COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

To: Honorable Jeffrey S. Sutton, Chair,
Standing Committee on Rules of Practice and Procedure

From: Honorable David G. Campbell, Chair,
Advisory Committee on Federal Rules of Civil Procedure

Date: December 5, 2012

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 2, 2012. The meeting had been scheduled for November 1 and 2, but in anticipation of travel disruptions following Super Storm Sandy it was rescheduled to enable most participants to attend by video conference, webcast, or other remote means. Several participants gathered at the Administrative Office. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part I of this Report presents for action a proposal recommending publication for comment of a revised Rule 37(e). The revisions provide both remedies and sanctions for failure to preserve discoverable information that reasonably should have been preserved. In addition, they describe factors to be considered both in determining whether information reasonably should have been preserved and also in determining whether a failure was willful or in bad faith.

Three other items are presented for action. One seeks approval to publish an amendment of Rule 6(d) to correct an inadvertent oversight in conforming former rule text to style conventions. The second seeks approval to publish a modest revision of Rule 55(c) to clarify a latent ambiguity that has caused some confusion. Both of these proposals seek approval for publication when they can be included in a package with more substantial rule proposals. The third seeks a recommendation to adopt without publication an inadvertent failure to correct a cross-reference in Rule 77(c)(1) when Rule 6 was revised in the Time Computation Project.

Part II presents several matters on the Committee agenda for information and possible discussion. The 2010 Duke Conference bristled with ideas for reducing cost and delay in civil litigation, including many that seem suitable subjects for incorporation in the rules. Several of these ideas are presented by rules drafts. The Committee hopes it will be possible to have a fairly full discussion of the drafts, aiming toward polished drafts that can be presented in June with a recommendation to publish for comment.

Other topics in Part II include the question whether Rule 84 and the Rule 84 Forms should be abandoned. Brief notes are made on the early stages of the Class-action Subcommittee's work and on the ongoing empirical work on pleading standards. Finally, there is a report on the Committee's conclusion that the Enabling Act process is not the arena to pursue proposals to encourage prompt rulings on motions to remand actions removed from state court and to make mandatory an award of fees and expenses whenever an action is remanded.

PART I: ACTION ITEMS

I.A. ACTION TO RECOMMEND PUBLICATION OF REVISED RULE 37(e)

ACTION ITEM: RULE 37(e)

The Civil Rules Advisory Committee has been working on the issues raised by concerns about preservation and sanctions since the May, 2010, Duke Conference. During that conference, the E-Discovery Panel recommended adoption of rule provisions to address these concerns. Very soon thereafter, the Advisory Committee's Discovery Subcommittee began work on these issues. That work has involved one major full-day conference and repeated discussions with the full Advisory Committee. During that time the Standing Committee also had a panel discussion (during its January, 2011, meeting) of these issues. Since the last Standing Committee meeting in June, 2012, the pace of work has quickened.

Beginning on July 5, 2012, the Discovery Subcommittee held a total of eight conference calls to discuss and develop its proposal. The last of those calls occurred after the Advisory Committee's Nov. 2 meeting, and addressed matters the full Committee remitted to the Subcommittee for further consideration.

At the Nov. 2 meeting, the full Committee voted to recommend approval of a new Rule 37(e) for publication for public comment during the Standing Committee's January, 2013, meeting. It is understood that actual publication would not occur until August, 2013, but the Subcommittee felt that there was no reason to delay submission of the preliminary draft it had developed and the full Committee agreed. The Advisory Committee continues to work on additional case-management amendment ideas with the help of its Duke Subcommittee, and those may be presented to the Standing Committee at its June, 2013, meeting with a recommendation for publication. If that happens, it is hoped that they would form a broad package of amendment ideas with new Rule 37(e). If that does not happen, at least Rule 37(e) would be available to respond to the pressing concerns about preservation and sanctions.

This memorandum provides background on this work and introduces the issues. It contains the Rule 37(e) preliminary draft that the Advisory Committee recommends be published for public comment.

Need for action

The Civil Rules Advisory Committee was first advised of the emerging difficulties presented by discovery of electronically stored information in 1997, but the nature of those problems and the ways in which rules might respond productively to them remained uncertain for some time. After considerable inquiry, the Committee was uncertain whether or how to proceed. Eventually, about a decade ago, it decided to proceed to try to draft rule amendments that addressed a variety of issues on which concern had then focused. Eventually that work led to the 2006 E-Discovery amendments to the Civil Rules.

One of those amendments was a new Rule 37(e), which provided protection against sanctions for loss of electronically stored information due to the "routine, good faith operation of an electronic information system." The Committee Note to that rule provision observed that the routine operation might need to be altered due to the prospect of litigation, and mentioned that a "litigation hold" would sometimes be needed.

The amount and variety of digital information has expanded enormously in the last decade. And the costs and burdens of litigation holds have escalated as well. In December, 2011, the House Judiciary Committee held a hearing on the costs of American discovery that largely focused on the costs of preservation. For details on that hearing, one can visit the following site:

http://judiciary.house.gov/hearings/hear_12132011_2.html

The Discovery Subcommittee developed three general models of possible rule-amendment approaches which it presented to the participants in its mini-conference in September, 2011, and summarized as follows at the time:

> Category 1: Preservation proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision. Submissions the Committee received from various interested parties provided a starting point in drafting some such specifics. A basic question is whether a single rule with very specific preservation provisions could reasonably apply to the wide variety of civil cases filed in federal court. A related issue is whether changing technology would render such a rule obsolete by the time it became effective, or soon thereafter. Even worse, it might be counter-productive. For example, a rule that triggers a duty to preserve when a prospective party demands that another prospective party begin preservation measures (among the triggers suggested) could lead to overreaching demands, counter-demands, and produce an impasse that could not be resolved by a court because no action had yet been filed.

> Category 2: A more general preservation rule could address a variety of preservation concerns, but only in more general terms. It would, nonetheless, be a "front end" proposal that would attempt to establish reasonableness and proportionality as touchstones for assessing preservation obligations. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Would it be too general to be helpful?

> Category 3: This approach would address only sanctions, and would in that sense be a "back end" rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information

acted reasonably. In form, however, this approach would not contain any specific directives about when a preservation obligation arises or the scope of the obligation. By articulating what would be "reasonable," it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering "carrots" to those who act reasonably, rather than relying mainly on "sticks," as a sanctions regime might be seen to do.

All three categories were presented -- with sketches of possible rule language raising subsidiary questions -- during the Subcommittee's September, 2011, mini-conference on preservation and sanctions. This conference gathered together about 25 practicing lawyers and judges from around the country with extensive experience on these topics. A number of papers were submitted to the Subcommittee before the conference, and they (along with notes of the conference) can be found at the following site:

www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011/aspx

After the mini-conference, the Subcommittee decided to focus on the Category 3 approach, embodied at the time in a proposed Rule 37(g) dealing with sanctions for failure to preserve information. There were many questions about how to refine this proposal. Many of those questions remained when the same proposal was presented to the full Committee and discussed during the March 2012 meeting in Ann Arbor. A further version of that Rule 37(g) approach was presented to the Standing Committee during its June, 2012, meeting. At that time, it included a large number of language choices and footnoted questions that had not been resolved.

Beginning in early July, 2012, the Subcommittee tackled those language choices and footnoted questions. Eventually that task took seven conference calls to prepare a final proposed rule for the full Advisory Committee meeting in November, 2012. The initial effort focused on arriving at rule language that satisfied the entire Subcommittee. That was an extended effort, and on several occasions involved returning to points previously considered and re-evaluating them. Once it was completed, the Subcommittee turned to the draft Note. Finally, it turned to whether this new provision should be a new Rule 37(g), or perhaps should replace current Rule 37(e), and the Subcommittee decided that current 37(e) would not provide any protection beyond that provided by the new rule, so that replacing the current rule seemed more suitable.

A central objective of the proposed new Rule 37(e) is to replace the disparate treatment of preservation/sanctions issues in different circuits with a single standard. In addition, the amended rule makes it clear that -- in all but very exceptional cases in which failure to preserve "irreparably deprived a party of any meaningful opportunity to present a claim or defense" -- sanctions (as opposed to curative measures) could be employed only if the court finds that the failure was willful or in bad faith, and that it caused substantial prejudice in the litigation. The proposed rule therefore rejects Residential Funding Corp. v. DeGeorge Finan. Corp., 306 F.3d 99 (2d Cir. 2002), which stated that negligence is sufficient culpability to support sanctions.

The Subcommittee's proposed new Rule 37(e) was presented to the Advisory Committee at its November, 2012, meeting and discussed at length. Eventually, there were votes on whether to retain certain provisions on which the Subcommittee did not reach consensus, leading to the removal of one factor listed in the draft rule and of a possible paragraph in the Committee Note. All members except the Department of Justice voted in favor of submitting the proposed rule to the Standing Committee at its January meeting. (The Department reported that it had not gathered input from interested parties within the Department and could not vote in favor at the time of the Advisory Committee meeting.)

The full Committee also tasked the Subcommittee with considering and acting on a suggestion by one liaison member for a rewording a factor in the rule and several other minor adjustments, as well as considering concerns about the *Erie* doctrine or rulemaking power that were raised at the full Committee meeting and in a submission received before that meeting. On November 28, the Subcommittee met again by conference call and considered these issues. The preliminary draft presented below implements the decisions made during that conference call.

Erie Doctrine Concerns

In a comment during the Advisory Committee's Nov. 2 meeting, and in a pre-meeting submission, John Vail of AAJ argued that the *Erie* doctrine or the Rules Enabling Act constitute serious obstacles to going forward with 37(e). Based on further discussion on Nov. 28, additional Committee Note language was added to make clear that the rule would have no effect on the cognizability in federal court of a tort claim for spoliation, which is recognized in a few states. With that clarification,

those issues do not appear to be a weighty reason for declining to proceed with the proposed amendments to Rule 37(e).

Certainly the Rules Enabling Act authorizes adoption of rules about how to handle federal-court litigation in relation to failure to provide through discovery materials that would assist in the resolution of the case before the court. Under the Supreme Court's decisions, such a rule is permissible if it is "arguably procedural." Thus, one could say that the issue is what "remedy" the federal court should grant when presented with a failure to respond to discovery on the ground that the material sought no longer exists. Rule 37 addresses exactly that sort of issue, and revising it so it more suitably handles this problem should not tax the Enabling Act authority.

Under 28 U.S.C. § 2072(b), a rule should not be applied if doing so would "abridge, enlarge or modify any substantive right." The Committee Note has been revised to make clear that amended Rule 37(e) has no effect on the cognizability in federal court of a state-law tort claim for spoliation. It appears that a relatively small minority of states (approximately eight) recognize such a claim. For a listing of those eight jurisdictions, see Diana v. NetJets Serv., Inc., 50 Conn.Supp. 655, 657 n.6 (Conn.Super.2007). It appears that intentional spoliation must be proved to support most such claims, but for some claims negligence may suffice.

There might be an argument that -- with regard to litigation in federal court -- a civil rule could nullify such a spoliation claim and treat the matter of responses to failures to preserve evidence as governed solely by the rule. As the Committee Note makes clear, however, that is not what this rule does. The viability of such a tort claim for spoliation must be determined under the applicable law, which will often be state law. This conclusion is consistent with existing federal-court practice. See Naylor v. Rotech HealthCare, Inc., 679 F.Supp.2d 505, 510-11 (D. Vt. 2009) (looking to Vermont law to determine "whether or not spoliation of evidence constitutes an independent cause of action," and deciding it did not).

Providing by rule for a uniform approach to spoliation in all federal-court cases (unless they include a state-law spoliation tort claim) should not present *Erie* or Enabling Act problems. In Burlington Northern R.R. v. Woods, 480 U.S. 1 (1987), the Supreme Court recognized that § 2072(b) was "an additional requirement" when competing state law is invoked against application of a Federal Rule, but the Court's actual holding in that case seems to provide strong support for proposed

37(e). The Court held that an Alabama statute commanding that 10% always be added to a money judgment if a defendant appealed and lost could not apply in federal court because it conflicted with Fed. R. App. 38, which grants the court of appeals discretion to decide whether or not to impose a sanction for a groundless appeal. The Court explained that § 2072(b) has a limited effect (480 U.S. at 5-6):

> The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules. Moreover, the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, give the Rules presumptive validity under both the constitutional and statutory constraints.

In Business Guides, Inc. v. Chromatic Communications Ent., Inc. 498 U.S. 533 (1991), the Court upheld imposition of Rule 11 sanctions on a party despite Justice Kennedy's argument in dissent that doing so "creates a new tort of 'negligent prosecution' or 'accidental abuse of process.'" The majority concluded that "[t]here is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental."

Lower courts have recognized that state law does not control federal-court spoliation sanctions even in the absence of a rule directly addressing the questions addressed by new 37(e). For example, here is the analysis of the Sixth Circuit en banc in Adkins v. Woelever, 554 F.3d 650, 652 (6th Cir. 2008), abandoning that court's prior reference to state law regarding spoliation:

> In contrast to our persistent application of state law in this area, other circuits apply federal law for spoliation sanctions. See, e.g., Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001): Reilly v. Natwest Mkts. Group, Inc., 181 F.3d 253, 267 (2d Cir. 1999); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993). We believe that this is the correct view for two reasons. First, the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, "from a court's inherent power to control the judicial process." Silvestri,

> 271 F.3d at 590. Second, a spoliation ruling is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters. These reasons persuade us now to acknowledge the district court's broad discretion in crafting a proper sanction for spoliation.

The goal of amended 37(e) is to achieve uniformity in the federal courts in their handling of failures to preserve. One of the chief stimuli behind the proposed amendment is the diversity of treatment of preservation sanctions across the country. So there seems little reason to expect that it would run afoul of § 2072(b), as interpreted by the Supreme Court.

Replacing Rule 37(e)

In 2006, Rule 37(e) was added to provide some protection against sanctions for failure to preserve. At the time, some objected that it would not provide a significant amount of protection. Since then, as explored in Andrea Kuperman's memorandum (which should be in this agenda book), the rule has been invoked only rarely. Some say it has provided almost no relief from preservation burdens. The question whether this rule provision would serve any ongoing purpose if a better provision could be devised was in the background from the beginning of the Subcommittee's efforts on preservation and sanctions.

The proposed amendment is designed to provide more significant protection against inappropriate sanctions, and also to reassure those who might in its absence be inclined to over-preserve to guard against the risk that they would confront serious sanctions. Thus, Rule 37(e)(2)(A) permits sanctions only if the court finds that the failure to preserve was willful or in bad faith. One goal of this requirement is to overturn the decision of the Second Circuit in Residential Funding Corp. v. DeGeorge Finan. Corp., 306 F.3d 99 (2d Cir. 2002), which authorized sanctions for negligence and has continued to apply despite the adoption in 2006 of current Rule 37(e). Other circuits have reached different conclusions, some requiring that willfulness or bad faith be proved to support spoliation sanctions. These divergences have created particular difficulties for entities that engage in operations throughout the nation and do not know which standard will apply if a suit is filed. Not only is the amendment designed to raise the threshold for sanctions above negligence, it is also meant to provide a uniform standard for federal courts nationwide and thereby to replace this divergent case law cacophony that many have reported causes difficulty for those trying to make preservation

decisions.

Amended Rule 37(e), in short, provides better protection than current Rule 37(e). The Subcommittee has been unable to identify any activity that would be protected by the current Rule 37(e) but not protected under the proposed rule. The proposed rule is significantly broader than the current rule, providing more guidance to those who must make preservation and sanctions decisions. It also applies to all discoverable information, not just electronically stored information.

The Discovery Subcommittee therefore recommended that current Rule 37(e) be replaced with amended Rule 37(e), and the Advisory Committee agreed. The Subcommittee reached this conclusion only after completing the long process of refining its amendment proposal, then called Rule 37(g). Having completed that refinement, it reflected on whether current 37(e) provides any useful protection beyond its proposed amendment and concluded that the current rule does not. The Subcommittee discussed abrogating current Rule 37(e) and also adopting its new proposal as 37(g), but that seems unnecessary and potentially confusing. If useful, the invitation for public comment could call attention to the question whether existing Rule 37(e) would have any ongoing value after adoption of the proposed amendment.

Grant of authority to sanction;
limitation on that authority to
situations involving willfulness or bad faith

The proposed amendment (in 37(e)(2)) says that if a party failed to preserve information that should have been preserved, "the court may impose any of the sanctions listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction only if the court finds" that the loss was willful or in bad faith. This formulation differs from the formulation in current Rule 37(e) in that it is a grant of authority to impose sanctions of the sort listed in Rule 37(b)(2)(A). There is accordingly no need to worry (as the language of Rule 37(b) might suggest if the sanction were imposed directly under that rule) about whether failure to preserve violated a court order. The new rule provision is not limited (as is current Rule 37(e)) to "sanctions under these rules," so that the grant of authority should make it unnecessary for courts to rely on inherent authority to support sanctions for failure to preserve. At the same time, the limitation to situations involving willfulness or bad faith should correspond to what is normally said to be necessary to support inherent power sanctions. It is important to ensure that looser notions of inherent power are not invoked to circumvent

the protections established by new Rule 37(e).

The limitation to situations in which the party to be sanctioned has acted willfully or in bad faith should provide significantly more protection than current Rule 37(e), as well as providing a uniform national standard.

Some thought was given to whether it would be helpful to try in the Note to define willfulness or bad faith, but the conclusion was that it would not be useful. The courts have considerable experience dealing with these concepts, and efforts to capture that experience in Note language seemed more likely to produce problems than provide help.

Sanctions in the absence of willfulness or bad faith

Rule 37(e)(2)(B) does permit sanctions in the absence of willfulness or bad faith when the loss of the information "irreparably deprived a party of any meaningful opportunity to present a claim or defense." The Subcommittee means this authority to be limited to the truly exceptional case. It functions as something of a safety valve for the general directive that sanctions can only be imposed on one who has acted willfully or in bad faith. The point is that the prejudice is not only irreparable, but also exceptionally severe. Rule 37(e)(2)(B) comports with cases such as Silvestri v. General Motors Corp., 273 F.3d 583 (4th Cir. 2001), which have recognized the need for consequences when one side loses information or evidence that is clearly essential to the other side's case. The Subcommittee spent considerable time refining and discussing the proper way to phrase this authority and ultimately arrived at the recommended formulation.

Precise preservation rules

As mentioned above, the Subcommittee began its analysis of these problems with two possible amendment approaches that sought to provide guidance on when a preservation obligation arises and the scope of that obligation. The amendment recommended below does not contain such a provision.

But Rule 37(e)(3) attempts nonetheless to provide general guidance for parties contemplating their preservation obligations. It lists a variety of considerations that a court should take into account in making a determination both about

whether the party failed to preserve information "that reasonably should be preserved" and also whether that failure was willful or in bad faith.

The Subcommittee carefully reviewed the catalog of considerations, and it was discussed by the full Committee during its November meeting. The full Committee decided to remove one factor, and remitted the issues to the Subcommittee for a final review. The Subcommittee further clarified another factor during its Nov. 28 conference call. The goal of Rule 37(e)(3) is to provide the parties with guidance on how to approach preservation decisions, and to identify factors that may often be relevant to courts in deciding whether a party failed to preserve information as it should have, and also whether that failure to preserve was willful or in bad faith.

At the same time, the rule does not attempt to prescribe new or different rules on what must be preserved. As the Note states, the question whether given information "reasonably should be preserved" is governed by the common law. Given the wide variety of cases brought in federal court, the Subcommittee concluded that it was not possible to write a single rule that would specify the materials to be preserved in every case. The decision is necessarily case-specific.

In the same vein, the Subcommittee considered whether providing specifics in the Note on what might trigger a duty to preserve would be desirable. Some versions of proposed rules contained very specific specifications of this sort. The Subcommittee's eventual conclusion, however, was that no single rule could be written that would apply fairly and effectively to the wide variety of cases in federal court.

Department of Justice Submission

On December 4, 2012, Principal Deputy Assistant Attorney General Stuart Delery submitted a letter to the Advisory Committee raising concerns about the Rule 37(e) proposal, with the request that these comments be forwarded to the Standing Committee. A copy of this letter should be included in these agenda materials.

As reflected in the minutes of the Advisory Committee's November 2 meeting, the Department raised many of the points included in this letter during that meeting. Some of these points had already been raised by the Department during earlier

discussion of preservation and sanctions problems in earlier meetings of the Advisory Committee. Some of them were also raised during the Discovery Subcommittee's September, 2011, mini-conference, at which the Department was represented. Based on the discussion at the Advisory Committee meeting, the Discovery Subcommittee revisited several of the Department's concerns during its November 28 conference call, as reflected in the notes of that call included in this agenda book. Because the letter did not arrive until December 4, the Subcommittee was not able to review it also. We would be happy to discuss any of these points during the Standing Committee meeting, and expect that the Department's concerns will continue to inform the Advisory Committee's evaluation of the Rule 37(e) proposal.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

~~**(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.** 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.~~

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION. If a party failed to preserve discoverable information that reasonably should have been preserved in the anticipation or conduct of litigation,

(1) The court may permit additional discovery, order the party to undertake curative measures, or require the party to pay the reasonable expenses, including attorney’s fees, caused by the failure.

(2) The court may impose any of the sanctions listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction only if the court finds:

(A) that the failure was willful or in bad faith, and caused substantial prejudice in the litigation; or

19 **(B)** that the failure irreparably deprived a party of
20 any meaningful opportunity to present a claim or
21 defense.

22

23 **(3)** In determining whether a party failed to preserve
24 discoverable information that reasonably should have
25 been preserved, and whether the failure was willful or
26 in bad faith, the court should consider all relevant
27 factors, including:

28

29 **(A)** the extent to which the party was on notice that
30 litigation was likely and that the information
31 would be discoverable;

32

33 **(B)** the reasonableness of the party's efforts to
34 preserve the information;

35

36 **(C)** whether the party received a request that
37 information be preserved, the clarity and
38 reasonableness of the request, and whether the
39 person who made the request and the party engaged
40 in good-faith consultation regarding the scope of
41 preservation;

42

43 **(D)** the proportionality of the preservation efforts to
44 any anticipated or ongoing litigation; and

45

46 **(E)** whether the party sought timely guidance from the
47 court regarding any unresolved disputes concerning
48 the preservation of discoverable information.

49

Draft Committee Note

1

2 In 2006, Rule 37(e) was added to provide protection against
3 sanctions for loss of electronically stored information under
4 certain limited circumstances, but preservation problems have
5 nonetheless increased. The Committee has been repeatedly
6 informed of growing concern about the increasing burden of
7 preserving information for litigation, particularly with regard
8 to electronically stored information. Many litigants and
9 prospective litigants have emphasized their uncertainty about the

10 obligation to preserve information, particularly before
11 litigation has actually begun. The remarkable growth in the
12 amount of information that might be preserved has heightened
13 these concerns. Significant divergences among federal courts
14 across the country have meant that potential parties cannot
15 determine what preservation standards they will have to satisfy
16 to avoid sanctions. Extremely expensive overpreservation may
17 seem necessary due to the risk that very serious sanctions could
18 be imposed even for merely negligent, inadvertent failure to
19 preserve some information later sought in discovery.

20

21 This amendment to Rule 37(e) addresses these concerns by
22 adopting a uniform set of guidelines for federal courts, and
23 applying them to all discoverable information, not just
24 electronically stored information. It is not limited, as is the
25 current rule, to information lost due to "the routine, good-faith
26 operation of an electronic information system." The amended rule
27 is designed to ensure that potential litigants who make
28 reasonable efforts to satisfy their preservation responsibilities
29 may do so with confidence that they will not be subjected to
30 serious sanctions should information be lost despite those
31 efforts. It does not provide "bright line" preservation
32 directives because bright lines seem unsuited to a set of
33 problems that is intensely context-specific. Instead, the rule
34 focuses on a variety of considerations that the court should
35 weigh in calibrating its response to the loss of information.

36

37 Amended Rule 37(e) applies to loss of discoverable
38 information "that reasonably should have been preserved in the
39 anticipation or conduct of litigation." This preservation
40 obligation arises from the common law, and may in some instances
41 be triggered or clarified by a court order in the case. Rule
42 37(e)(3) identifies many of the factors that should be considered
43 in determining, in the circumstances of a particular case, when a
44 duty to preserve arose and what information should be preserved.

45

46 Except in very rare cases in which the loss of information
47 irreparably deprived a party of any meaningful opportunity to
48 present a claim or defense, sanctions for loss of discoverable
49 information may only be imposed on a finding of willfulness or
50 bad faith, combined with substantial prejudice.

51

52 The amended rule therefore displaces any other law that
53 would authorize imposing litigation sanctions in the absence of a
54 finding of wilfulness or bad faith, including state law in
55 diversity cases. But the rule does not affect the validity of an
56 independent tort claim for relief for spoliation if created by

57 the applicable law. The law of some states authorizes a tort
58 claim for spoliation. The cognizability of such a claim in
59 federal court is governed by the applicable substantive law, not
60 Rule 37(e).

61

62 Unlike the 2006 version of the rule, amended Rule 37(e) is
63 not limited to "sanctions under these rules." It provides rule-
64 based authority for sanctions for loss of all kinds of
65 discoverable information, and therefore makes unnecessary resort
66 to inherent authority.

67

68 **Subdivision (e)(1)** When the court concludes that a party
69 failed to preserve information it reasonably should have
70 preserved, it may adopt a variety of measures that are not
71 sanctions. One is to permit additional discovery that would not
72 have been allowed had the party preserved information as it
73 should have. For example, discovery might be ordered under Rule
74 26(b)(2)(B) from sources of electronically stored information
75 that are not reasonably accessible. More generally, the fact
76 that a party has failed to preserve information may justify
77 discovery that otherwise would be precluded under the
78 proportionality analysis of Rule 26(b)(2)(C).

79

80 In addition to, or instead of, ordering further discovery,
81 the court may order the party that failed to preserve information
82 to take curative measures to restore or obtain the lost
83 information, or to develop substitute information that the court
84 would not have ordered the party to create but for the failure to
85 preserve. The court may also require the party that failed to
86 preserve information to pay another party's reasonable expenses,
87 including attorney fees, caused by the failure to preserve. Such
88 expenses might include, for example, discovery efforts caused by
89 the failure to preserve information.

90

91 **Subdivision (e)(2)(A).** This subdivision authorizes
92 imposition of the sanctions listed in Rule 37(b)(2)(A) for
93 failure to preserve information, whether or not there was a court
94 order requiring such preservation. Rule 37(e)(2)(A) is designed
95 to provide a uniform standard in federal court for sanctions for
96 failure to preserve. It rejects decisions that have authorized
97 the imposition of sanctions -- as opposed to measures authorized
98 by Rule 37(e)(1) -- for negligence or gross negligence.

99

100 This subdivision protects a party that has made reasonable
101 preservation decisions in light of the factors identified in Rule
102 37(e)(3), which emphasize both reasonableness and

103 proportionality. Despite reasonable efforts to preserve, some
104 discoverable information may be lost. Although loss of
105 information may affect other decisions about discovery, such as
106 those under Rule 26(b)(2)(B) and 26(b)(2)(C), sanctions may be
107 imposed only for willful or bad faith actions, unless the
108 exceptional circumstances described in Rule 37(e)(2)(B) are
109 shown.

110

111 The threshold under Rule 37(e)(2)(A) is that the court find
112 that lost information reasonably should have been preserved; if
113 so, the court may impose sanctions only if it can make two
114 further findings. First, it must be established that the party
115 that failed to preserve did so willfully or in bad faith. This
116 determination should be made with reference to the factors
117 identified in Rule 37(e)(3).

118 Second, the court must also find that the loss of
119 information caused substantial prejudice in the litigation.
120 Because digital data often duplicate other data, substitute
121 evidence is often available. Although it is impossible to
122 demonstrate with certainty what lost information would prove, the
123 party seeking sanctions must show that it has been substantially
124 prejudiced by the loss. Among other things, the court may
125 consider the measures identified in Rule 37(e)(1) in making this
126 determination; if these measures can sufficiently reduce the
127 prejudice, sanctions would be inappropriate even when the court
128 finds willfulness or bad faith. Rule 37(e)(2)(A) authorizes
129 imposition of Rule 37(b)(2) sanctions in the expectation that the
130 court will employ the least severe sanction needed to repair the
131 prejudice resulting from loss of the information.

132

133 **Subdivision (e)(2)(B).** Rule 37(e)(2)(B) permits the court
134 to impose sanctions without making a finding of either bad faith
135 or willfulness. As under Rule 37(e)(2)(A), the threshold for
136 sanctions is that the court find that lost information reasonably
137 should have been preserved by the party to be sanctioned.

138

139 Even if bad faith or willfulness is shown, sanctions may
140 only be imposed under Rule 37(e)(2)(A) when the loss of
141 information caused substantial prejudice in the litigation. Rule
142 37(e)(2)(B) permits sanctions in the absence of a showing of bad
143 faith or willfulness only if that loss of information deprived a
144 party of any meaningful opportunity to present a claim or
145 defense. Examples might include cases in which the alleged
146 injury-causing instrumentality has been lost before the parties
147 may inspect it, or cases in which the only evidence of a
148 critically important event has been lost. Such situations are
149 extremely rare.

150

151 Before resorting to sanctions, a court would ordinarily
152 consider lesser measures, including those listed in Rule
153 37(e)(1), to avoid or minimize the prejudice. If such measures
154 substantially cure the prejudice, Rule 37(e)(2)(B) does not
155 apply. Even if such prejudice persists, the court should employ
156 the least severe sanction.

157

158 **Subdivision (e)(3).** These factors guide the court when
159 asked to adopt measures under Rule 37(e)(1) due to loss of
160 information or to impose sanctions under Rule 37(e)(2). The
161 listing of factors is not exclusive; other considerations may
162 bear on these decisions, such as whether the information not
163 retained reasonably appeared to be cumulative with materials that
164 were retained. With regard to all these matters, the court's
165 focus should be on the reasonableness of the parties' conduct.

166

167 The first factor is the extent to which the party was on
168 notice that litigation was likely and that the information lost
169 would be discoverable in that litigation. A variety of events
170 may alert a party to the prospect of litigation. But often these
171 events provide only limited information about that prospective
172 litigation, so that the scope of discoverable information may
173 remain uncertain.

174

175 The second factor focuses on what the party did to preserve
176 information after the prospect of litigation arose. The party's
177 issuance of a litigation hold is often important on this point.
178 But it is only one consideration, and no specific feature of the
179 litigation hold -- for example, a written rather than an oral
180 hold notice -- is dispositive. Instead, the scope and content of
181 the party's overall preservation efforts should be scrutinized.
182 One focus would be on the extent to which a party should
183 appreciate that certain types of information might be
184 discoverable in the litigation, and also what it knew, or should
185 have known, about the likelihood of losing information if it did
186 not take steps to preserve. The court should be sensitive to the
187 party's sophistication with regard to litigation in evaluating
188 preservation efforts; some litigants, particularly individual
189 litigants, may be less familiar with preservation obligations
190 than other litigants who have considerable experience in
191 litigation. The fact that some information was lost does not
192 itself prove that the efforts to preserve were not reasonable.

193

194 The third factor looks to whether the party received a
195 request to preserve information. Although such a request may

196 bring home the need to preserve information, this factor is not
197 meant to compel compliance with all such demands. To the
198 contrary, reasonableness and good faith may not require any
199 special preservation efforts despite the request. In addition,
200 the proportionality concern means that a party need not honor an
201 unreasonably broad preservation demand, but instead should make
202 its own determination about what is appropriate preservation in
203 light of what it knows about the litigation. The request itself,
204 or communication with the person who made the request, may
205 provide insights about what information should be preserved. One
206 important matter may be whether the person making the
207 preservation request is willing to engage in good faith
208 consultation about the scope of the desired preservation.

209

210 The fourth factor emphasizes a central concern --
211 proportionality. The focus should be on the information needs of
212 the litigation at hand. That may be only a single case, or
213 multiple cases. Rule 26(b)(2)(C) provides guidance particularly
214 applicable to calibrating a reasonable preservation regime. Rule
215 37(e)(3)(D) explains that this calculation should be made with
216 regard to "any anticipated or ongoing litigation." Prospective
217 litigants who call for preservation efforts by others (the third
218 factor) should keep those proportionality principles in mind.

219

220 Making a proportionality determination often depends in part
221 on specifics about various types of information involved, and the
222 costs of various forms of preservation. The court should be
223 sensitive to party resources; aggressive preservation efforts can
224 be extremely costly, and parties (including governmental parties)
225 may have limited resources to devote to those efforts. A party
226 may act reasonably by choosing the least costly form of
227 information preservation, if it is substantially as effective as
228 more costly forms. It is important that counsel become familiar
229 with their clients' information systems and digital data --
230 including social media -- to address these issues. A party
231 urging that preservation requests are disproportionate may need
232 to provide specifics about these matters in order to enable
233 meaningful discussion of the appropriate preservation regime.

