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THE NEW ESI SANCTIONS FRAMEWORK UNDER THE PROPOSED RULE 37(E) AMENDMENTS

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I. INTRODUCTION

[1] The debate over the necessity, substance, and form of the proposed e-Discovery amendments to the Federal Rules of Civil Procedure (Rules) has been ongoing for over four years.¹ Since the Duke Conference convened in May 2010, the Judicial Conference Advisory Committee on the Civil Rules (Committee) has been working to address many of the perceived shortcomings in the current Rules regime.² Their efforts have not been conducted in a vacuum. Interest groups representing parties on

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¹ See JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 13–14, app. B-1 to B-2 (Sept. 2014) [hereinafter SEPT. ‘14 REPORT], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf>, archived at <http://perma.cc/S4YH-RF9T>.

² *Id.* at 13–14, app. B-2.

either side of the “v” in litigation, the U.S. Department of Justice, and even individual federal judges have lobbied the Committee in an effort to shape the final form of the proposed amendments.³ This process, while both lengthy and necessary, may be reaching its closing stages. With the Judicial Conference of the United States having approved the Rules amendment package in September 2014, the proposed changes appear to be on track for implementation by December 1, 2015.⁴

[2] Viewed holistically, the proposed changes are designed to usher in a new era of proportional discovery, increased cooperation, reduced gamesmanship, and more active judicial case management.⁵ For many litigants the amendments of greatest significance are those affecting Rule 37(e).⁶ If enacted, the changes to Rule 37(e) would provide a uniform national standard regarding the issuance of severe sanctions to address spoliation of electronically stored information (ESI).⁷ They would also

³ See generally JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES, REPORT OF ADVISORY COMMITTEE ON CIVIL RULES 95-305, 331-411 (May 2, 2014) [hereinafter MAY '14 REPORT], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/S2014-05.pdf>, archived at <http://perma.cc/6UFS-XLFQ> (summarizing the nature of the comments the Committee received on the published versions of the proposed Rules amendments).

⁴ See Thomas Y. Allman, THE CIVIL RULES PACKAGE AS APPROVED BY THE JUDICIAL CONFERENCE (Sept. 18, 2014), available at <http://www.theediscoveryblog.com/wp-content/uploads/2014/10/2014CommentsOnRulePackage.pdf>, archived at <http://perma.cc/QVF2-GPD4> (discussing the timetable for approving and enacting the Rule amendments).

⁵ See Philip J. Favro, *A Comprehensive Look at the Newly Proposed Amendments to the Federal Rules of Civil Procedure*, 26 UTAH BAR J. 38, 38–41 (2013).

⁶ See Raymond M. Ripple & Krystle Guillory Tadesse, *Proposed Amendment to FRCP Rule 37 Addresses Sanctions for Failure to Preserve ESI*, INSIDE COUNSEL (May 21, 2014), <http://www.insidecounsel.com/2014/05/21/proposed-amendment-to-frcp-rule-37-addresses-sanct>, archived at <http://perma.cc/8BA6-BCY9>.

⁷ See Favro, *supra* note 5, at 42.

introduce a new framework for determining whether sanctions of any nature should be imposed for ESI preservation shortcomings.⁸ Counsel, clients, and the courts should all be aware of the impact these changes could have in litigation and on client information governance programs.⁹

[3] In this article, I will analyze these issues. After covering the deficiencies with the current version of Rule 37(e) in Part II, I consider in Part III the new sanctions framework under the proposed amendments. This includes an analysis of the factors parties would be required to satisfy in order to justify the imposition of sanctions. I also describe the severe measures calculated to remediate the most harmful ESI preservation failures, along with lesser sanctions designed to cure prejudice stemming from less egregious forms of spoliation. In Part IV, I focus on some key questions about the Rule 37(e) revisions that remain unanswered and that will likely be resolved only by motion practice. This includes, among other things, a discussion of how a revised Rule 37(e) might apply to failures to preserve ESI stored with cloud computing providers.

II. THE NEED FOR REVISIONS TO RULE 37(e)

[4] The Committee has spent countless hours considering the over-preservation of ESI and the appropriate standard of culpability required to impose sanctions for its spoliation.¹⁰ Even though the current iteration of Rule 37(e) is supposed to provide guidance on these issues, amendments were deemed necessary given the inherent limitations with the rule.¹¹

⁸ See SEPT. '14 REPORT, *supra* note 1, at app. B-59 to B-62.

