordingly, represents approximately 880 million pages of traditional documents.[83] In the *McNulty* case, therefore, the amount of ESI requested was almost *338 times* the amount of paper documents.[84] As demonstrated by *McNulty*, it is not atypical for litigants to request exponentially larger amounts of ESI than paper documents.[85] In fact, these scenarios are so common that some judges have had to appoint special masters to deal with the voluminous amounts of relevant ESI.[86]

A second difference between e-discovery and traditional discovery is that ESI may be located in multiple places at the same time.[87] Indeed, a computer file may be stored electronically in any number of places, including on the hard drives of its creators, reviewers, and recipients; on the company server; on laptops and home computers; on backup tapes; and on local network servers and third-party hosted servers.[88] To illustrate, the plaintiff in *Clean Harbors Environmental Services, Inc. v. ESIS, Inc.* stored old emails on backup tapes.[89] This permitted them to retrieve archived ESI when it proved relevant to the litigation.[90] The upshot is that ESI is not necessarily destroyed upon its deletion.[91] Typically, when a user "deletes" a file, the file is marked as "unallocated space," which gives the computer permission to overwrite the file with new data.[92] It is only after the file is overwritten with new data that the file is permanently lost.[93] Moreover, even if the data is overwritten, there is always the

80. *Megabytes, Gigabytes, Terabytes… What Are They?*, WHAT'S A BYTE?, http://www.whatsabyte.com/ (last visited Mar. 8, 2015) ("A Terabyte is approximately one trillion bytes, or 1,000 Gigabytes . . . To put it in some perspective, a Terabyte could hold about 3.6 million 300 Kilobyte images or maybe about 300 hours of good quality video. A Terabyte could hold 1,000 copies of the Encyclopedia Britannica. Ten Terabytes could hold the printed collection of the Library of Congress. That's a lot of data."); *see also Costs and Burdens of Civil Discovery: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 1 (2011) [hereinafter Costs and Burdens Hearing] (statement of Rep. Trent Franks, Chairman, S. Comm. on the Constitution) ("[I]f one scanned every book and magazine in the entire Library of Congress, it would equal about 136 terabytes of information. This means that in the year 2010 alone, the world produced as much data as could be contained or would be contained in 7.4 million Libraries of Congress.").

81. *McNulty*, 271 F.R.D. at 570 & n.1.

82. *Id.*

83. *See id.*

84. *Id.*

85. *Id.*; ROTHSTEIN ET AL., *supra* note 46, at 25.

86. ROTHSTEIN ET AL., *supra* note 46, at 25.

87. *Id.* at 2.

88. *Id.*

89. No. 09-C-3789, 2011 WL 1897213, at *2–3 (N.D. Ill. May 17, 2011).

90. *Id.*

91. ROTHSTEIN ET AL., *supra* note 46, at 4.

92. Nucor Corp. v. Bell, 251 F.R.D. 191, 198 (D.S.C. 2008).

93. *Id.*

possibility that ESI may be recovered from the computer system's hardware or from disaster backup systems.[94]

Third, e-discovery is unique in that ESI is dynamic, mutable, and often fragile.[95] As a result, it may be easily damaged, altered, or destroyed—even without the user's knowledge.[96] For example, in *Nucor v. Bell*, the court held that the defendants had spoliated ESI by merely using a laptop after a duty to preserve attached.[97] Similarly, in *Bryant v. Gardner*, the court held that the defendant failed to preserve relevant ESI by continuing to use a laptop after a lawsuit had commenced.[98] There, the plaintiff alleged that the defendant had drafted a contract relevant to the litigation, but the defendant denied he had written it.[99] The plaintiff requested an examination of the defendant's laptop to show whether the defendant had indeed drafted the contract.[100] An independent analysis indicated that some files had been deleted from the laptop, but it was impossible to verify that any of them were the document in question.[101] The analysis concluded that they may have been able to render a more definitive finding had the defendant stopped using his computer.[102] As demonstrated by *Nucor* and *Bryant*, ESI is so dynamic, mutable, and fragile that there can be many opportunities for spoliation.

Fourth, e-discovery is exceptional in that ESI does not always produce a text-based document fit for human consumption.[103] If a person were to type the word "hello" into an instant messaging application, for instance, the program would translate the individual key strokes into binary code.[104] Thus, while the user would see "hello," the program would see "01101000011001010110110001101100011011111," which is certainly not fit for consumption by an untrained human eye.[105]

C. Problems Associated with E-Discovery

Given these major differences, e-discovery has introduced new and increasingly complex challenges for litigants and courts.[106] One challenge is that e-discovery is costly.[107] A second is that spoliation of ESI can result

94. ROTHSTEIN ET AL., *supra* note 46, at 4.
95. *Id.* at 3.
96. *Id.*
97. 251 F.R.D. at 197–99.
98. 587 F. Supp. 2d 951, 968 (N.D. Ill. 2008).
99. *Id.*
100. *Id.* at 967–68.
101. *Id.* at 968.
102. *Id.*; *see also supra* notes 91–92 and accompanying text.
103. ROTHSTEIN ET AL., *supra* note 46, at 3.
104. *See* Withers, *supra* note 54, at 364; *see also Binary to Text (ASCII) Conversion*, ROUBAIXINTERACTIVE.COM, http://www.roubaixinteractive.com/PlayGround/Binary_Conversion/Binary_To_Text.asp (last visited Mar. 8, 2015) (translating "hello" to "01101000011001010110110001101110011010001101111").
105. *See, e.g.*, *Binary to Text (ASCII) Conversion, supra* note 104.
106. ROTHSTEIN ET AL., *supra* note 46, at 3–4.
107. *See infra* Part II.C.1.

in irreparable prejudice and further expenses of parties.[108] Finally, a third problem concerns overpreservation, or the stockpiling of data that may prove relevant.[109] The following Subsections analyze each consideration individually.

1. E-Discovery Is Costly

E-Discovery is expensive.[110] In fact, e-discovery is *exponentially* more expensive than traditional discovery.[111] In some cases, e-discovery costs may comprise a majority of the total litigation costs.[112] Even in fairly typical cases, e-discovery can cost tens or hundreds of thousands of dollars.[113] This phenomenon is partially due to the fact that the requesting parties have no incentive to limit their e-discovery requests.[114] In traditional discovery, the producing and requesting parties had reciprocal discovery costs: the producing party would shoulder the costs of producing documents and the receiving party would pay the costs of reading and processing those documents.[115] In e-discovery, however, the producing party must bear *all* of the costs associated with responding to the discovery request.[116] Because the producing party is not likely to allow the requesting party to physically inspect its computer systems, the producing party must do the requesting party's job—find and process the relevant ESI.[117] The receiving party's burden is thereby greatly lessened.[118] This makes e-discovery costs lopsided; they benefit the requesting party and impose both a financial and legal detriment on the producing party.[119] Consequently, requesting parties have an incentive to request as much ESI as possible "in the hope of coercing a quick settlement."[120] All told, this dynamic has increased the cost of e-discovery because parties must spend more on producing ESI.[121]

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108. *See infra* Part II.C.2.

109. *See infra* Part II.C.3.

110. Hoelting, *supra* note 44, at 1110.

111. 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, 894–95 (2009); Andrew Mast, Note, *Cost-Shifting in E-Discovery: Reexamining* Zubulake *and 28 U.S.C. § 1920*, 56 WAYNE L. REV. 1825, 1826 (2010).

112. Hoelting, *supra* note 44, at 1105, 1106 n.12.

113. *See* Moss, *supra* note 111, at 894.

114. Hoelting, *supra* note 44, at 1111.

115. *Id.*

116. Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 778–79 (2011).

117. Mast, *supra* note 111, at 1830.

118. *Id.*

119. *Id.*; Redish & McNamara, *supra* note 116, at 779.

120. John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010); *see also* Mast, *supra* note 111, at 1844 ("[T]he requesting party, quite aware of the weakness of its case, [may] use[] massively expensive discovery requests as an attempt to pressure the responding party into settlement.").

121. *See* Allison O. Skinner, *Alternative Dispute Resolution Expands into Pre-Trial Practice: An Introduction to the Role of E-Neutrals*, 13 CARDOZO J. CONFLICT RESOL. 113, 118 (2011) (noting that "e-discovery motion practice is blamed for an increased cost in litigation in general").

2. Spoliation Is Costly

Spoliation is another problem associated with e-discovery and ESI.[122] Under the common law, "[w]henever litigation is reasonably anticipated, threatened, or pending against [a party], that [party] has a duty to undertake reasonable and good faith actions to preserve relevant and discoverable information and tangible evidence."[123] Spoliation, or the "destruction or material alteration of evidence or the failure to preserve property" for another party's "use as evidence in pending or reasonably foreseeable litigation," is a breach of that duty.[124] Such breaches are generally punishable by recognizing an independent cause of action or by sanctioning the spoliating party.[125] These punishments are often motivated by the fear that unscrupulous parties will intentionally destroy damaging evidence.[126] This apprehension is not unfounded. For instance, one particularly devious party in *Kvitka v. Puffin Co.* intentionally discarded a laptop, thereby destroying emails and other evidence that would have greatly assisted the opposing parties.[127] Another party in *Victor Stanley, Inc. v. Creative Pipe, Inc.* breached its duty to preserve by intentionally deleting files, which yielded a "cat and mouse game" designed to hide harmful ESI from production during discovery.[128]

Perhaps one of the extreme examples of intentional spoliation is found in *Domanus v. Lewicki*.[129] There, the plaintiff requested data that resided on a hard drive owned by the defendants.[130] Instead of cooperating, the defendants asserted that the hard drive had been destroyed.[131] Specifically, according to one defendant, the hard drive had suddenly stopped working, so he sent it to Poland where his codefendant resided.[132] Curiously, the codefendant was only able to recover *some* of the at-issue files.[133] Upon completing this data extraction, the codefendant then gave the hard drive to the local children, who liked to play with "shiny, interesting parts."[134] Thus, not only do parties have to worry about winning their case, they must also be wary of malevolent spoliation of ESI

122. ROTHSTEIN ET AL., *supra* note 46, at 30.

123. Withers, *supra* note 17, at 542 (quoting The Sedona Conference, *Commentary on Legal Holds: The Trigger & the Process*, 11 SEDONA CONF. J. 265, 267 (2010)).