234

235 Finally, the fifth factor looks to whether the party alleged
236 to have failed to preserve as required sought guidance from the
237 court if agreement could not be reached with the other parties.
238 Until litigation commences, reference to the court may not be
239 possible. In any event, this is not meant to encourage premature
240 resort to the court; Rule 26(f) directs the parties to discuss
241 and to attempt to resolve issues concerning preservation before
242 presenting them to the court. Ordinarily the parties'
243 arrangements are to be preferred to those imposed by the court.

244 But if the parties cannot reach agreement, they should not forgo
245 available opportunities to obtain prompt resolution of the
246 differences from the court.

Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Nov. 28, 2012

On Nov. 28, 2012, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee); Hon. David Campbell (Chair, Advisory Committee); Hon. John Koeltl (Chair, Duke Subcommittee); Anton Valukas; Elizabeth Cabraser; John Barkett; Peter Keisler; Prof. Edward Cooper (Reporter, Advisory Committee); and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call as a follow-up to the full Committee Nov. 2 meeting, convened to resolve issues remaining after that meeting on details left for further Subcommittee consideration in preparation of the Rule 37(e) proposal to the Standing Committee.

Erie Issues

Both before the Nov. 2 meeting and during the meeting, issues about the application of the Erie Doctrine to 37(e) were raised. But an analysis of rulemaking authority seems to make it clear that the authority extends far enough to include what's in proposed 37(e). An initial question, then, is whether there is an Erie Doctrine problem.

A reaction was that the chief concern seems to be with whether adoption of proposed 37(e) would nullify tort claims in states that permit tort-type claims for spoliation. That would be a substantive spoliation doctrine, and there is concern that adoption of 37(e) might raise questions about whether such claims could be asserted in federal court. So it would seem desirable to make clear that the rule provision is not focused on, and does not affect, a cognizable cause of action for spoliation recognized by state law.

A reaction was that the rule is only about sanctions for failure to preserve -- the kind of thing that Rule 37 ordinarily addresses -- not about independent causes of action created by state law.

Another reaction was agreement -- Rule 37(e) does not do anything to limit such state-law claims. There might be an interesting issue about whether state law properly could create a spoliation claim for destruction of evidence that was relevant only to a federal claim, in other words whether state law overreaches when it seeks to implement federal claims in this manner. But that is surely beyond the scope of what we have been discussing doing.

The original speaker agreed, but said that it would be wise

and politic to say something about these points either in the transmittal letter or in the Note.

A reaction was that this probably should be in the Note. If there is a concern that arguments might be made that 37(e) somehow stymies the assertion of a tort claim for spoliation in federal court, the Committee Note is the place to put the answer so that the Note can be used for guidance if the issue arises in a case. A statement in the transmittal memo would likely be too obscure to be used for that sort of guidance.

Another participant elaborated on the existence of such claims. It seems that they are recognized in Alaska, New Mexico, Ohio and possibly Connecticut. In West Virginia, there may be both first-party and third-party claims. As to most of these, however, one must prove intent to support the claim.

A reaction to this catalog was that in California such claims may in some circumstances survive a demurrer.

Another participant observed that we need to deal with these issues in the Note -- to say as clearly as we can that (a) we preempt reliance on state law in the non-tort sanctions setting, and (b) we do not intend to have any effect on the assertion in federal court of a state-law tort claim for spoliation.

This point drew agreement, and the suggestion that it could be expressed as displacing "procedural" but not "substantive" state law. But that characterization drew concerns about the uncertain meaning of those words in different contexts.

A further response was that we need to be clear that the federal-court cases relying on state law to determine the extent or availability of sanctions must be disapproved, but that goal should be distinguished from displacing independent claims created by state law.

A concurring opinion was expressed, noting that states may express this as a matter of common law or by legislative enactment. It should be made clear that Rule 37(e) does not affect the viability of claims, whether based on common law or legislation.

Attention was drawn to two possible locations in the current Note, where possible language dealing with Erie issues was suggested in the materials for the call. The question was whether there was a need to tweak one or the other of those possible additions.

A reaction was that the second addition (accompanying footnote 8) seemed to be the right location, but to be too brief. A suggestion was instead to include a new paragraph at this point

addressing both the positive and negative points. The positive point is that the rule displaces state law on sanctions that is different. The negative point is that the rule has no effect on state-law causes of action for spoliation, whether based on common law or statute and whether considered a separate "tort" or otherwise.

Another expression of agreement emphasized that it would be desirable to avoid entering into the thicket of possible issues about the extent of the Rules Enabling Act authority to define "remedies" in federal court that vary from what state courts might do in similar circumstances. In addition, it was noted that because Rule 37(e) could be applied in situations in which the activity on which the sanctions are based occurred before suit was filed, it might be uncertain at the time the action was taken whether a case would be in state or federal court.

The consensus was that Note language should be added to address both aspects of the Erie concern, and that Professor Marcus should draft this language and circulate the draft to the Subcommittee by email seeking an expedited "last look" (in an effort to deliver agenda materials in to the A.O. on schedule).

Judge Harris's suggested
revision of Rule 37(e)(3)

This issue was introduced as looking desirable at first blush, but raising questions after further consideration. As outlined in Prof. Marcus's memorandum for this conference call (attached hereto as an Appendix), the change would actually seem to raise possible concerns about focusing attention for some matters on factors that really should not be considered pertinent. On balance, it may be that making the change could create risks of mischief.

A first reaction was similar. "I don't quite understand Judge Harris's concern." For example, consider the issue whether (e)(2)(B) might apply in a given case. Is it really true that the factors in (e)(3) should be brought to bear on whether the loss of the information "deprived a party of any meaningful opportunity to present a claim or defense"?

Another participant agreed -- "these factors could be a distraction in addressing (e)(2)(B)."

Another participant noted that (e)(3) was not designed to address all issues that could arise under new 37(e). For example, they are not particularly pertinent to whether to apply a sanction or instead to use a curative measure under (e)(1). If one wanted to identify factors pertinent to that choice, one would probably add a number of things that are not in current (e)(3), such as whether the party that failed to preserve had

been guilty of other discovery misconduct, the degree of prejudice, etc.

That drew agreement -- this is a "very complicated matrix."

The consensus was to make no change in 37(e)(3).

Judge Pratter's concern

The issue was introduced as pointing out the risk that current (e)(2)(A) might be read to call for reference to the prejudice factor only when bad faith is shown, and not when willfulness is shown. Whether this is a problem might be debated. Prof. Marcus' memo suggested three alternative ways of clarifying to avoid the risk.

The consensus was to adopt alternative one -- adding a comma after "bad faith," to make clear (as the Committee Note does also) that prejudice must be proved to support sanctions even if willfulness is shown.

Adding "when appropriate" to 37(e)(3)

The issue was introduced as focusing on the language of (e)(3), which says that the court "should consider all relevant factors, including [the listed factors]." The concern is whether the command ("should") could require a court to consider factors that ought not bear on the questions actually before the court. Alternatively, the use of "relevant" and "including" may make it clear that this list does not include all factors that might bear on decisions in a given case, and that some on the list might not be relevant in a given case.

An initial reaction was that adding "when appropriate" is not necessary. Another participant agreed.

Another participant expressed misgivings, however. "Linguistically, when I first read this, I was concerned about whether all factors are always relevant." Might it be better to say "consider all relevant factors, which may include~~ing~~"? Another participant expressed support for this revision.

A reaction to both the use of "when appropriate" and "which may include" was that either would likely raise style questions. The assumption is that judges are to do only appropriate things under the rules, and also that they are to consider only appropriate things.

Another reaction was that, under the current language, any judge going down this list would be likely to react to some as being irrelevant to the particular case before the court. The

reaction would be "This one does not apply."

Another reaction was that this issue is one on which we might be focused during the public comment period; we could await comments about whether this causes a problem.

Based on this discussion, the participant who originally expressed concerns retracted them; "I'm happy to leave the language as it is, pending public comment."

The consensus was to leave the language as it is.

Reference to litigation hold in 37(e)(3)(B)

The Subcommittee has discussed this issue before and retained the reference in the rule to litigation holds. The issue was raised again by many comments during the Nov. 2 meeting. The question is whether to end the reasonableness of preservation efforts factor at ". . . preserve the information."

The issue was introduced as sparked by the question whether "litigation hold" is something of a lightening rod. Is it too specific and controversial (and perhaps uncertain) to warrant mention in rule language?

An initial reaction was "I think it should stay in. It's a positive factor." People are aware of what a litigation hold is. Putting it into the rule recognizes that such an effort is desirable, and should be acknowledged if sanctions issues arise.

A competing view was "I continue to think that it should go out." Individual litigants don't do things like big companies. "Am I supposed to send myself a written litigation hold?" This participant had recently had extended discussions with several individual clients in which the topic of preservation had been explored at length. But there would be no formal "litigation hold" in these instances. In addition, putting it into the rule raises issues about whether privilege or work-product protection applies to such documents. Is it always required to turn over such a document?

Another participant sees the question as cutting both ways. For large companies, some litigation hold procedure is fairly routine by now. They would perhaps benefit from inclusion of the explicit factor so that they can emphasize "We did what the rule says." But the reference to the litigation hold in (B) is jarring because it is much more specific than the rest of the matters listed in (e)(3), raising the concern that it is receiving disproportional emphasis. Smaller entities and individual litigants are much less likely to have "litigation hold" practices than large entities.

Attention was drawn to the existing Committee note on the second factor, as expanded a bit by Prof. Marcus to note the relevance of the party's sophistication in matters of litigation. Is there a problem with that reference to a litigation hold, and is there a need to mention it also in the rule provision itself?

A reaction from one concerned with the reference in the rule is that "Having it there in the Note is o.k."

Another participant said there was no problem with mentioning "litigation holds" in the rule. But it would surely suffice to do so in the Note. There is no universally recognized or accepted definition of what a hold involves. Moreover, the greater the emphasis, the greater the pressures on privilege and work product issues.

A summary was that we seem to be reaching the conclusion that the rule's reference to a litigation hold should be removed. If it were, would it not be proper also to continue with the same Committee Note language (expanded as Prof. Marcus did for the removal of former (D))?

A question was raised: There are a number of other issues that could be raised but are not addressed in relation to litigation holds. For example, questions arise about whether counsel must follow up regularly, whether a collection effort must be undertaken, what should be done with computers that are going to be replaced, whether one can entrust collection to the individuals at the company who were involved in the actions that might lead to corporate liability, etc. Should these topics be mentioned?

A reaction was that many of those topics are heavily disputed in given cases, and some of them relate to "cutting edge" questions. Getting into those could be very problematical.

Another reaction was that the revised Note language in Prof. Marcus' memo seems fine. In particular, judges are sensitive to the sophistication of litigants, even governmental litigants. Another point was that some mention of individual litigants seems important. More than once we have been reminded that "People change their Facebook pages and discard their diaries without thinking about preservation." We should acknowledge that somewhere.

It was also noted that, in relation to proportionality, the Note had been augmented to call attention to litigant resources, particularly with regard to governmental litigants.

The consensus was to remove the rule's reference to litigation holds but and to retain the Note as revised by Prof. Marcus in the materials for the conference call.

Department of Justice concerns

As the time for ending the call was approaching, attention turned to the various concerns raised by the Department of Justice. The Department is certainly an important source of input on civil litigation in federal courts, as it appears in far more cases than any other litigant, and is involved in cases running the gamut of types of litigation. It is unfortunate that the Department was not able to complete its internal review of the rule with all the agencies with which it works in time for the Nov. 2 meeting.

An overall reaction was that although the Department made many comments and raised questions about several aspects of the rule, it was surely not entirely negative. At least four of its comments supported decisions reached in the long drafting process, and four more seemed to seek a more expansive rule. It did urge retention of current Rule 37(e), but the Subcommittee has concluded that the amended rule would provide protection in any instance in which the current rule does so. And Andrea Kuperman's memo shows at length that the current rule is rarely invoked. Moreover, the Committee has actually done one of the things the Department recommended -- removing the reference in proposed 37(e)(3) to the resources and sophistication of a party as bearing on sanctions decisions. And the Committee Note has also been modified to note that governmental entities may actually have limited resources for preservation efforts. Finally, the Committee voted also to delete the draft Note language on failed bad-faith efforts to destroy evidence. On balance, the rule proposal responds to most of the Department's concerns.

One specific was raised, however: The Department expressed concern that proposed (e)(3)(A) might be interpreted to permit a party accused of spoliation to avoid the consequences by claiming lack of knowledge, so that some sort of "should have known" formulation should be used instead. Is that concern troubling?

A reaction was that the current language -- "the extent to which the party was on notice that litigation was likely and that the information would be discoverable" -- should provide a suitable method for dealing with such issues. In particular, "the extent to which the party was on notice" standard seems clearly to adopt a "constructive notice" attitude. It provides no handholds for a litigant trying to escape responsibility because "I did not realize" if the court is persuaded the party should have appreciated that litigation was likely.

A judge agreed: "This objection did not resonate with me; I think the current language is preferable."

Others agreed; the consensus was to retain 37(e)(3)(A) as

currently written.

APPENDIX

Memo considered by Subcommittee
during Conference call

Nov. 28 Conference Call
Issues after Nov. 2 Committee meeting
Redraft of 37(e)

This memorandum addresses issues remaining after the Nov. 2 meeting of the full Committee, which can be discussed during the Nov. 28 Conference Call. It also presents the version of the rule that was presented to the Committee, with changes responsive to the vote of the Committee. The revised rule proposal shows changes to rule language either with strikeover (for language removed) or double underlining (for language added). In the Note underline and strikeover is used for the same purpose. A couple of very small fixes to the Note that occurred to the Reporter are also so indicated.

The Committee voted (a) to remove our proposed 37(e)(3)(D) factor from the rule, (b) to remove the bracketed paragraph in the Note regarding unsuccessful but heinous efforts to destroy evidence, (c) to retain factor 37(e)(3)(C), and (d) to recommend publication of the rule for public comment. It made this vote subject to the Subcommittee's further consideration of the Erie issues raised by John Vail and Judge Harris's suggested rewording of Rule 37(e)(3). During the meeting, Judge Pratter raised a question about the wording (or punctuation) of 37(e)(2)(A), and that is addressed below as well. Additional issues raised during the meeting discussed below were whether to add a "when appropriate" to Rule 37(e)(3) and whether to remove the reference to a litigation hold from Rule 37(e)(3)(B). These possible changes are discussed below, but the redraft does not currently include them. The Note also includes underlined language reflecting concerns formerly addressed in factor (D).

A set of draft minutes of the Nov. 2 online "meeting" of the full Committee should accompany this memorandum.

This memorandum attempts to introduce the issues remaining for Subcommittee decision. The full Committee's vote was to authorize the Subcommittee to make modest improvements before forwarding the rule to the Standing Committee, and the small changes in the Note below respond to that invitation. The Subcommittee may also decide whether there is any need to poll the full Committee about revisions after reaching conclusions about what more needs to be done now. It's worth noting that, for logistical reasons, that polling might present some difficulties in terms of submitting Standing Committee agenda materials by the beginning of December.

It is also worth noting that the full Committee will certainly have an opportunity to revisit these issues if the Standing Committee authorizes publication at its January meeting. For one thing, if the Duke Subcommittee proposals go forward after the full Committee's Spring meeting, this proposal will need to be integrated with those proposals.[1] For example, one of those proposals is to add emphasis to preservation in the Rule 26(f)/Rule 16(b) process. More importantly, the process of public comment will afford the Subcommittee and the full Committee an abundant opportunity to reflect on the Rule 37(e) amendment proposal before a decision is made whether to recommend adoption to the Judicial Conference. It is likely that this proposal will draw much more interest than our Rule 45 amendment proposal; there will be abundant commentary.

Transmittal to Standing Committee

Eventually we will need to prepare an memorandum for the Standing Committee transmitting the rule proposal. That will likely be done by the Chairs and the Reporters, so it seems useful to preface the discussion of remaining issues for the Subcommittee with some mention of what that transmittal memorandum would likely contain.

It would likely contain an introduction like the introduction presented to the full Committee in the agenda materials at pp. 121-26. Among other things, that makes clear that the goal is to displace Residential Funding.

It would also report the full Committee's action, and any revisions made by the Subcommittee after the meeting in light of the full Committee discussion.

Erie Doctrine Concerns

John Vail has argued that the Erie Doctrine or the Rules Enabling Act constitute serious obstacles to going forward with 37(e). Frankly, those issues do not appear to be weighty. Certainly the Rules Enabling Act authorizes adoption of rules about how to handle federal-court litigation in relation to failure to provide through discovery materials that would assist in the resolution of the case before the court. Under the Supreme Court's decisions, such a rule is permissible if it is "arguably procedural." Thus, one could say that the issue is what "remedy" the federal court should grant when presented with a failure to respond to discovery on the ground that the material

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[1] As noted again below, to the extent the Duke proposals affect the content to Rule 26(b)(2)(C), that would require another look at this proposal, which refers to 26(b)(2)(C) in the Note.

sought no longer exists. Rule 37 addresses exactly that sort of issue, and revising it so it more suitably handles this problem should not tax the Enabling Act authority.

Under 28 U.S.C. § 2072(b), a rule should not be applied if doing so would "abridge, enlarge or modify any substantive right." It may be that a wholesale effort through a rule to define and limit or expand the duty to preserve could raise concerns on this score. But 37(e) does not do that. And the Supreme Court has been quite circumspect about the application of § 2072(b). In Burlington Northern R.R. v. Woods, 480 U.S. 1 (1987), it recognized that this provision was "an additional requirement" when competing state law is invoked against application of a Federal Rule, but the Court's actual holding in that case seems to provide strong support for our 37(e).

The issue in Burlington Northern was whether an Alabama statute that required that 10% be added to a money judgment if defendant appealed and the judgment was affirmed could be applied to a federal-court diversity judgment entered in Alabama. One could make a fairly strong argument that this right was a "substantive right," perhaps somewhat like postjudgment interest. But the Court held that the Alabama statute conflicted with Fed. R. App. 38, which permits the court of appeals to impose a sanction on a party that brings a groundless appeal and grants the court discretion to decide whether or not to impose a sanction, and also to determine the amount of any sanction. The Court said the mandatory nature of the Alabama statute conflicted with the discretionary operation of Rule 38. That finding of a conflict was also arguable; Alabama had its own Appellate Rule 38, modeled on the federal rule, and seemed perfectly able to apply both without problems of conflict between them.

Nonetheless, the Court's decision was a relatively ringing endorsement of rules adopted pursuant to the Enabling Act, even when they come up against state laws that could be said to create substantive rights (480 U.S. at 5-6):

> The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules. Moreover, the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, give the Rules presumptive validity under both the constitutional and statutory constraints.

In Business Guides, Inc. v. Chromatic Communications Ent.,

Inc. 498 U.S. 533 (1991), the Court upheld imposition of Rule 11 sanctions on a party despite Justice Kennedy's argument in dissent that doing so "creates a new tort of 'negligent prosecution' or 'accidental abuse of process.'" The majority concluded that "[t]here is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental."

Lower courts have recognized that state law is not controlling in this area even in the absence of a rule directly addressing the questions addressed by new 37(e). For example, here is the analysis of the Sixth Circuit en banc in Adkins v. Woelever, 554 F.3d 650, 652 (6th Cir. 2008), abandoning that court's prior reference to state law regarding spoliation:

> In contrast to our persistent application of state law in this area, other circuits apply federal law for spoliation sanctions. See, e.g., Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001): Reilly v. Natwest Mkts. Group, Inc., 181 F.3d 253, 267 (2d Cir. 1999); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993). We believe that this is the correct view for two reasons. First, the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather "from a court's inherent power to control the judicial process. Silvestri, 271 F.3d at 590. Second, a spoliation ruling is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters. These reasons persuade us now to acknowledge the district court's broad discretion in crafting a proper sanction for spoliation.

The goal of amended 37(e) is to achieve uniformity in the federal courts in their handling of failures to preserve. One of the chief stimuli behind the proposed amendment is the diversity of treatment of preservation sanctions across the country. So there seems little reason to expect that it would run afoul of § 2072(b), as interpreted by the Supreme Court.

Indeed, one could instead argue that the real problem of judicial power exists now, and that the proposed rule would solve it. Until now, many courts have invoked "inherent authority" to address the handling of these issues. Our Committee Note tries to make clear that new Rule 37(e) would make resort to inherent authority unnecessary. There may be an argument that these judges were overstepping their authority in doing so with regard to pre-litigation preservation.[2] That argument seems strained,

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[2] On this issue, see the recent and yet-unpublished article by Joshua M. Koppel, Federal Common Law and the Courts'

but no more so than the argument that adopting 37(e) would exceed the Enabling Act or transgress Erie (which really has no application to rules adopted pursuant to the Enabling Act). Acting to regularize matters through the Enabling Act process seems preferable in many ways. Indeed, if there were Enabling Act problems, it would seem that they apply relatively equally to current Rule 37(e).

Law professors have an almost insatiable enthusiasm for discussing Erie issues that the rest of the world understandably finds perplexing, so it's best to stop here. It's worth noting, however, that one possibility would be to invite comment on whether any perceive a serious Enabling Act problem. That may, however, be an odd topic on which to invite comment. But if there is reason to foresee that many comments will decry the rule as exceeding Enabling Act authority, it may be useful to invite others to react with contrary views. As noted above, the careful consideration the Advisory Committee gives to rule revision is one of the things that the Supreme Court has cited as contributing to the presumptive validity of rules.

By way of contrast, particularly given some comments during the full Committee meeting, it is likely desirable to invite public comment on whether anything would be lost due to discarding current Rule 37(e). Andrea Kuperman's research and our thorough discussion suggest there is no reason to retain the current rule if our proposal is adopted in its stead. But to be extra certain, specifically inviting comment on that point could be desirable. Whether it is also desirable to invite comments on Enabling Act concerns is perhaps best left to the Standing Committee. But it is dubious to add a more explicit focus to the rule or Note presently.

Judge Harris's suggestion

Judge Arthur Harris suggested revising our proposed Rule 37(e)(3) as follows:

(3) In determining whether to adopt measures under Rule 37(e)(1) or to impose sanctions under Rule 37(e)(2), ~~a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith,~~ the court should consider all relevant factors, including:

Judge Harris offered the following explanation for this suggestion:

Regulation of Pre-Litigation Preservation, available at http://ssrn.com/abstract=2154484.

> It seems to me that the factors are relevant to more than just the two items listed -- failure to preserve discoverable information and whether failure was willful or in bad faith. For example, the factors could also be relevant in determining whether the failure irreparably deprived a party of any meaningful opportunity to present a claim or defense or what, if any, sanctions should be imposed.

Possibly relevant to this suggestion is the discussion during the Nov. 2 Committee meeting about whether it would be desirable to identify which issues various factors actually address. Thus, some speakers favored more precision directing the reader to employ various factors only with regard to certain criteria important under the rule, seemingly cutting in a direction different from -- possibly opposite to -- the direction of Judge Harris's suggestion.

Turning first to the Nov. 2 discussion of focusing more precisely than we do now, it is worth recalling that some suggestions the Subcommittee has received (the N.Y. State Bar Ass'n submission comes to mind) have urged considerable precision in culpability calibrations, but those efforts at precision have seemed to tend in the direction of trying to create Sanctioning Guidelines. Rule 37(e)(3) was not designed this way.

At the same time, it is not necessarily true that these factors (as revised by the Nov. 2 vote of the full Committee) really bear on everything and anything raised pertinent to decisions under new Rule 37(e).

To take as an example the use suggested by Judge Harris -- determining whether Rule 37(e)(2)(B) applies -- there seems a strong argument that inviting broader use of the factors in (e)(3) would be dubious. True, loss of essential information due to events entirely beyond the control of a party (such as a hurricane) probably does not provide support for the conclusion that "a party failed to preserve information that reasonably should have been preserved." As currently written, 37(e)(3) would make it appropriate to employ its factors on that point. But it's not at all clear whether those factors should be employed in determining whether the loss of the information "irreparably deprived a party of any meaningful opportunity to present a claim or defense." Using them might create rather than solve problems.

To take a different example, consider the question whether to employ measures identified in Rule 37(e)(1). As the Committee Note explains, that decision resembles any case-management discovery decision by a court, with the added ingredient that a party has failed to retain discoverable information it should have retained. The Note therefore addresses how that additional

factor should come into play; it recognizes that it could alter the calculus under Rule 26(b)(2)(B) or 26(b)(2)(C).[3] But to say that the reasonableness of the party's efforts to preserve (factor B) somehow has more importance than under the normal case-management evaluation because that is on the list in 37(e)(3) seems peculiar. And with regard to Rule 37(e)(2), the Committee Note says that the court should use the least severe measure needed. So it seems that the rule and Note as written adequately address the issues without change.

On the other hand, making the revision recommended by Judge Harris probably would not do mischief, and there may be situations in which leaving the language as we drafted it could seem unduly constraining.

In short, it is probably not a matter of enormous importance either way, but it should be resolved.

Judge Pratter's Suggestion on Rule 37(e)(2)(A)

Judge Pratter (probably a fan of Lynne Truss's book Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation) raised an issue about the "or . . . and" sequence in Rule 37(e)(2)(A) as we drafted it:

> **(A)** that the failure was willful or in bad faith and caused substantial prejudice in the litigation; or

She is worried that without at least some further punctuation there may be arguments that the substantial prejudice element applies only to bad faith failures to preserve and not to willful ones.

Whether this is a serious risk might be debated, but several easy solutions seem to exist:

> **(A)** that the failure was willful or in bad faith, and caused substantial prejudice in the litigation; or [Alternative 1]

> **(A)** that the failure (i) was willful or in bad faith; and (ii) caused substantial prejudice in the the

[3] This brings to mind one possible outcome of Duke Subcommittee proposals. They may affect the content or composition of Rule 26(b)(2)(C). To the extent they do, that might affect what 37(e) should say.

litigation; or [Alternative 2][4]

(A) that the failure caused substantial prejudice in the litigation, and was willful or in bad faith ~~and caused substantial prejudice in the litigation~~; or [Alternative 3]

Alternative 1 seems the simplest solution to the problem, if it is a problem. Alternative 2 should make it absolutely clear that substantial prejudice must be shown separately whether or not willfulness or bad faith is shown. Alternative 3 seems to make that clear, but also to put the less important concern -- substantial prejudice -- before the more important one.

"when appropriate"

During the Nov. 2 meeting, several participants urged that we consider adding "when appropriate" to Rule 37(e)(3) as follows:

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court should consider all relevant factors, including when appropriate:

It appears that the reason for this suggestion is that the verb in the rule is "should," but that in given cases the court should not consider certain factors. One response to this concern (and a reaction that the Standing Committee's Style Consultant might have) is that all the rules call for judges to do only "appropriate" things. Another response is that the rule as proposed to the Committee does say that the court should consider "all relevant factors," so it takes account of the question whether given factors are relevant. But one reading of the rule is to say that the listed factors must always be considered, while other factors may be considered if relevant.

One possible comparison is Rule 23(g)(1), which lists four factors that the court "must" consider in appointing class

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[4] It may be that this alternative should be presented somewhat differently:

(A) that the failure:

(i) was willful or in bad faith; and

(ii) caused substantial prejudice in the litigation; or

counsel and then authorizes the court also to consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." The original version of this rule published for comment had only three mandatory factors, prompting objection that they were slanted in favor of certain law firms, and eventually a fourth was added. The comparison could stress the use of "must" in 23(g)(1) and "should" in 37(e). But it is valid to argue that what' son a possibly "mandatory" list matters.

In any event, the question whether to add these words to the rule prompted sufficient comment during the meeting to justify including it as a potential topic for discussion during the Nov. 28 conference call.

Removing the reference to litigation holds from 37(e)(3)(B)

The Subcommittee has already discussed this issue at some length, but it is included here because it received considerable attention during the Nov. 2 meeting. The change would be as follows:

> **(B)** the reasonableness of the party's efforts to preserve the information~~, including the use of a litigation hold and the scope of the preservation efforts~~;

One reason for making this change would be that it is undesirable to emphasize litigation holds by referring to them in the rule. The Committee Note to current Rule 37(e) refers to litigation holds, and there seems little doubt that the basic concept is recognized widely. At least some judges may be tempted to insist on specific sorts of litigation holds (e.g., written ones), which may be a different reason for avoiding mention of litigation holds in the rule itself. If this change were made, probably the reference to use of a litigation hold should be retained in the Committee Note; otherwise there might be an argument that litigation holds are irrelevant under new 37(e) because they are nowhere mentioned, while they were mentioned in the Note to the 2006 version of 37(e).

It may be that this worry overemphasizes the importance of including the term "litigation hold" in the rule. The Committee Note tries to defuse worries about the term becoming a talisman:

> The second factor focuses on what the party did to preserve information after the prospect of litigation arose. The party's issuance of a litigation hold is often important on this point. But it is only one consideration, and no specific feature of the litigation hold -- for example, a

> written rather than an oral hold notice -- is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized.

The next-to-last sentence quoted above attempts to deflect arguments that only a written hold satisfies preservation responsibilities.

A competing consideration is that including specific reference to a litigation hold is a good thing for parties whose preservation efforts are challenged. All current (B) says is that a litigation hold is a consideration in assessing the party's overall preservation efforts. The inclusion of a specific reference to a litigation hold, coupled with the Note's effort to avoid having the rule's reference mean something specific in all cases, means that parties that do something like a hold can point to that fact and emphasize the rule's recognition that this is responsible behavior of the sort that should dissuade the court from finding that the party was guilty of bad faith or willful destruction of evidence.

So the tradeoff between leaving (B) as currently written and shortening it does not seem invariably to favor or disfavor entities that are called upon to preserve evidence. Indeed, it may be more likely that companies and other organizational litigants than individual litigants would (and do now) in fact undertake some sort of litigation hold.

My understanding is that the Committee authorized us to go to the Standing Committee with (B) as it was, including the reference to the litigation hold. If that paragraph does go forward and is eventually published for public comment, one question that might be illuminated is whether the reference to litigation holds in the rule is likely to do mischief.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

~~**(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.** 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.~~

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION. If a party failed ~~fails~~ to preserve discoverable information that reasonably should have been ~~be~~ preserved in the anticipation or conduct of litigation,[5]

(1) The court may permit additional discovery, order the party to undertake curative measures, or require the party to pay the reasonable expenses, including attorney's fees, caused by the failure.

(2) The court may impose any of the sanctions listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction only if the court finds:

(A) that the failure was willful or in bad faith and caused substantial prejudice in the litigation; or

(B) that the failure irreparably deprived a party of any meaningful opportunity to present a claim or defense.

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court should consider all relevant

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[5] This revision of verb tense responds to Peter Keisler's comment during the meeting. The verb tenses would, as he noted, now match up with those in Rule 37(e)(3).

27 factors, including:[6]

28

29 (A) the extent to which the party was on notice that
30 litigation was likely and that the information
31 would be discoverable;

32

33 (B) the reasonableness of the party's efforts to
34 preserve the information, including the use of a
35 litigation hold and the scope of the preservation
36 efforts;

37

38 (C) whether the party received a request that
39 information be preserved, the clarity and
40 reasonableness of the request, and whether the
41 person who made the request and the party engaged
42 in good-faith consultation regarding the scope of
43 preservation;

44

45 ~~(D) the party's resources and sophistication in~~
46 ~~litigation;~~

47

48 (~~D~~E) the proportionality of the preservation efforts
49 to any anticipated or ongoing litigation; and

50

51 (~~E~~F) whether the party sought timely guidance from the
52 court regarding any unresolved disputes concerning
53 the preservation of discoverable information.

54

DRAFT COMMITTEE NOTE

1

2 In 2006, Rule 37(e) was added to provide protection against
3 sanctions for loss of electronically stored information under
4 certain limited circumstances, but preservation problems have
5 nonetheless increased. The Committee has been repeatedly

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[6] The introductory memorandum discussed Judge Harris' suggestion for amendment to this paragraph. If the Subcommittee decides to adopt that change, the Committee Note may need to be revised as well.

6 informed of growing concern about the increasing burden of
7 preserving information for litigation, particularly with regard
8 to electronically stored information. Many litigants and
9 prospective litigants have emphasized their uncertainty about the
10 obligation to preserve information, particularly before
11 litigation has actually begun. The remarkable growth in the
12 amount of information that might be preserved has heightened
13 these concerns. Significant divergences among federal courts
14 across the country have meant that potential parties cannot
15 determine what preservation standards they will have to satisfy
16 to avoid sanctions. Extremely expensive overpreservation may
17 seem necessary due to the risk that very serious sanctions could
18 be imposed even for merely negligent, inadvertent failure to
19 preserve some information later sought in discovery.