⁹ See Philip J. Favro, *Getting Serious: Why Companies Must Adopt Information Governance Measures to Prepare for the Upcoming Changes to the Federal Rules of Civil Procedure*, 20 RICH. J. L. & TECH. 5, ¶¶ 32–36 (2014) [hereinafter *Getting Serious*], <http://jolt.richmond.edu/v20i2/article5.pdf>, archived at <http://perma.cc/LUN9-T76D>.

¹⁰ See SEPT. '14 REPORT, *supra* note 1, at app. B-14 to B-15.

¹¹ *Id.* at app. B-58.

[5] As it stands, Rule 37(e) safeguards litigants from discovery sanctions when the good faith, programmed operation of their computer systems automatically eliminates ESI.¹² Nevertheless, the rule has largely proved ineffective as a national standard.¹³ While there are many reasons that could explain its futility, three problems predominate in the present version of the rule.

[6] First, Rule 37(e) did not expressly abrogate the negligence standard that the U.S. Court of Appeals for the Second Circuit implemented for severe sanctions involving preservation failures under *Residential Funding Corp. v. DeGeorge Financial Corp.*¹⁴ By allowing *Residential Funding* to remain in effect, courts in the Second Circuit and beyond are free to impose adverse inference instructions or order other doomsday sanctions for negligent spoliation of ESI.¹⁵ With the Second Circuit—one of the epicenters of U.S. litigation—following a sanctions touchstone that generally varies from the rest of the country, the rule has failed to become a uniform national standard for ESI sanctions.¹⁶

¹² *Getting Serious*, *supra* note 9, at ¶ 27.

¹³ *See* SEPT. '14 REPORT, *supra* note 1, at app. B-58; *see also* *Hawley v. Mphasis Corp.*, 302 F.R.D. 37, 47, n.4 (S.D.N.Y. 2014) (describing that the purpose of the amendments is “to replace the disparate treatment of preservation/sanctions issues in different circuits by adopting a single standard”).

¹⁴ *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 113 (2d Cir. 2002); *see also* SEPT. '14 REPORT, *supra* note 1, at app. B-17 to B-18, B-65.

¹⁵ *See, e.g.,* *Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494, 502–03 (S.D.N.Y. 2013) (relying on *Residential Funding* to impose an adverse inference instruction as a sanction for the plaintiffs’ grossly negligent spoliation of ESI).

¹⁶ *See* Philip J. Favro, *Sea Change or Status Quo: Has the Rule 37(e) Safe Harbor Advanced Best Practices for Information Management?*, 11 MINN. J.L. SCI. & TECH. 317, 328–29, 332 (2010) [hereinafter *Sea Change*] (discussing the Committee’s intent to establish the present version of Rule 37(e) as a national standard when it was implemented in 2006). The Second Circuit’s negligence standard is increasingly viewed as an anachronistic rule given the current challenges associated with ESI preservation. *See* SEPT. '14 REPORT, *supra* note 1, at app. B-18 (observing, among other things, that because “ESI is more easily lost than tangible evidence, . . . the sanction of an adverse

[7] The second reason Rule 37(e) has failed as a so-called “safe harbor” from sanctions is the emphasis the 2006 Committee note placed on requiring litigants to stop the routine destruction of ESI once a preservation duty attached.¹⁷ While litigants may be required to suspend particular aspects of their electronic information systems once a preservation duty is triggered, this is not the exclusive or the determinative factor in every sanctions analysis.¹⁸ For instance—as U.S. District Judge Paul Grimm emphasized in *Victor Stanley, Inc. v. Creative Pipe, Inc.*—a court should also consider as part of that analysis the “reasonableness and proportionality” of a party’s efforts to preserve relevant ESI.¹⁹ Nevertheless, most courts applying Rule 37(e) have instead generally focused on whether and when a party suspended particular aspects of its computer systems after a preservation duty attached.²⁰ This has led to sanctions rulings that are out of step with mainline ESI preservation jurisprudence.²¹

inference instruction imposes a heavy penalty for losses that are likely to become increasingly frequent as ESI multiplies”).

¹⁷ See *Sea Change*, *supra* note 16, at 327–28.

¹⁸ *Victor Stanley, Inc. v. Creative Pipe, Inc. (Victor Stanley II)*, 269 F.R.D. 497, 523 (D. Md. 2010).