124. ROTHSTEIN ET AL., *supra* note 46, at 30.

125. MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 53 (Daniel F. Gourash ed., 2d ed. 2006).

126. *See* Jay E. Rivlin, Note, *Recognizing an Independent Tort Action Will Spoil a Spolator's Splendor*, 26 HOFSTRA L. REV. 1003, 1013 (1998).

127. No. 1:06-CV-0858, 2009 WL 385582, at *7 (M.D. Penn. Feb. 13, 2009).

128. 269 F.R.D. 497, 502 (D. Md. 2010).

129. 284 F.R.D. 379 (N.D. Ill. 2012), *vacated*, No. 08 C 4922, 2012 WL 3307364 (N.D. Ill. Aug. 13, 2012).

130. *Id.* at 384–85.

131. *Id.* at 385.

132. *Id.*

133. *Id.*

134. *Id.*

perpetrated by unscrupulous parties aiming to obtain an improper advantage.[135]

3. Overpreservation Is Costly

Another problem with modern e-discovery is that it pressures parties to employ a "keep everything" approach to data management.[136] These strategies require parties to keep old ESI even in the absence of a legitimate business need, a statutory or regulatory retention requirement, or a reasonably likely threat of litigation.[137] One reason why parties find this strategy attractive is because data storage costs are increasingly more affordable.[138] Cloud computing, in particular, has allowed businesses to store massive amounts of ESI at very low costs.[139] Cloud computing's core benefit is that it allows organizations to store their data offsite. This, in turn, decreases the need to spend on computing, maintenance, and information technology support costs.[140] One company estimates that to store forty terabytes—the equivalent of *four copies* of the printed collection of the entire Library of Congress[141]—it would only cost $6000 a month.[142] Accordingly, some parties are willing to write off this cost in order to always have potentially relevant ESI on hand.[143]

Another reason parties employ the "keep everything" approach despite its inefficiency is because the precedent regarding the duty to preserve ESI is inconsistent and confusing.[144] The duty to preserve ESI is, after all, a common law duty, which means its contours are subject to a wide range of interpretation by the courts.[145] In particular, courts heavily

135. *See* Micron Tech., Inc. v. Rambus Inc, 645 F.3d 1311, 1326 (Fed. Cir. 2011) ("The fundamental element of bad faith spoliation is advantage-seeking behavior by the party with superior access to information necessary for the proper administration of justice.").

136. Withers, *supra* note 17, at 538.

137. *Id.*; *see also* Timothy J. Chorvat, *E-Discovery and Electronic Evidence in the Courtroom*: *A Primer for Business Lawyers*, BUS. L. TODAY (Sept.–Oct. 2007), *available at* http://apps.americanbar.org/buslaw/blt/2007-09-10/chorvat.shtml ("How can a business lawyer ensure that his or her client will not be found to have committed spoliation? The easy answer [is to] keep everything . . . .").

138. *See* Michael Passingham, *V3 Storage Summit: Falling Storage Costs Bring Big Data Analytics Closer to SMBs*, V3.CO.UK (Jan. 29, 2014), http://www.v3.co.uk/v3-uk/analysis/2325501/v3-storage-summit-falling-storage-costs-bring-big-data-analytics-closer-to-smbs ("When it comes to the cloud, huge arrays of hard disk drives available for increasingly low prices make the storage of large amounts of data fairly easy and affordable.").

139. Jason Conti, *Privacy and Security Concerns in E-Discovery*, *in* ETHICS AND E-DISCOVERY: LEADING LAWYERS ON NAVIGATING RULES AND REGULATIONS AND EFFECTIVELY HANDLING PRIVACY ISSUES IN THE E-DISCOVERY PROCESS (2012), *available at* 2012 WL 3058128.

140. *Id.*

141. *See Megabytes, Gigabytes, Terabytes…What Are They?*, *supra* note 80.

142. *See Cloud Storage Pricing*, CLOUDLEVERAGE.COM, http://cloudleverage.com/cloud-storage/pricing/ (last visited Mar. 8, 2015).

143. Withers, *supra* note 17, at 544–45.

144. *Id.*

145. *Id.* at 543; *see also* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d. Cir. 2002) ("[T]he culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or *negligently*." (internal quotation marks omitted)); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) (noting

disagree on the minimum culpability needed for sanctions.[146] Some courts have held that negligent conduct will satisfy culpability requirements for spoliation.[147] Other courts have held that only "bad faith" will suffice.[148] One court has even adopted an intermediate standard by requiring a culpability "greater than negligence but less than bad faith."[149] As such, this patchwork quilt of caselaw is of little help to litigants. One commentator specifically critiques these decisions as "invariably post-hoc judgments," which make it "next to impossible to obtain an advisory opinion from a court" on how to best preserve ESI.[150] The "easy" answer for parties, therefore, is to simply "keep everything" just in case it proves to be relevant later on.[151]

Yet "keeping everything" only adds to the costs of e-discovery.[152] Many parties are "keeping everything" due to the sharp decline in the cost of data storage, which has allowed businesses to store terabytes of data affordably.[153] The low cost of storage, however, is momentously offset by the cost of handling this massive amount of data in the event of litigation.[154] The median cost for data handling in response to discovery has been estimated to be $940 per gigabyte for collection, $2931 per gigabyte for processing, and $13,636 per gigabyte for review.[155] Based upon this data, one study found that "one-third of a terabyte of email being preserved costs $313,853 to collect and will cost $976,902.20 to process and $4,544,878.80 to review for production."[156] Perhaps adding insult to injury, "little of what is preserved is ever called for in litigation."[157]

Consequently, parties, are thrust into a dilemma: how are they to avoid sanctions yet furnish relevant ESI in the event of litigation? On the one hand, the discovery of ESI is important to litigation; yet, on the other, parties to a lawsuit must not be forced to expend excessive amounts

that "[o]nce the duty to preserve attaches, any destruction of documents is, at a minimum, negligent," which satisfies the *mens rea* requirement of the spoliation test).

146. Withers, *supra* note 17, at 554.

147. *Id.*; *see infra* Part III.B.1.b.

148. *See infra* Part III.B.1.b.

149. Withers, *supra* note 17, at 557 (citing Buckley v. Mukasey, 538 F.3d 306, 323 (4th Cir. 2008)).

150. *Id.* at 543.

151. *See* Chorvat, *supra* note 137.

152. Withers, *supra* note 17, at 538.

153. *Id.* at 540; *see* John M. Facciola, *Foreword to The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 FED. CTS. L. REV. 1, 3 (2013), *available at* http://www.fclr.org/fclr/articles/html/2010/grossman.pdf ("A one-terabyte drive can be purchased for about $100 and can hold what would otherwise be hundreds of thousands of pages of paper.") (internal citation omitted).

154. Withers, *supra* note 17, at 540.

155. *Id.* (citing NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 28 (2012), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf).

156. *Id.*

157. *Id.* at 546.

of resources on retention. It is with this dilemma in mind that the Advisory Committee began working on Rule 37(e).[158]

III. THE FIRST RULE 37(E): THE 2006 "SAFE HARBOR RULE"

The Civil Rules Advisory Committee of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States attempted to harmonize these competing interests with their adoption of Rule 37(e).[159] This Part first examines the formulation of the 2006 Rule 37(e). It then outlines problems associated with the 2006 Rule 37(e), including a lack of a coherent culpability requirement and its limited usage by courts.

A. The Formulation of the 2006 Rule 37(e)

In 2006, the Federal Rules of Civil Procedure were amended to include Rule 37(e)[160] in an attempt to lessen the anxiety surrounding ESI and e-discovery.[161] Under Rule 37(e), "[a]bsent exceptional circumstances, a court may not impose sanctions under [the Federal Rules of Civil Procedure] on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."[162] As such, the Advisory Committee hoped Rule 37(e) would create a "safe harbor" for parties that have inadvertently destroyed documents requested in pending litigation by forbidding courts from imposing sanctions.[163] This is well demonstrated by the Advisory Committee's further statement that Rule 37(e) was meant to "provide[] limited protection against sanctions for a party's inability to provide electronically stored information in discovery when that information has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith."[164] Importantly, though, Rule 37(e) was "not intended to provide a shield for parties that inten-

158. *See* Philip J. Favro, *Sea Change or Status Quo: Has the Rule 37(e) Safe Harbor Advanced Best Practices for Records Management?*, 11 MINN. J.L. SCI. & TECH. 317, 325 (2010) ("The answer was a *limited* Safe Harbor.").

159. *Id.*

160. FED. R. CIV. P. 37(e). Initially, Rule 37(e) was codified as Rule 37(f). In 2007, Rule 37(f) was renumbered Rule 37(e). No changes were made to the wording of the rule. FED. JUDICIAL CTR., ESSENTIAL FEDERAL E-DISCOVERY RULES WITH SELECTED ADVISORY COMMITTEE NOTES 33 (2010), *available at* http://www.ned.uscourts.gov/internetDocs/cle/2011-01/eDiscovery%20Rules%20Package.pdf.

161. Burns et al., *supra* note 72, at 201–02.

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

163. 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 of the Judicial Conference of the U.S. 73 (July 25, 2005) [hereinafter Advisory Committee Memo 2005], *available at* http://web.archive.org/web/20051227125129/http://www.uscourts.gov/rules/supct1105/Excerpt_CV_Report.pdf; *see also* Gal Davidovitch, Comment, *Why Rule 37(e) Does Not Create a New Safe Harbor for Electronic Evidence Spoliation*, 38 SETON HALL L. REV. 1131, 1131 (2008); Nicole D. Wright, Note, *Federal Rule of Civil Procedure 37(e): Spoiling the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 793 (2009).

164. Advisory Committee Memo 2005, *supra* note 163, at 73.

tionally destroy information because of its relationship to litigation."[165] While the intent of Rule 37(e) may be clear, the Rule has had only limited efficacy in practice.[166]

B. Problems with the 2006 Rule 37(e)

A litany of problems has limited the effectiveness of the 2006 Rule 37(e). For one, the Rule's "good faith" standard is ambiguous.[167] Additionally, the 2006 Rule 37(e) is frequently ignored or not applied by courts.[168] The following subsection analyzes these problems individually.