20

21 This amendment to Rule 37(e) addresses these concerns by
22 adopting a uniform set of guidelines for federal courts,[7] and
23 applying them to all discoverable information, not just
24 electronically stored information. It is not limited, as is the
25 current rule, to information lost due to "the routine, good-faith
26 operation of an electronic information system." The amended rule
27 is designed to ensure that potential litigants who make
28 reasonable efforts to satisfy their preservation responsibilities
29 may do so with confidence that they will not be subjected to
30 serious sanctions should information be lost despite those
31 efforts. It does not provide "bright line" preservation
32 directives because bright lines seem unsuited to a set of
33 problems that is intensely context-specific. Instead, the rule
34 focuses on a variety of considerations that the court should
35 weigh in calibrating its response to the loss of information.

36

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[7] This is a point at which Note language could be added to affirm that adoption of this rule does not raise an *Erie* problem, along the following lines:

> This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of guidelines for federal courts, displacing disparate federal decisions and state law as well. It applies ~~and applying them~~ to all discoverable information, not just electronically stored information.

Another possible place for a comment along these lines is in a later footnote. The question whether including anything along these lines is debatable; it may be best simply to present the Standing Committee with an explanation like the one in the introductory memorandum about why the *Erie* Doctrine does not seem like a problem rather than trying to put something along those lines into the Note.

37 Amended Rule 37(e) applies to loss of discoverable
38 information "that reasonably should be preserved in the
39 anticipation or conduct of litigation." This preservation
40 obligation arises from the common law, and may in some instances
41 be triggered <u>or clarified</u> by a court order in the case. Rule
42 37(e)(3) identifies many of the factors that should be considered
43 in determining, in the circumstances of a particular case, when a
44 duty to preserve arose and what information should be preserved.

45

46 Except in very rare cases in which the loss of information
47 irreparably deprived a party of any meaningful opportunity to
48 present a claim or defense, sanctions for loss of discoverable
49 information may only be imposed on a finding of willfulness or
50 bad faith<u>, combined with substantial prejudice</u>.[8]

51

52 Unlike the 2006 version of the rule, amended Rule 37(e) is
53 not limited to "sanctions under these rules." It provides rule-
54 based authority for sanctions for loss of all kinds of
55 discoverable information, and therefore makes unnecessary resort
56 to inherent authority.

57

58 **Subdivision (e)(1)** When the court concludes that a party
59 failed to preserve information it should have preserved, it may
60 adopt a variety of measures that are not sanctions. One is to
61 permit additional discovery that would not have been allowed had
62 the party preserved information as it should have. For example,
63 discovery might be ordered under Rule 26(b)(2)(B) from sources of
64 electronically stored information that are not reasonably
65 accessible. More generally, the fact that a party has failed to
66 preserve information may justify discovery that otherwise would
67 be precluded under the proportionality analysis of Rule
68 26(b)(2)(C).

69

70 In addition to, or instead of, ordering further discovery,
71 the court may order the party that failed to preserve information
72 to take curative measures to restore or obtain the lost

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[8] This is another point at which additional language could be added to address the question whether there is an *Erie* problem with our rule proposal. For example, we could continue with something like: "The rule therefore displaces any other law that would authorize imposing sanctions in the absence of a showing of willfulness or bad faith, including state law applied in diversity cases." That statement seems like saying "We really mean it." As noted in the prior footnote, it is not clear this adds usefully to the Note.

73 information, or to develop substitute information that the court
74 would not have ordered the party to create but for the failure to
75 preserve. The court may also require the party that failed to
76 preserve information to pay another party's reasonable expenses,
77 including attorney fees, caused by the failure to preserve. Such
78 expenses might include, for example, discovery efforts caused by
79 the failure to preserve information.

80

81 **Subdivision (e)(2)(A).** This subdivision authorizes
82 imposition of the sanctions listed in Rule 37(b)(2)(A) for
83 failure to preserve information, whether or not there was a court
84 order requiring such preservation. Rule 37(e)(2)(A) is designed
85 to provide a uniform standard in federal court for sanctions for
86 failure to preserve. It rejects decisions that have authorized
87 the imposition of sanctions -- as opposed to measures authorized
88 by Rule 37(e)(1) -- for negligence or gross negligence.

89

90 This subdivision protects a party that has made reasonable
91 preservation decisions in light of the factors identified in Rule
92 37(e)(3), which emphasize both reasonableness and
93 proportionality. Despite reasonable efforts to preserve, some
94 discoverable information may be lost. Although loss of
95 information may affect other decisions about discovery, such as
96 those under Rule 26(b)(2)(B) and 26(b)(2)(C), sanctions may be
97 imposed only for willful or bad faith actions, except in the
98 exceptional circumstances described in Rule 37(e)(2)(B).

99

100 The threshold under Rule 37(e)(2)(A) is that the court find
101 that lost information should have been preserved; if so, the
102 court may impose sanctions only if it can make two further
103 findings. First, it must be established that the party that
104 failed to preserve did so willfully or in bad faith. This
105 determination should be made with reference to the factors
106 identified in Rule 37(e)(3).

107

108 Second, the court must also find that the loss of
109 information caused substantial prejudice in the litigation.
110 Because digital data often duplicate other data, substitute
111 evidence is often available. Although it is impossible to
112 demonstrate with certainty what lost information would prove, the
113 party seeking sanctions must show that it has been substantially
114 prejudiced by the loss. Among other things, the court may
115 consider the measures identified in Rule 37(e)(1) in making this
116 determination; if these measures can sufficiently reduce the
117 prejudice, sanctions would be inappropriate even when the court
118 finds willfulness or bad faith. Rule 37(e)(2)(A) authorizes
119 imposition of Rule 37(b)(2) sanctions in the expectation that the

120 court will employ the least severe sanction needed to repair the
121 prejudice resulting from loss of the information.

122

123 ~~[There may be cases in which a party's extreme bad faith~~
124 ~~does not in fact impose substantial prejudice on the opposing~~
125 ~~party, as for example an unsuccessful attempt to destroy crucial~~
126 ~~evidence. Because the rule applies only to sanctions for failure~~
127 ~~to preserve discoverable information, it does not address such~~
128 ~~situations.]~~

129

130 **Subdivision (e)(2)(B).** Rule 37(e)(2)(B) permits the court
131 to impose sanctions without making a finding of either bad faith
132 or willfulness. As under Rule 37(e)(2)(A), the threshold for
133 sanctions is that the court find that lost information should
134 have been preserved by the party to be sanctioned.

135

136 Even if bad faith or willfulness is shown, sanctions may
137 only be imposed under Rule 37(e)(2)(A) when the loss of
138 information caused substantial prejudice in the litigation. Rule
139 37(e)(2)(B) permits sanctions in the absence of a showing of bad
140 faith or willfulness only if that loss of information deprived a
141 party of any meaningful opportunity to present a claim or
142 defense. Examples might include cases in which the alleged
143 injury-causing instrumentality has been lost before the parties
144 may inspect it, or cases in which the only evidence of a
145 critically important event has been lost. Such situations are
146 extremely rare.

147

148 Before resorting to sanctions, a court would ordinarily
149 consider lesser measures, including those listed in Rule
150 37(e)(1), to avoid or minimize the prejudice. If such measures
151 substantially cure the prejudice, Rule 37(e)(2)(B) does not
152 apply. Even if such prejudice persists, the court should employ
153 the least severe sanction.

154

155 **Subdivision (e)(3).** These factors guide the court when
156 asked to adopt measures under Rule 37(e)(1) due to loss of
157 information or to impose sanctions under Rule 37(e)(2). The
158 listing of factors is not exclusive; other considerations may
159 bear on these decisions, such as whether the information not
160 retained reasonably appeared to be cumulative with materials that
161 were retained. With regard to all these matters, the court's
162 focus should be on the reasonableness of the parties' conduct.

163

The first factor is the extent to which the party was on notice that litigation was likely and that the information lost would be discoverable in that litigation. A variety of events may alert a party to the prospect of litigation. But often these events provide only limited information about that prospective litigation, so that the scope of discoverable information may remain uncertain.

The second factor focuses on what the party did to preserve information after the prospect of litigation arose. The party's issuance of a litigation hold is often important on this point. But it is only one consideration, and no specific feature of the litigation hold -- for example, a written rather than an oral hold notice -- is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized. One focus would be on the extent to which a party should appreciate that certain types of information might be discoverable in the litigation, and also what it knew, or should have known, about the likelihood of losing information if it did not take steps to preserve. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than other litigants who have considerable experience in litigation.[9] The fact that some information was lost does not itself prove that the efforts to preserve were not reasonable.

The third factor looks to whether the party received a request to preserve information. Although such a request may bring home the need to preserve information, this factor is not meant to compel compliance with all such demands. To the contrary, reasonableness and good faith may not require any special preservation efforts despite the request. In addition, the proportionality concern means that a party need not honor an unreasonably broad preservation demand, but instead should make its own determination about what is appropriate preservation in light of what it knows about the litigation. The request itself, or communication with the person who made the request, may provide insights about what information should be preserved. One important matter may be whether the person making the preservation request is willing to engage in good faith consultation about the scope of the desired preservation.

~~The fourth factor looks to the party's resources and~~

[9] This is an effort to include in the Note considerations like those in our factor (D).

208 ~~sophistication in relation to litigation. Prospective litigants~~
209 ~~may have very different levels of sophistication regarding what~~
210 ~~litigation entails, and about their electronic information~~
211 ~~systems and what electronically stored information they have~~
212 ~~created. Ignorance alone does not excuse a party that fails to~~
213 ~~preserve important information, but a party's sophistication may~~
214 ~~bear on whether failure to do so was either willful or in bad~~
215 ~~faith. A possibly related consideration may be whether the party~~
216 ~~has a realistic ability to control or preserve some~~
217 ~~electronically stored information.~~

218

219 The fourth ~~fifth~~ factor emphasizes a central concern --
220 proportionality. The focus should be on the information needs of
221 the litigation at hand. That may be only a single case, or
222 multiple cases. Rule 26(b)(2)(C) provides guidance particularly
223 applicable to calibrating a reasonable preservation regime. Rule
224 37(e)(3)(E) explains that this calculation should be made with
225 regard to "any anticipated or ongoing litigation." Prospective
226 litigants who call for preservation efforts by others (the third
227 factor) should keep those proportionality principles in mind.

228

229 Making a proportionality determination often depends in part
230 on specifics about various types of information involved, and the
231 costs of various forms of preservation. The court should be
232 sensitive to party resources; aggressive preservation efforts can
233 be extremely costly, and parties (including governmental parties)
234 may have limited resources to devote to those efforts.[10] A party
235 may act reasonably by choosing the least costly form of
236 information preservation, if it is substantially similar to more
237 costly forms. It is important that counsel become familiar with
238 their clients' information systems and digital data -- including
239 social media -- to address these issues. A party urging that
240 preservation requests are disproportionate may need to provide
241 specifics about these matters in order to enable meaningful
242 discussion of the appropriate preservation regime.

243

244 Finally, the fifth ~~sixth~~ factor looks to whether the party
245 alleged to have failed to preserve as required sought guidance
246 from the court if agreement could not be reached with the other
247 parties. Until litigation commences, reference to the court may
248 not be possible. In any event, this is not meant to encourage
249 premature resort to the court; Rule 26(f) directs the parties to
250 discuss and to attempt to resolve issues concerning preservation
251 before presenting them to the court. Ordinarily the parties'

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[10] This is an effort to introduce into the Note considerations raised by what was our factor (D).

252 arrangements are to be preferred to those imposed by the court.
253 But if the parties cannot reach agreement, they should not forgo
254 available opportunities to obtain prompt resolution of the
differences from the court.

MEMORANDUM

DATE: August 24, 2012

TO: Discovery Subcommittee

FROM: Andrea L. Kuperman

CC: Judge David G. Campbell
Professor Edward H. Cooper
Professor Daniel R. Coquillette
Judge Mark R. Kravitz
Professor Richard L. Marcus

SUBJECT: Rule 37(e) case law

The Discovery Subcommittee is currently analyzing the best means for addressing growing concerns about preservation for litigation and associated sanctions for failure to preserve. The current thinking of the Subcommittee is to take a sanctions-only approach to addressing these concerns. The Civil Rules were amended in 2006 to address electronic discovery issues. At that time, concerns about preservation and sanctions with respect to electronically stored information ("ESI") were addressed in Rule 37(e),[1] which provides: "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." FED. R. CIV. P. 37(e).

To help assess the best course for proceeding on a preservation/sanction rule, the Discovery Subcommittee asked me to look into the case law on Rule 37(e). Specifically, I have been asked to look into the following questions:

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[1]The text now appearing in Rule 37(e) was originally added in 2006 as subsection (f). However, when the Civil Rules were restyled in 2007, the provision became subdivision (e). This memo will refer to the subdivision as Rule 37(e), unless a case or article refers to it as Rule 37(f).

- Has Rule 37(e) made a difference?
- How does the case law interpret "routine, good-faith operation of an electronic information system"? Does it encompass individual decisions to delete information?
- Has the "exceptional circumstances" clause in Rule 37(e) ever been used?
- How has Rule 37(e) been interpreted in terms of litigation holds?
- What is a "sanction" that may not be imposed under Rule 37(e)? Does it include curative measures?

I have reviewed the cases that discuss Rule 37(e), as well as some legal commentary, and I conclude that Rule 37(e) has had very limited impact. There are only a handful of cases that seem to apply it. Many disregard it because it is limited to sanctions under the Rules, and Rule 37(b) only provides for sanctions for violation of a court order. Others find it does not apply because the party failed to institute an adequate litigation hold, which many courts view as required, or at least strongly encouraged, by the advisory committee notes. Still others find it does not apply because the alleged destruction arose before the preservation duty applied (bringing in both the issue of the lack of a court order and the fact that Rule 37(e) is not necessary to address failures to preserve before the duty to do so arises). Many of the cases denying sanctions and citing Rule 37(e) seem likely to have reached the same result even without the provision.

In short, the rule was intended to do something quite limited: to clarify for courts and parties that the world of electronic discovery could not be treated the same in terms of preservation and related sanctions as the world of paper discovery, given the volume of electronic documents and the fact that electronic systems operate in ways that may destroy data unintentionally and often even without a party's knowledge. It was meant to provide limited protection so that parties could be comforted that they would not be sanctioned for good faith destruction done by electronic systems.

As a practical matter, however, this has proven to be a truly narrow area of protection, as most courts seem to find plenty of other reasons for denying sanctions in instances of good-faith destruction. To the extent litigants sought a true safe harbor for failure to preserve, Rule 37(e) does not appear to have provided much comfort.

This memo will first explore the history behind the adoption of Rule 37(e), to gain a better understanding of the Committee's goals in enacting that provision. It will then examine the case law on each of the questions listed above.

I. The History of Rule 37(e)

Amendments to add the provision in Rule 37(e) were published for public comment in August 2004. The brochure accompanying the proposals explained that the proposed amendments to Rule 37 would place a limit on sanctions for the loss of ESI as a result of the routine operation of computer systems. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, SUBMITTED FOR PUBLIC COMMENT, A SUMMARY FOR BENCH AND BAR 2 (Aug. 2004), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CompleteBrochure.pdf. The brochure further explained that the new provision would create a limited "safe harbor" that would address "a unique and necessary feature of computer systems — the automatic recycling, overwriting, and alteration of electronically stored information." *Id.* at 3. As published, the rule was meant to address only a small subset of issues involving sanctions for the loss of electronic information. At the time of publication, the Committee seemed to believe that the rule would require reasonable preservation efforts, including, in many instances, a litigation hold. The Committee report stated: "Proposed Rule 37(f) requires that a party seeking to invoke the 'safe harbor' must

have taken reasonable steps to preserve electronically stored information when the party knew or should have known it was discoverable in the action. Such steps are often called a 'litigation hold.'" *See* Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, Report of the Civil Rules Committee, at 18 (May 17, 2004, rev. Aug. 3, 2004), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CVAug04.pdf [hereinafter Civil Rules 2004 Report].

At the time of publication, the Advisory Committee was continuing to examine the appropriate degree of culpability or fault that would preclude application of the limited safe harbor. *Id.* at 19. The Advisory Committee's report submitting the proposal for public comment noted that "[s]ome have voiced concern that the proposed amendment to Rule 37 is inadequate because it only provides protection from sanctions for conduct unlikely to be sanctioned under the current rules: when information is lost despite a party's reasonable efforts to preserve the information and no court order is violated." *Id.* But "[o]thers have voiced concern that raising the culpability standard would provide inadequate assurance that relevant information is preserved for discovery." *Id.* The Committee requested comments "on whether the standard that makes a party ineligible for a safe harbor should be negligence, or a greater level of culpability or fault, in failing to prevent the loss of electronically stored information as a result of the routine operation of a computer system." *Id.* The published proposal used a negligence standard, but set out a possible alternative amendment that would be framed in terms of intentional or reckless failure to preserve ESI lost as a result of ordinary operation of a computer system. *Id.* The Committee also sought public comment on whether the proposed amendment accurately described the type of automatic computer operations that should be

covered. *Id.* at 20. The Committee explained that it intended "that the phrase, 'the routine operation of the party's electronic information system,' identifies circumstances in which automatic computer functions that are generally applied result in the loss of information." *Id.*

As published, the proposal stated:

> (f) **Electronically Stored Information**. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:
>
> (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and
>
> (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

Id. at 51–52.[2]

After considering the extensive public comments, the Advisory Committee ultimately went with an intermediate standard for the degree of culpability — "good faith." The Advisory Committee noted that many comments urged that the negligence standard would provide no meaningful protection, but would only protect against conduct unlikely to be sanctioned in the first place, while others urged that the more restrictive standard in the footnote went too far in the other

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[2]The alternative version that was set out as a possible example of a proposal that would impose a higher degree of culpability before excluding the conduct from the safe harbor stated:

> **(f) Electronically Stored Information**. A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless:
>
> (1) the party intentionally or recklessly failed to preserve the information; or
>
> (2) the party violated an order issued in the action requiring the preservation of information.

Civil Rules 2004 Report, *supra*, at 53.

direction by insulating conduct that should be subject to sanctions. *See* Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Civil Rules Advisory Committee, at 74 (May 27, 2005, rev. Jul. 25, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_CV_Report.pdf [hereinafter Civil Rules 2005 Report]. The Advisory Committee viewed the "good faith" standard as an intermediate option between the two published options. *See id.* at 74–75. The Advisory Committee's report indicated that it believed that the adequacy of a litigation hold would often bear on whether the party acted in good faith, but the Committee did not view it as a dispositive factor. *See id.* at 75 ("[G]ood faith may require that a party intervene to suspend certain features of the routine operation of an information system to prevent loss of information subject to preservation obligations. . . . The steps taken to implement an effective litigation hold bear on good faith, as does compliance with any agreements that the parties have reached regarding preservation and with any court orders directing preservation."). After publication, the Advisory Committee also decided to add the "exceptional circumstances" provision that appears in the final rule, explaining that it "adds flexibility not included in the published drafts."[3]

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[3]No further explanation of the addition of the "exceptional circumstances" provision is provided in the Civil Rules 2005 Report, but there is evidence that the Advisory Committee originally intended it to mean "severe prejudice" and that the Standing Committee revised the committee note to remove that explanation, prompting the Advisory Committee to revise its report to the Standing Committee before it was attached as an appendix to the Standing Committee's report to the Judicial Conference. (It is standard practice for an advisory committee to submit a report to the Standing Committee and then to revise the report to take account of Standing Committee actions after the Standing Committee's meeting and before the report is included as an attachment to the Standing Committee's report to the Judicial Conference.) For example, the original Advisory Committee report to the Standing Committee, before the June 2005 Standing Committee meeting, provided a fuller explanation of the "exceptional circumstances" exception. That report stated, with

respect to the “exceptional circumstances” provision:

> The revised rule also includes a provision that permits sanctions in “exceptional circumstances” even when information is lost because of a party’s routine good-faith operation of a computer system. As the Note explains, an important consideration in determining whether exceptional circumstances are present is whether the party seeking sanctions can demonstrate that the loss of the information is highly prejudicial to it. In such circumstances, a court has the discretion to require steps that will remedy such prejudice. The exceptional circumstances provision adds flexibility not included in the published drafts. The Note is revised, also in response to public commentary, to provide further guidance by stating that severe sanctions are ordinarily appropriate only when the party has acted intentionally or recklessly.

Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Civil Rules Committee, at 85 (May 27, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf [hereinafter May 2005 Civil Rules Report]. The underlined provisions do not appear in the version of the report that was revised after the June 2005 Standing Committee meeting and ultimately submitted to the Judicial Conference.

The committee note that was originally proposed after publication to the Standing Committee for final approval stated: “In exceptional circumstances, sanctions may be imposed for loss of information even though the loss resulted from the routine, good faith operation of the electronic information system. If the requesting party can demonstrate that such a loss is highly prejudicial, sanctions designed to remedy the prejudice, as opposed to punishing or deterring discovery conduct may be appropriate.” *Id.* at 88. But at the Standing Committee’s June 2005 meeting, there were objections to the note language on severe prejudice. *See, e.g.*, COMM. ON RULES OF PRACTICE AND PROCEDURE, MINUTES, JUN. 15–16, 2005, at 28 (2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2005-min.pdf (“One member stated that the amendment was very beneficial, but reiterated that the language of the note is troublesome. The rule focuses on good faith, but the note says there can be sanctions, even if the party acted in good faith, if the opposing party suffers ‘severe prejudice.’”). The Standing Committee voted to adopt the amendment, but to delete the parts of the committee note that were troubling some of the members. *Id.* at 29. The deletion of the note language on severe prejudice is likely what led to the revision of the portion of the Advisory Committee’s report that originally indicated that prejudice bears heavily on whether exceptional circumstances are present. Notably, the “Changes Made after Publication and Comment Report,” or “GAP Report,” which was part of the Advisory Committee’s report to the Standing Committee and which was part of an appendix to

Id. at 75. Finally, the Advisory Committee decided to remove the provision in the published rule that would have prevented application of the safe harbor if the party had violated a court order requiring preservation, noting that many comments had persuasively argued that the provision would create an incentive to obtain a preservation order to prevent operation of the safe harbor.[4] *Id.*

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the Standing Committee's report to the Judicial Conference that transmitted the rule for final approval, stated, even after the June 2005 Standing Committee meeting, that the "exceptional circumstances" provision "recognizes that in some circumstances a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information." *See* Civil Rules 2005 Report, *supra*, at 78; *see also* May 2005 Civil Rules Report, *supra*, at 89 (original, unrevised report of the Civil Rules Committee from May 2005, containing the same language on "exceptional circumstance" in the GAP report as the revised report included as an appendix to the Standing Committee's report to the Judicial Conference).

It is worth noting, however, that it is not clear that the Advisory Committee, even before revision by the Standing Committee, intended exceptional circumstances to be limited to situations involving severe prejudice. The minutes of the Advisory Committee's meeting after the public comment period closed seem to suggest that the "exceptional circumstances" phrase was merely meant to allow for some degree of flexibility. It was added in place of "ordinarily" at the beginning of the proposed rule. As published, the rule began, "Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions . . . ." After the public comment period, the Advisory Committee decided to abandon the provision excepting violation of a preservation order. During the course of its deliberations, a suggestion was made to have the rule state that "[*o*]*rdinarily*, a court may not impose sanctions . . . ." CIVIL RULES ADVISORY COMMITTEE, MINUTES, APR. 14–15, 2005, at 41 (2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0405.pdf [hereinafter CIVIL RULES MINUTES APR. 2005] (emphasis added). But "[o]rdinarily was questioned as not a good word, either in terms of general rule drafting or in terms of a rule that sets up a presumption." *Id.* at 42. Then, "[d]rawing from Rule 11(c)(1)(A), it was suggested that it may be better to say 'Absent exceptional circumstances.'" *Id.* The minutes to do not mention "absent exceptional circumstances" necessarily meaning "severe prejudice."

[4]Notably, the minutes of the Advisory Committee's meeting following the close of the public comment period emphasize the Committee's decision to have this amendment address the narrow issue of routine operation of an electronic information system, and not preservation issues generally. The minutes state:

> A broader question was introduced: should the rule be revised to protect against sanctions imposed for failure to take reasonable

In its report to the Standing Committee, the Advisory Committee set out examples of current systems that it thought would fall within the limited safe harbor, including: "programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been 'deleted'; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period." *Id.* at 73. The Advisory Committee's report clearly indicated that the Committee intended to encompass automatic features of electronic systems, rather than individual decisions to delete data. *See, e.g.*, *id.* ("many database programs automatically create, discard, or update information without specific direction from, or awareness of, users"; "the proposed rule recognizes that such automatic features are essential to the operation of electronic information systems."). This was confirmed in the Standing Committee's report to the Judicial Conference, recommending the rule for final approval. *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, TO THE CHIEF JUSTICE OF

> steps to preserve information that was lost for reasons other than routine operation of an electronic storage system? The response was that a rule this broad would directly address the duty to preserve information. As much as many litigants would welcome an explicit preservation rule, the Committee has concluded that the difficulties of drafting a good rule would be so great that there is no occasion even to consider the question whether a preservation rule would be an authorized or wise exercise of Enabling Act authority.

CIVIL RULES MINUTES APR. 2005, *supra*, at 30.

THE UNITED STATES AND THE MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, at 13 (Sept. 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_STReport_CV.pdf [hereinafter STANDING COMM. REPORT SEPT. 2005] ("The proposed amendment to Rule 37(f) responds to a distinctive and necessary feature of computer systems — the recycling, overwriting, and alteration of electronically stored information that attends normal use. This is a different problem from that presented by information kept in the static form that paper represents; such information is not destroyed without affirmative, conscious effort. By contrast, computer systems lose, alter, or destroy information as part of routine operations, making the risk of losing information significantly greater than with paper.").

Based on the history, I think it is safe to say that the Advisory Committee and the Standing Committee intended the addition of Rule 37(e) to address a very limited scenario — where the automatic features of an electronic system overwrite or otherwise destroy discoverable information without the party's knowledge — thus providing a limited security to litigants that they will not be sanctioned for such unintentional destruction that would not have occurred in the paper world. *See* STANDING COMM. REPORT SEPT. 2005, *supra*, at 14 ("The proposed amendment provides limited protection against sanctions under the rules for a party's failure to provide electronically stored information in discovery.").[5]

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[5]The "legislative history" of the proposal repeatedly emphasizes that it is meant to protect parties from sanctions due to routine recycling, overwriting, or changed information due to the operation of an electronic storage system. At the same time, the advisory committee notes clearly indicate that litigation holds are often required in order for a party to comply with the good faith requirement. Courts seem to have struggled with reconciling the need for a litigation hold with the safe harbor for routine operation of an electronic information system. One possibility is that the amendment was meant to get at truly mistaken deletion, such as where a party institutes a litigation

II. The Application of Rule 37(e)

There are only a few cases in which Rule 37(e) can be said to have been truly applied by the court. *See* Philip J. Favro, *Sea Change or Status Quo: Has the 37(e) Safe Harbor Advanced Best Practices for Records Management?*, 11 MINN. J. L. SCI. & TECH. 317, 333 (2010) ("In very few instances have courts invoked the rule to shield parties from sanctions."). The commentary published on the rule generally concludes that the rule has not been applied by courts in a way that provides much solace to those concerned about escalating costs associated with electronic discovery. *See, e.g.*, Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 SEDONA CONF. J. 217, 227–28 (2010) (noting that "some courts have interpreted an ambiguous Committee Note to Rule 37(e) as a mandatory duty to take specific action, regardless of the need to [do] so to effectuate preservation, thereby barring application of [the] Rule when a duty to preserve is identified and the action is not taken," and concluding that "'if the party cannot avail itself of the safe harbor because it had a duty to preserve data in the first instance, then Rule 37 does little to change the state of the pre-existing common law'" (quoting Emily Burns, Michelle Greer Galloway & Jeffrey Gross, *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201, 217 (2008))); Thomas Y. Allman, *Inadvertent Spoliation of ESI After the 2006 Amendments: The Impact of Rule 37(e)*, 3 FED. CTS. L. REV. 25, 26 (2009) [hereinafter Allman, *Impact of Rule 37(e)*] ("To say that Rule 37(e) has been met with intellectual disdain since its enactment is putting it mildly. To many it evokes 'a low standard [which] seems to protect against sanctions only in situations where [they] were unlikely to occur.' . . . Many commentators have characterized Rule 37(e) as 'illusory' and a 'safe' harbor in name only."

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hold, but the electronic system nonetheless overwrites some relevant data.

(alterations in original) (footnotes omitted)); John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 590–91 (2010) ("Although well-intentioned, this rule fails to provide adequate protection for a variety of reasons. First, it does not account for the possibility that even the most careful attempts to locate and preserve electronic data may not succeed in preserving all potentially relevant information. For example, if a party deletes electronic data in good faith but not as part of routine operations, Rule 37(e) would not protect it. Second, the phrase 'routine, good-faith operation of an electronic information system' is too vague to provide clear guidance as to a party's preservation obligations. It is unclear whether sanctions would be available against a party that fails to suspend a deleting or overwriting program that routinely rids the company's information system of data that are not reasonably accessible. Third, the rule fails to explain what exceptional circumstances might warrant the imposition of sanctions even when data are lost through the routine, good-faith operation of a computer system. Finally, the rule applies only to parties, and thus provides no protection to nonparties, who play an increasingly important role in litigation."); Robert Hardaway, Dustin D. Berger & Andrea Defield, *E-Discovery's Threat to Civil Litigation: Reevluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 566 (2011) ("[F]ederal courts have all but read this safe harbor provision out of the rules. They have generally concluded that once the duty to preserve arises—and it arises as soon as litigation becomes foreseeable—any deletion of relevant data is, by definition, not in good faith. These safety valve provisions not only fail to adequately control the costs associated with e-discovery, they sometimes increase it by fostering ancillary litigation on the producer's entitlement to the protection of these safety valves.");[6]

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[6]This article suggests several problems with the rule, including that a party seeking to rely on it "must show that it 'act[ed] affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business'"; that the rule

Andrew Hebl, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. ILL. U. L. REV. 79, 85 (2008) ("Despite the fact that courts should be prohibited from imposing sanctions for spoliation of electronically stored information which occurs after a preservation obligation has arisen, as a result of the good faith, routine operation of a party's electronic information system, this has not been the case. Instead, courts have in some cases limited their analysis to whether a preservation obligation has arisen at all, imposing sanctions per se if one has, and failing to consider the extent to which a party acted in good faith or not." (footnote omitted));[7] John H. Jessen, Charles R. Kellner, Paul M. Robertson & Lawrence T. Stanley, Jr., *Digital Discovery*, MA-CLE 10-1 (2010) (arguing that courts have interpreted the advisory committee notes to mean that the rule is inapplicable once the duty to preserve arises and that "[i]n view of the lack of protection and clarity provided by Rule 37(e) and the cases construing the rule, a litigant is well served to use the procedures currently recognized by the courts as adequate steps for the preservation of electronic data"); Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 791, 828 (2010) ("[T]he safe harbor

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contains an exception for exceptional circumstances; that the rule is limited to "'sanctions under these rules'" and therefore probably does not protect a party from sanctions pursuant to inherent authority; and that the term "electronic information system" may limit protection if a litigant, as operator of the system, directed deletion through configuration or programming of the system. Hardaway et al., *supra*, at 586–87.

[7]The author argues that this is "tantamount to strict liability, in that the state of mind of the spoliating party plays no role in determining whether sanctions should be imposed." Hebl, *supra*, at 85. He also notes that "negligent conduct has been sufficient to support the imposition of sanctions, despite the fact that the rule clearly requires a reckless or intentional state of mind. As a result, concerns about the intersection of electronically stored information and spoliation are not being addressed, and Rule 37(e) has been rendered largely superfluous." *Id.* He suggests that "courts have imposed sanctions for considerably less-culpable conduct than the rule was meant to target." *Id.*

provisions of Rule 37(e) of the Federal Rules of Civil Procedure have provided little protection to parties or counsel."; "[T]he safe harbor was intended to provide limited protection, and it has. Parties or counsel seeking refuge from the increasing sanction-motion practice will be able to reach Rule 37(e)'s refuge only in very limited situations. Since the rule's adoption, approximately two cases per year have met its requirements.");[8] Gal Davidovitch, Comment, *Why Rule 37(e) Does Not Create a New Safe Harbor for Electronic Evidence Spoliation*, 38 SETON HALL L. REV. 1131, 1131–32 (2008) ("Rule 37(e) will not, in most cases, offer any protection that the federal rules did not already provide. And in those few cases where 37(e) will deliver a novel safe harbor, it will be the result of a jurisdictional idiosyncrasy rather than the rule drafters' policy.");[9] Nicole D. Wright, Note, *Federal Rule of Civil Procedure 37(e): Spoiling the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 815 (2009) ("The language of Rule 37(e) is problematic because, once put into practice, it offers little constructive guidance as to precisely when a party will be relieved from sanctions due to its failure to produce evidence. Additionally, it provides the opportunity for corporate defendants to utilize the Rule's safe harbor provision as a cushion and allow those who are 'inclined to obscure

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[8]The authors found that between the rule's promulgation in 2006 and January 1, 2010, it had been cited in only 30 federal court decisions, three of which did not relate to discovery of ESI in civil cases, two of which involved paper documents, and one of which was a criminal case. Willoughby et al., *supra*, at 825. Of the remaining 25 cases, they found, at most, 7.5 that invoked Rule 37(e) to protect a party from sanctions. *Id.* In two of those cases, the court mentioned 37(e) and denied sanctions, but it was unclear whether the court relied on the rule in making its decision. *Id.* at 825–26.