¹⁹ *Id.* (observing that an “assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence”).

²⁰ See *Sea Change*, *supra* note 16, at 327–28.

²¹ See, e.g., *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-2299, 2014 U.S. Dist. LEXIS 86101, at *219–20 (W.D. La. June 23, 2014) (issuing an adverse inference instruction against one of the defendants for its failure to preserve relevant ESI and holding that a general litigation hold issued in an unrelated products liability suit filed nine years earlier had given rise to a duty to preserve relevant ESI in the instant litigation); *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1191 (D. Utah 2009) (finding that industry-related litigation that was initiated years before the lawsuit was filed against the defendant should have “sensitized” the defendant to the

[8] The third factor contributing to the futility of Rule 37(e) is that courts have frequently used their inherent authority to bypass the rule's protections.²² This is because Rule 37(e) only applies to conduct that occurred during the litigation.²³ It does not govern pre-litigation activities such as the destruction of ESI that occurred *before* the commencement of litigation.²⁴ As a result, courts have often wielded their inherent powers to fashion remedies for ESI destruction free from the rule's present constraints.²⁵

[9] With varying preservation standards, the inordinate focus on one factor in the preservation analysis, and the ease with which the rule's protections can be bypassed, there can be little doubt as to why a revised version of Rule 37(e) is needed.

reasonable anticipation of litigation and that its subsequent failure to preserve relevant ESI merited sanctions).

²² Thomas Y. Allman, *Dealing with Spoliation in the Federal Rules (Again): The Proposed Amendment to Rule 37(e)* at 5, IAALS/NJC E-DISCOVERY SUMMIT 2013 (Sept. 19–20, 2013), available at http://iaals.du.edu/images/wygwam/documents/publications/E-Discovery_Panel_2_Preservation.pdf, archived at <http://perma.cc/72GB-U82V>.

²³ *Nucor Corp. v. Bell*, 251 F.R.D. 191, 196, n.3 (D.S.C. 2008); see also *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 611–12 (S.D. Tex. 2010) (delineating the nature and scope of the court's inherent authority to issue sanctions and its interplay with Rule 37(e)).

²⁴ *Nucor*, 251 F.R.D. at 196, n.3 (“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.”).

²⁵ See, e.g., *id.*; see also *Escobar v. Houston*, No. 04-1945, 2007 U.S. Dist. LEXIS 72706, at *51–52, n.5 (S.D. Tex. Sept. 29, 2007) (describing the circumstances under which courts may exercise their inherent authority).

III. THE PROPOSED RULE 37(e) AMENDMENTS

[10] The proposed amendments to Rule 37(e) are designed to address these issues by providing a straightforward framework for the issuance of any sanctions stemming from failures to preserve relevant ESI.²⁶ They also encourage courts to draw on a wide range of factors to fashion sanctions awards that cure prejudice caused by less harmful forms of ESI spoliation.²⁷ In addition, the proposed changes establish “a uniform standard in federal court” for the imposition of severe remedial measures resulting from ESI preservation failures.²⁸

A. The New Sanctions Framework

[11] The Committee has established a set of requirements in the proposed rule that must be satisfied before a court could impose sanctions on a litigant for failing to preserve ESI.²⁹ The reason for doing so is to ensure sanctions for preservation failures are based on the designated criteria and not the potentially arbitrary use of a court’s inherent powers:

New Rule 37(e) authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. *It therefore forecloses reliance on inherent authority* or state law to determine whether measures should be used.³⁰

[12] The prerequisites a party must satisfy when moving for sanctions

²⁶ See SEPT. ‘14 REPORT, *supra* note 1, at app. B-56 to B-57.

²⁷ See *id.* at app. B-63 to B-64.

²⁸ *Id.* at app. B-65.

²⁹ See *id.* at app. B-56 to B-57, B-61 to B-62.