1. Rule 37(e)'s "Good Faith" Standard Is Ambiguous

Under the 2006 Rule 37(e), only those who act in "good faith" are exempt from sanctions.[169] Perplexingly, though, Rule 37(e) offers no guidance as to what "good faith" means.[170] This is of little help to courts, who must undertake an inquiry of the spoliator's culpability.[171] The good faith standard is further obscured by (1) its confusing promulgation history and (2) judicial treatment of the good faith standard. Consequently, confusion exists among courts and litigants alike as to when parties are acting in accordance with Rule 37(e)'s conception of "good faith."[172] The following Subsections analyze each consideration in turn.

165. *Id.* at 74.

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

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

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

169. *See* FED. R. CIV. P. 37(e) ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.").

170. *Id.*

171. Alexander B. Hastings, Note, *A Solution to the Spoliation Chaos: Rule 37(e)'s Unfulfilled Potential to Bring Uniformity to Electronic Spoliation Disputes*, 79 GEO. WASH. L. REV. 860, 874 (2011) ("[C]ourts must establish the required level of mens rea that will allow a party to claim that it lost information in the 'routine, good-faith operation' of its computer systems."); *see, e.g.*, Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 615–16 (S.D. Texas, 2010) ("It is well established that a party seeking the sanction of an adverse inference instruction based on spoliation of evidence must establish that: (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) *the evidence was destroyed with a culpable state of mind*; and (3) the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." (emphasis added) (citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003))).

172. *Compare* Doe v. Norwalk Comty. Coll., 248 F.R.D. 372, 378 (D. Conn. 2007) (adopting a strict liability standard by noting that "in order to take advantage of the good faith exception, a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business"), *with* Escobar v. City of Houston, No. 04-1945, 2007 WL 2900581, at *19 (S.D. Tex. Sept. 29, 2007) (holding that spoliation sanctions were not warranted in the absence of bad faith).

a. Rule 37(e)'s Promulgation History Obfuscates the "Good Faith" Standard

The promulgation history of Rule 37(e) is of no help to courts and litigants in figuring out what "good faith" standard means.[173] This is in part because the prior drafts of Rule 37(e)'s culpability requirements are inconsistent.[174] The first draft of Rule 37(e) held that a spoliating party could only avoid sanctions if it "took reasonable steps to preserve the information after it *knew or should have known* the information was discoverable in the action."[175] This formulation, therefore, was essentially a negligence test.[176] Yet, this negligence standard was attacked by critics as "afford[ing] no protection from sanctions than that already developed by case law."[177] Furthermore, it was argued, *any* mistake in interrupting the routine operation of a computer system might be found unreasonable, thus precluding the application of the rule and allowing sanctions.[178]

Meanwhile, the Advisory Committee contemplated another culpability standard. The Advisory Committee added a footnote to the draft of Rule 37(e), which stated that it was "continuing to examine the degree of culpability that will preclude eligibility for a safe harbor."[179] The Advisory Committee then provided an alternative formulation of Rule 37(e) that only exempted those who did not "*intentionally* or *recklessly* fail[] to preserve the information."[180] This standard was criticized for being too lenient, as "sanctions might not issue for genuinely nefarious conduct."[181] In addition, there were concerns that it would be too difficult to prove "that a litigant acted intentionally or recklessly in permitting the regular operation of an information system to continue."[182]

Yet, the final version of Rule 37(e), looks nothing like these two formulations—it offers the "good faith" standard instead.[183] Despite this change to a so-called "intermediate" standard, it is heavily implied that the Advisory Committee intended the substance of the "good faith" standard to be that of the alternate version: those acting intentionally or

173. *See* Andrew Hebl, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. ILL. U. L. REV. 79, 96–99 (2008).

174. *See id.* at 94.

175. 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 of the Judicial Conference of the U.S. 32 (Aug. 3, 2004) [hereinafter Advisory Committee Memo 2004], *available at* http://web.archive.org/web/20050120205011/http://www.uscourts.gov/rules/comment2005/CVAug04.pdf (emphasis added).

176. Advisory Committee Memo 2005, *supra* note 163, at 74.

177. Favro, *supra* note 158, at 329; Advisory Committee Memo 2005, *supra* note 163, at 74 ("A number of comments urged that the text version—precluding any protection under the rule even for negligent loss of information—provided no meaningful protection . . . .").

178. Favro, *supra* note 158, at 329.

179. Advisory Committee Memo 2004, *supra* note 175, at 32 n.**.

180. *Id.*

181. Favro, *supra* note 158, at 329; Advisory Committee Memo 2005, *supra* note 163, at 74.

182. Advisory Committee Memo 2005, *supra* note 163, at 74.

183. Hebl, *supra* note 173, at 94.

recklessly may not invoke the protections of Rule 37(e).[184] This is evident in two ways. First, the Advisory Committee obviously did not retain the negligence standard found in the first draft, and thus the "good faith" standard was not meant to punish those who act negligently in spoliating ESI.[185] Second, the prevailing definition of "good faith" is not consistent with the notion that negligent conduct was not intended to be sanctionable.[186] "Good faith" is generally understood to be the absence of "bad faith," which is well-settled to mean "intentional or reckless conduct."[187] Given that the Advisory Committee was surely aware of this definition but adopted it anyway, the "good faith" standard could be reasonably read to authorize sanctions only in instances of intentional or reckless spoliation.[188]

The Advisory Committee, however, further obscured its intentions by purporting to have embraced "a culpability standard intermediate *between* the two published versions."[189] By omitting a clear definition and including such conflicting evidence regarding its intentions for Rule 37(e)'s "good faith" standard, the Advisory Committee has left it to the courts to generate their own definitions for what "good faith" means.[190]

b. Judicial Disagreement on the 2006 Rule 37(e)'s "Good Faith" Requirement

To date, courts stridently disagree as to what Rule 37(e)'s "good faith" standard means.[191] Some courts have held that those who do not act intentionally or recklessly may take shelter under the Rule 37(e) Safe Harbor.[192] The Third Circuit, for instance, has explicitly held that that mere negligence is insufficient to warrant spoliation sanctions.[193] Instead, sanctions for spoliation of ESI require evidence of bad faith.[194] In *Bensel*

184. *See id.* at 96–99.

185. *Id.* at 96.

186. *Id.* at 96–97, n.73.

187. *Id.*

188. *Id.* at 98-99.

189. Advisory Committee Memo 2005, *supra* note 163, at 74–75 (emphasis added); *see also id.* at 78 (noting that the final version of Rule 37(e) "establishes an intermediate standard, protecting against sanctions if the information was lost in the 'good faith' operation of an electronic information system").

190. *See infra* Part III.B.1.b.

191. *Compare* Arista Records LLC v. Usenet.com, Inc., 608 F. Supp. 2d 409, 431 n.31 (S.D.N.Y. 2009) (citing FED R. CIV. P. 37(e) advisory committee's note) (noting that Rule 37(e) does not limit a court from imposing sanctions once the duty to preserve attaches), *with* Escobar v. City of Houston, No. CV-04-1945, 2007 WL 2900581, at *18 (S.D. Tex. Sept. 29, 2007) (holding that sanctions are inappropriate without evidence of bad faith).

192. *See* Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 SEDONA CONF. J. 217, 227 (2010) [hereinafter Allman, *Preservation Rulemaking*]; *see also* Hastings, *supra* note 171, at 872, n.90.

193. *See* Bensel v. Allied Pilots Ass'n, 263 F.R.D. 150, 153 (D.N.J. 2009) (quoting Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 334 (3rd Cir. 1995)).

194. Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 615 (S.D. Tex. 2010) ("In the Fifth Circuit and others, negligent as opposed to intentional, 'bad faith' destruction of evidence is not sufficient to give an adverse inference instruction . . . .").

v. Allied Pilots Association, for example, the court did not find evidence of bad faith and consequently declined to impose a spoliation inference or to "impose any other sanction."[195] The Fifth Circuit likewise held that negligent destruction of evidence is insufficient to warrant intermediate sanctions, such as adverse inference instructions.[196] The Seventh, Eighth, and Eleventh Circuits follow similar approaches and require a showing of "bad faith" to trigger sanctions.[197]

Other courts, however, hold that mere negligent conduct is sufficient to warrant even the most serious sanctions.[198] Illustratively, the Second Circuit in *Residential Funding Corp. v. DeGeorge Financial Corp.* held that the culpability requirement is satisfied by a showing that the evidence was destroyed "knowingly, even if without intent to [breach a duty to preserve it], or *negligently*."[199] Even though *Residential Funding* predated Rule 37(e), the Second Circuit has clung tightly to it and chosen to ignore Rule 37(e).[200] This has been true even in light of the current amendment proceedings. In *Sekisui American Corp. v. Hart*, for example, the court noted that Proposed Rule 37(e) "would abrogate *Residential Funding* insofar as it holds that sanctions may be appropriate in instances where evidence is negligently destroyed."[201] But because the Proposed Rule has not yet been adopted, the court bluntly concluded that it remains "irrelevant."[202] As such, the Second Circuit's rule allows for sanctions in cases of negligent spoliation.[203] The Fourth, Sixth, Ninth, and D.C. Circuits have followed the Second Circuit and have similarly held that mere negligence is sufficient to support spoliation sanctions.[204] To add to the chaos, a subset of these circuits have required that harsh sanctions correspond to higher culpability standards.[205] The Sixth Circuit, for instance, has held that "the choice of an appropriate sanction should be linked to the degree of culpability, with more severe sanctions reserved

195. *Bensel*, 263 F.R.D. at 153.

196. *Rimkus*, 688 F. Supp. 2d at 615.

197. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 548–49, 552 (D. Md. 2010). This is particularly true for intermediate sanctions, such as adverse jury instructions. *See id.* at 535 (quoting *Rimkus*, 688 F. Supp. 2d at 614).

198. Allman, *Preservation Rulemaking*, *supra* note 192, at 227; *see also Rimkus*, 688 F. Supp. 2d at 615 (noting that the Second Circuit's caselaw "has been read to allow severe sanctions for negligent destruction of evidence").

199. 306 F.3d 99, 108 (2d Cir. 2002) (quoting Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 109 (2d Cir. 2001)) (internal quotation marks omitted).

200. Sekisui Am. Corp. v. Hart, 945 F. Supp. 2d 494, 503 (S.D.N.Y. 2013) ("The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.") (quoting *Residential Funding*, 306 F.3d at 108).

201. *Id.* at 503 n.51.

202. *Id.*

203. *See Residential Funding*, 306 F.3d at 108.