[9]Davidovitch argues that the circumstances in which Rule 37(e) applies are quite narrow, especially when coupled with the "exceptional circumstances" exception, and that Rule 37 already included various requirements that effectively functioned similarly to the safe harbor created under Rule 37(e). Davidovitch, *supra*, at 1132. Nonetheless, Davidovitch believes that Rule 37(e) "is not entirely irrelevant" because "[i]t organizes the pre-existing exceptions into one rule and thus provides guidance to litigants and judges on how to deal with electronic information loss." *Id.*

or destroy evidence of any sort . . . to hide behind the shield of good faith and undue burden to protect themselves from sanctions.'" (footnote omitted) (omission in original));[10] *cf.* Timothy J. Chorvat, *E-Discovery and Electronic Evidence in the Courtroom*, 17 BUS. L. TODAY 13, 15 (2007) ("Rule 37(f) will protect truly routine deletions of data such as when data in a computer's RAM memory is erased and a file is saved to a hard disk, or when a file is moved from one storage medium to another. But those 'routine, good-faith' actions have not been the source of clients' concern. If Rule 37(f) protects only conduct that never would have been sanctioned, then it is not a safe harbor in any useful sense."); *but see* Favro, *supra*, at 319 ("[O]ne rule is helping to clarify preservation and production burdens for electronically stored information: Federal Rule of Civil Procedure 37(e).").
While the legal commentary has generally concluded that Rule 37(e) has had very minimal impact, Allman notes that "even if it were true that 'Rule 37(e) [does] not, in most cases, offer any protection that the Federal Rules did not already provide,' there is, as a member of the Advisory Committee noted at the time, a 'real benefit in reassuring parties that if they respond to [challenges] reasonably, they will be protected.'" Allman, *Impact of Rule 37(e)*, *supra*, at 37 (alterations in original) (footnote omitted).

A. Cases Applying or Influenced by Rule 37(e)

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[10]Wright concludes that "[t]he absence of guidance for parties that are following document retention policies and for when a party may expect to incur spoliation sanctions leads one to believe parties are, in fact, worse off since Rule 37(e) was enacted." Wright, *supra*, at 816. She argues: "In light of the multitude of factors to be taken into account, Rule 37(e) is ineffective. The considerations that a court must make prior to imposing sanctions on a party already encompass the concern that fueled the implementation of the Rule, rendering it unnecessary. Therefore, Rule 37(e) should be removed from the FRCP." *Id.* at 820. She concludes that "the Rule, as evidenced in its interpretation and application, does no more than reiterate the policies behind the traditional spoliation doctrine," and that as a result "Rule 37(e) should be removed from the FRCP, and the traditional spoliation doctrine should instead govern the imposition of these sanctions." *Id.* at 823–24.

Only a handful of cases seem to have been directly influenced by Rule 37(e) in precluding sanctions.[11] Even in those cases, it is not clear that the result would have been different without the rule. A number of other cases have discussed the rule or been influenced by it, but have not seemed to directly apply it. The cases purporting to directly apply the rule or to have been influenced by it are described below in reverse chronological order.

2012 Cases

In *FTC v. Lights of America Inc.*, No. SACV 10-1333 JVS (MLGx), 2012 WL 695008 (C.D. Cal. Jan. 20, 2012), the court found Rule 37(e) inapplicable because there was no court order, but precluded sanctions pursuant to inherent authority, with reference to Rule 37(e). The defendants sought terminating sanctions or an adverse inference for the plaintiff's failure to institute a litigation hold when litigation became reasonably foreseeable, including failure to suspend the plaintiff's 45-day auto-delete policy for all email. *Id.* at *1, *3. The court noted that the defendants "have not asserted that the FTC failed to obey a discovery order. Absent a failure to obey a discovery order, the Court does not have authority under Rule 37 to sanction a party." *Id.* (citing *Kinnally v. Rogers Corp.*, 2008 WL 4850116 (D. Ariz. Nov. 6, 2008)). The court concluded that the motion was governed by the court's inherent authority to sanction. *Id.* Nonetheless, the court stated that "given that the Rule 37 sanctions and sanctions levied under the Court's inherent power both analyze the same factors, the Court finds case law regarding Rule 37 sanctions persuasive." *Id.* at *2 n.3. The court concluded that the FTC's e-discovery policy, which provides that relevant ESI must be

[11] The cases that seem to have applied Rule 37(e) most directly include *Kermode v. University of Mississippi Medical Center*, No. 3:09-CV-584-DPJ-FKB, 2011 WL 2619096 (S.D. Miss. Jul. 1, 2011), *Miller v. City of Plymouth*, No. 2:09-CV-205 JVB, 2011 WL 1458491 (N.D. Ind. Apr. 15, 2011), and *Olson v. Sax*, No. 09-C-823, 2010 WL 2639853 (E.D. Wis. Jun. 25, 2010).

preserved in an archive, while duplicates must be deleted, was consistent with its duty to preserve relevant material. *Id.* at *5. The court then noted that "to the extent that the auto-delete policy caused the inadvertent loss of any relevant email correspondence, that is not a sanctionable offense," and cited Rule 37(e). *FTC*, 2012 WL 695008, at *5. The court explained that Rule 37(e) "instructs that "'[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the *routine, good-faith operation of an electronic information system*,'" *id.* (alteration in original), and concluded that "[s]imilarly, the inadvertent deletion of some emails due to the good-faith operation of an electronic information system is not a ground for issuing [] sanctions under this Court's inherent power to sanction," *id.* There was no evidence that the plaintiff's retention policy was operated in bad faith, and "[t]he auto-delete system is a function of the computer information system's finite storage capacity and the desire to avoid needless retention of documents, which slows the system." *Id.* The court did not refer to the advisory committee note's reference to the possible need to suspend auto-delete functions if they are likely to result in the destruction of discoverable ESI.

<u>2011 Cases</u>

In *Webb v. Jessamine Cty. Fiscal Court*, No. 5:09-CV-314-JMH, 2011 WL 3652751, at *5 (E.D. Ky. Aug. 19, 2011), the court denied a request for sanctions based on the loss of video recordings because there was no bad faith and the duty to preserve did not arise until the suit was filed a year later. The court found that its decision was further supported by Rule 37(e) because the recordings were overwritten in the normal course of business after three months due to limited storage space, and "[a]s a result, these recordings were lost 'as a result of the routine, good-faith operation of an electronic information system.'" *Id.* at *6. The court then noted, however, that even

assuming the plaintiff could have shown that the defendant had a duty to preserve evidence, the recordings at issue would not have been relevant because they would have captured activity in areas that had no bearing on the plaintiff's claims. *Id.* at *6 n.6.

In *Kermode v. University of Mississippi Medical Center*, No. 3:09-CV-584-DPJ-FKB, 2011 WL 2619096 (S.D. Miss. Jul. 1, 2011), the court relied on Rule 37(e), at least in part, to preclude sanctions for automatic email purging. The plaintiff requested default judgment as a sanction for the defendants' alleged failure to preserve certain email communications, failure to produce others in native format as part of the defendants' pre-discovery disclosures, and failure to produce the emails in response to written discovery requests. *Id.* at *2. The court first noted that the sanctions request faced several procedural hurdles, including that it was raised after the close of discovery and after the motions deadline expired, and that it violated both local and national rules. *Id.* at *2–3. Besides the procedural defects, the court noted that Rule 37(e) presented "a more serious impediment" to the motion for sanctions because "the subject e-mails were apparently deleted as part of the e-mail system before reason existed to preserve them in another format." *Id.* at *3. As a result, the court concluded that "Rule 37(e) sanctions [we]re not available." *Id.* Although the court stated that Rule 37(e) precluded the default judgment, it is unclear that Rule 37(e) necessitated this result. First, since the court noted that the emails were deleted before a reason to preserve them existed, it is unclear that sanctions could be imposed anyway. Rule 37(e) presumably provides some protection after the duty to preserve has arisen; the common law generally precludes sanctions for failure to preserve before the duty to preserve arises. Second, it seems likely that the denial of sanctions would have occurred in any event in this case because of the procedural defects in the plaintiffs' motion.

The *Kermode* court also considered an alternative request for an evidentiary hearing, and ultimately an adverse inference, but concluded that neither prong of the spoliation test in the Fifth Circuit had been met because the plaintiff failed to show either that there were any missing relevant emails or that the defendants acted in bad faith. *Id.* at *4. The court noted that the plaintiff "acknowledges facts establishing that Defendants' duty to preserve electronically stored information did not arise until after much of the information had been automatically deleted from the University's e-mail server." *Kermode*, 2011 WL 2619096, at *5. The potentially missing emails would have been in the time period of June or July 2008, at which time the defendants' email system automatically deleted emails that were not saved after 60 days. *Id.* The court determined that the very earliest the defendants would have anticipated litigation would have been September 2008, and concluded that "it does not appear the e-mails in question—if they ever existed—would have survived the automatic purging." *Id.* The court concluded that even if a litigation hold had been immediately implemented at the time litigation was anticipated, it would only have preserved emails from the end of July 2008 and later. *Id.* The court held that "[s]ince the events of which Park complained transpired prior to this date, the allegedly relevant correspondence would have already been deleted." *Id.* Notably, however, the court's discussion of this automatic deletion was in the context of its determination that there was no bad faith, as required under Fifth Circuit law to impose an adverse inference, and did not reference Rule 37(e). It is unclear that Rule 37(e) could have had much force here, since the court determined that the alleged deletion occurred before a duty to preserve existed. Presumably destruction before the duty to preserve exists is protected behavior with or without Rule 37(e).

In *Miller v. City of Plymouth*, No. 2:09-CV-205 JVB, 2011 WL 1458491 (N.D. Ind. Apr. 15,

2011), Rule 37(e) seemed to make a difference in the court's decision not to impose sanctions. In that case, the plaintiffs filed a suit based on a 2008 incident in which a police officer pulled over and detained the plaintiffs while using a dog to search their car and person for contraband. The court ordered the defendants to produce any reports and audio or video recordings detailing incidents where the officer had ordered his dog to sniff a detained vehicle since January 1, 2004. *Id.* at *2. The police department apparently had a video recording policy that dated back to 1993, when VHS cassettes were still used. *Id.* That policy required officers to retain recordings for at least seven days, after which they could be reused. "If an officer believed the tape would be useful 'in the judicial process,' the officer could choose to save the video." *Id.* In 2006, the police department began using digital recording systems instead of VHS devices, but the digital recording system frequently malfunctioned. *Id.* The officer involved in the incident at issue did preserve a DVD copy of the plaintiff's traffic stop. The system in his car worked by continuously recording onto an embedded hard drive, which automatically burned video footage onto a DVD every time the officer turned on his police lights. *Id.* When the DVD was full, the system asked the user if he wished to save the entries made on the DVD or reformat the disk, which would erase the content and allow the DVD to be reused. *Miller*, 2011 WL 1458491, at *2. Although the hard drive could store up to 30 days of traffic stops, the DVD could be filled in a single shift. *Id.* At some point in 2010, the officer's camera malfunctioned and thereafter only worked off and on. *Id.* The police department installed a new video system, and the officer testified that he did not have any video recordings dating back to 2004. *Id.*

The plaintiffs argued that the magistrate judge's order denying sanctions was erroneous "'because the recording device in this case did not *automatically* record over previously stored

videos. Rather, the hard drive was knowingly and willfully 'reformatted' . . . at the prompting of the equipment operator.'" *Id.* at *3 (omission in original). The plaintiffs further asserted that the defendants were precluded from using Rule 37(e)'s safe harbor because "the choice not to burn relevant video footage to DVD was a policy, practice, or custom of the Defendants, not a routine operation of an electronic information system." *Id.* The court rejected this interpretation of Rule 37(e) as too narrow, noting that the advisory committee's note to Rule 37(e) "explain[s] that the routine operation of computer systems 'includes the alteration and overwriting of information, often without the operator's specific direction or awareness,'" and that "[s]uch features are essential to the operation of electronic information systems." *Miller*, 2011 WL 1458491, at *3 n.1. The court noted that in this case, "it was essential to the operation of Defendants' cameras that the user either save the recordings on the DVD or rewrite the information on it." *Id.* The court found that "by noting that routine operations 'often' occur without the operator's specific direction, the drafters acknowlege[d] that 'routine operations' can still occur despite the direct involvement of a system user." *Id.* The court rejected the plaintiff's argument that the camera user's minimal involvement took the loss of electronic information outside of Rule 37(e). *Id.* The court concluded that the defendants had not acted in bad faith, explaining that they "kept no 'video library' of past police stops, and its policy since the early 1990s had been to record over old footage—except when an individual officer exercised her discretion to preserve the footage. Thus, pursuant to departmental policy, the Defendants recorded over some of the desired footage long before Plaintiffs' stop on May 18, 2008." *Id.* at *4. The court further emphasized that the magistrate judge had noted that the defendants had no control over the fact that the hard drives were recorded over every 30 days and that there was no evidence that any DVD copies were destroyed. *Id.* at *5.

Although the *Miller* court rejected the argument that Rule 37(e) did not apply, it is not clear that the rule was necessary to the result. The opinion indicates that the tape of the incident itself had been preserved (and that there was no evidence that any DVDs were destroyed), so presumably the plaintiffs sought sanctions based on the defendants' inability to comply—due to the automatic overwriting of hard drives every 30 days—with the court's order to produce recordings from incidents dating back to 2004. But it is unclear that there would have been any obligation to preserve recordings before the incident in question, at which time the failure to save the recordings would have arguably been protected behavior even without Rule 37(e).[12] Perhaps Rule 37(e) operated to protect the later destruction of hard drives that occurred after the court's order in 2010, or after a 2009 post-suit letter from the plaintiff requesting any video evidence the department had of the officer and his dog.

2010 Cases

In *Streit v. Electronic Mobility Controls, LLC*, No. 1:09-cv-0865-LJM-TAB, 2010 WL 4687797 (S.D. Ind. Nov. 9, 2010), the court found that Rule 37(e) precluded sanctions where electronic data was inadvertently deleted, without any bad faith. The case involved a car accident in which a vehicle control system manufactured by the defendant allegedly malfunctioned. *Id.* at *1. The vehicle control system had a "black box" that logged data from the system in two different ways.

[12]The fact that Rule 37(e) operates only for sanctions issued under the rules, which in turn require the violation of a court order, supports the conclusion that Rule 37(e) was not meant to operate before the preservation duty arose. That is, Rule 37(e) seems to come into play only after the violation of a court order, which would not occur before the duty to preserve arose. *See* Civil Rules 2004 Report, *supra*, at 18 ("[P]roposed Rule 37(f) addresses only sanctions under the Civil Rules and applies only to the loss of electronically stored information after commencement of the action in which discovery is sought. The proposed amendment does not define the scope of a duty to preserve and *does not address the loss of electronically stored information that may occur before an action is commenced*." (emphasis added))

> The operations log records all "events," such as a problem with the wiring of the steering system, a low battery, or an impact to a vehicle. The datalogger continuously records all of the vehicle control system's inputs and outputs, including all events recorded in the operations log.
>
> When the datalogger detects an event, it stores the corresponding data on a block. At any time, there are fifteen blocks in which data is stored temporally. The datalogger is refreshed by a three block rotation that consists of 1) the oldest block, which is overwritten, 2) the block that is in use, and 3) the block that was previously in use. If an impact, or "G-event," is detected, the corresponding block is locked, so that it cannot be overwritten.

Id. (internal citations omitted). The defendant's practice after an accident involving a vehicle equipped with the control system was to download the vehicle's datalogger. *Id.* After the incident at issue, one of the defendant's employees attempted to start the vehicle a number of times because the battery was very low. *Id.* However, every time a vehicle with this system starts, the datalogger grabs the oldest of the three blocks in rotation and, if an event occurs, overwrites the oldest block with new data. *Id.* In this case, because the vehicle had a low battery, every time the employee attempted to restart the vehicle, the datalogger recorded the event of the low battery. *Streit*, 2010 WL 4687797, at *1. As a result, the blocks that would have recorded all events and inputs and outputs more than about 2.5 minutes before the accident were overwritten. *Id.* But the block recording any events within 2.5 minutes of the accident and the accident itself were not overwritten. *Id.* It was undisputed that any event that occurred before the accident would have been recorded in the operations log, which was fully preserved and produced. *Id.* There were no events recorded on the operations log before the accident, but the plaintiff alleged that at some point before the accident, she pulled her vehicle over because the steering felt abnormal. *Id.* at *1–2. The plaintiff alleged that the defendants intentionally deleted information from the vehicle's datalogger, specifically the

information from when the plaintiff pulled her vehicle over after feeling a steering abnormality. *Id.* at *2. The defendant argued that the information on the datalogger was overwritten during the ordinary course of recovery procedures and that the only relevant information would have been an "event," which would have been preserved on the operations log. *Streit*, 2010 WL 4687787, at *2.

The court stated that federal law applied and was "mindful" of Rule 37(e). *Id.* at *2. The court stated that bad faith was required to impose sanctions for destruction of ESI, and that bad faith means destruction for the purpose of hiding adverse information, but it was not clear if this was based on Rule 37(e) or the common law. *See id.* The court noted in a footnote after its citation to Rule 37(e) that "[o]f course, the Court's power to sanction is inherent and, therefore, not governed by rule or statute." *Id.* at *2 n.1. The court concluded that the request for sanctions failed because the plaintiffs had not shown bad faith. Specifically, the plaintiffs had not shown that the defendant instructed its employee to start and restart the vehicle, much less that it did so with the intent to overwrite data, or that the datalogger would have recorded the alleged steering malfunction, when it was not recorded in the operations log. *Id.* While the court seemed influenced by Rule 37(e), it seems likely that the court would have reached the same result even without the rule because it implied that it was not bound by the rule and seemed to require bad faith regardless of the safe harbor in the rule.

In *Coburn v. PN II, Inc.*, No 2:07-cv-00662-KJC-LRL, 2010 WL 3895764 (D. Nev. Sept. 30, 2010), the court awarded monetary sanctions for spoliation, but also found that certain behavior did not warrant sanctions, relying in part on Rule 37(e). The plaintiff had engaged in various acts of alleged spoliation. First, in analyzing the plaintiff's home computer pursuant to a court order, the forensic expert found that the computer's operating system had overwritten portions of files and data,

and the expert suggested that some of the files were deleted by CCleaner, but that it was likely that many of the files had been manually deleted. *Id.* at *1. The expert's report indicated that CCleaner was run on the plaintiff's computer two days before the court-ordered forensics examination and that the default configuration settings were manually modified at that time. *Id.* at *2. The program was not set to run automatically and had only been run twice since its installation two years earlier. *Id.* The plaintiff asserted that she did not even know CCleaner existed on her computer until after the forensic exam, after which she learned it was installed as part of service package she purchased. *Id.* The defendants sought sanctions on the basis of the running of CCleaner just before the forensics exam; the existence on the plaintiff's computer of nearly 4,000 "non-standard files" containing keywords relevant to litigation, allegedly indicating that the plaintiff had regularly destroyed evidence; and the alleged destruction of relevant emails on the plaintiff's home computer. *Id.* The plaintiff argued that she never deleted a large volume of files from her computer and that the normal operation of CCleaner would be protected under Rule 37(e). *Coburn*, 2010 WL 3895764, at *2.

The court noted that monetary sanctions are available either under Rule 37(b) or the court's inherent authority, and that willfulness is not required to impose monetary sanctions under Rule 37, but bad faith is required to use inherent authority to sanction. *Id.* at *3. The court noted that Rule 37(e) provides a "safe harbor" for failure to provide ESI, and explained that "[t]he destruction of emails as part of a regular good-faith function of a software application may not be sanctioned absent exceptional circumstances." With respect to the running of CCleaner two days before the forensic exam, the court declined to impose sanctions because there was no evidence that the plaintiff had run it herself or directed someone else to do so, and therefore the court could not conclude that the plaintiff "destroyed relevant evidence 'in bad faith, vexatiously, wantonly, or for oppressive

reasons.'" *Id.* at *4 (citation omitted). The quoted language was from a case the court cited for the prerequisites to using its inherent powers to sanction, and the court did not cite Rule 37(e) in this section of its opinion.

The court also denied sanctions based on the existence of nearly 4,000 irregular files on the plaintiff's computer. The plaintiff submitted expert testimony that "while many such files are technically 'intentionally deleted,' they are not necessarily *volitionally* deleted; meaning that the computer may delete the files without any user intervention." *Id.* at *5. The court concluded that levying sanctions based on the irregular files "would be to levy sanctions on the basis of an evidentiary estimate or 'hunch.'" *Id.* With respect to the deleted emails, the plaintiff testified that she regularly sent email from her work email to her home email, and that her practice was to download whatever files she sent to her home computer and then delete the email and any duplicative files. *Id.* at *6. Although the emails were deleted, it was undisputed that the files themselves were saved and produced. *Coburn*, 2010 WL 3895764, at *6. The court acknowledged that the wiser decision would have been not to delete the emails and that this was a close case, but given that the information was actually produced in the form of the files saved on the plaintiff's hard drive, the court found sanctions to be unwarranted. The court did impose sanctions for the plaintiff's destruction of audio tapes of conversations with co-workers, which was allegedly done because the tapes were of poor quality. *Id.* at *7. The court found no bad faith in the destruction, even though it was done intentionally, and awarded attorneys' fees as a sanction, pursuant to its inherent authority. In sum, although the court discussed Rule 37(e) in its discussion of the legal standards, it did not seem to actually apply it.

In *Olson v. Sax*, No. 09-C-823, 2010 WL 2639853 (E.D. Wis. Jun. 25, 2010), the court

applied Rule 37(e) to preclude sanctions for routine overwriting of surveillance video. In that employment discrimination suit, the plaintiff filed a motion for sanctions, accusing the defendant employer of failing to preserve a video tape, made just over a week before the plaintiff's termination, of her alleged theft of property from the employer. *Id.* at *1. The video tape was created on July 22, 2008; the plaintiff was terminated on July 31, 2008; and the plaintiff requested to see the videotape on the day of her termination. *Id.* Her attorney also requested the tape through formal discovery requests, although the date of that particular request was unclear. *Id.* The plaintiff requested that the defendants be barred from producing any evidence of the alleged theft and an award of expenses incurred in bringing the sanctions motion, unless the defendants showed good cause for the destruction. *Id.* The defendants invoked Rule 37(e), arguing that the court could not impose sanctions where ESI was lost as the result of the routine, good faith operation of an electronic storage system. *Id.* Specifically, the defendants stated that they were not aware of the possibility of litigation until February 24, 2009, when they received a letter from the plaintiff's attorney, but that the video was created using a recorder that recorded footage on a 500 gigabyte hard drive that holds about 29 days of video and records in a loop. *Olson*, 2010 WL 2639853, at *1. Once the hard drive is full, it records over the oldest footage. *Id.* The defendants argued that the alleged theft would have been recorded over around August 20, 2008, well before the letter from the plaintiff's attorney. *Id.* The defendants "assert that the subject video recording was recorded over as a part of Goodwill's routine good faith operation of its video electronic system—a system that is in place at all Goodwill retail stores and is commonly used throughout the retail industry." *Id.*

The *Olson* court noted that the common law required "wilfulness, bad faith or fault" in order to impose sanctions, and that Rule 37(e) precluded sanctions for failing to provide ESI lost as the

result of routine, good-faith operation of an electronic storage system. *Id.* at *2. But after citing Rule 37(e), the court stated that "'[t]he rules do not state the limits of judicial power . . . [j]udges retain authority, long predating the Rules of Civil Procedure.'" *Id.* at *2 n.1 (alterations and omission in original) (citing *Langley by Langley v. Union Elec. Co.*, 107 F.3d 510, 514 n.4 (7th Cir. 1997)). The court then stated that bad faith was required, but did not clarify whether the bad faith was required as a prerequisite to precluding application of Rule 37(e) or as a prerequisite to using inherent authority to sanction under the common law. *See Olson*, 2010 WL 2639853, at *2. The court concluded that the defendants were aware of possible litigation by August 11, 2008, and that as of that date, the video recording had not been overwritten and the defendants had a duty to preserve the evidence. *Id.* But the court denied sanctions because of Rule 37(e), stating:

> Nonetheless, the only evidence before the Court indicates that the recording over of the video record from July 22, 2008, was part of Goodwill's routine good faith operation of its video system. There is no evidence that Goodwill engaged in the "bad faith" destruction of evidence for the purpose of hiding adverse evidence. *See Trask–Morton*, 543 F.3d at 681. Therefore, pursuant to Rule 37(e) of the Federal Rules of Civil Procedure, the Court denies Olson's motion for sanctions. Neither party is awarded the fees and expenses incurred with respect to the motion.

Id. at *3.[13]

2009 Cases

In *Mohrmeyer v. Wal-Mart Stores East, L.P.*, No. 09-69-WOB, 2009 WL 4166996 (E.D. Ky.

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[13] Although the court purported to apply Rule 37(e) to preclude sanctions, it is unclear whether the result would have been different in the absence of the rule, given the court's note that it was not bound by the rules in terms of imposing sanctions and its imposition of a bad faith requirement under the common law. On the other hand, perhaps Rule 37(e) operated to preclude sanctions under the rules, while the common law's bad-faith requirement operated to preclude sanctions under inherent authority.

Nov. 20, 2009), the court analogized to Rule 37(e) in finding that the destruction of temporary documents before litigation did not warrant sanctions. The case arose out of a slip-and-fall accident in a Wal-Mart store, which was alleged to have resulted from Wal-Mart's negligent failure to maintain the restroom. *Id.* at *1. Wal-Mart had a practice of maintaining a log or chart of maintenance and inspection of the restroom, but the log was not ordinarily preserved in the ordinary course of business and was destroyed on a weekly basis. *Id.* Wal-Mart asserted that it destroyed the log at issue long before it became aware of the possibility of litigation from the fall. *Id.* The court stated:

> The law does not and should not require businesses to preserve any and all records that may be relevant to future litigation for any accidental injury, customer dispute, employment dispute, or any number of other possible circumstances that may give rise to a claim months or years in the future, when there is absolutely no contemporaneous indication that a claim is likely to result at the time records are destroyed pursuant to a routine records management policy.

Id. at *2. Because the log was a temporary document that was routinely discarded on a weekly basis, the court found no basis for imposing sanctions for its destruction. The court rejected the plaintiff's reliance on a Sixth Circuit case that held: "'It is beyond question that a party to civil litigation has a duty to preserve ESI when that party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation.'" *Id.* at *3 (quoting *John B. v. Goetz*, 531 F.3d 448 (6th Cir. 2008)). The court concluded that "[i]t is debatable whether the principle recently articulated by the Sixth Circuit in *Goetz* concerning ESI can be generalized to establish a broader pre-litigation 'duty to preserve' all evidence no matter how speculative future litigation may be," and that a narrow reading of that case was suggested by Rule 37(e). *Mohrmeyer*, 2009 WL 4166996, at *3. The court held that "[b]y analogy, it would be improper for this court to

impose any type of sanction upon Walmart on the facts presented, where evidence was discarded as a result of its routine good-faith records management practices long before Walmart received any notice of the likelihood of litigation." *Id.* The court emphasized that it was not implying that formal notice of litigation is required in every case before the duty to preserve arises, but was "merely hold[ing] that on the facts presented, the 'trigger date' requiring Walmart to preserve evidence arose well after [the date the log was destroyed]." *Id.* at *3 n.1. While Rule 37(e) seemed to support the court's determination not to award sanctions, it seems likely that the result would have been the same even without that rule. The court seemed to frame its holding in terms of when the duty to preserve arose, not in terms of destruction of ESI after the duty arose, and it is not clear that the log at issue was electronically stored.

In *Southeastern Mechanical Services v. Brody*, No. 8:08-CV-1151-T-30EAJ, 2009 WL 2242395, at *1 (M.D. Fla. Jul. 24, 2009), the defendant alleged spoliation based on the plaintiff's failure to suspend the automatic overwriting of its backup tapes that archive employee emails and other electronic information. The plaintiff's company policy was to retain emails on its server until an employee deletes the emails, to backup the server daily to backup tapes, and to overwrite the backup tapes every two weeks. *Id.* After Brody, a defendant and former employee of the plaintiff, had his last day of employment with the plaintiff, the plaintiff inspected Brody's account and discovered that emails, contacts, and tasks were deleted from his computer. *Id.* The plaintiff waited more than two weeks after Brody's departure before checking the backup tapes of Brody's account. *Id.* The defendants argued that the plaintiff spoliated evidence by failing suspend the automatic overwriting of the backup tapes, which destroyed the only evidence of the plaintiff's claim that Brody improperly deleted data from his work computer before his termination. *Id.* The plaintiff

argued that it did not act in bad faith in failing to retain its backup tapes and that the automatic overwriting was part of its regular data management policy. *Id.* at *2. The court noted that bad faith is required to impose sanctions pursuant to its inherent authority. *S.E. Mech. Servs.*, 2009 WL 2242395, at *2. It also noted that Rule 37 provides authority for imposing sanctions for failure to comply with the court's rules, and that Rule 37(e) provides a limited safe harbor for failure to preserve ESI. *Id.*

The court held that the plaintiff had a duty to turn off the overwriting function at least by the time it received a demand letter a week after Brody's termination. *Id.* at *3. Despite finding it "baffling" that the plaintiff would not have put a litigation hold in place that would have suspended the overwriting of the backup tapes a week after the termination, the court found no sanctions were appropriate because the automatic overwriting did not involve bad faith and "was part of the company's routine document management policy." *Id.* The court then noted that "[i]n accordance with the traditional view that spoliation must be predicated on bad faith, Rule 37(e) sanctions have been deemed inappropriate where 1) electronic communications are destroyed pursuant to a computer system's routine operation and 2) there is no evidence that the system was operated in bad faith." *Id.* (citing *Escobar v. City of Houston*, No. 04-1945, 2007 WL 2900581, at *18 (S.D. Tex. Sept. 29, 2007)).[14] Thus, the court cited Rule 37(e) in support of its conclusion that no sanctions

[14] *See also Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 628 n.13 (D. Colo. 2007) ("Consistent with this general rule [that '[a] litigation hold does not apply to inaccessible back-up tapes . . . which may continue to be recycled on the schedule set forth in the company's policy'], newly enacted Rule 37(f) provides limited protection against sanctions where a party fails to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system" (quoting *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 431 (2007) (alterations and omission in original))). This statement seems to imply that routine deletion of backup tapes amounts to routine operation of an electronic storage system.

were warranted, but it seems to have reached its conclusion first based on the common law requirement in its circuit of bad faith to impose spoliation sanctions, presumably pursuant to inherent authority.