³⁰ *Id.* at app. B-58 (emphasis added).

under the amended Rule 37(e) proposal are as follows:

1. Relevant ESI “should have been preserved in the anticipation or conduct of litigation,”
2. Relevant ESI was “lost,”
3. The party charged with safeguarding the lost ESI “failed to take reasonable steps to preserve” the information, and
4. The lost ESI “cannot be restored or replaced through additional discovery.”³¹

[13] While the first two steps essentially reflect existing common law requirements,³² the third step includes a key notion memorialized in *Victor Stanley II* and *Rimkus Consulting Group, Inc. v. Cammarata*: preservation efforts must be analyzed through the lens of reasonableness.³³ This is a significant step since it would oblige courts to examine preservation issues with a broader perspective and not focus exclusively on whether and when the party modified aspects of its electronic information systems.³⁴ Moreover, it would direct preservation questions away from a mythical standard of perfection that has unwittingly crept into discovery jurisprudence over the past several years.³⁵ Instead of punishing parties that somehow failed to preserve every last e-mail that could conceivably be relevant, the rule would essentially require a common sense

³¹ *Id.* at app. B-56.

³² See SEPT. ‘14 REPORT, *supra* note 1, at app. B-59.

³³ *Victor Stanley II*, 269 F.R.D. 497, 523 (D. Md. 2010); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (observing that reasonableness is the touchstone of the preservation analysis); see also SEPT. ‘14 REPORT, *supra* note 1, at app. B-59 to B-62.

³⁴ See SEPT. ‘14 REPORT, *supra* note 1, at app. B-59 to B-62.

³⁵ See *id.* at app. B-61 (“This rule recognizes that ‘reasonable steps’ to preserve suffice; it does not call for perfection.”); *Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 615, 631 (C.D. Cal. 2013) (holding that the Rules “do not require perfection” and discussing related authorities).

determination of the issues based on a benchmark—reasonableness—with which courts and counsel are familiar.³⁶

[14] The fourth and final provision is significant since it would prevent the imposition of sanctions where there is essentially no harm to the moving party given the availability of replacement evidence.³⁷

B. Severe Sanctions vs. Curative Measures

[15] To obtain the most severe measures under Rule 37(e)(2), the moving party must additionally demonstrate that the alleged spoliator “acted with the intent to deprive another party of the information’s use in the litigation.”³⁸ This specific intent requirement is designed to create a uniform national standard by ensuring severe sanctions are imposed only for the most flagrant violations of ESI preservation duties.³⁹ These violations appear to include bad faith destructions of ESI that occur in connection with the instant lawsuit.⁴⁰ They do not, however, include negligent or grossly negligent conduct.⁴¹ The draft Committee note makes clear that the Rule 37(e) amendments “reject[] cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2nd Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.”⁴²

³⁶ *Rimkus*, 688 F. Supp. 2d at 613.

³⁷ See SEPT. ‘14 REPORT, *supra* note 1, at app. B-62 (“[i]f the information is restored or replaced, no further measures should be taken.”).

³⁸ *Id.* at app. B-56 to B-57.

³⁹ See *id.* at app. B-64 to B-65.

⁴⁰ See *id.* app. B-17 (“This intent requirement is akin to bad faith.”).

⁴¹ See *id.* at app. B-65.

⁴² *Id.*

[16] The severe sanctions a court could issue under Rule 37(e)(2) are limited to dismissing the case, entering default judgment, or “instruct[ing] the jury that it may or must presume the information was unfavorable to the party.”⁴³ Alternatively, a court could presume that the lost ESI was unfavorable to the alleged spoliator.⁴⁴ Nevertheless, a court is under no obligation to order any of these measures even if the specific intent requirement is satisfied.⁴⁵ As the Committee cautions in the draft note, “[t]he remedy should fit the wrong, and the severe measures authorized . . . should not be used when the information lost was relatively unimportant or lesser measures . . . would be sufficient to redress the loss.”⁴⁶

[17] If the moving party cannot satisfy the specific “intent to deprive” requirement, the court could then resort to curative measures under Rule 37(e)(1) to address prejudice resulting from the loss of the ESI.⁴⁷ The sanctions a court could order pursuant to that provision would be “no greater than necessary to cure the prejudice” to the aggrieved party.⁴⁸ That wording was drafted broadly to ensure that jurists would have sufficient discretion to craft remedies that could ameliorate the prejudice.⁴⁹ While the precise range of these remedies is not delineated in the rule, a Committee report and the draft Committee note suggest the remedies could include the following:

⁴³ SEPT. ‘14 REPORT, *supra* note 1, at app. B-56 to B-57.

⁴⁴ *See id.*

⁴⁵ *See id.* at app. B-67.

⁴⁶ *Id.*

⁴⁷ *Id.*, at app. B-55 to B-57.