204. Thomas Y. Allman, Public Comment to the Civil Rules Advisory Committee Concerning Proposed Rule 37(e)(2013) 5 (Oct. 24, 2013) [hereinafter Allman, *Public Comment*] (unpublished public comment), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0308; *see also* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 545, 547, 550, 553 (D. Md. 2010).

205. Allman, *Public Comment*, *supra* note 204, at 5, n.30.

for the knowing or intentional destruction of material evidence."[206] Thus, courts will accept varying degrees of negligence as sufficient culpability to sanction parties for spoliation of ESI.

Even further, a minority of courts have even adopted a strict liability standard.[207] These courts ground their approach in a Committee Note to Rule 37(e),[208] which they interpret as imposing "a mandatory duty to take specific action" as soon as the duty to preserve attaches.[209] After this duty attaches, *any* loss of ESI is sanctionable.[210] In *Oxford House, Inc. v. City of Topeka*, for instance, the court noted that "[s]poliation of evidence only occurs when a party has an obligation to preserve evidence in the face of pending litigation and fails to do so."[211] Importantly, the court's analysis only revolved around when the duty to preserve attached—it did not even mention Rule 37(e).[212] In effect, this standard essentially imposes a strict liability standard.[213] Therefore, on top of the two culpability standards explicitly contemplated by the Advisory Committee, litigants must also deal with the possibility that a court will employ a strict liability standard.[214] The cumulative effect is that the 2006 Rule 37(e)'s Safe Harbor provision offers little guidance to courts and litigants, thereby resulting in low predictability.

2. The 2006 Rule 37(e) Is Not Used by Courts

Another problem with the 2006 Rule 37(e) is that courts simply do not use it.[215] In *Nucor Corporation v. Bell*, for example, the court issued an adverse jury instruction against the defendant for spoliating evidence by continuing to use a laptop that contained relevant data.[216] The court noted that event logs, system restore points, and items in unallocated space were lost as a result of the continued use.[217] This data, however, was automatically modified or destroyed every time: (1) the computer

206. Stocker v. United States, 705 F.3d 225, 236 (6th Cir. 2013) (citing Beaven v. U.S. Dep't of Justice, 622 F.3d 540, 553–54 (6th Cir. 2010)).

207. Thomas Y. Allman, *Conducting E-Discovery After the Amendments: The Second Wave*, 10 SEDONA CONF. J. 215, 220 (2009) [hereinafter Allman, *Conducting E-Discovery*].

208. FED. R. CIV. P. 37 advisory committee's note (2006) ("When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'").

209. Allman, *Preservation Rulemaking*, *supra* note 192, at 227–28.

210. Allman, *Conducting E-Discovery*, *supra* note 207, at 220.

211. No. 06–4004–RDR, 2007 WL 1246200, at *3 (D. Kan. Apr. 27, 2007) (citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y.2003)).

212. Hebl, *supra* note 173, at 106.

213. *Id.* at 105.

214. *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, 41 (2006) (noting that the seminal e-discovery case of *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) "approach[es] the 'strict liability' standard foreshadowed by Professor Redish"); *see also* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 623 (2001).

215. *See* Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 824 (2010).

216. 251 F.R.D. 191, 196–99 (D.S.C. 2008).

217. *Id.* at 198.

was turned on or shut down; (2) a program was installed or de-installed; (3) a user ran a program; or (4) "virtually any time anything happen[ed]" on the computer.[218] The defendant argued that it did not intend to destroy this evidence, it merely happened as a consequence of ordinary operation.[219] As part of its argument, the defendant asserted that the 2006 Rule 37(e) prevented the court from imposing any sanction for loss of data on the laptop.[220] The court swiftly dismissed this argument by relegating it to a footnote and noting that Rule 37(e) was "not applicable when the court sanctions a party pursuant to its inherent powers."[221]

Nucor's treatment of Rule 37(e) is not atypical. From Rule 37(e)'s promulgation on December 1, 2006, until January 1, 2010, one study found that only thirty federal court decisions had cited Rule 37(e).[222] Of these thirty cases, "at most, only seven and one-half cases . . . invoked Rule 37(e) to protect a party from sanctions."[223] In two of those cases, the court mentioned Rule 37(e) and denied sanctions, but "it is unclear whether the court relied on the rule in making its decision."[224]

There are other indicia that courts are neglecting Rule 37(e). One court, for instance, advised the parties that they should be "very cautious" in relying upon the rule.[225] Other courts have also been unwilling to extend the 2006 Rule 37(e) to other circumstances.[226] In *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*, for instance, the court limited Rule 37(e) only to situations where the parties actively sought sanctions.[227] The court in *Stanfill v. Talton* echoed the same sentiment by holding that Rule 37(e) was not implicated where the plaintiff had not moved for sanctions under Rule 37.[228]

Most importantly, some courts have also held that Rule 37(e) cannot bar sanctions awarded under the court's inherent power.[229] The court in *Nucor*, for example, explicitly held that Rule 37(e) did not apply when the court sanctions a party using inherent powers.[230] The *Stanfill* court similarly dismissed a Rule 37(e) argument by noting that it would only rely on its "inherent power" to "impose spoliation sanctions against liti-

218. *Id.*

219. *But see* Leon v. IDX Sys. Corp., 464 F.3d 951, 956 (9th Cir. 2006) (stating that plaintiff was sanctioned for intentionally "wr[iting] a program to 'wipe' any deleted files from the unallocated space in the hard drive" after the duty to preserve attached).

220. *Nucor*, 251 F.R.D. at 196 n.3.

221. *Id.*

222. Willoughby, Jr. et al., *supra* note 215, at 825.

223. *Id.* at 825–26 ("The half case is a decision in which the court held that Rule 37(e)'s safe harbor would protect a party from potential sanctions for some conduct prior to notice of litigation, but that it would not protect the party from potential sanctions for other conduct after notice.").

224. *Id.* at 825–26.

225. Oklahoma *ex rel.* Edmondson, No. 05-CV-329-GKF-SAJ, 2007 WL 1498973, at *6 (N.D. Okla. May 17, 2007).

226. Willoughby, Jr. et al., *supra* note 215, at 827, n.169.

227. 242 F.R.D. 139, 146 (D.D.C. 2007) ("Rule 37(e) is inapplicable to this instance because Plaintiffs are not seeking sanctions . . . .").

228. 851 F. Supp. 2d 1346, 1363 n.12 (M.D. Ga 2012).

229. Willoughby, Jr. et al., *supra* note 215, at 827, n.168.

230. Nucor Corp. v. Bell, 251 F.R.D. 191, 196 n.3 (D.S.C. 2008).

gants."[231] More recently, in *E.E.O.C. v. JP Morgan Chase Bank, N.A.*, the court discussed Rule 37(e), but then noted "[t]he conduct involved here is sanctionable *even without resort to the federal rules* or to state law claims for relief."[232]

Accordingly, because its good faith requirement is ambiguous and its use is limited, Rule 37(e) provides only minimal protection from sanctions under very narrow circumstances.[233] In doing so, it offers no guidance and cuases parties to adopt expensive "keep everything" data retention policies.[234] As a result, Rule 37(e) has failed to decrease e-discovery costs.

IV. THE PROPOSED RULE 37(E) IS INADEQUATE

In formulating Proposed Rule 37(e), the Advisory Committee sought to ameliorate the problems that have plagued the 2006 Rule 37(e).[235] This attempt, however, will be inadequate. This Part traces the construction of Proposed Rule 37(e) and then summarizes the text of the new Rule. This Part goes on to analyze the anticipated effects of Proposed Rule 37(e) and conclude that these ambitions will not lower e-discovery costs.

A. The Genesis of the Proposed Rule 37(e)

The Civil Rules Advisory Committee began working on Proposed Rule 37(e) in May 2010.[236] The Advisory Committee began by noting that the "amount and variety of digital information has expanded enormously in the last decade, and the costs and burdens of litigations holds have escalated as well."[237] Despite the 2006 Rule 37(e), the Advisory Committee had been "repeatedly informed of growing concern about the increasing burden of preserving information for litigation, particularly with regard to [ESI]."[238] The Advisory Committee then stated that there had been significant divergences among federal courts nationwide, thus hindering the ability for potential parties to determine what preservation standards they would have to satisfy to avoid sanctions.[239] As such, the Advisory Committee redrafted Rule 37(e) and recommended that the Standing Committee approve the proposed draft for publication in August 2013.[240] After some revision, a revised draft was presented to the Standing

231. 851 F. Supp. 2d at 1362–63 & n.12.
232. 295 F.R.D. 166, 174 (S.D. Ohio 2013) (emphasis added).
233. Willoughby, Jr. et al., *supra* note 215, at 828.
234. Davidovitch, *supra* note 163, at 1141.
235. PROPOSED RULE 37(E), *supra* note 19, at 274.
236. *Id.* at 270.
237. *Id.* at 271.
238. *Id.* at 317.
239. *Id.* at 318.
240. *Id.* at 270.

Committee in June 2013, where it was approved for publication and public comment.[241]

B. The Text of Proposed Rule 37(e)

Proposed Rule 37(e) is titled "Failure to Preserve Discoverable Information."[242] Its first subsection regards "curative measures" and "sanctions."[243] Under this subsection:

> If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may: (A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and (B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions: (i) caused substantial prejudice in the litigation and were willful or in bad faith; or (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.[244]

Proposed Rule 37(e) also prescribes a number of factors to be considered in assessing a party's conduct in its second subsection. Under this subsection, courts "should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith."[245] Among these factors are:

> (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable; (B) the reasonableness of the party's efforts to preserve the information; (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation; (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.[246]

C. The Anticipated Effects of Proposed Rule 37(e)

The Advisory Committee's ultimate ambition is to remedy the problems associated with the 2006 Rule 37(e)[247] and institute "a uniform

241. *Id.*
242. *Id.* at 314.
243. *Id.*
244. *Id.* at 314–15.
245. *Id.* at 316.
246. *Id.* at 316–17.
247. *See supra* Part III.B.

set of guidelines for federal courts."[248] By broadening its scope beyond the "routine, good-faith operation of an electronic computer system" language found in its predecessor,[249] Proposed Rule 37(e) attempts to protect parties that make reasonable efforts to satisfy their preservation duties from serious sanctions.[250] To this end, the Advisory Committee designed Proposed Rule 37(e) to: (1) discourage the use of sanctions; (2) promote the alternative use of curative measures; and (3) provide a basis of authority beyond the court's inherent power.[251] The following subsections analyze each consideration in turn, and conclude that each is inadequate to lower e-discovery costs.