In *In re Kessler*, No. 05 CV 6056(SJF)(AKT), 2009 WL 2603104, at *3 (E.D.N.Y. Mar. 27, 2009), the court implicitly applied Rule 37(e) in rejecting, on de novo review, the magistrate judge's award of attorneys' fees for the negligent destruction of video footage. That case arose out of a fire on a vessel that was docked at a marina. *Id.* at *1. The petitioner sought sanctions based on the marina's destruction of a critical video tape showing the main dock where the vessel was docked just before the fire. *Id.* at *4. The marina used a digital video recorder that recorded data from the camera onto a hard drive. *Id.* at *16. Once the hard drive was full, which occurred every 24 hours, the hard drive overwrote the old data in recording new data. *Id.* The marina did not do anything to preserve the footage from the day of the fire and it was taped over in the normal course of the video camera's operation. *Id.* The magistrate judge noted, without explanation, that Rule 37(e) was not applicable to preclude sanctions where surveillance video had been overwritten in the normal course of business, but found it useful to determine the steps necessary to preserve electronic evidence. *Kessler*, 2009 WL 2603104, at *18. The magistrate judge declined to impose an adverse inference instruction because the proponent had failed to show bad faith, but found that the opponent's negligent conduct warranted monetary sanctions, including an award of attorney's fees in connection with the motion for sanctions and the cost of a forensic examination of the surveillance system to determine if any lost data could be retrieved. *Id.* at *20. The district court rejected the portion of the magistrate judge's report and recommendation that awarded attorney's fees as a sanction. The court concluded: "Petitioner has not met his burden of showing that the Marina 'had an obligation to

preserve [the surveillance footage], acted culpably in destroying it, and that the [surveillance footage] would have been relevant to [Petitioner's] case.'" *Id.* at *3 (alterations in original) (citation omitted). The court further explained that "the surveillance footage from the date of the fire self-destructed approximately twenty-seven (27) hours after it was recorded" "[i]n accordance with the routine operation of the Marina's surveillance system." *Id.* The court did not cite Rule 37(e) in coming to this conclusion, but may have implicitly accepted it in rejecting the portion of the magistrate judge's opinion that rejected the application of the rule. Nonetheless, the court's notation that there was no obligation to preserve, no culpability in destruction, and no showing of relevance, coupled with its lack of citation to Rule 37(e), suggests that the court would have reached the same conclusion even without the existence of Rule 37(e).

2008 Cases

In *Liquidating Supervisor for Riverside Healthcare, Inc. v. Sysco Food Services of San Antonio, LP* (*In re Riverside Healthcare, Inc.*), 393 B.R. 422 (Bankr. M.D. La. 2008), the court declined to sanction the routine deletion of email. In that case, the plaintiff alleged that the defendant's deletion of email relating to the defendant's dealings with the debtors supported an adverse inference sanction. *Id.* at 428. The court noted that the Fifth Circuit requires a showing of bad faith to impose an adverse inference instruction and that the plaintiff did not prove that the defendant intentionally deleted or allowed deletion of email to frustrate litigation. *Id.* Instead, the email was deleted routinely before the lawsuit, pursuant to the computer system's routine deletion of email after 60 to 90 days (and retention of deleted email on the server for an additional 14 days). *Id.* at 429. By the time the defendant had been joined as a party, the email from the relevant time period had been deleted pursuant to the automatic deletion routine. *Id.* The plaintiff also

complained that it could not get email from a particular employee's work station, but because the employee testified that her hard drive had failed and was replaced three times since the relevant bankruptcy filing, the court concluded that the loss of information "was not the result of SSA's 'fraudulent intent and a desire to suppress the truth.'" *Id.* (citing *Consol. Aluminum v. Alcoa*, 244 F.R.D. 335, 343–44 (M.D. La. 2006)). The court also noted that the plaintiff had not shown prejudice. *Riverside Healthcare*, 393 B.R. at 429. Because the plaintiff failed to show bad faith, the court concluded that sanctions were not warranted. *Id.* at 430. The court noted in a footnote that Rule 37(e) limits the ability to sanction "where loss of information results from good faith operation of [an] electronic information system," but did not seem to rely on that provision to preclude sanctions. *See id.* at 429 n.21.

In *Gippetti v. United Parcel Service, Inc.*, No. C07-00812 RMW (HRL), 2008 WL 3264483 (N.D. Cal. Aug. 6, 2008), the court rejected sanctions when certain records were destroyed under the party's routine document retention policy. In that case, the plaintiff sued for employment discrimination and sought production of tachograph records for other UPS drivers, which show a vehicle's speed and the length of time it is moving or stationary. *Id.* at *1. UPS produced some of these, but many had been destroyed under its policy of preserving such records for only 37 days due to the large volume of data. *Id.* The court rejected sanctions for this destruction, finding that the records were not clearly relevant, that there was no clear notice to the defendants to preserve the tachograph records of other employees, and that the plaintiff was not prejudiced by destruction as similar information was available through the production of other employees' time cards. *See id.* at *3–4. The court concluded that the record "shows only that the tachographs were maintained and then destroyed several years ago in the normal course of UPS's business in accordance with the

company's document retention policy." *Id.* at *4. In the "legal standards" section of the opinion, the court mentioned the ability to sanction pursuant to its inherent authority, but did not mention sanctioning power under Rule 37. *See id.* at *2. The court noted that bad faith was not required for sanctions, but that the party's degree of fault was relevant to what sanction should be imposed. *Gippetti*, 2008 WL 3264483, at *2. The court cited common law for these principles, but added a "see also" citation to Rule 37(e) in support of its statement that the degree of fault is relevant to the determination of the sanction imposed. *Id.* The court did not mention Rule 37(e) anywhere else in the opinion. The court may have been influenced by Rule 37(e) in its decision not to impose sanctions where documents were destroyed under a routine document retention policy, but given the court's findings of lack of relevance, prejudice, duty to preserve, and culpability, it seems quite likely that the same result would have occurred without Rule 37(e).

2007 Cases

In another case, the court deferred a sanctions motion based on an entire year's worth of emails lost due to a server move, but noted that Rule 37(e) requires good faith, which depends on the circumstances. *See U&I Corp. v. Adv. Med. Design, Inc.*, No. 8:06-CV-2041-T-17EAJ, 2007 WL 4181900, at *5–6 (M.D. Fla. Nov. 26, 2007). The court deferred a decision on the request for sanctions because it lacked information on whether the computer error that caused the lost emails was made in good faith and whether the emails were truly forever lost. *Id.* Because Rule 37(e) requires good-faith operation, which in turn depends on the circumstances of each case, the court could not yet determine whether sanctions were warranted, although it did leave open the possibility of Rule 37(e) precluding sanctions if the emails were lost in good faith. *Id.* at *6.

In *Escobar v. City of Houston*, No. 04-1945, 2007 WL 2900581 (S.D. Tex. Sept. 29, 2007),

the court denied sanctions for the loss of emails, but it was unclear whether this was based on the Fifth Circuit's requirement of bad faith for imposing an adverse inference or based on Rule 37(e). The lawsuit arose out of a city police officer's deadly shooting of a teenage boy. The plaintiffs alleged that the City failed to preserve records of the police department's electronic communications in the 24 hours after the death. *Id.* at *17. The plaintiffs argued that they notified the City of their claim within 60 days of the shooting and that the police department's policy was to keep "mobile digital terminal transmissions" for 90 days. *Id.* The plaintiffs argued that destruction of electronic communications after their notice constituted spoliation; they requested an adverse inference jury instruction. *Id.* The court noted that the Fifth Circuit requires bad faith before imposing severe spoliation sanctions, including adverse inference instructions. *Id.* The court also noted that federal courts may impose sanctions for failing to obey discovery orders under Rule 37 (and that Rule 37(f) applies to ESI), or they may impose sanctions for conduct that abuses the judicial process pursuant to their inherent authority. *Id.* at *17 n.5. But the court explained that inherent power applies only when the parties' conduct is not controlled by other mechanisms. *Escobar*, 2007 WL 2900581, at *17 n.5. The court concluded that although the duty to preserve existed, an adverse inference instruction was not warranted because there was no showing that relevant electronic communications were destroyed or that the destruction was in bad faith, citing Fifth Circuit case law from before the 2006 e-discovery amendments. *Id.* at *18 (citing *Condrey v. Suntrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005); *King v. Ill. Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003)).

The court found further support for its conclusion in Rule 37(e), stating: "And under Rule 37(f) of the Federal Rules of Civil Procedure, if the electronic communications were destroyed in the routine operation of the HPD's computer system, and if there is no evidence of bad faith in the

operation of the system that led to the destruction of the communications, sanctions are not appropriate." *Id.* The court also found a lack of prejudice, noting that "[t]he record shows that the officers involved in the shooting were not likely to have used e-mail to communicate about the event in the day after it occurred. *Id.* at *19. The court concluded that because the plaintiffs had not shown bad faith or the loss of relevant information, no sanctions were warranted, again citing a pre-2006 Fifth Circuit case. *Id.* (citing *Toon v. Wackenhut Corrections Corp.*, 250 F.3d 950, 952 (5th Cir. 2001)). Thus, while Rule 37(e) supported the court's decision, given the lack of bad faith, as required by circuit precedent, and lack of showing of loss of relevant evidence, the court might have reached the same conclusion even without Rule 37(e).[15] *See* Hebl, *supra*, at 110 (arguing that *Escobar* is the only court that has arguably applied Rule 37(e) correctly, but noting that the case is not dispositive on the issue because there were grounds independent of Rule 37(e) for not granting sanctions). Another possibility is that the court ruled out sanctions under Rule 37 because of the safe harbor in Rule 37(e), and ruled out sanctions under inherent authority based on the common law requirement of bad faith.

Finally, in *Columbia Pictures Industries v. Bunnell*, No. 06-1093FMCJCX, 2007 WL 2080419 (C.D. Cal. May 29, 2007), the court denied sanctions for failure to preserve data stored temporarily in RAM because there was no prior preservation order or request for such temporary data. The court noted Rule 37(e), but it was unclear if it specifically applied. The court denied sanctions because the "failure to retain the Server Log Data in RAM was based on a good faith belief that preservation of data temporarily stored only in RAM was not legally required." *Id.* at *14. The

[15]The Fifth Circuit's requirement of bad faith provided an additional layer of protection here that might not have been present in circuits that do not require bad faith. Rule 37(e) might have had a greater impact on the same facts in circuits without a bad faith requirement.

court mentioned that Rule 37(e) precludes sanctions for the good-faith operation of an electronic information system, and that "good faith" may require suspending certain features of routine operation once a duty to preserve arises, but it was not clear if that rule was the basis for the court's decision not to impose sanctions. *See id.* at *13–14.

B. Cases Finding Rule 37(e) Inapplicable

The remaining cases citing Rule 37(e) have either determined that the rule did not apply or mentioned it but did not seem to directly apply it.

Some courts find that Rule 37(e) does not apply because sanctions have been requested pursuant to the court's inherent authority rather than Rule 37 or because there is no prior court order to bring the conduct within Rule 37 sanctions. *See Stanfill v. Talton*, --- F. Supp. 2d ---, No. 5:10-CV-255(MTT), 2012 WL 1035385, at *8 n.12, *9–11 (M.D. Ga. Mar. 29, 2012) (after portions of a video recording were lost because the recording system automatically overwrote old video, the court denied sanctions because even if the duty to preserve existed, it was not clear that it was owed to the plaintiff and there was no showing of bad faith (as required under circuit law); the court noted that Rule 37(e) did not apply because the plaintiff had not moved for sanctions under Rule 37 and it would not have applied anyway because the plaintiff's argument was that the video was not lost as part of the good-faith operation of an electronic storage system, but because of the defendants' knowing failure to preserve the video before it was overwritten); *Tech. Sales Assocs., Inc. v. Ohio Star Forge Co.*, Nos. 07-11745, 08-13365, 2009 WL 728520, at *8 (E.D. Mich. Mar. 19, 2009) (rejecting application of Rule 37(e) both because lost ESI was deleted intentionally and because sanctions were sought under the court's inherent authority); *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 429 n.30, 431 n.31 (S.D.N.Y. 2009) (Rule 37(e) did not apply because there

was no violation of a previous court order and sanctions were requested under the court's inherent authority);[16] *Johnson v. Wells Fargo Home Mortg., Inc.*, No. 3:05-CV-0321-RAM, 2008 WL 2142219, at *2, *3 n.1 (D. Nev. May 16, 2008) (relying on inherent authority to analyze sanctions because although the defendant brought the motion under Rule 37 and inherent authority, the plaintiff's conduct did not violate any discovery order under Rule 37 because it occurred before the filing of the motion to compel production of the hard drives at issue, and rejecting application of Rule 37(e) for the same reason); *Nucor Corp. v. Bell*, 251 F.R.D. 191, 196 n.3 (D.S.C. 2008) (imposing an adverse inference for intentional destruction of a USB thumb drive with relevant evidence and for allowing employees' continued use of a computer, which resulted in loss of relevant data, and noting that Rule 37(e) did not apply because sanctions were imposed pursuant to inherent authority, not the rules);[17] *see also* Allman, *The Impact of Rule 37(e)*, *supra*, at 27 ("Rule 37(e) applies only to mitigation of 'rule-based' spoliation sanctions, despite the fact that sanctions can also be imposed under the inherent power of courts. Some have concluded that this limitation implies approval to avoid the impact of the Rule by simply relying on a court's inherent powers." (footnote omitted)); *cf. Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1321 (10th Cir. 2011) (affirming dismissal of plaintiff's action for "thrice repeated failure to produce materials that have always been and remain within its control" because such behavior was "strong evidence of willfulness and bad faith, and in

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[16]Although Rule 37(e) did not apply, the court found it instructive in understanding the steps parties should take to preserve electronic evidence. *Arista Records*, 608 F. Supp. 2d at 431 n.31.

[17]The court stated: "Assuming arguendo that defendants['] conduct would be protected under the safe-harbor provision, Rule 37(e)'s plain language states that it only applies to sanctions imposed under the Federal Rules of Civil Procedure (e.g., a sanction made under Rule 37(b) for failing to obey a court order). Thus, the rule is not applicable when the court sanctions a party pursuant to its inherent powers." *Nucor*, 251 F.R.D. at 196 n.3.

any event is easily fault enough," as required under circuit law for severe spoliation sanction, but also noting that Rule 37(e) protects from sanctions those who have discard materials as a result of good-faith business procedures); *Northington v. H&M Int'l*, No. 08-CV-6297, 2011 WL 663055, at *12 (N.D. Ill. Jan. 12, 2011) ("[W]hether or not defendant's conduct is sanctionable under any subdivision of Rule 37 is an academic issue, as the analysis for imposing sanctions under that Rule or our inherent power is 'essentially the same.'" (citations omitted)); *Grubb v. Bd. of Trustees of the Univ. of Ill.*, 730 F. Supp. 2d 860, 865–66 (N.D. Il.. 2010) (denying sanctions where third party destroyed the relevant computer without the plaintiff's knowledge, and where the plaintiff inadvertently altered/destroyed ESI by simply using his computer, because there was no bad faith as required for sanctions in that circuit; the court noted that the request was brought pursuant to inherent authority, but was "mindful" of Rule 37(e), which also seemed to weigh in favor of denying sanctions).

One court explained that the reason many courts might look to inherent authority to impose sanctions for failure to preserve is that Rule 37 sanctions do not easily apply to pre-litigation conduct:

> Several courts have held that Rule 37 sanctions are available even where evidence is destroyed before the issuance of a discovery request, with a few going so far as to apply the rule to conduct that occurred before the lawsuit was filed, provided the party was on notice of a claim. But, the majority view—and the one most easily reconciled with the terms of the rule—is that Rule 37 is narrower in scope and does not apply before the discovery regime is triggered. *See Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994); *Dillon v. Nissan Motor Co.*, 986 F.2d at 268–69; *Unigard Sec. Ins. Co.*, 982 F.2d at 368; *see also* Iain D. Johnson, "Federal Courts' Authority to Impose Sanctions for Prelitigation or Pre-order Spoliation of Evidence," 156 F.R.D. 313, 318 (1994) ("it is questionable whether Rule 37 provides a federal court with authority to impose sanctions for spoliating evidence prior to a court order

> concerning discovery or a production request being served"). If that is true, the court must look to its inherent authority to impose, if at all, sanctions for evidence destruction that occurs between the time that the duty to preserve attaches and, at the least, the filing of a formal discovery request. But, this approach begs yet another question—what sort of intent requirement ought to apply in this non-rule context?

United Med. Supply Co. v. United States, 77 Fed. Cl. 257, 268 (Fed. Cl. 2007).[18] However, the court

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[18]The court described the complicated circuit split on the degree of culpability required for particular sanctions:

> [A]s startling[] as it might seem, the *mens rea* issue confronting this court appears to be an open question in this circuit. There is, in fact, a division of authority among the circuits on this issue. While the tendency is to view that split in terms of whether *vel non* a showing of bad faith is required, in fact, the diverging views cover a much broader spectrum. On one end of that spectrum, actually representing a distinct minority, are courts that require a showing of bad faith before any form of sanction is applied. Other courts expect such a showing, but only for the imposition of certain more serious sanctions, such as the application of an adverse inference or the entry of a default judgment. Further relaxing the scienter requirement, some courts do not require a showing of bad faith, but do require proof of purposeful, willful or intentional conduct, at least as to certain sanctions, so as not to impose sanctions based solely upon negligent conduct. On the other side of the spectrum, we find courts that do not require a showing of purposeful conduct, at all, but instead require merely that there be a showing of fault, with the degree of fault, ranging from mere negligence to bad faith, impacting the severity of the sanction. If this continuum were not complicated enough, some circuits initially appear to have adopted universal rules, only to later shade their precedents with caveats. Other times, the difference between decisions appear to be more a matter of semantics, perhaps driven by state law, with some courts, for example, identifying as "bad faith" what others would call "recklessness" or even "gross negligence."

United Med. Supply Co., 77 Fed. Cl. at 266–67 (footnotes omitted). The court noted that United States Court of Federal Claims Rule 37, which is modeled after Civil Rule 37, does not require bad faith to impose sanctions. *Id.* at 267. The court explained:

noted that many courts have taken a flexible approach to when Rule 37 sanctions can be triggered. *See id.* at 271 n.26 ("Courts have held that, for purposes of Federal Rule 37(b)(2), a party fails to obey a court 'order' whenever it takes conduct inconsistent with the court's expressed views regarding how discovery should proceed. As such, the court need not issue a written order compelling discovery for RCFC 37 to be triggered." (internal citations omitted)); *see also Domanus v. Lewicki*, --- F.R.D. ----, 2012 WL 2072866, at *4 (N.D. Ill. Jun. 8, 2012) ("'In other words, the Court may sanction a party pursuant to Rule 37 for discovery violations; however these sanctions are limited to circumstances in which a party violates a court order or discovery ruling.' 'Courts have broadly interpreted what constitutes an 'order' for purposes of imposing sanctions.'" (citations omitted));[19] Wright, *supra*, at 816 ("[W]hen a violation of the duty [to preserve] occurs before

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> The omission of any *mens rea* requirement in this rule is not an oversight. Indeed, in 1970, FED.R.CIV.P. 37(d) was modified to eliminate the requirement that the failure to comply with a discovery request be 'willful,' with specific indication in the drafters' notes that, under the modified rule, sanctions could be imposed for negligence. Under the revised rule, wilfullness instead factors only into the selection of the sanction. As such, it is apparent that 'bad faith' need not be shown in order to impose even the most severe of the spoliation sanctions authorized by RCFC 37(b) and (d). And courts construing the Federal rule counterpart to this rule have so held.

Id. at 267–68 (internal citations and footnote omitted).

The court also noted that Rule 37(e)'s safe harbor's protection for good-faith preservation implies that sanctions are permitted under Rule 37 for conduct less culpable than bad faith. *See United Med. Supply Co.*, 77 Fed. Cl. at 270 n.24 ("That the Advisory Committee would need to adopt a limited 'good faith' . . . exception to the imposition of sanctions belies the notion such sanctions should be imposed only upon a more traditional finding of 'bad faith.'").

[19] Some courts note that while Rule 37 requires a court order, the difference between imposing sanctions under Rule 37 or under inherent authority is immaterial because the sanctions analysis is the same under either source of authority. *See Domanus*, 2012 WL 2072866, at *4 ("Nevertheless, the Court need not determine whether it is exercising its statutory or inherent authority. 'Under

litigation commences, it is less clear as to whether or not Rule 37(e) may be invoked. Therefore, Rule 37(e) is problematic in that it 'addresses only sanctions under the federal rules, which generally do not apply prior to commencement of litigation.'" (footnote omitted)).

Other courts have found the rule inapplicable because the conduct did not amount to "routine, good-faith operation of an electronic storage system." *See, e.g.*, *Domanus*, 2012 WL 2072866, at *6 & n.4 (Rule 37(e) did not apply because intentional destruction of a hard drive during litigation (after it crashed and the party had already allegedly recovered and produced what it could) was neither "routine" or "ordinary," and Rule 37(e) does not apply once a preservation duty arises);[20] *Bootheel Ethanol Invest., L.L.C. v. Semo Ethanol Coop.*, No. 1:08-CV-59 SNLJ, 2011 WL 4549626, at *4 (E.D. Mo. Sept. 30, 2011) (rejecting application of Rule 37(e) after the plaintiff threw away a hard drive because Office Depot said it would not start, explaining that "it cannot now be said that information was lost due to routine, good-faith operation of the computer" because it was not even known whether ESI was lost at all, since all that was known was that Office Depot confirmed that the computer would not boot up); *United States v. Universal Health Servs., Inc.*, No. 1:07cv00054,

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either Rule 37 or under the Court's inherent authority, the analysis for imposing sanctions is essentially the same.'" (citation omitted)).

[20]It seems clear that some courts believe that Rule 37(e) does not apply once a duty to preserve arises. This may not comport with the Committee's original intent in enacting Rule 37(e). Since sanctions are not generally available for failing to preserve before the duty to preserve arises, and since Rule 37(e) was meant to alleviate some of the concerns about excessive sanctions for lost ESI, presumably it was meant to apply in some respects after the duty to preserve arises. *See* Allman, *The Impact of Rule 37(e)*, *supra*, at 26 ("[S]ome courts 'have completely ignored the clear implication of Rule 37(e)—namely that it applies after the duty to preserve has arisen,' thereby 'render[ing] the rule largely superfluous.'" (second alteration in original) (footnote omitted)); *id.* at 30 ("The mere fact that the loss occurs after a preservation duty has already attached is, of course, not decisive."); Hebl, *supra*, at 84 ("Rule 37(e) creates a safe harbor for parties after the preservation obligation has arisen, whether it is due to a court order or a party's reasonable anticipation of litigation.").

2011 WL 3426046, at *5 (W.D. Va. Aug. 5, 2011) (Rule 37(e) did not apply when a party's electronic data became much less accessible due to its failure to implement a litigation hold until two years after the duty to preserve arose because this was negligent and not routine, good-faith operation of an electronic storage system);[21] *Wilson v. Thorn Energy, LLC*, No. 08 Civ. 9009(FM), 2010 WL 1712236, at *3 (S.D.N.Y. Mar. 15, 2010) (rejecting Rule 37(e) argument based on loss of flash drive after duty to preserve arose because the Advisory Committee notes explain that "'routine operation' relates to the 'ways in which such systems are designed, programmed, and implemented to meet the party's technical and business needs,'" but "the flash drive was not overridden [sic] or erased as part of a standard protocol; rather it was lost because the Defendants failed to make a copy"; also concluding that the failure to make a copy of the drive meant that the party failed to act in good faith, which also precluded application of Rule 37(e)); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 642 (S.D. Tex. 2010) ("[A] policy put into place after a duty to preserve had arisen, that applies almost exclusively to emails subject to that duty to preserve, is not a routine, good-faith operation of a computer system"); *KCH Servs., Inc. v. Vanaire, Inc.*, No 05-777-C, 2009 WL 2216601, at *1 (W.D. Ky. Jul. 22, 2009) (after the plaintiff accused the defendant of misappropriating the plaintiff's software (pre-litigation), the defendant instructed employees to delete all such software from their computers; this, coupled with failure to put a litigation hold on any electronic correspondence, led the court to conclude there was not routine, good-faith operation, and to impose an adverse inference instruction); *Stratienko v. Chattanooga-Hamilton Cty. Hosp. Auth.*, No. 1:07-CV-258, 2009 WL 2168717, at *4 (E.D. Tenn. Jul. 16, 2009) (reimaging of employee's

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[21] The court ordered the production of back-up tapes to remedy the failure to preserve, but it was not clear whether this was considered a "sanction" under Rule 37 or a determination that inaccessible data should be produced based on a finding of good cause under Rule 26(b)(2)(B).

hard drive after employee's retirement did not fall within Rule 37(e) because the defendant had been on notice that information on the hard drive could be at issue and the reimaging took place immediately after the employee's retirement); *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1191–92 (D. Utah 2009) (Rule 37(e) did not apply to destruction of evidence when the defendant had no document destruction/retention policy and left it to employees to save documents they thought important); *Tech. Sales Assocs.*, 2009 WL 728520, at *8 (one relevant computer had approximately 70,000 files deleted with a tool known as "Eraser" in just one month during the discovery period; another computer had email files moved into the "recycle bin" the day before a scheduled forensic examination; the court held Rule 37(e) "is intended to protect a party from sanctions where the routine operation of a computer system inadvertently overwrites potentially relevant evidence, not when the party intentionally deletes electronic evidence"); *Pandora Jewelry, LLC v. Chamilia, LLC*, No. CCB-06-3041, 2008 WL 4533902, at *8 n.7 (D. Md. Sept. 30, 2008) ("To the extent the lack of production results from deletion of emails, Chamilia's failure to prevent the loss does not fall within the routine, good faith exception of Rule 37(e), which protects parties 'for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.'");[22] *Meccatech, Inc. v. Kiser*, No. 8:05CV570, 2008 WL 6010937, at *9 (D. Neb. Apr. 2, 2008) (imposing severe sanctions for intentional and bad faith discovery conduct and noting that intentional destruction is "not 'lost as a result of the routine, good-faith operation of an electronic information system'" (citing FED. R. CIV. P. 37(e))); *Doe v. Norwalk*

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[22] The court also implied that Rule 37(e) could not apply once the duty to preserve had arisen. *See Pandora Jewelry*, 2008 WL 4533902, at *8 n.7 ("[B]ecause Chamilia had a duty to preserve documents when it sent the January 8 and 15, 2007 communications and the October 2, 2007 communication, Chamilia's failure to preserve documents does not fall within the protective scope of Rule 37(e).").

Cmty. Coll., 248 F.R.D. 372, 378 (2007) ("[I]n 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. Because the defendants failed to suspend it at any time, . . . the court finds that the defendants cannot take advantage of Rule 37(f)'s good faith exception. . . . This Rule therefore appears to require a routine *system* in order to take advantage of the good faith exception, and the court cannot find that the defendants had such a system in place.");[23] *Peskoff v. Faber*, 244 F.R.D. 54, 60–61 (D.D.C. 2007) (sanctions were permitted for failure to turn off auto-delete features after the preservation duty arose and Rule 37(f) did not provide protection because that rule requires a litigation hold and turning off auto-delete features; sanctions were precluded for the period before notice of litigation because Rule 37(f) does not require auto-delete features to be disabled in that period and no exceptional circumstances were present);[24] *United States v. Krause* (*In re Krause*), 367 B.R. 740, 767–68 (Bankr. D. Kan. 2007) (Rule 37(f) did not apply because the installation of the GhostSurf program, a program designed to wipe or eradicate data or files, on one computer after the court ordered turning over electronic

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[23]The court explained that at one point emails were backed up for one year, and at an earlier point were only backed up for six months or less. The defendants did not have "one consistent, 'routine' system in place," and did not follow a State Librarian's policy of retaining electronic documents for two years. Further, the defendants did nothing to stop the destruction of backup tapes after the duty to preserve arose. *Doe*, 248 F.R.D. at 378. Because the Rule 37(e) advisory committee notes indicate that "the Rule only applies to information lost 'due to the 'routine operation of an electronic information system'—the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs,'" it could not apply in this case, where there was no routine system in place. *Id.*

[24]Although the court found that sanctions were precluded for continuing the auto-delete feature before notice of litigation was received, the court stated that "[n]onetheless, Rule 37(f) must be read in conjunction with the discovery guidelines of Rule 26(b)." *Peskoff*, 244 F.R.D. at 61. The court concluded that the balancing factors in Rule 26(b)(2)(C) authorized requiring the defendant to participate in a process to ascertain whether a forensic examination was justified. *Id.*

evidence and on another the day before turning it over, was not routine, good-faith operation of an electronic information system; there was an obligation to disable the wiping feature once the preservation duty arose and certainly to not reinstall and run the program, as the debtor did here);[25] *cf. Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 145–46 (D.D.C. 2007) (defendant failed to stop its email system from automatically deleting all emails after 60 days until at least more than two years after suit was filed; court held that "it is clear that [Rule 37(e)] does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation"; court also found Rule 37(e) inapplicable because the plaintiffs did not seek sanctions but rather that the defendant be required to search backup tapes for discoverable information previously deleted).[26]

And other courts have found that sanctions were not appropriate without the need to specifically apply Rule 37(e). *See, e.g.*, *Denim N. Am. Holdings, LLC v. Swift Textiles, LLC*, 816 F. Supp. 2d 1308, 1311–12, 1328–30 (M.D. Ga. 2011) (refusing sanction of dismissal or adverse inference based on individual employees' practice of manually deleting emails because circuit law

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[25]The court noted that "[j]ust as a litigant may have an obligation to suspend certain features of a 'routine operation,' the Court concludes that a litigant has an obligation to suspend features of a computer's operation that are not routine if those features will result in destroying evidence." *In re Krause*, 367 B.R. at 768. The court held that in this case "that obligation required Krause to disable the running of the wiping feature of GhostSurf as soon as the preservation duty attached. And it certainly obligated Krause to refrain from reinstalling GhostSurf when his computers crashed and he restored them." *Id.*

[26]The court noted: "I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only electronically stored information that remains. It reminds me too much of Leo Kosten's definition of chutzpah: 'that quality enshrined in a man who, having killed his mother and his father, throws himself on the mercy of the court because he is an orphan.'" *Disability Rights Council of Greater Wash.*, 242 F.R.D. at 147.

required bad faith, and citing Rule 37(e), but not seeming to rely on it in denying sanctions (and not mentioning Rule 37(e) in denying reconsideration)); *Bryden v. Boys and Girls Club of Rockford*, No. 09 C 50290, 2011 WL 843907, at *5 (N.D. Ill. Mar. 8, 2011) (the court denied a motion for sanctions without prejudice when the defendant's third-party contractor that hosted the defendant's domain and email accounts upgraded their server without the defendant's knowledge and deleted all prior emails, a year after the preservation duty began, but did so because it did not yet have enough information on prejudice to the plaintiff or on the defendant's efforts to preserve; the court cited Rule 37(e) in its description of the legal standard, but did not say whether it applied); *Viramontes v. U.S. Bancorp*, No. 10 C 761, 2011 WL 291077, at *3–5 (N.D. Ill. Jan. 27, 2011) (denying request for adverse inference as a sanction for the defendant's destruction of emails pursuant to its routine document retention policy because the emails were destroyed before the duty to preserve arose and there was no bad faith given the routine operation of the document destruction policy; mentioned Rule 37(e) in the statement of legal standards, but did not seem to directly apply it); *Sue v. Milyard*, No. 07-cv-01711-REB-MJW, 2009 WL 2424435, at *2 (D. Colo. Aug. 6, 2009) (after video footage of a strip search at issue was recorded over within five to seven days due to the normal operating process of the camera's computer system, and the request to retain it was not received until after the normal process deleted it, the court denied sanctions, but although Rule 37(e) was cited in the legal standards section of the opinion, there was no indication that it was actually applied and the court seemed to rely on lack of intentional destruction, as required for use of inherent authority); *cf. Northington v. H & M Int'l*, No. 08-CV-6297, 2011 WL 663055, *8–9, *14, *16, *21 (N.D. Ill. Jan. 12, 2011) (the defendant was grossly negligent and reckless in preserving ESI related to the discrimination claim, which eventually led to email accounts and other ESI being destroyed as part

of routine business operations; the court imposed some, but not all, requested sanctions and noted Rule 37(e) in the legal standards but did not seem to apply it); *Keithley v. Home Store.com, Inc.*, No. C-03-04447 SI (EDL), 2008 WL 383384, at *1, *4–5, *16 (N.D. Cal. Aug. 12, 2008) (discussing Rule 37(e) but not whether it applied; discovery misconduct included failure to properly administer a litigation hold on electronic documents; court imposed monetary sanctions and an adverse inference for what it described as reckless and egregious discovery misconduct, seemingly under both inherent authority and Rule 37); *Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SAJ, 2007 WL 1498973, at *6 (N.D. Okla. May 17, 2007) (advising the parties, without explanation, that "they should be very cautious in relying upon any 'safe harbor' doctrine as described in new Rule 37(f)").