⁴⁸ *Id.*

⁴⁹ *See* SEPT. ‘14 REPORT, *supra* note 1, at app. B-63 to B-64 (“The range of such measures is quite broad . . . [; m]uch is entrusted to the court’s discretion.”).

- “[P]reclude a party from presenting evidence,”⁵⁰
- “[D]eem some facts as having been established,”⁵¹
- “[P]ermit the parties to present evidence and argument to the jury regarding the loss of information,”⁵²
- “[G]ive the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies,”⁵³ or
- “[E]xclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.”⁵⁴

[18] Thus, a moving party could very well obtain weighty penalties against an alleged spoliator even if it is unable to establish the specific intent to deprive.⁵⁵ Nevertheless, the draft Committee note establishes that any such sanctions must be tailored so they do not equal or exceed the severe measures of Rule 37(e)(2).⁵⁶

IV. KEY ISSUES FOR MOTION PRACTICE UNDER THE NEW RULE 37(e)

[19] While the new Rule 37(e) proposal addresses the main problems associated with the current rule, there are several questions about the

⁵⁰ MAY ‘14 REPORT, *supra* note 3, at 312.

⁵¹ *Id.*

⁵² SEPT. ‘14 REPORT, *supra* note 1, at app. B-64.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at app. B-63 to B-64; *see also* MAY ‘14 REPORT, *supra* note 3, at 312.

⁵⁶ *See* SEPT. ‘14 REPORT, *supra* note 1, at app. B-64 (“Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information’s use in the litigation.”).

revised rule that remain unanswered and will likely be the subject of vigorous motion practice. I will consider three of those questions in this section.

A. What Are “Reasonable Steps to Preserve” ESI?

[20] One of the principal battlegrounds under the revised version of Rule 37(e) will certainly involve deciphering the meaning of “reasonable steps to preserve” ESI.⁵⁷ This is because the “reasonable steps” provision is an express—though undefined—prerequisite for obtaining sanctions.⁵⁸ This is confirmed by the wording of the draft Committee note: “Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party’s reasonable steps to preserve.”⁵⁹ Thus, a party who employs “reasonable steps” to keep relevant ESI cannot be sanctioned for its loss.⁶⁰

[21] However, as to the precise meaning of “reasonable steps,” the Committee provides only general guidance. For example, the draft note suggests sanctions may not be appropriate if the destroyed ESI is either outside of a preserving party’s control or has been wiped out by circumstances (e.g., flood, fire, hackers, viruses, etc.) beyond the party’s control.⁶¹ Nevertheless, the note does not suggest these *force majeure* circumstances are an absolute defense to a sanctions request.⁶² Instead, it advises courts to view the context of the destruction and what steps the preserving party could reasonably have taken to prepare for the problem

⁵⁷ *Id.* at app. B-56.

⁵⁸ *Id.* at app. B-56, B-61.

⁵⁹ *Id.* at app. B-61.

⁶⁰ *See id.* (“Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party’s reasonable steps to preserve.”).

⁶¹ *See id.*

⁶² *See* SEPT. ‘14 REPORT, *supra* note 1, at app. B-61.

before it occurred.⁶³ However, the Committee acknowledges that engaging in this type of hindsight analysis has its limitations.⁶⁴

[22] The note also suggests that the range of a party's preservation efforts should be tempered by proportionality standards.⁶⁵ However, as U.S. Magistrate Judge James Francis observed in *Orbit One Communications, Inc. v. Numerex Corp.*, proportionality is an "amorphous" and "highly elastic" concept that may not "create a safe harbor for a party that is obligated to preserve evidence."⁶⁶ Therefore, while notions of proportionality may factor into the preservation analysis, it is unlikely they alone will determine the issue of "reasonable steps to preserve."⁶⁷

[23] In the absence of meaningful direction on this issue, courts will likely turn to existing case law to help guide their decision on whether a party has taken "reasonable steps" to retain ESI.⁶⁸ To be sure, the

⁶³ See *id.* at app. B-61 to B-62 ("Courts may, however, need to assess the extent to which a party knew of and protected against such risks.").

⁶⁴ See *id.* at app. B-59 (cautioning generally about the limited perspective that hindsight provides into the nature of a party's conduct).

⁶⁵ See *id.* at app. B-61 to B-62; see also Philip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933, 952 (2012) (citing authorities holding that preservation efforts "must be viewed through the lens of proportionality" and not just the "kaleidoscope of relevance").

⁶⁶ *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436, n.10 (S.D.N.Y. 2010).