1. Discourage Sanctions

Proposed Rule 37(e) clearly disfavors the use of sanctions to remedy spoliation of discoverable information.[252] Indeed, Proposed Rule 37(e) places three very high requirements on the use of sanctions. First, the Proposed Rule makes it clear that sanctions are not warranted "in all but very exceptional cases in which failure to preserve 'irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.'"[253] In fact, the Proposed Rule 37(e) requires a showing of "substantial prejudice in the litigation."[254] Second, the Proposed Rule 37(e) only allows sanctions if the court finds that the failure to preserve was "willful or in bad faith."[255] Thus, the party moving for sanctions must carry the burden of proof in establishing intentional or reckless misconduct.[256] Consequently, Proposed Rule 37(e) rejects strict liability and negligence as sufficient culpability standards to support sanctions.[257] Third, Proposed Rule 37(e) prefers courts to use "curative measures" instead of sanctions.[258]

Proponents of Proposed Rule 37(e) argue that it may help to ease the concerns associated with sanctions.[259] By promoting curative measures, the Proposed Rule may "reduce any prejudice sufficiently to preclude sanctions."[260] Accordingly, proponents argue, the number of

248. PROPOSED RULE 37(E), *supra* note 19, at 318.
249. FED. R. CIV. P. 37(e).
250. PROPOSED RULE 37(E), *supra* note 19, at 318.
251. *Id.* at 272.
252. *Id.* at 318–19.
253. *Id.* at 319.
254. *Id.* at 322.
255. *Id.*
256. *Cf. supra* Part III.B.2.a.
257. PROPOSED RULE 37(E), *supra* note 19, at 272; *see also* supra notes 73, 93–94.
258. *Id.*
259. *See* H. Christopher Boehning & Daniel J. Toal, *Proposed Rule 37(e): A Step in the Right Direction?*, 249 N.Y. L.J. June 4, 2013, http://www.paulweiss.com/media/1666131/nylj_4jun13.pdf ("The revised Rule will, however, moderate—if not eliminate—many of the concerns of litigants that lead to chronic over-preservation.").
260. PROPOSED RULE 37(E), *supra* note 19, at 273.

sanctions would be decreased and e-discovery costs will be lowered.[261] Further, in the event that a party does spoliate evidence in good faith, the penalty would be prescribed by the Proposed Rule, which promotes uniformity.[262]

Despite Proposed Rule 37(e)'s good intentions, there are many disadvantages to discouraging sanctions.[263] First, a recent study by the Federal Judicial Center found that, even though their sheer numbers have increased, motions for sanctions based on spoliation of evidence are *very* uncommon.[264] The study observes that "motions for discovery sanctions, not limited to spoliation motions, were filed in only 3.2% of cases."[265] Strikingly, motions for spoliation sanctions only account for approximately *five percent* of that number.[266] According to the study, a motion alleging spoliation was found in only "0.15% of cases filed in 2007–2008 in the study districts."[267] Moreover, of this one-fifteenth of one percent, sanctions are only granted "23% of the time and denied 44% of the time."[268] Therefore, as one commentator notes, "you have a better chance of getting struck by lightning than getting sanctioned for failure to preserve."[269] As such, Proposed Rule 37(e)'s attempt to discourage sanctions will only have a very minimal effect, if any.

Second, Proposed Rule 37(e)'s insistence upon discouraging sanctions is undesirable, because only those who have engaged in "clearly egregious" behavior are being sanctioned.[270] As of 2010, only thirty-six sanctions of dismissal or default judgment have been imposed for spoliation ESI *in history*.[271] In sixteen of these cases, a party or lawyer (or both)

261. *See* Charles S. Fax, *Less Is More: Proposed Rule 37(e) Strikes the Right Balance*, ABA, http://apps.americanbar.org/litigation/litigationnews/civil_procedure/073114-federal-rules-balance.html (last visited Mar. 13, 2015) ("A court can sanction a wrongdoer, but in most cases in which there is no proof of intent, the focus can is on solving the problem . . . .").

262. *See* Raymond M. Ripple & Krystle Guillory Tadesse, *Proposed Amendment to FRCP Rule 37 Addresses Sanctions for Failure to Preserve ESI*, INSIDE COUNSEL (May 21, 2014), http://www.insidecounsel.com/2014/05/21/proposed-amendment-to-frcp-rule-37-addresses-sanct ("The proposed revisions, with a national uniform standard for spoliation, also will provide greater predictability when addressing the loss of ESI.").

263. *See* Sekisui Am. Corp. v. Hart, 945 F. Supp. 2d 494, 503 n.51 (S.D.N.Y. 2013) (noting that Proposed Rule 37(e) makes it more difficult to impose sanctions for the spoliation of ESI).

264. *See* EMERY G. LEE III, FED. JUDICIAL CTR., MOTIONS FOR SANCTIONS BASED UPON SPOLIATION OF EVIDENCE IN CIVIL CASES: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 4 (2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Empirical_Data/Federal%20Judicial%20Center.pdf ("I am not aware of any study that indicates that such motions are relatively common."); *see also* Laura A. Adams, Comment, *Reconsidering Spoliation Doctrine Through the Lens of Tort Law*, 85 TEMP. L. REV. 137, 154 (2012).

265. LEE, *supra* note 264, at 4 (citing INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 46 (2009), *available at* http://iaals.du.edu/images/wygwam/documents/publications/PACER_FINAL_1-21-09.pdf).

266. *Id.*

267. *Id.*

268. *Id.* at 8.

269. Costs and Burdens Hearing, *supra* note 80, at 136 (statement of William P. Butterfield, Partner, Hausfeld LLP).

270. *Id.* at 331.

271. Willoughby, Jr. et al., *supra* note 215, at 805–06.

made misrepresentations to the court.[272] Twenty of the thirty-six cases concerned "serious, inalterable, severe, substantial, unfair, or significant" prejudice to the opposing party caused by the failure to preserve ESI.[273] Further, in nineteen of these thirty-six cases, the court "emphasized a pattern of misconduct."[274] Additionally, adverse jury instructions have been granted in fifty-two e-discovery cases.[275] Of these fifty-two cases, thirty-four have involved "intentional conduct, bad faith, or both."[276] Finally, as of 2010, monetary awards had been identified in only seventy-seven e-discovery cases *ever*.[277] Of these seventy-seven cases, only twenty-eight awarded judgments in excess of $100,000.[278]

Clearly, only truly egregious activity is being sanctioned. Therefore, the Proposed Rule 37(e) will not have a serious effect on the prevalence of sanctions.[279] The Proposed Rule allows sanctions upon a showing of bad faith, just as its predecessor did.[280] Accordingly, the parties that are currently being sanctioned would likely be sanctioned under Proposed Rule 37(e) as well. Additionally, the threat of sanctions is so minimal that it should not present a real threat to innocent parties.[281]

2. Promote the Alternative Use of Curative Measures

Proposed Rule 37(e) promotes the alternative use of curative measures over the use of sanctions.[282] Subsection (e)(1)(A) displays this by "authoriz[ing] a variety of measures to reduce or cure the consequences of loss of information."[283] These measures include permitting additional discovery, ordering curative measures, and ordering the party to pay the reasonable expenses (including attorney's fees) caused by the failure.[284] These curative measures are especially preferred when they can

272. *Id.*
273. *Id.* (internal quotation marks omitted).
274. *Id.* at 807.
275. *Id.* at 812.
276. *Id.* at 813.
277. *See* Millberg LLP & Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules . . .*, 4 FED. CTS. L. REV., 1, 51, (2011) [hereinafter Millberg & Hausfeld], *available at* http://www.fclr.org/fclr/articles/html/2010/Milberg-Hausfeld.pdf (citing Willoughby, Jr. et al., *supra* note 215, at 814–15).
278. *Id.*
279. *See* Costs and Burdens Hearing, *supra* note 80, at 136 (statement of William P. Butterfield, Partner, Hausfeld LLP).
280. *See* PROPOSED RULE 37(E), *supra* note 19, at 314–15 ("If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may: . . . (B) *impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions:* (i) *caused substantial prejudice in the litigation and were willful or in bad faith*; or (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.") (emphasis added).
281. Millberg & Hausfeld, *supra* note 277, at 51.
282. PROPOSED RULE 37)(E), *supra* note 19, at 272 ("Another central focus of the proposed amendment is to encourage use of curative measures.").
283. *Id.*
284. *Id.* at 314–15.

"substantially undo the litigation harm resulting from the failure to preserve."[285]

One attractive feature of promoting curative measures is that they appear to protect parties from spoliation sanctions.[286] Indeed, Proposed Rule 37(e) would require courts to be satisfied that: (1) sanctions are appropriate, *and* (2) curative measures will not undo the harm caused by the spoliation.[287] By imposing a high burden on sanctions, the hope is that the number of sanctions will decrease and thereby lessen e-discovery costs.[288] Prescribing curative measures over sanctions would also provide the added benefit of avoiding the stigma of being sanctioned.[289]

Proposed Rule 37(e)'s curative measure scheme, however, will not be effective. The curative measure/sanction dichotomy is illusory—curative measures are sanctions in disguise.[290] In fact, these curative measures are not new at all; courts already issue sanctions in the form of "supplemental discovery and additional access to computer systems."[291] Thus, it is clear that the only difference under Proposed Rule 37(e) is in the form, not the substance, of sanctions. Therefore, this effort to rebrand sanctions will not be an improvement over the 2006 Rule 37(e) because it does not alleviate the fear of being sanctioned.

Because curative measures are merely sanctions in disguise, Proposed Rule 37(e)'s insistence on curative measures may actually prove counterproductive.[292] Even though the Advisory Committee asserted that promoting curative measures will reduce sanctions,[293] the opposite is true: the amount of sanctions will *increase* because "curative measures" are sanctions in substance.[294] This is compounded with the fact that Proposed Rule 37(e) lifts the 2006 Rule 37(e)'s categorical ban on sanctioning a party for failing to provide ESI in good faith.[295] Abandoning this prohibition also promotes liberal use of curative measures—the wolf in sheep's clothing—and thereby increases sanctions.[296] Proposed Rule 37(e)'s may therefore undermine the ultimate ambitions of the Advisory Committee.

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285. *Id.* at 272.

286. *Id.* at 273 ("If the loss occurs even though the party took reasonable steps to preserve information, due perhaps to a natural disaster or malicious action of a third person, curative measures may be warranted but sanctions are not.").