II. Meaning of "routine, good-faith operation of an electronic storage system"

"Routine" has been described as "actions taken 'according to a standard procedure' or those which are 'ordinary.'" Allman, *Impact of Rule 37(e)*, *supra*, at 28. "The Committee Note to Rule 37(e) speaks of 'the ways in which such [electronic storage] systems are generally designed, programmed, and implemented' . . . ." *Id.* at 28–29; *see also* Davidovitch, *supra*, at 1136 (noting that the Rules Committees defined "routine" as "the 'ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs'" and that "'[s]uch features are essential to the operation of electronic information systems.'" (alteration in original)). Davidovitch argues that the Committee's "choice of language indicates that the Judicial [Conference] Committee believes that a system's 'routine' operation is more than just an operation which is periodic or habitual, but rather one that has a purpose linked to the party's particular 'technical and business needs.'" Davidovitch, *supra*, at 1136. "In essence, a determination of

whether a system is 'routine' should focus on how the system was operated generally, without regard to the particular facts surrounding the lost information in question." *Id.* Relatedly, some have pointed out that a document retention policy is critical to being able to take advantage of the rule. *See* Jacquelyn A. Caridad & Stephanie A. Blair, *Electronic Discovery Decisions Relating to the Amended Federal Rules*, 80 PA. B. ASS'N Q. 158, 171 (2009) (describing a case that "elevates the importance of establishing a thorough retention program with sufficient oversight," and that "indicates that organically derived retention and storage practices that almost solely rely on employees for retention of important company documents and data are no longer acceptable"); Rachel Hytken, Comment, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 893 (2008) ("In other words, to receive the benefits of a safe harbor, a party must have a functioning and enforced records management system.").

Another commentator has explained "routine operation" as used in Rule 37 as follows:

> Turning first to the Rule's requirement that the party lose the information during the "routine operation" of its electronic information systems, little debate exists regarding whether an individual's actions may fall within this provision. The routine operation of a computer system includes more than simply a "periodic or habitual" operation of an electronic system. In particular, the Judicial Conference suggests that to be routine, the operation must be "designed, programmed, and implemented to meet the party's technical and business needs." To this end, the court must examine the electronic system as a whole and determine whether the system operated to generally serve the technical and business needs of the party. As such, the court will evaluate the computer system as a whole and not consider how the system operated in the specific instance that resulted in the loss of responsive information.

Alexander B. Hastings, Note, *A Solution to the Spoliation Chaos: Rule 37(e)'s Unfulfilled Potential to Bring Uniformity to Electronic Spoliation Doctrine*, 79 GEO. WASH. L. REV. 860, 874–75 (2011)

(footnotes omitted).

There is some evidence that manual deletion of ESI would not qualify as routine operation under the rule. *See* John M. Barkett, *Help Has Arrived . . . Sort Of: The E-Discovery Rules*, SN082 ALI-ABA 201 (2008) ("Rule 37(e) does not seem to provide a safe harbor for the electronic storage habit of individuals . . . ."); Emily Burns, Michelle Greer Galloway & Jeffrey Gross, *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201, 220 (2008) (noting that in *Doe*, the court stated that Rule 37(e) requires a "routine system," which is "a system which is 'generally designed, programmed, and implemented to meet the party's technical and business needs,'" and that the court "suggested that the deletion of the defendant's emails was not the result of an established system, but rather of ad hoc deletions by individual custodians"); Favro, *supra*, at 326–27 ("The Safe Harbor only applied to data that was destroyed due to the ordinary functions of a computer system. It did not prevent sanctions when data was manually deleted. For example, the Safe Harbor afforded no protection to a company that relied on its individual employees to manually archive and delete electronic data." (footnotes omitted)); *see also* Favro, *supra*, at 333 (describing a case that held that programming server to automatically delete all mail not manually archived by employees was unreasonable because "'[w]hile a party may design its information management practices to suit its business purposes, one of those business purposes must be accountability to third parties'" (quoting *Philip M. Adams*, 621 F. Supp. 2d at 1191, 1195)) *cf. Coburn*, 2010 WL 3895764, at *3 ("The destruction of emails as part of a regular good-faith *function of a software application* may not be sanctioned absent exceptional circumstances." (emphasis added)).[27] The cases focus heavily on electronic systems and auto-delete functions, not

[27] *Coburn* also indicated that Rule 37(e) can apply to electronic information systems of any

on the involvement of individual decisions to delete, even if the individuals have a regular practice of deleting or preserving material. And the Advisory Committee seemed to contemplate automated functions that had little, if any manual involvement. *See* Civil Rules 2005 Report, *supra*, at 73 (explaining that the rule responds to "a distinctive feature of electronic information systems, the routine modification, overwriting, and deletion of information that attends normal use," and that "[e]xamples of this feature in present systems include programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been 'deleted'; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period. . . . [T]he proposed rule recognizes that such automatic features are essential to the operation of electronic information systems.").

Nonetheless, there is some evidence that minimal individual intervention in an electronic system may not take a protected activity out of Rule 37(e)'s protections. *See Miller*, 2011 WL 1458491, at *3 (rejecting argument that denial of sanctions was erroneous because the recording device did not automatically overwrite previous videos but instead required a decision by the user to reformat the hard drive). As the *Miller* court pointed out, the committee notes state that routine operation "includes the alteration and overwriting of information, *often* without the operator's specific direction or awareness," FED. R. CIV. P. 37(e), Advisory Comm. Note (2006 Amendments)

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size. *Id.* at *3 n.3 ("While Rule 37(e) is more readily applicable to larger scale 'electronic information systems,' Coburn asserts, and Pulte does not dispute, that the Rule is also applicable to her home use of an electronic information system.").

(emphasis added), and this suggests that while the Advisory Committee contemplated that the routine operations covered by the rule would usually occur without the operator's direction, it was not limited to such situations and might also include instances of deletion at the operator's direction. *See Miller*, 2011 WL 1458491, at *3 n.1 ("Here, it was essential to the operation of Defendants' cameras that the user either save the recordings on the DVD or rewrite the information on it. Critically, by noting that routine operations 'often' occur without the operator's specific direction, the drafters acknowledge that 'routine operations' can still occur despite the direct involvement of a system user. Accordingly, Plaintiffs' contention that the activity of the camera user—which was extremely minimal in this case—takes the electronic information outside of Rule 37(e)'s safe harbor construes Rule 37(e) too narrowly."). Thus, a party has some basis for arguing that some manual intervention in an electronic system does not necessarily mean that the system is not operating "routinely," but given that Rule 37(e) has really only been applied in a handful of cases not involving the additional complication of manual intervention, it is safe to assume that the more manual intervention or individual decisionmaking involved, the less likely it is that the rule will be applied.

With respect to defining "good faith," Allman explains that "[t]he absence of 'bad faith' plays a decisive role in defining the presence of 'good faith.' The cases typically hold that 'bad faith' is 'when a thing is done dishonestly and not merely negligently.'" Allman, *Impact of Rule 37(e)*, *supra*, at 29 (footnotes omitted); *see also* Wright, *supra*, at 819 ("[A]s a general principle, ['good faith'] is commonly understood to be the absence of bad faith."). Clearly, "[a] party which utilizes a system involving routine destruction for the purpose of eliminating information believed to be disadvantageous is not operating in 'good faith.'" Allman, *supra*, at 31.

Another commentator has suggested that "the good faith standard limits the imposition of

spoliation sanctions for failure to provide electronically stored information to a showing of reckless or intentional conduct." Hebl, *supra*, at 83. Hebl suggests that "[g]ood faith is generally understood to be the absence of bad faith, so if a spoliating party can show that its actions were not in bad faith, it will have met the state of mind standard required by Rule 37(e)."[28] *Id.* at 96. According to Hebl, "it is well settled that 'bad faith' does in fact mean intentional or reckless conduct," and therefore the 'good faith' standard in Rule 37(e) requires acting without intentional or reckless conduct, despite the Advisory Committee's assertions that it was stopping short of an reckless standard by adopting an "intermediate standard." *Id.* at 97. Hebl concludes: "[A]lthough the Advisory Committee suggested that it was adopting an 'intermediate standard,' the adoption of language which already had a well-settled meaning in the spoliation context, in combination with the Advisory Committee's own statements, leads to the inevitable conclusion that Rule 37(e)'s good faith standard requires a showing of intent or recklessness." *Id.* at 98–99. He suggests several types of conduct that would constitute bad faith and take the party's conduct outside the scope of Rule 37(e):

> To summarize, if a party consciously and purposefully downloads software that targets and deletes relevant information from its storage system, bad faith is present and Rule 37(e)'s protection will be unavailable. Second, if a party is subjectively aware that its document deletion policy will result in the destruction of relevant

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[28]The good-faith standard in Rule 37(e) may be more nuanced and flexible than just the absence of bad faith. Clearly a party cannot act in bad faith and take advantage of the safe harbor, but the rule seems to go further than that, requiring affirmative good-faith operation of an electronic information system. The *Cache La Poudre* case may illustrate this. In that case, the party did take some actions to ensure that ESI was not destroyed. But because the party relied on employees to implement most of its preservation obligations, the court imposed sanctions. The party most likely was not acting in bad faith, with the intent to hide information from the other side. But if the party clearly did not take sufficient actions to preserve, even if they were not intentionally hiding information, it seems there is a good argument that the party did not act in good faith. Perhaps the "good faith" standard was meant to provide courts with flexibility for dealing with situations somewhere between negligent and intentional or reckless conduct.

> evidence, and that party does not intervene to stop this policy, its conduct is willfully blind, the party is acting in bad faith, and Rule 37(e)'s protection will be unavailable. Finally, the intentional destruction of evidence in direct response to pending litigation does not, under any circumstances, receive Rule 37(e)'s protection.

Id. at 103.

Another commentator has noted that "by itself, . . . the good-faith clause does not reveal the level of mens rea at which a party may still claim protection under the safe harbor provision. . . . [T]he Judicial Conference intended the good-faith standard to serve as a middle ground between the alternative of a strict intentional or narrow reasonableness standard." Hastings, *supra*, at 875. He suggests that the good-faith standard represented a compromise between the "reasonableness" standard proposed in the proposal published for public comment and the intentional standards in the footnoted version of the published proposal. *Id.* at 876. As a result, he concludes that "[t]he hesitancy of the Judicial Conference to fully adopt an intentional or reasonableness standard demonstrates that the good-faith standard should not be read as a firm standard, but rather should be interpreted as a malleable approach to mens rea." *Id.* He also suggests that courts have "erred on the side of caution and have narrowly interpreted the protections of Rule 37(e)," but that "the varying interpretations of the Rule prevent parties from developing 'routine' computer systems that appropriately maintain and delete electronic information." *Id.*

The case law has also provided examples of certain actions that do not qualify as routine, good-faith operation of an electronic storage system. *See, e.g.*, *Bootheel*, 2011 WL 4549626, at *4 (throwing away computer that had crashed after Office Depot confirmed it would not reboot was not routine, good-faith operation of an electronic storage system); *Wilson*, 2010 WL 1712236 ("routine, good-faith operation" does not encompass failure to make a copy of relevant ESI, but rather is

directed to overwriting as part of standard protocol); *Rimkus*, 688 F. Supp. 2d at 642 (concluding that "a policy put into place after a duty to preserve had arisen, that applies almost exclusively to emails subject to that duty to preserve, is not a routine, good-faith operation of a computer system," and that the selective and manual deletion of emails was not covered by Rule 37(e)).[29]

III. Use of the "absent exceptional circumstances" clause

The courts have not defined this term and I did not find any cases in which the court utilized this exception to avoid application of Rule 37(e). As noted in the section above on the history of Rule 37(e), there is some evidence that the Advisory Committee intended this provision to apply to instances of severe prejudice, but it ended up leaving flexibility for courts to interpret the exception. The courts have not done so. *See* Hytken, *supra*, at 895 ("Neither the Committee nor the courts have attempted to define ['exceptional circumstances']; there is no sense of when, if, or how this term will take on meaning.").

According to one commentator, the exceptional circumstances exception "allows a party seeking sanctions to override the safe harbor if it can establish that the circumstances under which the information was lost necessitate sanctions, even though the party responsible for the loss has satisfied the three elements of Rule 37(e)." Davidovitch, *supra*, at 1140. Davidovitch indicates that although the Rules Committees did not specify what constitutes an exceptional circumstance, they did indicate that "it is one in which 'a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important

[29]For more examples, see the section above on cases declining to apply Rule 37(e) due to the lack of "routine, good-faith operation."

information.'"[30] *Id.*; *see also* Hardaway et al., *supra*, at 586 (concluding that the exception for "exceptional circumstances" "suggests that a showing of extreme prejudice to the requesting party's case might overcome the safe harbor"). Davidovitch predicted that "if courts choose to apply the 'exceptional circumstances' provision in the same way that the courts [have interpreted that language in other contexts], then they withhold the benefit of the rule from parties which are found to repeatedly lose information, without the appearance of bad faith, or from parties that have a history of dishonesty." Davidovitch, *supra*, at 1141.

IV. Litigation Holds

Many courts have held that a party must have implemented an adequate litigation hold in order to take advantage of the protection of Rule 37(e). *See, e.g.*, *Webb v. Jessamine Cty. Fiscal Court*, No. 5:09-CV-314-JMH, 2011 WL 3652751, at *6 (E.D. Ky. Aug. 19, 2011) ("Good-faith operation requires a party intervene to prevent the elimination of information on the system 'because of pending or reasonably anticipated litigation.'" (citing FED. R. CIV. P. 37 (2006 Advisory Committee's Note))); *Cannata v. Wyndham Worldwide Corp.*, No. 2:10-cv-00068-PMP-LRL, 2011 WL 3495987, at *3 (D. Nev. Aug. 10, 2011) ("The Advisory Committee's comments to Rule 37(e) provide that any automatic deletion feature should be turned off once a litigation hold is imposed."); *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, No. 09-61166-CIV, 2011 WL 1456029, at *11 (S.D. Fla. Apr. 5, 2011) (citing Rule 37(e) advisory committee note for proposition that "[a] party has an obligation to retain relevant documents, including emails, once litigation is reasonably anticipated");

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[30]Davidovitch cites the GAP report included in the Civil Rules Committee's report, which was eventually attached to the Standing Committee's report to the Judicial Conference. However, as noted earlier in the section on the history of Rule 37(e), it appears that there was some concern at the Standing Committee level about the language relating to prejudice and it was removed from the committee note.

Coburn, 2010 WL 3895764, at *3 ("If the routine operation of the computer system is likely to destroy electronically stored information that is relevant and not otherwise available on another source, a party must place a litigation hold suspending the destruction."); *S.E. Mech. Servs.*, 2009 WL 2242395, at *2 (noting that Rule 37(e) contains a limited safe harbor, but that "[o]nce a party files suit or reasonably anticipates doing so, however, it has an obligation to make a conscientious effort to preserve electronically stored information that would be relevant to the dispute." (citing *Peskoff v. Faber*, 251 F.R.D. 59, 62 (D.D.C. 2008); FED. R. CIV. P. 37, advisory committee notes (2006 amendments))); *Kessler*, 2009 WL 2603104, at *18 ("The Advisory Committee notes [to Rule 37(e)] make clear, however, that '[w]hen 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 *required*." (emphasis added) (second alteration in original) (quoting Advisory Committee Note to the 2006 Amendment to Federal Rule of Civil Procedure 37(e))); *Major Tours, Inc. v. Colorel*, No. 05-3091, 2009 WL 2413631, at *4 (D.N.J. Aug. 4, 2009) ("The Advisory Committee comments to FED. R. CIV. P. 37(e) further prescribe that any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated."); *KCH Servs.*, 2009 WL 2216601, at *1 (failure to implement litigation hold after notice fell "beyond the scope of 'routine, good faith operation of an electronic information system'"); *Arista Records*, 608 F. Supp. 2d at 431 n.31 ("The Advisory Committee notes make clear, however, that '[w]hen 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 required.");[31] *Peskoff*, 244 F.R.D. at 60 ("The

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[31] The court did not apply Rule 37(e) because sanctions were requested pursuant to its inherent authority, but found Rule 37(e) instructive on the parties' duty to preserve ESI.

Advisory Committee comments to amended Rule 37(f) make it clear that any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated."); *Disability Rights Council of Greater Wash.*, 242 F.R.D. at 146 ("[I]t is clear that this Rule does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation."); *see also* Burns et al., *supra*, at 220 ("Other courts have taken the producing party's 'shield' embodied in Rule 37(e) and turned it into a 'sword' to be used by the requesting party to prove spoliation of evidence. At least one well-respected e-discovery jurist has interpreted the advisory committee's notes to Rule 37(e) as actually imposing a separate affirmative obligation on parties to disable any routine systems that would eliminate discoverable information after the duty to preserve had attached."); Favro, *supra*, at 327 ("Most courts applying Rule 37(e) have issued sanctions for spoliation when a party has failed to suspend particular aspects of its computer systems after a preservation duty attached. Thus, the Advisory Committee did impose a duty to stop the routine destruction of electronic data in certain circumstances despite its earlier misgivings about doing so."); Hardaway et al., *supra*, at 585–86 ("Courts have generally concluded that, when the duty to preserve attaches to evidence, the safe harbor of Rule 37(e) does not apply because a party cannot, in good faith, delete this relevant evidence, even as part of a records management program. Indeed, once a party is aware of or should reasonably anticipate litigation, the party has a duty to implement a litigation hold. A party who fails to implement the litigation hold cannot take advantage of the safe haven." (footnotes omitted)); Joanna K. Slusarz, *No Fishing Poles in the Office*, 78 DEF. COUNS. J. 450, 461 (Oct. 2011) ("A party must show that it has modified or suspended the routine operation of computer systems to prevent loss of data that is subject to a preservation requirement" in order to take advantage of Rule 37(e).);

Wright, *supra*, at 814–15 ("Under Rule 37(e), good faith requires that a party adhere to its preservation obligation, whereby it *must* intervene with any document destruction policy and 'modify or suspend certain features of that routine operation to prevent the loss' of potentially relevant documentation when litigation is reasonably foreseeable." (emphasis added)); *cf.* Hytken, *supra*, at 892 ("The safe harbor discourages a judge from levying sanctions against a party who disposes of E.S.I. as part of their regular information management system in good faith and *before their litigation hold responsibilities arise*. A producing party benefits from Rule 37 when 1) acting in 'good faith', 2) *it implements a litigation hold*, and 3) the loss of E.S.I. resulted from 'the routine operation of . . . an electronic information system.'" (emphases added)).[32]

The courts that have indicated that Rule 37(e) requires a litigation hold often focus on the following language in the committee note:

> Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. . . . The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of any information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. 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."

FED. R. CIV. P. 37 Advisory Committee Note (2006 Amendment). The Advisory Committee's report submitting the final proposed rule to the Judicial Conference indicated that implementation of a

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[32]Hytken argues that "[t]he second requirement of the safe harbor, implementing a proper litigation hold, has great importance because a court may presume when a party has taken proper steps to put a litigation hold in place that it has acted in good faith." Hytken, *supra*, at 893.

litigation hold would often bear on the court's determination of a party's good faith, but would not be dispositive: "As the Note explains, good faith *may require* that a party intervene to suspend certain features of the routine operation of an information system to prevent loss of information subject to preservation obligations. Such intervention is often called a 'litigation hold.'. . . The steps taken to implement an effective litigation hold *bear on good faith*, as does compliance with any agreements the parties have reached regarding preservation and with any court orders directing preservation." Civil Rules 2005 Report, *supra*, at 75 (emphases added). The Advisory Committee did not seem to put the same emphasis on a litigation hold as the courts subsequently interpreting the rule.

Although numerous cases have read the advisory committee notes to Rule 37(e) to require a litigation hold in order to take advantage of the rule's protections, at least some commentators have recognized that this is an inaccurate reading of the note. *See* Hebl, *supra*, at 105 (noting that the court's holding in *Peskoff* that the committee note requires a litigation hold "is not what the note says . . . . Rather the note merely provides that failure to turn off an automatic deletion feature may be one factor to consider in determining whether good faith is present and . . . , if the failure to turn this feature off is not the result of reckless or intentional conduct, a sanction cannot be imposed"); Douglas L. Rogers, *A Search for Balance in the Discovery of ESI since December 1, 2006*, 14 RICH. J. L. & TECH. 8, 22 (2008) (disagreeing with the conclusion reached by some courts that the advisory committee notes require the implementation of a litigation hold in all circumstances in order to take advantage of the rule).

V. What is a "sanction"?

Courts and commentators have not directly addressed what constitutes a "sanction" that

cannot be entered if a party's actions fall under the protections of Rule 37(e). The rule text limits its application to only sanctions provided for under the rules. The advisory committee notes reflects the same: "The protection provided by Rule 37(f) applies only to sanctions 'under these rules.' It does not affect other sources of authority to impose sanctions or rules of professional responsibility." FED. R. CIV. P. 37 Advisory Committee Note (2006 Amendment). Thus, a party who meets the requirements for applying Rule 37(e) would clearly be exempt from the specific sanctions under Rule 37(b), for example. Courts that have applied Rule 37(e) have precluded requested sanctions including dismissal or default, an adverse inference instruction, and monetary expenses. *See, e.g.*, *Kermode*, 2011 WL 2619096, at *2 (denying default judgment and an evidentiary hearing for an adverse inference); *Olson*, 2010 WL 2639853, at *3 (denying request for an order barring production of any evidence of an alleged theft and an award of expenses incurred in bringing the motion for sanctions).

The case law does not clearly indicate whether Rule 37(e) would preclude a separate category of curative measures, remedies, or discovery management tools, as opposed to punitive sanctions, but a couple of cases may be instructive. In *Disability Rights Council of Greater Wash.*, 242 F.R.D. at 146, the court found Rule 37(e) inapplicable in part because the plaintiffs did not seek sanctions, but instead requested that the defendant be ordered to search backup tapes for information that was deleted pursuant to the defendant's automatic email deletion policy, which had not been suspended during litigation. This seems to imply that requiring searching backup tapes for inaccessible information that might have been reasonably accessible had an appropriate litigation hold been put in place is not a "sanction" barred by Rule 37(e).[33] Relatedly, in *Peskoff*, 244 F.R.D. at 60–61, the

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[33]However, the court found Rule 37(e) inapplicable anyway because of the party's failure to

court found that Rule 37(e) did not require disabling automatic deletion features before litigation is anticipated, but still utilized Rule 26(b)(2)(C) to require the defendant to participate in a process to ascertain whether a forensic examination was justified. The court explained that "Rule 37(f) must be read in conjunction with the discovery guidelines of Rule 26(b). . . . I find that balancing the factors in Rule 26(b)(2)(C) authorizes me to require Faber to participate in a process designed to ascertain whether a forensic examination is justified because the emails are relevant, the results of the search that was conducted are incomprehensible, and there is no other way to try to find the emails." *Id.* at 61. It was not clear that the court was directly considering sanctions, but instead, in the context of discovery deficiencies, the questions of "whether it is time to appoint a forensic analyst who can search the network server and the individual hard drives of [relevant people] to see if any additional information can be retrieved . . ." and "who shall pay for such a forensic examination." *Id.* at 59. But the court's discussion of Rule 37(e) and its potential interaction with Rule 26(b)(2)(C) may imply that Rule 37(e) may not preclude curative measures even if other "sanctions" are precluded.

In sum, there is not enough case law applying Rule 37(e) to determine whether application of the rule would preclude curative measures.

VI. Conclusion

Rule 37(e) was intended to provide a narrow protection for loss of ESI subject to a preservation duty. The history of the rule provision indicates that the Advisory Committee was

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stop its automatic email deletion feature during litigation. *See Disability Rights Council of Greater Wash.*, 242 F.R.D. at 146. If Rule 37(e) had come into play because of the routine, good-faith operation of an electronic storage system, perhaps ordering searching of backup tapes might have been precluded.

primarily concerned with ensuring that courts distinguish between the loss of information in the world of paper discovery and the loss of information in the electronic world. The Advisory Committee wanted to ensure that courts and parties understood that because of both the volume of ESI and the potential for inadvertent loss of ESI, both of which were exponentially greater than in the world of paper discovery, the loss of ESI could not be treated in the same manner as the loss of information kept in static form. The application of the rule has been extremely narrow. It has only been applied in a handful of cases, and even in those cases it is not clear that the court would have reached a different result without the rule. I did not find any cases where it was clear that Rule 37(e) precluded sanctions and that a different result would have been reached without the rule.

In addition, while the rule was intended to address a narrow set of circumstances, many courts may have interpreted the rule even more narrowly than intended, by, for example, finding it inapplicable once a duty to preserve arises, finding a strict requirement of a litigation hold in the advisory committee notes, or relying on inherent authority for sanctions analysis. Nonetheless, the rule's principles may have influenced even those courts analyzing sanctions under inherent authority. The rule seems to have been a first step in the direction of providing comfort to parties in their efforts to adequately preserve ESI, but it appears to only apply in a narrow set of circumstances.

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

December 4, 2012

The Honorable David G. Campbell
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The Honorable Paul Grimm
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Dear Judges Campbell and Grimm:

Pursuant to Judge Campbell's request and my offer at the November Rules Committee meeting, the Department of Justice respectfully submits its further thoughts regarding potential changes to the Federal Rules of Civil Procedure concerning preservation sanctions. As discussed at the meeting, while the Department continues to question how widespread preservation sanctions issues may be, the proposed revision to Federal Rule of Civil Procedure 37(e) makes substantial progress in addressing some of our concerns. We have now had time to consult further within the Department and with other agencies and we conclude that proposed FRCP 37(e) is more consistent with language the Department may be inclined to support with a few proposed changes.

We offer these comments to assist the Committee in finalizing the proposed revision to FRCP 37(e). We respectfully request that the Committee make the changes we suggest below before forwarding the language to the Standing Committee for its January meeting, and request that our comments be forwarded to the Standing Committee as well. We also urge the Committee to submit the proposed FRCP 37(e) to the Standing Committee for purposes of discussion – rather than a final vote – at the January meeting. The Duke Subcommittee

proposals may affect the final sanctions rule language. We believe it would be advisable and more efficient to have thorough discussion of proposed 37(e) in January, and then a final vote on all of the proposed amendments once the Standing Committee has considered the Duke Subcommittee proposals at the June Standing Committee meeting. This sequencing will permit the Committee to determine whether there is further information that should be taken into account before reaching a final decision on the proposed 37(e).

The federal government has many interests to weigh in considering this potential amendment, since we are a party in one-third of all civil litigation in the federal courts. At various times, we are plaintiffs, defendants, litigants in complex cases, and parties in small matters. We are thus uniquely affected by any change. We offer the Committee the following general and specific observations regarding proposed FRCP 37(e).

General Observations

We provide four general observations regarding proposed FRCP 37(e). First, the Department agrees that, if a rule is going to be promulgated, it should apply equally to electronic documents, paper, and tangible things. The notes to proposed FRCP 37(e) should make this scope and application clear. Second, we strongly support including the concept of proportionality, as phrased in proposed FRCP 37(e)(3)(E). Third, we continue to support the Committee's removal of FRCP 37(e)(3)(D), as decided at the November 2012 meeting.

Finally, the proposed removal of current FRCP 37(e) is a key change and warrants additional consideration. The proposed revision to FRCP 37(e) does not expressly provide a safe harbor or address the routine operation of a computer system. In the Department's experience, while the case law is sparse in the use of this subsection, current FRCP 37(e) is valuable because it is used and relied upon when creating document retention policies and proactive preservation plans. Current FRCP 37(e) has the desired effect, and was a "carrot" for organizations to move toward better electronic document and information management systems. If current FRCP 37(e) is removed, this incentive will no longer exist. Many of the executive branch agencies we have consulted do not support the removal of current 37(e). We strongly suggest that current FRCP 37(e) and its accompanying note be preserved. At the very least, current FRCP 37(e) and its accompanying note text should be expressly included in the notes to the revised rule.

Specific Concerns with Proposed FRCP 37(e) Language

In addition to our general observations, we have specific concerns and suggestions regarding portions of the language of the proposed rule, specifically: (1) the scope of discovery in proposed FRCP 37(e); (2) the undefined use of "willful" and "bad faith" in proposed FRCP 37(e)(2)(a); and (3) several of the factors listed in proposed FRCP 37(e)(3) (specifically FRCP 37 (3)(A), and (3)(F)). We also have several suggestions for additional language to address concerns raised by proposed FRCP 37(e)(2)(a).

1. Scope of "Discoverable Information" in Proposed FRCP 37(e) is Ambiguous

Proposed FRCP 37(e) is limited to addressing the preservation of "discoverable information." It is unclear from the text and the accompanying note what "discoverable information" entails. Is it broader, narrower, or different from the scope outlined in FRCP 26? Does "discoverable information" include privileged information? Does "discoverable information," for example, include data a party would consider inaccessible, such as information on disaster recovery tapes? This broad language may be interpreted to include any failure to preserve any information, no matter how trivial, redundant, or marginally relevant the information may be. We recommend that the note clarify that the scope of discovery a party anticipates should be consistent with the scope of FRCP 26(b)(1). We are concerned that, absent clarification, the rule revision will trigger ancillary litigation regarding the scope of "discoverable information."

2. The Terms "Willful" and "In Bad Faith" are Undefined in the Proposed Rule and Have Been Inconsistently Interpreted by Courts.

The Department is concerned by the undefined use of "willful or in bad faith" in proposed FRCP 37(e)(2)(a). While the Committee notes that courts have experience with these concepts, there is no consistency within or across circuits. The desire for predictability and a uniform national standard that in part motivated the Committee to consider amending the rule will not be achieved because key terms are not defined. As reflected in Judge Grimm's decision in *Victor Stanley II*, courts have adopted a wide variety of interpretations for "willful" and "bad faith." We understand the rule lists the factors to be considered, but we are concerned that this is not the same as setting a national standard that would define these terms.

For example, in some tax litigation, "willfulness" includes reckless disregard and in other cases, "willfulness" may include "willful blindness." *See e.g. Jefferson v. United States*, 546 F.3d 477, 481-482 (7th Cir. 2008); *Phillips v. United States*, 73 F.3d 939, 942-943 (9th Cir. 1996)(finding no error in trial court's use of a jury instruction on "willfulness" that quoted a "gross negligence" standard); *United States v. Vespe*, 868 F.2d 1328, 1335 (3d Cir. 1989); *United States v. Williams*, 2012 WL 2948569, at *3 (4th Cir. July 20, 2012); *United States v. McBride*, 2012 WL 5464955, at *18 (D. Utah Nov. 8, 2012).

We are concerned that there may be unintended confusion for litigants and the courts if the rule lacks clarity on these important terms. For example, will certain technology or process failures – such as not turning off email auto-deletion or failing to preserve inaccessible data or destroying disaster recovery tapes—be universally interpreted by the courts under the proposed rule? We question whether courts will consistently evaluate how the actions of, for example, a third party contractor or social media provider in control of the relevant data, might be imputed to a litigant when the "willful" or "bad faith" standard is undefined.

We suggest that "willful" and/or "bad faith" be defined or clarified, at least in the note, to provide uniform guidance to the courts and litigants. The Department does not propose a definition at this time but we welcome the opportunity to work with the Committee to define this crucial term.

3. *Comments and Concerns with Three of the Factors Listed in proposed 37(e)(3)*

a. Suggestions for Proposed FRCP 37(e)(3)(A)

The current draft of proposed FRCP 37(e)(3)(A) does not account for a situation where a party repeatedly "loses" data while claiming ignorance of its preservation obligations. The Department has confronted this defense in past cases. We believe changing "was on notice" to "reasonably should have known" or similar language in proposed FRCP 37(e)(3)(A) would allow a court to take into account prior instances of the same or similar conduct by the party that would put the party on notice that it had a duty to preserve. We propose the following revision in advance of the Committee forwarding the language to the Standing Committee:

> "(A) the extent to which the party ~~was on notice that~~ reasonably should have known that litigation was likely and that the information would be discoverable;"

b. Suggestions for Proposed FRCP 37(e)(3)(F)

We question whether the language of proposed FRCP 37(e)(3)(F) and the corresponding note create an expectation that parties would seek court guidance before dispositive motions are filed. We are concerned that, as currently phrased, (F) would be an invitation to parties to burden the courts with trivial disputes that the parties should work out on their own. If a party can only avoid sanctions by showing that it made timely and sufficient efforts to bring all discovery disputes to the attention of the court, then the rule may create incentives for parties to bring every disagreement to courts for resolution or fear being sanctioned under proposed FRCP 37(e)(3)(F). The results of this interpretation would obviously overtax the judiciary's already strained dockets and would create collateral litigation for the parties. We would ask the Committee to consider clarification of this language in advance of the Standing Committee's January meeting.

c. Suggestions for Proposed New Language

Finally, we recommend additional language to help clarify the use of "substantial prejudice" in proposed FRCP 37(e)(2)(a). The rule should provide guidance and consistency in how courts should interpret "substantial prejudice." In particular, we think that the court should consider the availability of reliable alternative sources of the lost or destroyed information and the materiality of the lost information to the claims and defenses in the case. Our proposed FRCP 37(e)(4) text is as follows:

Proposed FRCP 37(e)(4):

> *"(4) In determining whether a party has been substantially prejudiced by another party's failure to preserve relevant information, the court should consider all relevant factors, including:*
>
> *(A) the availability of reliable alternative sources of the lost or destroyed information;*
>
> *(B) the materiality of the lost information to the claims or defenses in the case."*

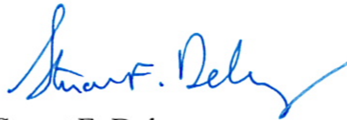
We believe that the rule should elaborate on the factors the court should consider in evaluating "substantial prejudice," so that this key term is given context like other important aspects of the proposed rule.