⁶⁷ See *Pippins v. KPMG L.L.P.*, No. 11 Civ. 0377(CM)(JLC), 2011 U.S. Dist. LEXIS 116427 (S.D.N.Y. Oct. 7, 2011), *aff'd*, 279 F.R.D. 245, 255–56 (S.D.N.Y. 2012) (rejecting the defendant's proportionality-based argument because it failed to consider reasonable conditions upon its request to retain only excerpts of its preserved ESI).

⁶⁸ See *Sea Change*, *supra* note 16, at 334–39 (discussing various cases).

jurisprudence on this issue is far from uniform.⁶⁹ Nevertheless, there are many cases that delineate the acceptable boundaries of preservation conduct.⁷⁰ How those cases are applied under the revised Rule 37(e) will turn—as they always have—on the facts of the case,⁷¹ the quality of counsel’s advocacy,⁷² and the court’s perception of the issues.⁷³

B. What Does “Intent to Deprive” Mean?

[24] Another likely area of dispute between litigants will be on the

⁶⁹ Compare *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746–48 (8th Cir. 2004) (holding an adverse inference instruction was appropriate given the defendant’s failure to suspend its 90-day audio recording retention policy, which resulted in the destruction of relevant evidence), with *Morris v. Union Pac. R.R.*, 373 F.3d 896, 899–902 (8th Cir. 2004) (holding an adverse inference instruction was not proper despite the defendant’s failure to suspend its 90-day audio recording retention policy, which could have resulted in the destruction of relevant evidence). See also *Victor Stanley II*, 269 F.R.D. 497, 523 (D. Md. 2010) (observing “in terms of what a party must do to preserve potentially relevant evidence, case law is not consistent across the circuits, or even within individual districts.”).

⁷⁰ See, e.g., *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1322 (Fed. Cir. 2011) (approving information retention policies that eliminate documents for “good housekeeping” purposes); *Brigham Young Univ. v. Pfizer, Inc.*, 282 F.R.D. 566, 572–73 (D. Utah 2012) (denying plaintiffs’ motion for sanctions since the evidence at issue was destroyed pursuant to defendants’ “good faith business procedures”).

⁷¹ See, e.g., *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (explaining a preservation “analysis depends heavily on the facts and circumstances of each case and cannot be reduced to a generalized checklist of what is acceptable or unacceptable.”); see also *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012) (reasoning that a “case-by-case approach” is the preferred method for determining the appropriate remedial measures for failures to preserve relevant information).

⁷² See, e.g., *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998) (affirming an order of judgment against the plaintiff despite the defendant’s destruction of relevant evidence and expressing “surprise” at the “perplexing failure” of the plaintiff’s counsel to formally move for discovery sanctions).

⁷³ See SEPT. ‘14 REPORT, *supra* note 1, at app. B-59 to B-60.

meaning of the “intent to deprive” requirement of revised Rule 37(e)(2).⁷⁴ While the draft Committee note makes clear that this specific intent requirement does not include negligent or grossly negligent conduct,⁷⁵ the question confronting clients, counsel, and the courts is what conduct does it refer to?

[25] The Committee report issued in connection with the Rule 37(e) proposed amendments explains that the “intent requirement is akin to bad faith.”⁷⁶ Despite this straightforward explanation, the draft Committee note does not take such a restrictive view.⁷⁷ Instead, the note indicates that sanctions under Rule 37(e)(2) are limited “to instances of intentional loss or destruction.”⁷⁸ Conduct that is “intentional” and which results in the spoliation of ESI is not necessarily tantamount to bad faith.⁷⁹ Indeed, that intentional conduct is a lesser standard than bad faith was confirmed by the United States Court of Appeals for the Seventh Circuit many years ago.⁸⁰ In addressing a document spoliation question, the Seventh Circuit noted the distinction between bad faith and intentional conduct: “[t]hat the documents were destroyed *intentionally* no one can doubt, but ‘bad faith’ means destruction for the purpose of hiding adverse information.”⁸¹

⁷⁴ *Id.* at app. B-56 to B-57.

⁷⁵ *Id.* at app. B-65.

⁷⁶ *Id.* at app. B-17.

⁷⁷ *See id.* at app. B-65.

⁷⁸ *Id.*

⁷⁹ *See* *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1327 (Fed. Cir. 2011) (“In determining that a spoliator acted in bad faith, a district court must do more than state the conclusion of spoliation and note that the document destruction was intentional.”).