287. PROPOSED RULE 37(E), *supra* note 19, at 314–15.

288. *See supra* Part IV.C.1.

289. *See* Costs and Burdens Hearing, *supra* note 80, at 136 (statement of William P. Butterfield, Partner, Hausfeld LLP) ("Companies say that they're worried about their reputation when they get sanctioned.").

290. *See* Allman, *Public Comment*, *supra* note 204, at 8 ("The distinction suggested in Subsection (1) between 'sanctions' and 'curative measures' is quite murky . . . .").

291. Willoughby, Jr. et al., *supra* note 215, at 803–04.

292. *See supra* text accompanying note 289.

293. *See* PROPOSED RULE 37(E), *supra* note 19, at 272.

294. *See* Allman, *Public Comment*, *supra* note 204, at 8; *see also supra* text accompanying notes 239–40.

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

296. *See* PROPOSED RULE 37(E), *supra* note 19, at 272.

3. Provide a Basis of Authority for Imposing Sanctions Beyond the Court's Inherent Power

Another aim of Proposed Rule 37(e) is to "remove any occasion" to rely on the court's inherent power when issuing spoliation sanctions.[297] Currently, courts use a variety of different rules and statutes to sanction parties for e-discovery violations.[298] Beyond these bases of authority, federal courts also have the power to sanction parties based upon their inherent authority as courts.[299] This power has been confirmed by the Supreme Court, which noted that federal courts are "universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."[300] Thus, the power to impose sanctions is not governed "by rule or statute but by the control necessarily vested in the courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[301] Because relying upon inherent authority is intrinsically an ad hoc (and therefore an uncertain) practice, the Advisory Committee drafted Proposed Rule 37(e) to discourage sanctioning a party for spoliation based upon a court's inherent authority.[302] This is evidenced by the Advisory Committee's assertion that "affirmatively provid[ing] authority for sanctions for failure to preserve discoverable information . . . should remove any occasion to rely on inherent power."[303]

Proposed Rule 37(e) will not stop federal courts from resorting to their inherent power to issue sanctions. Conversely, courts will continue to use their inherent power even if Proposed Rule 37(e) prohibits it. Courts routinely avoid these limitations on their ability to sanction and will always manage to sanction parties when appropriate.[304] Indeed, one study "identified *no case* in which a court inclined to impose a sanction was unable to do so."[305] This is further reinforced by the fact that courts do not even have to artfully dodge these restrictions; they can simply ignore them. In practice, courts do not have to be precise in identifying the reasoning upon which their decisions to impose sanctions are based.[306] In

297. *Id.*

298. Willoughby, Jr. et al., *supra* note 215, at 798–99 ("The sanctioning authorities include Rule 26(g) and Rules 37(b), 37(c), and 37(d) [as well as] Section 1927 of 28 U.S.C. . . .").

299. United Med. Supply Co. v. United States, 77 Fed. Cl. 257, 263 (2007) ("In the Federal system, spoliation sanctions spring from two main sources of authority. First, sanctions may be based on the court's inherent power to control the judicial process and litigation, a power that is necessary to redress conduct 'which abuses the judicial process.'" (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 45–46 (1991))); Willoughby, Jr. et al., *supra* note 215, at 798–99.

300. *Chambers*, 501 U.S. at 43 (internal quotation marks omitted).

301. *Id.* (internal quotation marks omitted).

302. PROPOSED RULE 37(E), *supra* note 19, at 272.

303. *Id.*

304. Willoughby, Jr. et al., *supra* note 215, at 799.

305. *Id.* at 798 (emphasis added).

306. *Id.* at 800.

some cases, for instance, courts do not bother to identify a basis at all.[307] And why should they? Courts already have power to issue sanctions that cannot be diminished by a rule or statute.[308]

Proposed Rule 37(e)'s goal of supplanting the inherent power of the courts,[309] therefore, is unattainable. Like all the other restrictions on sanctions, courts will simply ignore it.[310] At best, the Proposed Rule might result in courts using it as a basis of authority in easy cases. But even this is no change from the status quo; courts already cite Rule 37 as a basis for sanctions in such cases.[311] Consequently, Proposed Rule 37(e)'s effort to supersede the court's inherent authority will not be effective in changing the status quo.

V. RECOMMENDATION

This Note proposes that, because the 2006 Rule 37(e) and the Proposed Rule 37(e) are inadequate to alleviate the demands of modern e-discovery, changes must be made. First, a new Rule 37(e) must recognize that sanctions are beneficial under the correct circumstances. Second, this Rule 37(e) must use sanctions as a tool to develop a unified culpability requirement. Third, Rule 37(e) must delineate and clarify sanctionable conduct. Each adjustment is discussed in turn below.

A. Rule 37(e) Must Reflect that Sanctions Can Be Beneficial

Both the 2006 Rule 37(e) and Proposed Rule 37(e) rely upon the assumption that sanctions are detrimental because they are a cause of increased costs.[312] This supposition is erroneous—sanctions themselves are *not* the cause of disproportionate costs.[313] Rather, it is the *fear* of being sanctioned for failure to preserve ESI that drives parties to institute disproportionately expensive "keep everything" data retention policies.[314] By doing so, these parties set themselves up for increased costs when a lawsuit is filed. To the cautious party, adopting a "keep everything"

307. *Id.*

308. Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991) ("We discern no basis for holding that the sanctioning scheme of the statute [28 U.S.C. § 1927] and the rules [Federal Rules of Civil Procedure] displaces the inherent power to impose sanctions for the bad-faith conduct described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions.").

309. PROPOSED RULE 37(e), *supra* note 19, at 272.

310. *Chambers*, 501 U.S. at 46.

311. Willoughby, Jr. et al., *supra* note 215, at 800 ("[O]ur analysis indicates that the most prevalent bases for sanctions were Rule 37 and the court's inherent authority.").

312. *See supra* Part IV.C.1.

313. *See* Withers, *Risk Aversion*, *supra* note 17, at 542–43 ("[T]he frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information." (internal quotation marks omitted)); *see also* Costs and Burdens Hearing, *supra* note 80, at 323 (written statement of Thomas H. Hill, Associate General Counsel for Environmental Litigation & Legal Policy, General Electric Company) ("The threat of sanctions . . . poses a disproportionate reputational risk too great for most companies to bear.").

314. *Id.*

policy may be attractive because the costs of data storage are quite low.[315] Importantly, however, it is the costs incurred in e-discovery that are overwhelmingly burdensome.[316] As such, the true cost of a "keep everything" policy is realized only *after* a lawsuit is filed.[317] One study illustratively estimates that e-discovery costs approximately $5,835,634 for every third of a terabyte, or $17,506,902 for every full terabyte.[318] In contrast, storage of a full terabyte costs only around $100,000, including expenses for network communications, maintenance, redundancy, development, security, and data backup.[319] Using these figures, the costs of e-discovery are approximately *one hundred and seventy-five times* more expensive than the costs of storage. Given that a litigant has a very slim chance of being sanctioned for loss of ESI in the first place, and that this chance is even further diminished by the fact that the only parties being sanctioned are the ones that act in bad faith, parties should be confident that they do not need to over preserve.[320]

Sanctions are not the enemy. They are the necessary byproduct of bad faith dealings. Parties should not over preserve for fear of sanctions, just as they should not specifically over insure for fear of a catastrophic meteor strike. The Advisory Committee, therefore, should abandon its policy against sanctions. Instead, it should use sanctions as a tool to enforce a clearly defined culpability requirement, a duty of cooperation, and uniform ground rules. The following sections flesh out these considerations individually.

B. Rule 37(e) Must Clearly Delineate Culpability Requirements

One—if not *the*—largest shortcoming of the 2006 Rule 37(e) is that it fails to define a clear level of culpability.[321] Indeed, courts differ as to the type of culpability required to satisfy the "good faith" requirement.[322]

315. Shira A. Scheindlin & Jonathan M. Redgrave, *Discovery of Electronically Stored Information*, *in* BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 25:19 (2013) ("The use of off-site, cloud computing capabilities can also provide substantial volumes of storage space at relatively low cost."); Robert Kirk Walker, Note, *The Right to be Forgotten*, 64 HASTINGS L.J. 257, 281 (2012).

316. *See* Withers, *Risk Aversion*, *supra* note 17, at 546.

317. *Id.*

318. *See id.* at 545 (citing PACE & ZAKARAS, *supra* note 155, at 28) ("Extrapolating from the RAND figures, that one-third of a terabyte of email being preserved costs $313,853 to collect and will cost $976,902.20 to process and $4,544,878.80 to review for production."). To arrive at the result of $5,835,634, I added the previously cited costs of collection, processing, and review.

319. PACE & ZAKARAS, *supra* note 155, at 88. In fact, storage costs may even be less than that if the data storage is performed by a third party. Cloud storage companies, for instance, offer competitive pricing, and may even provide better security than in-house storage systems. Timothy Kearley, *Cloud Computing*, WYO. LAW., Feb. 2012, at 58; *see also* Stephanie L. Kimbro & Tom Mighell, *Popular Cloud Computing Services for Lawyers: Practice Management Online*, LAW PRAC. MAG., Sept.–Oct. 2011, *available at* http://www.americanbar.org/publications/law_practice_magazine/2011/september_october/popular_cloud_computing_services_for_lawyers.html (reporting that Box.net, a popular document management service, charges $15 per user per month for 500GB (half of one terabyte) of space).

320. *See supra* Part IV.C.1.

321. Nichols, *supra* note 16, at 901; *see also* supra Part III.A.

322. *See supra* Part III.B.1.b.

To further add to the confusion, the 2006 Rule 37(e) provides an exception to the "good faith" standard if there are "exceptional circumstances,"[323] which affords courts the opportunity to differ even further on what constitutes such an "exceptional circumstance."[324] Accordingly, the 2006 Rule 37(e) fails to accomplish the stated purpose in amending the Federal Rules of Civil Procedure: to prevent "the uncertainty, expense, delays, and burdens" of modern e-discovery.[325] As such, Proposed Rule 37(e) must not repeat the past if it is to be effective. A new Rule 37(e) is needed to resolve this staggering disunity among federal courts.