Conclusion

We commend the Committee for its work and look forward to continuing the dialogue on these important issues, which will have significant effects on the federal government as the largest litigant in the civil justice system. We believe real progress has been made, but further modifications are needed. The pending and interrelated work of the Duke Subcommittee counsels in favor of waiting to move the proposed FRCP 37(e) for a final vote at the Standing Committee until it is clear how all of the potential rules changes interrelate.

We respectfully request that, in advance of the January Standing Committee meeting, the Committee revise proposed FRCP 37(e) as we suggest and forward our comments to the Standing Committee. We remain committed to assisting this process and thank the Committee for its consideration.

Sincerely,



Stuart F. Delery
Principal Deputy Assistant Attorney General

I.B. ACTION TO RECOMMEND PUBLICATION OF REVISED RULE 6(d)

ACTION ITEM: RULE 6(d)

The Committee recommends this revision of Rule 6(d) for publication at an appropriate time:

> (d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after ~~service~~ <u>being served</u> and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

The purpose of the revision is to defeat the argument that a party who must act within a specified time after making service can extend the time to act by choosing a method of service that provides added time.

Before Rule 6(d) was amended in 2005 it provided the extra time to act when a party had a right or was required to act within a prescribed period after service "upon the party" if the paper or notice "is served upon the party" by the designated means. Only the party served, not the party making service, could claim the extra three days.

When Rule 6(d) was revised in 2005 for other purposes, it was restyled according to the conventions adopted for the Style Project. "[A]fter service" seemed a useful economy of words. The problem is that at least three rules allow a party to act within a specified time after making service.

Rule 14(a)(1) requires permission to serve a third-party complaint only if the third-party plaintiff files the complaint "more than 14 days after serving its original answer." Rule 15(a)(1)(A) allows a party to amend a pleading once as a matter of course "within * * * 21 days after serving it" if the pleading is not one to which a responsive pleading is required. Rule 38(b)(1) allows a party to demand a jury trial by "serving the other parties with a written demand * * * no later than 14 days after the last pleading directed to the issue is served."

A literal reading of present Rule 6(d) would, for example, allow a defendant to extend the Rule 15(a)(1)(A) period to amend once as a matter of course to 24 days by choosing to serve the answer by any of the means specified in Rule 6(d).

It seems worthwhile to correct this unintended artifact of drafting, although the reason may be no more than to undo an unintended change. Allowing the 3 extra days does not seem a matter of great moment. There is no sign that the present rule has caused any problems in practice; it was pointed out in a law

review article,[1] not by anguished courts or litigants. It is possible to read the present rule to allow 3 added days only after being served, looking back to the pre-2005 language. That possibility, however, may be the best reason to amend to make "being served" explicit. A defendant, for example, might read the present rule literally, and deliberately take 24 days to amend an answer. Reading "being served" into the rule might prove a trap for the wary. Even then, it seems unlikely that a court would deny leave to amend — or to implead, or demand jury trial — over a 3-day delay in presenting a plausible position.

I.C. ACTION TO RECOMMEND PUBLICATION: "FINAL" JUDGMENT

ACTION ITEM: RULE 55(c)

A latent ambiguity may be found in the interplay of Rule 55(c) with Rules 54(b) and 60(b). The question arises when a default judgment does not dispose of all claims among all parties to an action. Rule 54(b) directs that the judgment is not final unless the court directs entry of final judgment. Rule 54(b) also directs that the "judgment" "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Rule 55(c) provides simply that the court "may set aside a default judgment under Rule 60(b)." Rule 60(b), in turn provides a list of reasons to "relieve a party * * * from a final judgment, order, or proceeding * * *."

Close reading of the three rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties. Several cases described in a memorandum by Judge Harris, however, show that several courts have recognized the risk that unreflected reading of Rule 55(c) may lead a court astray. Judge Harris's memorandum is attached.

Rule 55(c) is easily clarified by adding a single word. If the question had been recognized at the time, the change would have been suitable for the Style Project. The change can be recommended now, although it may be better to schedule publication for comment with a suitable package of proposals. Remembering the distinction between a default and a default judgment, Rule 55(c) would be revised:

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[1] James J. Duane, *The Federal Rule of Civil Procedure That Was Changed by Accident: A lesson in the Perils of Stylistic Revision*, 62 S.C.L. Rev. 41 (2010).

(c) SETTING ASIDE A DEFAULT OR A DEFAULT JUDGMENT. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

Committee Note

Rule 55(c) is amended to make plain the interplay between Rules 54(b), 55(c), and 60(b). A default judgment that does not dispose of all of the claims among all parties is not a final judgment unless the court directs entry of final judgment under Rule 54(b). Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time. The demanding standards set by Rule 60(b) apply only in seeking relief from a final judgment.

Early drafts of the Committee Note offered a bit of further advice: "In many circumstances it is inappropriate to enter final judgment because proceedings that remain among other parties may show that there is no claim against the party subjected to the default judgment. See *Frow v. De La Vega*, 15 Wall. (82 U.S.) 552 (1872)." The Committee decided that this sort of advice is generally inappropriate for a Committee Note, and is particularly inappropriate when a modest amendment is made for a modest purpose.

MEMORANDUM

To: Professor Edward H. Cooper, Reporter
Advisory Committee on Civil Rules

cc: Honorable David G. Campbell, Chair
Advisory Committee on Civil Rules

Professor Richard Marcus, Reporter
Advisory Committee on Civil Rules

From: Arthur I. Harris, U.S. Bankruptcy Judge and Liaison from Bankruptcy Rules Advisory Committee to Civil Rules Advisory Committee

Date: December 14, 2011

Re: Motions to set aside nonfinal default judgments under Fed. R. Civ. P. 55(c), 54(b), and 60(b)

This memorandum follows up on an issue I raised during the "mailbox" portion of the meeting of the Advisory Committee on Civil Rules on Nov. 8, 2011. At the meeting, I flagged a potential conflict in the way the Federal Rules of Civil Procedure address motions to set aside nonfinal default judgments. Under Rule 55(c) a court "may set aside a default judgment under Rule 60(b)," however, a nonfinal default judgment (where claims remain pending against one or more parties) is an interlocutory order that is arguably governed by Rule 54(b), which does not carry the same restrictions as Rule 60(b).

As I explain in more detail below, Sixth Circuit precedent permits me to use the more lenient standard in Rule 54(b) for setting aside nonfinal default judgments. On the other hand, it may be worth considering an amendment to Rule 55(c) to clarify to judges and attorneys that motions to set aside nonfinal default judgments, like all other interlocutory judgments, are not governed by Rule 60(b). In any event, the exercise of writing this memo has helped me better understand these issues and, I hope, is worthy of sharing with my former teacher and longtime rules committee reporter.

In re Brown

Confusion as to whether Rule 60(b) governs relief from nonfinal default judgments is illustrated in an adversary proceeding and two appeals that arose from a bankruptcy case called *In re Brown*. In this case, everyone involved – including the party seeking Rule 60(b) relief, the bankruptcy court, the Bankruptcy Appellate Panel (BAP), and the Sixth Circuit – apparently assumed that the motion to set aside the nonfinal default judgment was governed by Rule 60(b).[1] Had the courts applied the more lenient standard for reconsidering interlocutory orders under the last sentence of Rule 54(b), the outcome in all likelihood would have been different.

In *Brown*, the bankruptcy trustee filed an adversary complaint seeking to avoid a mortgage and obtain other relief under the Bankruptcy Code because of an alleged defect in the acknowledgement of the debtor's mortgage. The alleged defect was that the notary who notarized the mortgage was not authorized to be a notary because the notary's application was incomplete, even though the State of Kentucky had approved the notary's application. The trustee obtained a default judgment against defendant Countrywide, but claims remained pending in the same adversary proceeding against another defendant, First Liberty.

Ten weeks after entry of a default judgment against Countrywide, Countrywide moved to set aside the default judgment under Rule 60(b)(1), (b)(4), and (b)(6). At the time, cross motions for summary judgment remained pending as to the trustee's claims against defendant First Liberty. Countrywide argued that

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[1] Although this matter arose in the context of an adversary proceeding – essentially a civil action within a bankruptcy case – the situation is essentially the same as one arising in a civil case in district court. Rule 7055 of the Federal Rules of Bankruptcy Procedure incorporates Fed. R. Civ. P. 55; Rule 7054 of the Federal Rules of Bankruptcy Procedure incorporates Fed. R. Civ. P. 54(a)-(c); and Rule 9024 of the Federal Rules of Bankruptcy Procedure generally incorporates Fed. R. Civ. P. 60. In addition, the more pragmatic concept of finality in bankruptcy cases generally does not apply to appeals from adversary proceedings. *See, e.g.*, *Millers Cove Energy Co. v. Moore* (*In re Millers Cove Energy Co.*), 128 F.3d 449, 451-52 (6th Cir. 1997) (noting that adversary proceedings can be viewed as "stand-alone lawsuits").

under a Kentucky statute, a trustee cannot collaterally attack a notarized document simply because the notary's application to be a notary should not have been approved.

The bankruptcy court held a hearing on Countrywide's Rule 60(b) motion. At the hearing, Countrywide abandoned its Rule 60(b)(1) argument and specifically stated that it was focusing its request for relief under Rule 60(b)(4) and (b)(6). At the hearing, the bankruptcy court stated:

> The Court will grant the motion to vacate the order under Rule 60(b)(6). I don't think 60(b)(4) applies. . . . Countrywide has not offered any particular reason why they can't seem to get their act together, didn't get their act together in this case. But, it does appear that there is a meritorious defense and maybe a winning defense. And there will not be prejudice to the plaintiff in this case because the case is ongoing. And with respect to culpable conduct and whether or not that's applicable here, we just don't know. The switch of service of process agents may have, in fact, contributed to the problem that's before the Court today. But, I think it's a matter of, in this case, because the really driving concern is the question of the likelihood of a meritorious defense in this case.

Bankr. Ct. Tr. at 14-15. The bankruptcy court later entered summary judgment in Countrywide's favor, upholding the validity and enforceability of the mortgage, and dismissed the Trustee's claims against all remaining defendants. The Trustee appealed the order granting summary judgment and the order vacating the default judgment to the BAP.

The BAP reversed the decision of the bankruptcy court after concluding that the bankruptcy court abused its discretion in setting aside the default judgment. *See Rogan v. Countrywide Home Loans, Inc.* (*In re Brown*), 413 B.R. 700 (B.A.P. 6th Cir. 2009). The BAP noted that Countrywide had abandoned its arguments under Rule 60(b)(1) and (b)(4) and held that Countrywide had not met its burden of showing "extraordinary circumstances" for relief under Rule 60(b)(6). 413 B.R. at 705 (citing *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship.*, 507 U.S. 380, 393 (1993)). Countrywide appealed the decision to the Sixth Circuit.

In an unpublished decision, the Sixth Circuit affirmed the decision of the BAP. *Countrywide Home Loan, Inc. v. Rogan (In re Brown),* No. 09-6198, Document: 006110766206 (6th Cir. Oct. 21, 2010)(unpublished Order). The Sixth Circuit held:

> In the absence of evidence demonstrating "exceptional and extraordinary circumstances," the bankruptcy court abused its discretion in vacating the default judgment. Contrary to Countrywide's argument on appeal, the existence of a meritorious defense and the avoidance of its mortgage does not satisfy the "exceptional and extraordinary circumstances" requirement of Rule 60(b)(6).

Id. at 4 (citation omitted).[2]

In none of these decisions, did any of the courts consider the possibility that a standard other than Rule 60(b) should apply to a motion to set aside a nonfinal default judgment.[3]

Discussion

The decisions by the bankruptcy court, the BAP, and the Sixth Circuit in the *Brown* case illustrate the possible confusion created by the language in Rule 55(c) that a court "may set aside a default judgment under Rule 60(b)." It is true that Rule 60(b) indicates in several places that it addresses *final* judgments:

- the adding of the word "final" to the heading of Rule 60(b) in the 2007 restyling;
- the adding of the word "final" before "judgment" in the 1948 amendment;
- the language in the 1946 committee note explaining that Rule 60(b) affords relief from *final* judgments; "and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to

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[2] A copy of the Sixth Circuit's unpublished Order in *Brown* is attached.

[3] Although I was initially assigned to the panel hearing the appeal to the BAP, that appeal was later reassigned to a randomly drawn reconstituted panel that did not include me.

the complete power of the court rendering them to afford such relief from them as justice requires."

And it is true that the last sentence of Rule 54(b) provides that nonfinal orders may be revised at any time before entry of final judgment. Nevertheless, there appear to be many judges and attorneys who read the literal language of Rule 55(c) as directing them to consider or draft motions to set aside all default judgments, even nonfinal ones, within the restrictions of Rule 60(b).

Proposed Amendment to Fed. R. Civ. P. 55(c)

I have included a proposed amendment to Rule 55(c) to clarify that Rule 60(b) affords relief from *final* judgments. The added word is *italicized*.

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Rule 55

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1. (c) **Setting Aside a Default or a Default Judgment**.
2. The court may set aside an entry of default for good cause, and it
3. may set aside a *final* default judgment under Rule 60(b).

Possible Committee Note

The qualifying word "final" is added to clarify that Rule 60(b) affords relief from *final* judgments. Consistent with the last sentence of Rule 54(b) and the 1946 Advisory Committee Note to Rule 60(b), interlocutory judgments, including nonfinal default judgments, are not subject to the restrictions of Rule 60(b), "but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires."

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Other Case Law

Serendipitously, on December 13, 2011, the Sixth Circuit issued a new opinion that addressed almost exactly the same issue. *See Dassault Systemes, SA v. Childress*, __F.3d __ , 2011 WL 6157308 (6th Cir. Dec. 13, 2011).[4] The only difference was that in the *Dassault* case the default judgment was not final because the amount of damages had yet to be determined when the motion to set aside the default judgment was filed. Judge Karen Nelson Moore, writing for the Sixth Circuit, explained:

> Because of the initial grant of default judgment and the timing of Childress's motion to set aside entry of default judgment, it is not immediately clear which rule should have been applied. At first blush, the district court's grant of Dassault's motion for default judgment suggests that Rule 60(b) should apply. But, because final judgment was not entered until after Childress filed his motion to set aside entry of default judgment, applying the Rule 60(b) standard to a motion challenging a not-yet-final default judgment seems premature.
>
> . . . .
>
> An order granting default judgment without any judgment entry on the issue of damages is no more than an interlocutory order to which Rule 60(b) does not yet apply. . . . Thus, absent entry of a final default judgment, the more lenient Rule 55(c) standard governs a motion to set aside a default or default judgment.

Id. at *6-8 (citations omitted).

My nonexhaustive review of relevant case law indicates several other circuit courts hold, or at least suggest, that Rule 60(b) does not apply to motions to set aside nonfinal default judgments. *See Swarna v. Al Awadi*, 622 F.3d 123, 140 (2d Cir. 2010) (default judgment that left open the issue of damages was a nonfinal order for purposes of appeal); *FDIC v. Francisco Inv. Corp.*, 873 F.2d 474, 478 (1st Cir. 1989); *Jackson v. Beech*, 636 F.2d 831, 835-36 & n.7

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[4] A copy of the Sixth Circuit's slip opinion in *Dassault* is attached.

(D.C. Cir. 1980); *see also*; *O'Brien v. R.J. O'Brien & Assoc., Inc.*, 998 F.2d 1394, 1401 (7th Cir. 1993) (declining to state whether Rule 60(b) standard or less restrictive standard applied to motion to set aside a default judgment that had not become final and appealable).

Among these additional cases, the First Circuit's *FDIC v. Francisco* decision provides perhaps the most definitive analysis:

> A cursory reading of [Rule 55(c)] seems to mandate the application of the stricter standards of Rule 60(b) to all requests to set aside default judgments. However, the Rule 60(b) standards were tailored for setting aside *final* judgments. In the case at bar, when the court denied defendants' motion to set aside default judgment, it had not become final. Fed.R.Civ.P. 54(b).
>
> Thus, the more liberal "good cause" standard should be applied. . . . Generally, non-final judgments can be set aside or otherwise changed by the district court at any time before they become final. Fed.R.Civ.P. 54(b). If we were to apply the 60(b) standard to non-final default judgments we would have the anomaly of using the strict standard envisioned for final judgments to non-final default judgments and the more liberal standard of Rule 54(b) to other non-final judgments. This result would be inconsistent with the purposes underlying the Federal Rules of Civil Procedure, especially considering that when deciding whether to set aside entries of default and default judgments courts favor allowing trial on the merits.

873 F.2d at 478 (citations omitted) (emphasis in original).

Whether this is a problem that warrants discussion as a possible amendment to the Civil Rules is for you and the civil rules committee to decide. Certainly there is case law to support the proposition that Rule 60(b) does not apply to motions to set aside nonfinal default judgments, even absent any amendment to the Civil Rules. On the other hand, the fact that attorneys and lower courts continue to apply the more restrictive Rule 60(b) standard to nonfinal default judgments suggests that an amendment to clarify Rule 55(c) may be in order.

I.D. ACTION TO RECOMMEND PUBLICATION: CROSS-REFERENCE

ACTION ITEM: RULE 77(c)(1)

The Committee recommends adoption without publication of the following technical amendment of Rule 77(c)(1) to correct a cross-reference to Rule 6(a) that should have been amended when Rule 6(a) was amended in the Time Project amendments of 2009:

RULE 77. CONDUCTING BUSINESS; CLERK'S AUTHORITY; NOTICE OF AN ORDER OR JUDGMENT

* * *

(c) CLERK'S OFFICE HOURS; CLERK'S ORDERS.

(1) *Hours.* The clerk's office — with a clerk or deputy on duty — must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(~~4~~6)(A).

Before the Time Computation Project amendments, Rule 6(a)(4)(A) defined "legal holiday" to include ten days set aside by statute. Rule 77(c)(1) incorporated this definition by cross-reference. The Time Project amended Rule 6(a) in many ways. The definition of statute-designated legal holidays remained unchanged, but became Rule 6(a)(6)(A). Present Rule 6(a)(4)(A) defines the end of the "last day" for computing a time period for electronic filing. The cross-reference in Rule 77(c)(1) no longer makes sense. It is easily corrected by revising it to refer to Rule 6(a)(6)(A).

No arguable issue of policy is involved. This amendment is a clear example of a technical or conforming amendment that can be recommended for adoption without publication. See §440.20.40(d) of the Procedures for the Conduct of Business.

PART II: DISCUSSION ITEMS

II.A. DUKE CONFERENCE RULES DRAFTS

The rules sketches shown here are presented for discussion to guide further development looking toward a package that may be ready to advance at the June meeting with a recommendation for

publication. The sketches have been developed through countless conference calls, a miniconference held in Dallas on October 8, 2012, and discussions in the Advisory Committee. The goal is to find ways to reduce cost and delay, increasing realistic access to the courts and furthering the goals of Rule 1.

The current sketches grow out of the conference held at the Duke University School of Law in May, 2010. The most prominent themes developed at the Conference are frequently summarized in two words and a phrase: cooperation, proportionality, and "early, hands-on case management." Most participants felt that these goals can be pursued effectively within the basic framework of the Civil Rules as they stand. There was little call for drastic revision, and it was recognized that the rules can be made to work better by renewing efforts to educate lawyers and judges in the opportunities already available. It also was recognized that many possible rules reforms should be guided by empirical work, both in the form done by the Federal Judicial Center and other investigators and also in the form of pilot projects. Many initiatives have been launched in those directions. Rules amendments remain for consideration. Some of them are being developed independently. The Discovery Subcommittee has come a long way in considering preservation of information for discovery and possible sanctions. Pleading standards remain on the Committee’s agenda. Other rules, however, can profitably be considered for revision. Early stages of the Subcommittee’s work generated a large number of possible changes, both from direct suggestions at the Conference and from further consideration of the broad themes. More recently the Subcommittee has started to narrow the list, discarding possible changes that, for one reason or another, do not seem ripe for present consideration.

The proposals presently being considered are grouped in three roughly defined sets. They involve several rules and different parts of some of those rules. The proposals have been developed as part of an integrated package, with the thought that in combination they may encourage significant reductions in cost and delay. The package can survive without all of the parts, although greater effects can be expected if most parts remain.

The first topics look directly to the early stages of establishing case management. These changes would shorten the time for making service after filing an action; reduce the time for issuing a scheduling order; and emphasize the value of holding an actual conference of court and parties before issuing a scheduling order. They also would look toward encouraging an informal conference with the court before making a discovery motion. The last item in this set would modify the Rule 26(d) discovery moratorium by allowing Rule 34 requests to be served at some interval after the action is begun, but setting the time to respond to start at the Rule 26(f) conference.

The next set of changes look more directly to the reach of

discovery. They begin with shifting the Rule 26(b)(2)(C)(iii) proportionality factors into Rule 26(b)(1). Rule 26(b)(1) is further changed by limiting the scope of discovery to matter relevant to any party's claim or defense and by modifying the provision for discovery of information not admissible in evidence. More specific means of encouraging proportionality are illustrated by models that reduce the presumptive number of depositions and interrogatories, and for the first time incorporate presumptive limitations on the number of requests to produce and requests for admissions. Another approach is a set of provisions to improve the quality of discovery objections and the clarity of responses. Finally, modest changes would serve as reminders of the need to consider preservation of electronically stored information and the value of considering agreements under Evidence Rule 502 by adding these topics to Rules 16(b)(3)(B)(iii) and (iv) as well as 26(f)(3)(C) and (D).

The last proposal would revise Rule 1 to direct that the rules be employed by the court and parties to secure the canonical goals of Rule 1.

A few variations on the sketches are presented in footnotes, at times to note ideas that have been considered and put aside.

Other topics considered by the Subcommittee have been deferred for possible future work. The value of Rule 26(a)(1) initial disclosures is regularly debated by various groups. The Subcommittee decided that any consideration of this subject should await developing experience with various state-court models that provide expanded initial disclosures. The timing of contention discovery under Rules 33 and 36 was considered by drafts that would encourage postponement to the conclusion of other discovery, but some observers urged that early contention discovery can be useful. This subject has been deferred indefinitely, in part because adoption of presumptive numerical limits on Rule 36 requests to admit and reducing the presumptive limit on the number of Rule 33 interrogatories would likely reduce the occasional over-uses of contention discovery. And a major topic, cost sharing in discovery, is addressed only by a sketch that revises Rule 26(c) to make explicit the authority to provide for cost sharing by a protective order. Broader cost-sharing issues have been referred to the Discovery Subcommittee. Cost sharing is so important as to require in-depth study that would unduly delay the other proposals in the package.

These sketches have advanced a long way from their beginnings. But work remains, both in expression and in resolving some details. More importantly, the list of topics is not closed. Time remains to permit development of new proposals. Suggestions for new topics will be welcomed.

If possible, it will be desirable to publish these proposals together with the proposed revision of Rule 37(e) on preservation and spoliation. There is always a hope that the frequency of

publication for comment can be reduced. And a substantial package of proposals may well provoke greater interest and more thorough comments on all parts than would happen with separate publication.

1. Scheduling Orders and Managing Discovery

a. Rules 16(b) and 4(m): Scheduling Order Timing & Conference

These proposals attack delay directly by shortening the time for service allowed by Rule 4(m) and by advancing the time to issue a scheduling order. In addition, Rule 16(b)(1)(B) is revised to encourage an actual scheduling conference.

Rule 4(m)

(m) ***Time Limit for Service.*** If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *.

The proposal to shorten the time for service set by Rule 4(m) has been approved by consensus.

Shortening the time to issue the scheduling order provoked conflicting reactions. The special concerns expressed by the Department of Justice are noted below. More generally, some participants worried that setting the time too early could mean that under-prepared lawyers are unable to support an effective conference. At the same time, many thought the present 120- and 90-day periods are too long. This draft reflects a modest reduction, to 90 and 60 days, and adds permission to delay the order for good cause.

Rule 16(b)

(b) SCHEDULING.

(1) Scheduling Order. Except in categories of actions exempted by local rule,[2] the district judge — or a

[2] Earlier sketches sought to integrate the exemptions from Rule 16(b)(1) with the exemptions from initial disclosure requirements listed in Rule 26(a)(1)(B). The disclosure exemptions apply to the parties' conference under Rule 26(f) and to the discovery moratorium under Rule 26(d)(1). It would be attractive to have a single set of exemptions for all of these related rules. This possibility remains under consideration. The next step will be to survey local rules to determine what categories of actions are frequently made exempt from Rule 16(b)(1). The survey may suggest additional categories that might be added to 26(a)(1)(B). It also might support a determination whether to continue to recognize exemptions

magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless good cause is found for delay must issue the order within the earlier of ~~120~~ 90 days after any defendant has been served with the complaint or ~~90~~ 60 days after any defendant has appeared.[3]

The revision of Rule 16(b)(1)(B) emphasizes the value of holding an actual conference, at least by telephone, before issuing a scheduling order. This change has not proved controversial in itself. But there have been conflicting suggestions that Rule 16(b)(1)(A) should be eliminated so that there always must be a conference apart from the exempted categories of cases, or that the court should have authority to dispense with any conference.

Eliminating Rule 16(b)(1)(A) would foreclose entry of a scheduling order based on the parties' Rule 26(f) report without a scheduling conference. Subcommittee members believe a conference should be held in every case. "Effective management requires a conference." Even if the parties agree on a scheduling order, the court may wish to change some provisions, and it may be important to address issues not included in the report. But there are counter-arguments that the court should be free, if it finds it appropriate, to dispense with the conference. The thought is that although in most cases there are important advantages to having a conference even after the parties have presented an apparently sound discovery plan, there may be cases in which the court is satisfied that an effective management

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by local rule from scheduling order requirements.

[3] The 90 and 60 day periods have been adopted only for illustration. Each period has an impact on timing the Rule 26(f) conference. Rule 26(f)(1) sets the conference "as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." If reducing the time to enter the scheduling order seems to deprive the parties of sufficient time to prepare for the 26(f) conference, Rule 26(f) could be amended to set the time for the conference, and for the 26(f) report, closer to the time for the scheduling order.

order can be crafted without a conference.[4]

Some participants have suggested the court also should have authority to dispense with any scheduling conference. On this view, many cases on the federal docket are not particularly complicated, and a conference may impose significant burdens without any corresponding benefit. This concern would be addressed in part if the rule carries forward authority to exempt categories of actions by local rule. And the sketch continues to authorize issuance of a scheduling order without a conference after receiving the parties' report under Rule 26(f).

The Department of Justice is concerned with the proposals to accelerate the time for issuing a scheduling order. It advances the reasons for allowing it 60 days to answer under Rule 12(a)(2) and (3). After a complaint is served "it takes time to find the right lawyer, and for the right lawyer to identify the right people in the right agency" to figure out what an action really involves. The Subcommittee, however, believes that the alternative 90- and 60-day periods suggested in the sketch should suffice for the Department's needs in most cases.

Resetting the time to issue the scheduling order invites trouble when the time comes before all defendants are served. Later service on additional defendants may lead to another conference and order. Revising Rule 4(m) to shorten the presumptive time for making service reduces this risk. Shortening the Rule 4(m) time may also be desirable for independent reasons, encouraging plaintiffs to be diligent in attempting service and getting the case under way. There may be some collateral consequences — Rule 15(c)(1)(C) invokes the time provided by Rule 4(m) for determining relation back of pleading amendments that change the party against whom a claim is asserted. But that may not deter the change.

b. Uniform Exemptions: Rules 16(b), 26(a)(1)(B), 26(d), 26(f)

There has been considerable support for adopting a single set of exemptions that would remove cases from the requirements for a scheduling order, initial disclosures, the parties' conference, and the discovery moratorium. See footnote 2 above. The topic will be deferred, however, unless relatively easy research into the local rule exemptions authorized by Rule 16(b)(1) shows either that there is no reason to expand the

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[4] The judge may not see any need for a conference, particularly if the Rule 26(f) report is prepared by attorneys known to be reliable and seems sound. The judge might ignore a requirement that a conference be held in all cases, or might hold a pro forma conference. The dockets in some courts may not permit scheduling conferences in all cases.

categories of actions exempted from initial disclosure or that a sensible number of categories can be added without risking serious loss.

c. Informal Conference With Court Before Discovery Motion

Participants at the Duke Conference repeated the running lament that some judges — too many from their perspective — fail to take an active interest in managing discovery disputes. They repeated the common observation that judges who do become involved can make the process work well. Many judges tell the parties to bring discovery disputes to the judge by telephone, without formal motions. This prompt availability to resolve disputes produces good results. There are not many calls; the parties work out most potential disputes knowing that pointless squabbles should not be taken to the judge. Legitimate disputes are taken to the judge, and ordinarily can be resolved expeditiously. Simply making the judge available to manage discovery disputes accomplishes effective management. A survey of local rules showed that at least a third of all districts have local rules that implement this experience by requiring that the parties hold an informal conference with the court before filing a discovery motion.

It will be useful to promote the informal pre-motion conference for discovery motions. The central question is whether to encourage it or to make it mandatory. Encouragement is not likely to encounter significant resistance. Making it mandatory, even with an escape clause, is likely to encounter substantial resistance from some judges. In the end, the Subcommittee has concluded that there is likely to be too much resistance to justify a mandatory provision. The proposal adds the conference to the Rule 16(b)(3) list of subjects that may be included in a scheduling order. This reminder could serve as a gentle but potentially effective encouragement, particularly when supplemented by coverage in judicial education programs.

Rule 16(b)(3)(B)(v)

(3) * * *

(B) *Permitted Contents.* The scheduling order may: * * *

(v) <u>direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court.</u>

[present (v) and (vi) would be renumbered]

d. Discovery Before Parties' Conference

The parties' Rule 26(f) conference may work better if the parties have actual discovery requests to consider. But Rule 26(d)(1) imposes a moratorium on discovery "before the parties have conferred as required by Rule 26(f)." Early sketches considered by the Subcommittee would have allowed all forms of discovery to be pursued before the Rule 26(f) conference. One approach imposed an initial waiting period, while another would have allowed requests to be made at any time after the action is commenced. The time to respond would run from the Rule 26(f) conference. These sketches have been narrowed to a draft that applies only to requests under Rule 34(a), and that imposes a 21-day waiting period.

Rule 26(d)(1)

(1) **Timing**. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except:

(A) in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)~~,~~;

(B) that more than 21 days after service of the summons and complaint on any defendant a party may deliver to [any party][that defendant] requests under Rule 34(a), to be considered as served at the [first] Rule 26(f) conference; or

(C) when authorized by these rules, by stipulation, or by court order.

The proposal has been limited to Rule 34 requests for several reasons. Rule 34 is a major source of discovery difficulties. Depositions may also be a source of problems, but there is little reason to believe that much will be gained by advance lists of people who may be deposed, nor even by designating the matters for examination by deposing an entity under Rule 30(b)(6). Any need for early depositions is protected by Rule 30(a)(2)(A)(iii). Advance models of interrogatories and requests to admit also seem less important, and relief from the moratorium is already available under Rule 26(d)(1). Rule 35 examinations require a court order or agreement.

The waiting period has been retained. To be sure, there is little reason to fear a return to the problems encountered in prior practice that allowed a plaintiff to launch discovery before a defendant could get started, and then accorded a presumptive priority that allowed the plaintiff to complete discovery before the defendant could begin. But at least two practical concerns have emerged. One is that early requests may

be drawn in broad terms that, given need to reflect, may be narrowed. Another is that even though the time to respond is set from the Rule 26(f) conference, legitimate requests for additional time will encounter inappropriate skepticism based on the opportunity to begin to prepare before the time formally began to run.

This proposal is not without complications. Several miniconference participants said that they would serve early discovery requests if the Rule 26(d) discovery moratorium were relaxed. Most of them regularly represent plaintiffs, but at least one corporate counsel said he would welcome the opportunity to receive early requests. In addition, there are signs that at least some lawyers simply ignore the Rule 26(d) moratorium, perhaps because of ignorance or possibly because of tacit agreement that it is unnecessary. But doubts also were expressed about the probability that many parties will take advantage of an opportunity for early discovery. Most lawyers seem to delay discovery as long as possible, and are unlikely to serve requests before the Rule 26(f) conference. The discovery rules are complicated now. Further complications should be introduced only for reasons better than providing the possibility of early discovery requests. There also is a possible ambiguity in calculating time from the Rule 26(f) conference because conferences often are informal, providing occasions for disputes about the time of the conference.