⁸⁰ *See* *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998) (explaining the differences between bad faith and intentional conduct in connection with a defendant’s destruction of relevant information).

⁸¹ *Id.*

[26] If the “intent to deprive” requirement does encompass lesser forms of ESI spoliation than bad faith, the question then becomes what is the level of conduct punishable under Rule 37(e)(2)? The answer is that “intentional” spoliations may very well include instances where parties have been reckless or willful in their destructions of ESI.⁸² Whether that conduct is sufficient to justify the severe measures that a revised Rule 37(e) authorizes will once again turn on the nature and circumstances surrounding the spoliation.⁸³ In other words, the courts will again be left to sort out the meaning of a key provision from the rule.⁸⁴

C. How Would Rule 37(e) Apply to Cloud Computing Preservation Failures?

[27] A third unanswered question is how the revised Rule 37(e) might apply in the context of cloud computing. This is a particularly significant issue given that many organizations and individuals have moved or will move their data to cloud-based storage platforms.⁸⁵ Even though

⁸² See generally *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 463–65 (S.D.N.Y. 2010) (“*willfulness* involves intentional or reckless conduct that is so unreasonable that harm is highly likely to occur”).

⁸³ See *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012); see also *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010).

⁸⁴ See generally *Victor Stanley II*, 269 F.R.D. 497 (D. Md. 2010) (discussing cases and the challenges associated with evidence preservation confronting courts and organizational litigants).

⁸⁵ See Ned Smith, *Why More Businesses Are Using Cloud Computing*, CNBC (July 25, 2012, 1:00 PM), http://www.cnbc.com/id/48319526/Why_More_Businesses_Are_Using_Cloud_Computing, archived at <http://perma.cc/JB7Q-D2ES> (“More than eight in 10 companies currently use some form of cloud solution, and more than half plan to increase cloud investments by 10 percent or more this year . . . [and] more than half of micro (one to nine employees) and small (10 to 99 employees) businesses use cloud-based business productivity applications.”); see also Nicole Black, *Introduction*, GLOBAL CLOUD SURVEY REPORT

petabytes of data are now being stored in the cloud, there are few lawyers who possess the expertise or understanding required to preserve and produce that data in discovery.⁸⁶ These factors suggest cloud-related ESI preservation breakdowns should be expected in the coming years.⁸⁷ Given these circumstances, how should courts address cloud preservation breakdowns under the amended Rule?

[28] One recent case that provides some insight into the issues is *Brown v. Tellermate Holdings*.⁸⁸ In *Brown*, the court imposed an issue preclusion sanction on the defendant employer for failing to preserve relevant information stored in the cloud.⁸⁹ The plaintiffs had sought various categories of data from their former employer in order to substantiate their age discrimination claims.⁹⁰ In particular, the plaintiffs—who previously worked as sales representatives at the company—requested their former employer produce sales records maintained by the employer on cloud provider Salesforce.com to establish that they either met or exceeded their

2012, LEGAL IT PROFESSIONALS 4, 7, *available at* <http://www.legalitprofessionals.com/wpcs/cloudsurvey2012.pdf>, *archived at* <http://perma.cc/HXK7-ZS2H> (“[N]early all respondents acknowledged that cloud computing would ultimately overtake on-premise computing in the legal industry.”); SEPT. ‘14 REPORT, *supra* note 1, at app. B-15.

⁸⁶ See Philip Favro, *Mind Over Matters: Q & A with eDiscovery and Litigation Guru Craig Ball*, RECOMMIND (Aug. 7, 2014), <http://www.recommind.com/blog/q-ediscovery-litigation-guru-craig-ball>, *archived at* <http://perma.cc/4D7H-7ZTF> (observing that most lawyers generally lack the training and are unprepared to “preserve and produce data stored with cloud providers, maintained on mobile devices, or exchanged on social networking sites”).

⁸⁷ *See id.*

⁸⁸ *Brown v. Tellermate Holdings Ltd.*, No. 2:11-cv-1122, 2014 U.S. Dist. LEXIS 90123, *4–6, *27 (S.D. Ohio July 1, 2014).

⁸⁹ *Id.* at *72–74.