Even though alleviating such a circuit split was a "central objective" of the Advisory Committee in drafting Proposed Rule 37(e),[326] the Proposed Rule cannot achieve this goal because it continues to retain the problematic "faith" language of its predecessor. While the Proposed Rule is a significant upgrade from the 2006 Rule 37(e) in that it requires spoliation that was "wilful or in bad faith," this formulation nevertheless invites judicial interpretation and diverge.[327] Replacing this "good faith" language with concrete culpability requirements eliminates *all* doubt as to what culpability the Proposed Rule requires.

More importantly, such an explicit culpability requirement is not subject to as wide of a range of interpretations as "good/bad faith" is. This phraseology is also more realistic, as courts routinely use traditional culpability-based tests when contemplating sanctions for failure to preserve ESI in spite of the availability of Rule 37(e)'s "good faith" standard.[328] Further, because the "good faith" standard translates to a reckless or intentional culpability requirement anyway, eliminating the Proposed Rule 37(e)'s "good faith" standard simply spares courts an analytical step. Consequently, a new Rule 37(e) should remove the "good/bad faith" standard and replace it with the traditional culpability requirements of intentional or reckless conduct.

After Rule 37(e) establishes a clear culpability requirement, it can use sanctions as a tool. Instead of offering safe harbor to those who act in good faith, Proposed Rule 37(e) should *encourage* courts to sanction those who exceed the minimum culpability requirement. This approach is more realistic, as the courts will seek to sanction those parties anyway. Under this construction, courts need not resort to their inherent powers, just as the Advisory Committee intended. Instead, the courts will be giv-

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

324. Nichols, *supra* note 16, at 901.

325. *Id.* (quoting COMM. ON RULES OF PRACTICE & PROCEDURE, SUMMARY REPORT OF THE JUDICIAL CONFERENCE 83 (2005) [hereinafter 2005 COMMITTEE SUMMARY], *available at* http://web.archive.org/web/20051109061543/http://www.uscourts.gov/rules/Reports/ST09-2005.pdf).

326. PROPOSED RULE 37(e), *supra* note 19, at 272 ("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.").

327. *Id.* at 315.

328. Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 685 (2009).

en a tool to use in case of malfeasance, not another rule to work around. Furthermore, by reversing the logic of Proposed Rule 37(e), courts will be given concrete guidance on what conduct in particular to sanction. As such, sanctions can and should be very effective in increasing the effectiveness of Rule 37(e).

C. Rule 37(e) Must Incentivize Cooperation

If Rule 37(e) is to use sanctions as an enforcement measure, it must clearly and unambiguously set forth what conduct will trigger sanctions. By doing so, Rule 37(e) would further uniformity, reduce uncertainty, and increase fairness to parties. Rule 37(e), however, can go further in reducing costs associated with e-discovery by encouraging cooperation between parties. The following subsections illustrate the effectiveness of the Seventh Circuit Pilot Program and how Rule 37(e) can improve by adopting its principles.

1. The Seventh Circuit Electronic Discovery Pilot Program on Cooperation

One way to accomplish this cooperation between parties is to adopt some of the principles of the Seventh Circuit's Electronic Discovery Pilot Program.[329] The Seventh Circuit's Electronic Discovery Pilot Program Committee was formed in May 2009 to "improve pretrial litigation procedures that would provide fairness and justice to all parties while reducing the cost and burden of electronic discovery."[330] The Pilot Program specifically stresses the importance of cooperation.[331] Indeed, the Pilot Program's preamble states that: "[a]n attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions."[332]

To further cooperation, the Pilot Program confers a duty upon parties to meet and confer on discovery and to identify disputes for early resolution.[333] The Pilot Program thereby requires that counsel for the parties to a lawsuit must "meet and discuss the application of the discovery process" prior to the initial status conference.[334] As part of these discussions, the parties are required to identify: (1) the "relevant and discoverable ESI and documents"; (2) the "scope of discoverable ESI to be preserved by the parties"; (3) the "formats for preservation and production of ESI"; and (4) the potential for conducting discovery utilizing

329. PILOT PROGRAM, *supra* note 34, at 1.
330. *Id.*
331. *Id.*
332. *Id.* at 6.
333. *Id.*
334. *Id.* at 7.

"phases or stages."[335] Furthermore, each party's attorney must "review and understand how their client's data is stored and retrieved before they meet and confer" with opposing parties.[336] If disputes regarding ESI arise, the parties must present them to the court at the initial status conference, Rule 16(b) Scheduling Conference,[337] or as "soon as possible thereafter."[338] During the Rule 26(f) conference later in the lawsuit, moreover, the parties must "discuss potential methodologies for identifying ESI for production."[339] The Pilot Program advises that the parties should make plans to eliminate duplicative ESI, filter data based on specific parameters, and use advanced data culling technologies.[340] If the court determines that any party has failed to cooperate and participate in good faith in these discussions, "the court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate."[341]

2. Rule 37(e) Should Adopt the Seventh Circuit Pilot Program's Principles of Cooperation

Many judges, attorneys, and commentators have noted that cooperation in discovery is an effective method to reduce the costs of litigation.[342] The Seventh Circuit Pilot Program has been particularly efficacious.[343] According to participating judges and litigants, the first phase of the Seventh Circuit Pilot Program had a positive effect upon improving the efficiency of e-discovery.[344] In an anonymous survey, one judge noted that the duty to meet and confer was a useful aspect because it "fleshes out unavoidable e-discovery issues/disputes earlier in the discovery process."[345] Another judge observed "[a]ny time parties are direct to cooper-

335. *Id.*
336. *Id.*
337. *See* FED. R. CIV. P. 16(b)(3)(B)(iii).
338. PILOT PROGRAM, *supra* note 34, at 7.
339. *Id.* at 11.
340. *Id.*
341. *Id.* at 7.
342. The Sedona Conference, for instance, has aggressively promoted cooperative discovery. THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION 1 (2008) [hereinafter COOPERATION PROCLAMATION], *available at* https://thesedonaconference.org/cooperation-proclamation. By encouraging cooperation, the Sedona Conference aims to "reverse the legal culture of adversarial discovery that is driving up costs and delaying justice." *Id.* This approach has been endorsed by at least 129 federal judges and cited with approval in thirty-four judicial opinions. *Id.*; *see* William Butterfield, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 339 (2009); Steven S. Gensler, *A Bull's-Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363, 363 (2009); *see also Judicial Endorsements as of October 31, 2012*, THE SEDONA CONFERENCE COOPERATION PROCLAMATION 1–9 (2012), *available at* https://thesedonaconference.org/system/files/Judicial%20Endorsements%2010-31-2012_1.pdf.
343. PILOT PROGRAM, *supra* note 34, at 1.
344. *Id.*
345. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS, DATA ANALYSIS FOR THE SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: SURVEY OF JUDGES, *reprinted in* PILOT PROGRAM, *supra* note 34, app. F.1.a, at 24.

ate helps the discovery process."[346] An additional judge opined that the most useful aspect of the Pilot Program was that it "give[s] the parties a sense of the Court's expectations at the very outset of the case."[347] The duty to meet and confer was so well liked by respondents that it was listed as the most useful aspect of the Pilot Program seven times out of the thirteen total write-in responses.[348]

Attorneys were also surveyed on the effectiveness of the Seventh Circuit Pilot Program.[349] One surveyed attorney stated that the duty to meet and confer yielded benefits such as "address[ing] issues early" and "avoid[ing] spoliation."[350] Another attorney echoed this sentiment by noting that the Pilot Program set provided "[c]lear expectations," while another stated that the "Pilot Program gives litigants some much needed direction and standards in what was previously uncharted territory."[351] Accordingly, the Seventh Circuit Pilot Program and its peers have recognized the utility that cooperation can have in lowering e-discovery costs.[352]

If the goal of a new Rule 37(e) is truly to prevent "the uncertainty, expense, delays, and burdens" of modern e-discovery, any new rule must institute a similar cooperation requirement.[353] Adopting such a requirement is within the spirit of the Federal Rules of Civil Procedure, as parties are already required by Rule 37(a)(1) to confer or attempt to confer with other parties in good faith.[354] Rule 37(e), however, does not go as far as to require good faith conferrals regarding ESI in particular. A new Rule 37(e) may fill this gap by recommending specific conferral requirements.[355]

Given that sanctions may be used as an effective enforcement mechanism, these cooperation requirements should be policed by the threat of sanctions.[356] Cooperation amongst parties will not be self-executing.[357] Lawyers frequently "fail to recognize or act on opportunities" that may make discovery more productive and less costly.[358] Also, there are some lawyers who have no interest in cooperation, leaving well-intentioned parties to wonder if cooperating is worth it.[359] The threat of

346. *Id.*
347. *Id.*
348. *Id.*
349. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS, DATA ANALYSIS FOR THE SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: SURVEY OF ATTORNEYS, *reprinted in* PILOT PROGRAM, *supra* note 34, app. F.1.b.
350. *Id.* at 50.
351. *Id.* at 50, 52.
352. *See* PILOT PROGRAM, *supra* note 34, at 1.
353. 2005 COMMITTEE SUMMARY, *supra* note 325, at 23.
354. FED. R. CIV. P. 37(a)(1).
355. *See, e.g.*, PILOT PROGRAM, *supra* note 34, at 74–75.
356. *See supra* Part V.A.
357. COOPERATION PROCLAMATION, *supra* note 342, at 2 ("It is unrealistic to expect a *sua sponte* outbreak of pre-trial discovery cooperation.").
358. *Id.*
359. *Id.*

sanctions in these circumstances will incentivize parties to confer in good faith.[360]

Therefore, Rule 37(e) must encourage cooperation as a method to control e-discovery costs. This new Rule 37(e) may use the threat of sanctions as an effective measure to enforce cooperation in good faith.