It may be desirable to amend the time-to-respond provisions of Rule 34 by adding a cross-reference to the provision that considers an early Rule 34 request to be served at the time of the Rule 26(f) conference. Experience shows that lawyers do not always keep in mind the often intricate interactions among the rules, and indeed sometimes fail to follow through express cross-references. It may prove difficult to draft an elegant cross-reference. This draft is a tentative illustration:

Rule 34(b)(2)(A)

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(1)(B) — within 30 days after the parties' [first] Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 45

The Subcommittee has not thought it worthwhile to provide an exemption from the Rule 26(d)(1) moratorium for nonparty subpoenas to produce under Rule 45. Rule 45 subpoenas addressed to nonparties seem to be more clearly focused than the broad or overbroad requests that sometimes characterize Rule 34 practice.

And Rule 45 specifically protects a nonparty who objects against significant expense resulting from compliance. It is better to avoid complications that promise little real advantage.

2. Other Discovery Issues

a. Proportionality: Rule 26(b)(1)

Both at the Duke Conference and otherwise, laments are often heard that although discovery in most cases is conducted in reasonable proportion to the nature of the case, discovery runs out of control in an important fraction of all cases. It is difficult to resist the proposition that discovery should be confined to limits reasonably proportional to the needs of the case. The rules provide for this in many ways. Rule 26(c), for example, provides for an order that protects against "undue burden or expense." In 1983 the underlying concept of proportionality was adopted in Rule 26(b)(2) and also Rule 26(g), with the expectation that the new cost-benefit calculus would solve most problems of excessive discovery. That expectation has not been realized. More recently still, Rule 26(b)(1) was amended in 2000 to distinguish between lawyer-managed discovery of material relevant to the parties' "claims or defenses" and court-managed discovery of material relevant only to a more broadly conceived "subject matter involved in the action." In part the hope was to provide a stimulus to more active involvement in discovery by judges who had been holding aloof. The optimistic assessment is that the 2000 amendment had some slight effect. However that may be, and however well discovery works in a high percentage of all cases as measured by total docket numbers, serious, even grave problems persist in enough cases to generate compelling calls for further attempts to control excessive discovery. The geometric growth in potentially discoverable information generated by electronic storage adds still more imperative concerns. And these concerns are exacerbated by the problem of preserving information in anticipation of litigation, a problem addressed by the proposed revisions of Rule 37(e) that are presented separately.

Early Subcommittee sketches sought to bolster these earlier attempts by expressly limiting the scope of discovery under Rule 26(b)(1) to what is "proportional to the reasonable needs of the case." But substantial concern was expressed that even a shared pragmatic understanding of proportionality does not provide sufficiently definite meaning to enshrine "proportionality" in rule text. The initial sketches and post-Dallas attempts to sketch alternative ways to incorporate "proportional" into Rule 26(b)(1) failed to allay these concerns.

Those who expressed concern with adding "proportional" to Rule 26(b)(1) without further refinement also commonly expressed support for the cost-benefit limits on discovery mandated by Rule 26(b)(2)(C)(iii). These provisions were seen to provide suitably nuanced guidance to avoid interminable wrangling in contentious discovery cases.

The inability to control excessive discovery by revising the scope of discovery in 2000, and the substantial support for Rule 26(b)(2)(C)(iii), have combined to suggest that it would be desirable to transfer the calculus of (iii) to become part of the Rule 26(b)(1) definition of the scope of discovery. This transfer is illustrated by the sketch set out below.

The sketch makes further changes as well. Discovery is confined to matter relevant to any party's claim or defense, eliminating the present provision that, on finding good cause, allows a court to expand discovery to the subject matter involved in the action. It is difficult to see why discovery that is not relevant to any party's claim or defense should be allowed. Substantial limits are placed on the present third sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The concern is that the "reasonably calculated" concept has failed in practice. Too many lawyers, and perhaps judges, understand the rule to mean that there are no limits on discovery, because it is always possible that somehow, somewhere, a bit of relevant information may be uncovered.

In all, this sketch reflects a determination that it is important to attempt once more to adopt effective controls on discovery while preserving the core values that have been enshrined in the Civil Rules from the beginning in 1938. Reducing the burdens of discovery also enhances access to the courts by reducing what can be a daunting obstacle. There are increasing demands to make far more dramatic changes.

The current sketches of Rule 26(b)(1) and 26(b)(2)(C)(iii) look like this:

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of~~

~~any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

Other revisions would be made in Rule 26(b)(2). Subparagraph (A) would incorporate references to proposed limits on the numbers of discovery requests and to the length of depositions, as illustrated below. Subparagraph (B) would be amended to refer to the scope of discovery under (b)(1) rather than to subparagraph (C). And subparagraph (C) would be revised to reflect the transfer of (iii) to (b)(1):

(C) When required. On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

This approach would require revising many of the cross-references to Rule 26(b)(2) in other rules, substituting Rule 26(b)(1). For example, Rule 30(a)(2) would begin: "A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) ~~(2)~~: * * *."

b. Limiting the Number of Discovery Requests

The Duke Conference included observations about approaching proportionality indirectly by tightening present presumptive numerical limits on the number of discovery requests and adding new limits. These sketches illustrate lower limits for Rule 33 interrogatories and new limits for Rule 36 requests to admit that have stirred little controversy. Lower limits on the numbers and length of depositions have been studied and are carried forward to test further the doubts that have been expressed with some force. Similarly, possible limits on the number of Rule 34 requests are sketched to prompt further discussion.

An important common feature of all of these sketches is that the limits are merely presumptive. They can be set aside by agreement of the parties or by court order.

Many studies over the years, several of them by the FJC, show that most actions in the federal courts are conducted with a modest level of discovery. Only a relatively small fraction of cases involve extensive discovery, and in some of those cases extensive discovery may be reasonably proportional to the needs of the case. But the absolute number of cases with extensive discovery is high, and there are strong reasons to fear that many of them involve unreasonable discovery requests. Many reasons may account for unreasonable discovery behavior — ineptitude, fear of claims of professional incompetence, strategic imposition, profit from hourly billing, and other inglorious motives. It even is possible that the presumptive limits now built into Rules 30, 31, and 33 operate for some lawyers as a target, not a ceiling.

Various proposals have been made to tighten the presumptive limits presently established in Rules 30, 31, and 33, and to add new presumptive limits to Rule 34 document requests and Rule 36 requests to admit. The actual numbers chosen for any rule will be in part arbitrary, but they can reflect actual experience with the needs of most cases. Setting limits at a margin above the discovery actually conducted in most cases may function well, reducing unwarranted discovery but leaving appropriate discovery available by agreement of the parties or court order.

Beginning with a proposal that has generated little controversy, Rule 33(a)(1) could be revised:

> **(1)** *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

(This could be made more complicated by adding a limit for multiparty cases — for example, no more than 15 addressed to any single party, and no more than 30 in all. No one seems to have suggested that. The complication is not likely to be worth the effort.)

Adding similar limits to Rule 36 for the first time also has generated little controversy. A clear version would add a new 36(a)(2), building on present (a)(1):

> **(1)** *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:
>
> (A) facts, the application of law to fact, or opinions about either; and
>
> (B) the genuineness of any described document.
>
> **(2)** *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) on any other party,

including all discrete subparts.

Things are not so simple for Rule 34. Many participants at the Dallas miniconference questioned the wisdom of adopting limits, even if limits could be enforced with little difficulty. They believe that Rule 34 burdens are reduced if the requesting party frames a larger number of narrowly and sharply focused requests than if forced to frame a smaller number of broadly diffuse requests. And one participant suggested that the problem is not the number of requests but the number of sources that must be searched. Questions of implementation supplement these reservations. It may not be easy to apply a numerical limit on the number of requests; "including all discrete subparts," as in Rule 33, may not work. This question ties to the Rule 34(b)(1)(A) requirement that the request "must describe with reasonable particularity each item or category of items to be inspected." Counting the number of requests could easily degenerate into a parallel fight over the reasonable particularity of a category of items. But concern may be overdrawn. Actual experience with scheduling orders that impose numerical limits on the number of Rule 34 requests suggests that parties can adjust to counting without any special difficulty. If this approach is followed, the limit might be located in the first lines of Rule 34(a):

(a) In General. A party may serve on any other party ~~a~~ no more than [25] requests within the scope of Rule 26(b):
* * *

(3) Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(1).

This form applies to all the various items that can be requested — documents, electronically stored information, tangible things, premises. It would be possible to draft a limit that applies only to documents and electronically stored information, the apparent subject of concern. But either way, there is a manifest problem in setting numerical limits. If a car is dismembered in an accident, is it only one request to ask to inspect all remaining parts? More importantly, what effect would numerical limits have on the ways in which requests are framed? "All documents, electronically stored information, and tangible things relevant to the claims or defenses of any party?" Or, with court permission, "relevant to the subject matter involved in this action"? Or at least "all documents and electronically stored information relating to the design of the 2008 model Huppmobile"? For that matter, suppose a party has a single integrated electronic storage system, while another has ten separate systems: does that affect the count? Still, the experience of judges who adopt such limits in scheduling orders suggests that disputes about counting seldom present real problems.

(The Subcommittee has concluded there is no apparent need to attempt to revise Rule 45 to mirror the limits proposed for Rule 34.)

For depositions, the sketches discussed at the Dallas miniconference reduced the presumptive limits from 10 depositions per side to 5, and reduced the presumptive duration of a deposition to 4 hours. The sketch encountered mixed reactions. The main argument against the proposal was that the present limits — 10 depositions per side, lasting up to 7 hours — work well. Some cases legitimately need more than 5 depositions per side, and there is no point in requiring the parties to seek the court's permission. So for the length of a deposition, although a reduction to 6 hours might be appropriate. On the other hand, FJC data show that most cases involve fewer than 5 depositions. A limit that reflects common practice should work well. In Professor Gensler's memorable phrase, "it is easier to manage up from a lower limit than to manage down from a higher limit." The sketches are carried forward for continuing discussion:

Rules 30(a)(2)(A)(i) and 30(d)(1):

(a) When a Deposition May Be Taken. * * *

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2[1]):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; * * *

(d) Duration; Sanction; Motion to Terminate or Limit

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

A parallel change would be made in Rule 31(a)(2)(A)(i) as to the number of depositions. Rule 31 does not have a provision parallel to the "one day of 7 hours" provision in Rule 30(d).

The authority to change any of these limitations would be repeated in revised Rule 26(b)(2)(A):

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, ~~and~~ interrogatories, requests [to produce][under Rule 34], and requests for

admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

c. Discovery Objections and Responses

The common laments about excessive discovery requests are occasionally met by protests that discovery responses often are incomplete, evasive, dilatory, and otherwise out of keeping with the purposes of the rules. Several proposals have been made to address these problems. One, which would add "not evasive" to the certifications attributed by Rule 26(g)(1) to a discovery request, response, or objection met vigorous opposition at the miniconference. Many participants felt this addition is unnecessary and might promote additional litigation. The Subcommittee has decided to withdraw this sketch, in part because the certifications already stated in Rule 26(g)(1)(B) can be used to reach evasive responses.

RULE 34: SPECIFIC OBJECTIONS

Two proposals have been advanced to improve the quality of discovery objections. The first would incorporate in Rule 34 the Rule 33 requirement that objections be stated with specificity. The second would require a statement whether information has been withheld on the basis of the objection. These proposals have won general support.

Rule 33(b)(4) begins: "The grounds for objecting to an interrogatory must be stated with specificity." Two counterparts appear in Rule 34(b)(2). (B) says that the response to a request to produce must state that inspection will be permitted "or state an objection to the request, including the reasons." (C) says: "An objection to part of a request must specify the part and permit inspection of the rest." "[I]ncluding the reasons" in Rule 34(b)(2)(B) may not convey as clearly as should be a requirement that the reasons "be stated with specificity." If the objection rests on privilege, Rule 26(b)(5)(A) should control. But for other objections, it is difficult to understand why specificity is not as important for documents, tangible things, and entry on premises as it is for answering an interrogatory. Even if the objection is a lack of "possession, custody, or control," the range of possible grounds is wide.

This sketch revises Rule 34(b)(2)(B) to parallel Rule 33(b)(4):

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [the grounds for

objecting {to the request} with specificity] [an objection to the request, including the specific reasons.]

RULE 34: STATE WHAT IS WITHHELD

Many Conference participants, both at the time of the Conference and since, have observed that responding parties often begin a response with a boilerplate list of general objections, and often repeat the same objections in responding to each individual request. At the same time, they produce documents in a way that leaves the requesting party guessing whether responsive documents have been withheld under cover of the general objections. (The model Rule 16(b) scheduling order in the materials provided by the panel on Eastern District of Virginia practices reflects a similar concern: " * * * general objections may not be asserted to discovery demands. Where specific objections are asserted to a demand, the answer or response must not be ambiguous as to what if anything is being withheld in reliance on the objection.)

Broad support has been expressed for addressing this problem by adding a new sentence to Rule 34(b)(2)(C):

(C) *Objections*. An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis of} the objection.[5]

RULES 34 AND 37: FAILURE TO PRODUCE

Rule 34 is somewhat eccentric in referring at times to stating that inspection will be permitted, and at other times to "producing" requested information. Common practice is to produce documents and electronically stored information, rather than make them available for inspection. Two amendments have been proposed to clarify the role of actual production, one in Rule 34, the other in Rule 37.

Earlier sketches revising Rule 34(b)(2)(B) have been improved in response to observations offered at the Dallas miniconference. The changes address the time for producing, recognizing that frequently production cannot be made all at once at the time for the response, but also recognizing that the time for production should not be open-ended. "Rolling production" is a common and necessary mode of compliance:

(B) Responding to Each Item. For each item or category, the

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[5] Could this be simplified: "An objection must state whether anything is being withheld on the basis of the objection"?

response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons. If the responding party elects to produce copies of documents or electronically stored information instead of permitting inspection, the response must state that copies will be produced, and the production must be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

Rule 37(a)(3)(B)(iv) would be amended to provide that a party seeking discovery may move for an order compelling an answer if:

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

d. Preservation and Evidence Rule 502 in Rules 16(b), 26(f)

Quite modest suggestions have been made to expand Rules 16(b) and 26(f) to add reminders of subjects already covered in the rules. Many observers continue to lament that preservation obligations are too often overlooked in Rule 26(f) conferences and in scheduling orders. And the Evidence Rules Committee is concerned that the advantages of Evidence Rule 502(e) agreements on the effect of disclosure are still not widely known. There has been little discussion of these sketches, but some good might come of adding these topics to Rules 16(b) and 26(f):

Rule 16(b)(3)(B)(iii), (iv)

(B) *Permitted Contents.* The scheduling order may:

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Rule 502(e) of the Federal Rules of Evidence;

Rule 26(f)(3)(C), (D)

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on: * * *

(C) any issues about disclosure, ~~or~~ discovery, or

preservation of electronically stored information, including the form or forms in which it should be produced;[6]

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Rule 502(d) and (e) of the Federal Rules of Evidence;[7]

e. Initial Disclosures

Questions about the value of initial disclosures under Rule 26(a)(1)(A) have persisted for many years. Divergent views were expressed at the Duke Conference. The Subcommittee has concluded that this topic is not yet ripe for consideration. Practices in some states require more expansive disclosures than Rule 26 requires. Empirical studies are being made of some of these practices. It is better to wait to see what they reveal.

f. Cost Shifting (Discovery only)

Both at the Duke Conference and otherwise, suggestions continue to be made that the discovery rules should be amended to include explicit provisions requiring the requesting party to bear the costs of responding. Cost-bearing could indeed reduce the burdens imposed by discovery, in part by compensating the responding party and in part by reducing the total level of requests. But any expansion of this practice runs counter to deeply entrenched views that every party should bear the costs of sorting through and producing the discoverable information in its possession. These proposals deserve serious development. But they require careful work that cannot be rushed. And they can readily be severed from the other proposals that make up the present package. They will remain on the Committee agenda, but are no

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[6] Note that Rule 26(f)(2) deliberately requires discussion of issues about preserving "discoverable information"; it is not limited to electronically stored information. The (f)(3) discovery plan provisions are more detailed than the (f)(2) subjects for discussion, so the discontinuity may not be a problem.

[7] This drafting assumes that any request to adopt the agreement in a court order should mean that it is a Rule 502(e) agreement, and that the order should be governed by Rule 502(d).

longer part of the "Duke Rules" package. What remains is a more modest approach through Rule 26(c).

Rule 26(c) authorizes "an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *." The list of examples does not explicitly include cost shifting. Paragraph (B) covers an order "specifying terms, including time and place, for the disclosure or discovery." "Terms" could easily include cost shifting, but may be restrained by its association with the narrow examples of time and place. More importantly, "including" does not exclude — the style convention treats examples as only illustrations of a broader power. Rule 26(b)(2)(B), indeed, covers the idea of cost shifting when the court orders discovery of electronically stored information that is not reasonably accessible by saying simply that "[t]he court may specify conditions for the discovery." The authority to protect against undue expense includes authority to deny discovery unless the requesting party pays part or all of the costs of responding. Courts in fact exercise this authority now, particularly in addressing electronic discovery issues.

Notwithstanding the conclusion that Rule 26(c) now authorizes cost shifting in discovery, this authority is not prominent on the face of the rules. Nor does it yet figure prominently in reported cases. If it is desirable to encourage greater use of cost shifting, a more explicit provision could be useful. Rule 26(b)(2)(B) recognizes cost shifting for discovery of electronically stored information that is not reasonably accessible from concern that Rule 26(c) might not be equal to the task. So it may also be desirable to supplement Rule 26(c) with a more express provision.

The more conservative approach does no more than add an express reference to cost shifting in present Rule 26(c)(1)(B):

(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place <u>or the allocation of expenses</u>, for the disclosure or discovery; * * *

3. Cooperation: Rule 1

The wish for reasonable proportionality in discovery overlapped with a broader theme explored at the Duke Conference. Cooperation among the parties can go a long way toward achieving proportional discovery efforts and reducing the need for judicial

management. But cooperation is important for many other purposes. Discovery is not the only arena for tactics that some litigants lament as tactics in a war of attrition. Ill-founded motions to dismiss — whether for failure to state a claim or any other Rule 12(b) ground, motions for summary judgment, or other delaying tactics are examples.

It is easy enough to draft a rule that mandates reasonable cooperation within a framework that remains appropriately adversarial. It is difficult to know whether any such rule can be more than aspirational. Rule 11 already governs unreasonable motion practice, and there is little outcry for changing the standards defined by Rule 11.[8] And there is always the risk that the ploy of adding an open-ended duty to cooperate will invite its own defeat by encouraging tactical motions, repeating the sorry history of the 1983 Rule 11 amendments.

The sketch considered at the Dallas miniconference revised Rule 1 to impose duties on the parties in two ways. The first, which survives on the agenda, provided that the rules should be "employed by the court and parties" to achieve the iconic Rule 1 aspirations. The second would have added "and the parties should cooperate to achieve these ends." This second provision encountered substantial opposition. The opposition extended to a suggested softening that would say only that the parties "are expected to cooperate to achieve these ends." Much of the opposition rested on concern that cooperation is an open-ended concept that, if embraced in rule text, could easily lead to less cooperation and an increase in disputes in which every party accuses every other party of failing to cooperate. Additional concerns have been expressed that anything imposing new duties on lawyers will become entangled with rules of professional responsibility. This provision has been abandoned. The concept of cooperation could be spelled out in the Committee Note once it is clear that Rule 1 applies to lawyers and not simply the court.

The surviving Rule 1 sketch is:

> * * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive[9] determination

[8] Nor is there any sense that the 1993 amendments softening the role of sanctions should be revisited, despite the continuing concern reflected in proposed legislation currently captioned as the Lawsuit Abuse Reduction Act.

[9] Here the ACTL/IAALS proposal would ratchet down the expectations of Rule 1: "~~speedy, and inexpensive~~ timely, efficient, and cost-effective determination * * *."

of every action and proceeding.[10]

If this proposal moves forward, it will be important to frame the Committee Note with care. Descriptions of cooperation as a duty or obligation will encounter the same reactions as explicit rule text.

Appendix

Various parts of the same rules are affected by proposals made for different purposes. This appendix lays out the full set of changes rule by rule.

Rule 1

* * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Rule 4

(m) TIME LIMIT FOR SERVICE. If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *

Rule 16(b)

(b) SCHEDULING.

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless good cause is found for delay must issue the order: within the earlier of ~~120~~ 90 days after any defendant

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[10] The ACTL/IAALS version is much longer. The court and parties are directed to "assure that the process and costs are proportionate to the amount in controversy and the complexity and importance of the issues. The factors to be considered by the court * * * include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation."

has been served with the complaint or ~~90~~ 60 days after any defendant has appeared.

(3) * * *

(B) *Permitted Contents.* The scheduling order may:

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Rule 502(e) of the Federal Rules of Evidence;

(v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court;

[present (v) and (vi) would be renumbered] * * *

Rule 26

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~ * * *

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of

depositions, ~~and~~ interrogatories, requests [to produce][under Rule 34], and requests for admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

* * *

(c) Protective Orders

(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except:

(A) in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)~~,~~;

(B) that more than 21 days after service of the summons and complaint on any defendant a party may deliver to [any party][that defendant] requests under Rule 34(a), to be considered as served at the [first] Rule 26(f) conference; or

(C) when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless the parties stipulate, or~~, on motion,~~ the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence;

and

(B) discovery by one party does not require any other party to delay its discovery.

* * *

(f)(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or * * *"

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on: * * *

(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Rule 502(d) and (e) of the Federal Rules of Evidence;

Rule 30

(a)(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1~~2~~)[11]:

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; * * *

(d) Duration; Sanction; Motion to Terminate or Limit

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

Rule 31

(a)(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule

[11] This change from (b)(2) to (b)(1) illustrates a number of cross-references to present (b)(2) that would have to be changed to conform to the proposed transposition of (b)(2) to become part of (b)(1)'s definition of the scope of discovery.

26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; * * *

Rule 33

(a)(1) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

Rule 34

(a) In General. A party may serve on any other party ~~a~~ no more than [25] requests within the scope of Rule 26(b): * * *

(3) Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(1).

(b)(2) *Responses and Objections.* * * *

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(1)(B) — within 30 days after the parties' [first] Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [the grounds for objecting {to the request} with specificity] [an objection to the request, including the specific reasons.] If the responding party elects to produce copies of documents or electronically stored information instead of permitting inspection, the response must state that copies will be produced, and the production must be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis

of} the objection.

Rule 36

(a) SCOPE AND PROCEDURE.

(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described document.

(2) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) on any other party, including all discrete subparts. * * *

Rule 37

(a)(3)(B)(iv) [A party seeking discovery may move for an order compelling an answer if:] a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

II.B. RULE 84 FORMS

Uncertainties about the impact of the Supreme Court's still recent decisions on pleading standards on the Rule 84 official pleading forms led the Committee to broader questions about Rule 84 and the Rule 84 Forms. These questions led to comparisons with the other bodies of rules. Official forms are attached to the Appellate, Bankruptcy, and Civil Rules. The Appellate and Civil Forms have been generated through the full Enabling Act Process. The Bankruptcy Forms are developed through the Enabling Act committees, but the final step is approval by the Judicial Conference without going on to the Supreme Court or Congress. The Administrative Office produces forms for use in criminal prosecutions, but these forms are not "official." A subcommittee formed of representatives of the advisory committees examined these differences. It reported that forms play different roles in the different types of litigation, and that there is no apparent reason to adopt a uniform approach across the different sets of rules and advisory committees.

With this reassurance of independence, the Rule 84 Subcommittee was formed to study Rule 84 and the Rule 84 forms. It gathered information about the general use of the forms by informal inquiries that confirmed the initial impressions of Subcommittee members. Lawyers do not much use these forms, and

there is little indication that they often provide meaningful help to pro se litigants. And as discussed further below, the pleading forms live in tension with recently developing approaches to general pleading standards.

From this beginning, the Subcommittee considered several alternative approaches. The simplest would be to leave Rule 84 and the Rule 84 forms where they lie. The most burdensome would be to take on full responsibility for maintaining the forms in a way that ensures a good fit with contemporary practice and needs, and perhaps developing additional forms to address many of the subjects that are not now illustrated by the forms. The work required to maintain the forms through the full Enabling Act process would divert the energies of all actors in the process from other work that, over the years, has seemed more important. Other approaches also were considered.

After some initial hesitation, the Subcommittee has come to believe that the best approach is to abrogate Rule 84 and the Rule 84 forms. Several considerations support this conclusion. One important consideration is the amount of work that would be required to assume full responsibility for maintaining the forms. Another consideration is that many alternative sources provide excellent forms. One source is the Administrative Office.

A further reason to abrogate Rule 84 is the tension between the pleading forms and emerging pleading standards. The pleading forms were adopted in 1938 as an important means of educating bench and bar on the dramatic change in pleading standards effected by Rule 8(a)(2). They — and all the other forms — were elevated in 1946 from illustrations to official status by adding to Rule 84 the present provision that the forms "suffice under these rules." Whatever else may be said, the ranges of topics covered by the pleading forms omit many of the categories of actions that comprise the bulk of the federal docket. And some of the forms have come to seem inadequate, particularly the Form 18 complaint for patent infringement. Attempting to modernize the existing forms, and perhaps to create new forms to address such claims as those arising under the antitrust laws (*Twombly*) or implicating official immunity (*Iqbal*), would be very difficult considering the case-specific pleading required by *Twombly* and *Iqbal*.

Abrogation need not remove the Enabling Act committees entirely from forms work. The Administrative Office has a working group on forms that includes six judges and six court clerks. They have produced a number of civil forms that are quite good. The forms are available on the Administrative Office web site, some of them in a format that can be filled in, and others in a format that can be downloaded for completion by standard word-processing programs. The working group is willing to work in conjunction with the Advisory Committee. If Rule 84 is abrogated, a conservative initial approach would be to appoint a liaison

from the Advisory Committee to work with the working group. New and revised forms could be reviewed, perhaps by a Forms Subcommittee. Experience with this process would shape the longer-term relationships. The forms for criminal prosecutions have been developed successfully with only occasional review by the Criminal Rules Committee. Similar success may be hoped for with the Civil Rules. The Administrative Office forms, moreover, would have to win their way by intrinsic merit, unaided by official status. A court dissatisfied with a particular form would not be obliged to accept it.

One and perhaps two particular forms require special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver is not required, but is closely tied to Form 5. It would be possible simply to remove this requirement, perhaps substituting a recital in the rule of the elements that must be included in the request and in the waiver. The corresponding Administrative Office forms are identical to Form 5 and virtually identical to Form 6. But without something in Rule 4(d) to mandate their use, the Administrative Office forms might not be uniformly employed. An alternative would be to adopt a request form, and perhaps a waiver form, as part of Rule 4. These forms were carefully developed as part of creating Rule 4(d), and might be carried forward into Rule 4 without change. It also would be possible to consider some revisions, even to Rule 4(d) itself, but it is not clear whether there is a need for change that justifies further delay in the Rule 84 project.

The Committee and Subcommittee ask this question: Does the Standing Committee have concerns about the possible abrogation of Rule 84 and its official forms?

II.C. CLASS ACTIONS: RULE 23

The Rule 23 Subcommittee Report to the Committee in November said that "[t]houghtful observation and fact-gathering, rather than immediate action, seem the order of the day." It will be some time before proposals to revise Rule 23 are made, if any are to be made by this Subcommittee.

At least three concerns account for the Subcommittee's approach of "watchful waiting." The work of the Discovery and Duke Conference Subcommittees continues to command much of the Committee's resources, and the work of at least the Discovery Subcommittee seems never to be done. In addition to the remaining uncertainties about the ways in which recent Supreme Court class-action decisions will play out in practice, the Court has granted certiorari in at least three class-action cases; one of them raises questions that bear directly on one of the central issues the Subcommittee thinks deserves attention. And it will be

important to gain broader input to identify which issues should be considered — and perhaps addressed — without attempting a complete review of all possible Rule 23 issues.

The tentative lists of potential issues reported in November are copied here in the hope of eliciting reactions and guidance as to the importance of these issues and, perhaps more important, as to other issues that also deserve attention. The lists are tentative not only in identifying issues but also in allocating them between "front burner" and "back burner" status. All observations are welcome.

"Front burner" issues

(1) Settlement class certification

(2) Class certification and merits scrutiny

(3) Issues classes under Rule 23(c)(4)

(4) Refining or improving criteria for settlement review under Rule 23(e)

(5) Rule 23(b)(2) and monetary relief

"Back burner" issues

(1) Fundamental revision of Rule 23(b)

(2) Revisiting Rule 23(a)(2)

(3) Requiring court approval for "individual" settlement of cases filed as putative class actions

(4) Revisiting the "predominance" or "superiority" language in Rule 23(b)(3)

(5) Revising the notice requirements of Rule 23(c), and considering notice by means other than U.S. mail

(6) Responding to the Supreme Court’s *Shady Grove* decision by confirming district court discretion in deciding whether to certify a class

(7) Addressing choice of law in Rule 23

(8) Revisiting Rule 23(h) and standards for attorney-fee awards in class actions

(9) Addressing the binding effect of a federal court’s denial of certification or refusal to approve a proposed class-action settlement

(10) Addressing the propriety of aggregation by consent.

(Another issue may be added in conjunction with the Appellate Rules Committee, which has begun consideration of a proposal to require court approval when an objector seeks to dismiss an appeal from a class-action judgment. Both Committees

recognize that these questions implicate both the Appellate and Civil Rules.)

II.D. PLEADING STANDARDS

Pleading standards were included in the agenda materials for the Committee's meetings in March and November, as they have been included in the materials for every meeting since the 2007 decision in the *Twombly* case. Discussion at the March meeting was brief. There was no discussion at the shortened November meeting.

The Committee has been provided many alternative approaches to revising pleading standards. Some focus directly on pleading standards. Others look to integrating discovery with practice on motions to dismiss, spurred in part by concerns about the difficulty plaintiffs face in pleading cases with "asymmetrical information." Expansion of the motion for a more definite statement also has been sketched.

The Committee feels that it should await further development of the case law and the results of a pending FJC study before considering whether amendments to the pleading rules are warranted. The lower courts continue to engage in an essentially common-law process of refining pleading practices, and new lessons remain to be learned from this process. The Federal Judicial Center is launching a project to study all Rule 12 motions, not only 12(b)(6) motions to dismiss for failure to state a claim, and will include motions for summary judgment as well.

The time to take up these topics may come when the FJC study is complete. Or it may come when there is a sense that lower courts have come about as far as can be, if the outcomes seem to be substantial disuniformity among courts or general pleading standards that seem too relaxed or too demanding. It might even be that the cases show a need to develop specific pleading standards for particular categories of cases, generalizing on the models provided by Rule 9. The Committee will continue to monitor developments and will keep the Standing Committee apprised of its thinking.

II.E. DELAYED RULINGS ON MOTIONS TO REMAND REMOVED ACTIONS

Jim Hood, Attorney General of the State of Mississippi, wrote to this Committee to propose two amendments to the Federal Rules of Civil Procedure. The proposals are prompted by frustration with delays in ruling on motions to remand actions brought "to protect citizens from corporate wrongdoing," often

presenting a need for immediate protection. In one case the court of appeals issued mandamus to direct a prompt ruling on a motion to remand that had been pending for three years. In another case it took 15 months to get a ruling on the motion to remand.

General Hood proposed two new rules provisions. One would require "automatic remand of cases in which the district court takes no action on a motion to remand within 30 days." The second would require the removing party to pay all actual expenses, including attorney fees, incurred as a result of removal when remand is ordered.

It is easy to understand a litigant's sense of frustration with what seem undue delays in ruling on remand. Without knowing the detailed circumstances of these two cases — apart from the fact that relief was granted by extraordinary writ in one of them — it may be assumed that the district court should have managed its docket and the complexities of the motions in a way that provided prompter rulings.

Interesting questions could be identified in fleshing out the details of these proposals. The Committee concluded, however, that each is a matter calling for action by Congress, not by Rules Enabling Act committees. The automatic remand rule would at times result in surrendering federal subject-matter and removal jurisdiction over an action properly brought to the federal court. Congress controls subject-matter jurisdiction. The Civil Rules do not. Rule 82, indeed, expressly provides that the rules "do not extend or limit the jurisdiction of the district courts." The award of expenses and attorney fees on remand is addressed by 28 U.S.C. § 1447(c), which makes the award discretionary. The Supreme Court has confirmed that there are circumstances in which there are good reasons to deny an award of expenses and fees. Whatever else might be thought of Enabling Act authority to address this question, it is more fitting to submit this question to Congress.

Judge Sutton has conveyed to Attorney General Hood the Committee's response.