⁹⁰ *Id.* at *9–10, *70–71.

sales quotas in comparison to younger employees.⁹¹

[29] While the employer’s counsel issued a “general directive” that relevant documents be kept for litigation, neither the employer nor its lawyers took meaningful follow-up steps to ensure the responsive cloud-stored data was preserved.⁹² For example, the employer did not export the requested data from Salesforce.com and neglected to back up that information.⁹³ Nor did the employer keep the plaintiffs’ Salesforce.com account information.⁹⁴ Instead, it repurposed these accounts, thereby enabling other employees to modify or revise the data.⁹⁵ Finally, the employer did not ask Salesforce.com for a back-up of the requested account data until after the cloud provider recycled the data pursuant to its own retention schedule.⁹⁶ All of which compromised and spoliated the requested information that ultimately could have established (or negated) the plaintiffs’ claims.⁹⁷

[30] Would a revised Rule 37(e) change the outcome in *Brown*? The employer almost certainly would not have escaped sanctions under the amended Rule since it “failed to take reasonable steps to preserve”⁹⁸ the relevant Salesforce.com ESI and due to the lack of replacement evidence.⁹⁹ Given the importance of the spoliated evidence to the

⁹¹ *Id.*

⁹² *Id.* at *56–58.

⁹³ *Id.* at *24–26.

⁹⁴ *Brown*, 2014 U.S. Dis. LEXIS 90123 at *21–23.

⁹⁵ *Id.*

⁹⁶ *Id.* at *57–58.

⁹⁷ *See id.* at *72–74.

⁹⁸ SEPT. ‘14 REPORT, *supra* note 1, at app. B-56, B-60 to B-62.

⁹⁹ *See Brown*, 2014 U.S. Dist. LEXIS 90123, at *72–74.

plaintiffs' claims and the court's other findings on the issues,¹⁰⁰ the issue preclusion sanction would likely be an appropriate curative measure under the updated version of Rule 37(e)(1).¹⁰¹

[31] Indeed, the new sanctions framework suggests the only change in *Brown* might be in the gravity of the sanction issued against the employer. Was the employer's preservation failure tantamount to an "intent to deprive"¹⁰² the plaintiffs of the Salesforce.com ESI under amended Rule 37(e)(2)? While the employer unquestionably allowed the ESI to be destroyed, its conduct seems more akin to recklessness than bad faith,¹⁰³ *i.e.*, the purposeful concealment of adverse information.¹⁰⁴ And yet, given the ambiguity created by the draft committee note, such reckless conduct arguably could satisfy the "intentional loss or destruction" language.¹⁰⁵

[32] Though impossible to predict how a court would precisely rule in this instance, it is clear that the new sanctions framework would not dramatically change the analysis of the matter. In essence, courts will continue to adjudicate ESI preservation failures—regardless of whether they occur in the cloud or in more conventional storage locations—based on the traditional notions of reasonableness and proportionality.¹⁰⁶

¹⁰⁰ See *id.* at 66–74.

¹⁰¹ See SEPT. '14 REPORT, *supra* note 1, at app. B-55 to B-57, B-63 to B-64.

¹⁰² *Id.* at app. B-55 to -57, B-64 to B-67.

¹⁰³ See *Brown*, 2014 U.S. Dist. LEXIS 90123, at *69–70.

¹⁰⁴ See *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998).

¹⁰⁵ See SEPT. '14 REPORT, *supra* note 1, at app. B-65.

¹⁰⁶ This line of reasoning appears to be equally applicable to ESI preservation failures on mobile devices. See Philip Favro, *The Impact of Cloud Computing and Mobile Devices on Litigation Holds*, LAW JOURNAL NEWSLETTERS (Jan. 2015), available at http://www.lawjournalnewsletters.com/issues/ljn_legaltech/31_9a/news/the_impact_of_cloud_computing_and_mobile_devices_on_litigation_holds160645-1.html, archived at <http://perma.cc/MB8Z-FAQ8> (describing the preservation challenges associated with data stored on mobile devices).

V. CONCLUSION

[33] While not every issue associated with ESI preservation failures has been addressed by the Rule 37(e) proposal, it is unrealistic to expect that any rule could do so. Moreover, the revised rule appears to have resolved many of the shortcomings with the current version. By creating a basic analytical framework, widening the analysis to ensure a broad set of factors are considered in connection with preservation conduct, and establishing a uniform standard for severe sanctions, lawyers may finally have a workable paradigm to provide straightforward advice to clients on ESI preservation questions.