D. Rule 37(e) Must Dictate Ground Rules Regarding the Scope of Preservation.

Rule 37(e) must also acknowledge that special ground rules are needed for e-discovery and preservation of ESI.[361] The Seventh Circuit Pilot Program's limitations on the scope of e-discovery serve as an illustrative model.[362] The Pilot Program presumes that certain categories of ESI are generally not discoverable unless the requesting party manifests an intention to seek that ESI in the conferral process.[363] Excluded ESI includes: (1) deleted data; (2) RAM; (3) online access data (such as temporary internet files, history, cache, and cookies); (4) data in metadata fields that are frequently updated automatically (such as last-opened dates); (5) backup data that is "substantially duplicative of data that is more accessible elsewhere"; and (6) other forms of ESI whose preservation requires "extraordinary affirmative measures that are not utilized in the ordinary course of business."[364] By creating presumptions against certain types of discoverable ESI, the Pilot Program provides guidance on what parties need to preserve.[365] This, in turn, avoids scenarios involving "unhelpful demands for the preservation of all data."[366]

By laying down these ground rules, Rule 37(e) would have the power to increase uniformity while maintaining the flexibility needed to properly adjudicate each individual claim.[367] One of the primary goals of the Advisory Committee in drafting Proposed Rule 37(e) was to provide a uniform standard for sanctioning parties that have failed to preserve ESI.[368] While this goal is laudable, every case will invariably present dis-

360. Importantly, conferring in good faith must be distinguished from the "good faith" standard found in the current Rule 37(e). The "good faith" standard found in the current Rule 37(e) regards what conduct is sanctionable vis-à-vis spoliated ESI. *See* FED. R. CIV. P. 37(e). The good faith standard as applied to the cooperation construction should track the conduct of the parties in figuring out what to do if such a loss were to occur. *See, e.g.*, PILOT PROGRAM, *supra* note 34, at 75 ("If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate."). Parties would *not* be sanctioned simply because they lost ESI; they would only be sanctioned if they refused to confer and attempt to resolve such an issue in good faith. *Id.*

361. *See, e.g.*, PILOT PROGRAM, *supra* note 34, at 10.

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* at 31.

367. *Id.* at 31.

368. PROPOSED RULE 37(E), *supra* note 19, at 272, 321. In furtherance of this goal, for instance, Proposed Rule 37(e) rejects decisions such as *Residential Funding* that authorize sanctions for negli-

tinct situations because no two cases are exactly alike.[369] The Federal Rules of Civil Procedure, therefore, will never be able to offer guidance for every situation presented.[370] Accordingly, Rule 37(e) should adopt the Seventh Circuit Pilot Program's presumption that certain types of ESI are not discoverable unless there is prior conferral.[371] Specifically, the rule should presumptively exclude data in metadata fields.[372] This variety of ESI can be changed and thereby spoliated simply by opening it.[373] Moreover, the new rule should also presumptively exclude duplicative backup data.[374] This decreases the temptation for unscrupulous litigants to request superfluous amounts of ESI in an attempt to use e-discovery as a tactic.[375] Furthermore, Rule 37(e) should also generally exclude data stored in RAM.[376] Such a prohibition is needed because data contained in RAM can be automatically destroyed simply by powering down the computer system.[377] Finally, as a catchall provision, Rule 37(e) should presumptively not require preservation of data that requires extraordinary affirmative measures.[378] This would give the rule flexibility to adapt to new technologies and e-discovery techniques.[379] Accordingly, by limiting the scope of discoverable data, Rule 37(e) will even further increase uniformity and decrease uncertainty.[380]

E. Proposed Text for a New Rule 37(e)

To lower e-discovery costs, it is imperative that Rule 37(e) undergo significant changes. First, the rule must reflect that sanctions can be beneficial. Second, Rule 37(e) must clearly set forth a unified culpability requirement that is resistant to judicial interpretation. Third, the rule must promote cooperation. Fourth, it must dictate ground rules regarding the scope of preservation. With these considerations in mind, this Part proposes a new formulation of Rule 37(e):

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gence or gross negligence. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002); *see also supra* Part III.B.1.b.

369. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1673 (2010).

370. *Cf.* Elizabeth Ruth Carter, Comment, *Ghosts of the Past and Hopes for the Future: Article 466 and Societal Expectations*, 81 TUL. L. REV. 1665, 1678 (2007) ("[A]ll civil codes are incomplete; that is, codes have gaps because the legislature cannot possibly foresee all problems that will arise in the future.").

371. PILOT PROGRAM, *supra* note 34, at 10.

372. *See, e.g.*, *id.*

373. ROTHSTEIN ET AL., *supra* note 46, at 3.

374. *See, e.g.*, PILOT PROGRAM, *supra* note 34, at 10.

375. *See* Beisner, *supra* note 120, at 549.

376. *See, e.g.*, PILOT PROGRAM, *supra* note 34, at 10.

377. *See supra* notes 61–69 and accompanying text.

378. *See, e.g.*, PILOT PROGRAM, *supra* note 34, at 10.

379. *Id.* at 91.

380. *See, e.g.*, *id.* at 69 (noting that the Seventh Circuit Pilot Program improves case management efficiency by providing "a uniform and default set of Principles that need not be reinvented for each case . . . .").

e. E-DISCOVERY AND FAILURE TO PRESERVE DISCOVERABLE INFORMATION.

1. DUTY TO MEET AND CONFER. In cases involving discovery of electronically stored information, counsel shall meet and discuss the application of the discovery process set forth in Rules 26 to 37 prior to the initial status conference with the Court.[381]

A. INITIAL DISCOVERY CONFERRAL. The following topics shall be discussed:[382]

i. The identification of relevant and discoverable ESI and documents;[383]

ii. Identification of ESI and documents that are most likely to contain the relevant and discoverable information;[384]

iii. Methodologies for extracting relevant and discoverable ESI from the materials identified in subsection (A) and (B);[385]

iv. The format for preservation and production of ESI and documents;[386]

B. POST-DISCUSSION DISPUTES. Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the court at the initial status conference, Rule 16(b) Scheduling conference, or as soon as possible thereafter.[387]

C. SANCTIONS FOR FAILURE TO COOPERATE. If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith,[388] the Court may impose appropriate sanctions.[389]

2. PRESUMPTIVE SCOPE OF DISCOVERABLE ESI. The following categories of ESI are presumed to be non-discoverable.[390] If any party intends to request the preservation or production of this ESI, then that intention must be discussed at the Initial Discovery Conferral.[391]

A. Data in metadata fields that are automatically updated by the computer system;[392]

B. Duplicative backup data;[393]

C. Data stored in Random Access Memory ("RAM");[394]

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381. *See id.* at 7.
382. *See id.*
383. *See id.*
384. *See id.*
385. *See id.*
386. *See id.*
387. *See id.*
388. *See supra* note 9 (noting that there is an important distinction between good faith in this context versus the "good faith" standard found in the current Rule 37(e)).
389. *See* PILOT PROGRAM, *supra* note 34, at 7.
390. *See id.* at 10.
391. *See id.*
392. *See id.*
393. *See id.*
394. *See id.*

D. Any data that requires extraordinary affirmative measures to produce or preserve;[395]

3. SANCTIONS FOR FAILURE TO PRESERVE DISCOVERABLE INFORMATION. If a party or a party's agent spoliates ESI recklessly or intentionally,[396] the Court may impose appropriate sanctions.

VI. CONCLUSION

Anne Thomas is not alone—there are many individuals who do not understand the 2006 Rule 37(e).[397] As a result, they fear sanctions and employ expensive "keep everything" approaches to data management.[398] Unfortunately, these seemingly risk-averse strategies will inevitably backfire, as the high costs of e-discovery are only incurred after a lawsuit is filed.[399]

The current Rule 37(e) has proved ineffective in reducing e-discovery costs.[400] This is partially because the 2006 Rule 37(e)'s "good faith" standard is ambiguous.[401] The rule's promulgation history obscures what the Advisory Committee intended the minimum culpability threshold to be.[402] Combined with the open-ended language of the rule, there is widespread judicial disagreement on what conduct is sanctionable,[403] thus leading to uncertainty and further panic among parties.[404] Moreover, courts simply do not use the 2006 Rule 37(e).[405] Thus, it cannot offer the protection that parties seek from it.

Proposed Rule 37(e) is similarly inadequate. This rule repeats the same mistake made by its predecessor by discouraging sanctions.[406] Further, it does not definitively resolve the ongoing minimum culpability requirement debate that has engulfed the federal court system.[407] Additionally, Proposed Rule 37(e)'s emphasis on curative measures will not alleviate the fears of parties—they are simply sanctions in disguise.[408] Finally, Proposed Rule 37(e) will be insufficient because it does not provide a basis of authority for imposing sanctions as intended.[409] Because Proposed Rule 37(e) retains the anti-sanction dogma of the 2006 Rule

395. *See id.*
396. *See supra* Part V.B. (noting that an explicit culpability requirement is needed).
397. *See* Wilson v. Thorn Energy, LLC, No. 08 Civ. 9009, 2010 WL 1712236, at *2 (S.D.N.Y. Mar. 15, 2010); *see also supra* notes 2–15 and accompanying text.
398. Withers, *supra* note 17, at 545–46.
399. *See supra* Part II.C.3.
400. *See supra* Part III.B.
401. *See supra* Part III.B.1.
402. *See supra* Part III.B.1.a.
403. *See supra* Part III.B.1.b.
404. Withers, *Risk Aversion*, *supra* note 17, at 545–46.
405. *See supra* Part III.B.2.
406. *See supra* Part IV.C.1.
407. *See supra* note 280 and accompanying text.
408. *See supra* notes 290–96 and accompanying text.
409. *See* PROPOSED RULE 37(E), *supra* note 19, at 272; *see also supra* Part IV.C.3.

37(e), it invites courts to simply ignore it and sanction parties by using their inherent powers.[410]

Thus, Rule 37(e) must undergo a paradigm shift: it must embrace sanctions as a tool.[411] It is only then that the rule can reduce e-discovery costs. This Note posits that sanctions can be especially useful in three respects. First, sanctions will prove useful in policing a uniform culpability requirement, which will set parties at ease and increase predictability.[412] Second, sanctions will also be effective in enforcing a uniform and clearly delineated standard of conduct.[413] This will further assure parties that they will not be surprised when it becomes time to engage in e-discovery. Third, sanctions will be imperative in incentivizing cooperation among parties.[414] The Seventh Circuit Pilot Program's principles on cooperation show that early cooperation will reduce costs by eliminating the excess and uncertainty of e-discovery. In this context, sanctions will ensure penalty for noncooperation, thus incentivizing the quick and inexpensive resolution of e-discovery disputes.[415]

Only after these adjustments will Rule 37(e) reach its true potential. By adopting the language set forth above, Rule 37(e) will finally carry a big enough stick to command order and lower e-discovery costs.

410. *See supra* notes 304–07 and accompanying text.
411. *See supra* Part V.A.
412. *See supra* Part V.B.
413. *See supra* Part V.D.
414. *See supra* Part V.C.2.
415. PILOT PROGRAM, *supra* note 34, at 6.