NOTE

FEDERAL RULE OF CIVIL PROCEDURE 37(e): SPOILING THE SPOLIATION DOCTRINE

I. INTRODUCTION

It certainly cannot be debated that technology has brought about profound change to all aspects of modern society. The legal world has not been immune to the changes brought about by technology, nor to the nuanced questions that have arisen in its wake. In particular, the discovery process in litigation has been significantly impacted by the rise of new technology. In fact, technology has had so momentous an influence on the discovery process that the use of technology during the discovery process has become a practice in and of itself, known today as electronic discovery ("e-discovery").

In 2007, the Federal Rules of Civil Procedure ("FRCP") were amended in an attempt to address the problematic issues associated with e-discovery.[1] Most importantly, for purposes of this Note, the amendments attempted to address the issue of the failure of a party to produce documents requested in discovery because they have been destroyed in conjunction with the use of an electronic information system. Rule 37(e) of the FRCP was designed to create a "safe harbor" for parties that have inadvertently destroyed documents requested in a pending litigation. This safe harbor prohibits courts from sanctioning parties who fail to produce documents "as a result of the routine, good-faith operation of an electronic information system."[2]

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1. *See* Thomas Y. Allman, *Rule 37(f) Meets Its Critics: The Justification for a Limited Preservation Safe Harbor for ESI*, 5 NW. J. TECH. & INTELL. PROP. 1, 3 (2006) (citing JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, at Rules App. C-83, *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf).

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

At first glance, Rule 37(e) is a welcome addition to the Federal Rules because of its attempt to alleviate the problem of inadvertent document destruction resulting from use of a particular electronic information system.[3] However, Rule 37(e) must be considered in light of the long recognized common law doctrine of spoliation of evidence, whereby parties are sanctioned for the destruction of requested documents during discovery.[4] When analyzed against this backdrop, it becomes clear that Rule 37(e) does little to efficiently ease the problems associated with document destruction that occurs during electronic discovery.

This Note posits that courts have interpreted and applied Rule 37(e) in such a way that renders it inconsistent with the theoretical underpinnings of the spoliation doctrine, as well as the stated purposes of the FRCP; that is, that the Rules are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[5] Because Rule 37(e) has been ineffective, it should be removed from the FRCP. Part II offers a brief overview of the spoliation doctrine and the role it plays in discovery. Part III is a discussion of the extensive role of electronic information systems in discovery as well as the complications that this has caused for parties. Part IV provides an analysis of Rule 37(e) and the "safe harbor" provision that it creates. Finally, Part V is an overview of the impact of Rule 37(e) on discovery. It argues that Rule 37(e) should be removed from the FRCP, because the traditional spoliation doctrine is sufficient for courts to impose sanctions on parties for violations of the discovery process, and instead, the focus must shift to firmly establishing the confines of the duty to preserve potentially relevant evidence.

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3. *See* Allman, *supra* note 1, at 3. Note: An amendment, effective Dec. 1, 2007, restyled the FRCP and relocated Rule 37(f) to 37(e). 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 n.1 (2008). As such, references in the sources cited herein to Rule 37(f) refer to the current Rule 37(e).

4. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (defining spoliation as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation").

5. FED. R. CIV. P. 1.

II. HISTORY AND APPLICATION OF THE SPOLIATION DOCTRINE

A. Introduction

Spoliation is "[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usu[ally] a document."[6] The spoliation doctrine is invoked when a party alleges that its opposing party has caused a crucial piece of evidence to be unavailable.[7] If an opposing party is responsible for the destruction of relevant evidence, it is within the trial court's discretion to impose sanctions on that party.[8]

As a general rule, the trial court is afforded broad authority in its determination as to which sanction is to be imposed on a party for spoliation.[9] To determine the severity of sanctions, the court weighs several countervailing factors,[10] one of which is the prejudice to the opposing party resulting from the spoliation.[11] This prejudice is regarded as being more significant than other factors, most notably the state of mind of a party alleged to have destroyed the documents.[12]

FRCP 37(b)(2) explicitly authorizes courts to impose sanctions on a party for failure to comply with a discovery order.[13] This provision gives courts the authority to sanction parties that destroy documents in direct violation of a discovery order.[14] The inherent authority of courts is also recognized as an additional source of power for courts to impose sanctions.[15] This enables courts to impose sanctions on those parties who destroy evidence in contexts other than in direct violation of a discovery order.[16] The inherent power of the courts to sanction is limited by the requirement that sanctions be imposed when a party acts in bad faith, in

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6. BLACK'S LAW DICTIONARY 1437 (8th ed. 2004).

7. *E.g.*, Moghari v. Anthony Abraham Chevrolet Co., 699 So. 2d 278, 279 (Fla. Dist. Ct. App. 1997).

8. *See, e.g.*, Patton v. Newmar Corp., 538 N.W.2d 116, 119 (Minn. 1995).

9. 27 C.J.S. *Discovery* § 182 (2009).

10. James T. Killelea, Note, *Spoliation of Evidence: Proposals for New York State*, 70 BROOK. L. REV. 1045, 1055 (2005).

11. *Id.* Other factors considered in determining sanctions include the "nature and significance of the interests promoted by the actor's conduct, . . . the character of the means used by the actor; and . . . the actor's motive." *Id.*

12. *See* Huhta v. Thermo King Corp., No. A03-1961, 2004 Minn. App. LEXIS 722, at *9-10 (Minn. Ct. App. June 29, 2004).

13. FED. R. CIV. P. 37(b)(2)(A) ("If a party or a party's officer, director, or managing agent . . . fails to obey an order to provide or permit discovery . . . the court . . . may issue further just orders.").

14. *Id.*

15. Chambers v. NASCO, Inc., 501 U.S. 32, 43-51 (1991).

16. *Id.* at 45-46.

order to allow the courts to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[17]

The spoliation doctrine interplays with the duty to preserve, a duty which stems from the common law obligation to preserve evidence when a party "has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to the future litigation."[18] Indeed, "a finding of spoliation is necessarily contingent upon the determination that a litigant had the duty to preserve the documents in question."[19]

The spoliation doctrine has generally been applied to punish those parties who destroy relevant documents in bad faith.[20] In essence, where the duty to preserve potentially relevant evidence clearly exists, and that duty is disregarded and consequently prevents the production of relevant documents, the court sees fit to punish the party responsible for destroying those documents.[21] The rationale for this punishment is rooted in the theory that the destruction of documents hinders the discovery process and unfairly prejudices the requesting party because potentially relevant evidence is unavailable to them due to the conduct of their adversary.[22] As such, the party in the wrong must be held accountable for its actions.[23]

B. The Duty to Preserve Under the Spoliation Doctrine

A party's duty to preserve potentially relevant documents is paramount to understanding the spoliation doctrine.[24] The concept of spoliation springs from the presumption that the documents at issue were destroyed when litigation was either pending or reasonably

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17. *Id.* at 43, 49 (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962)).

18. Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001).

19. Michael R. Nelson & Mark H. Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery*, 12 RICH. J.L. & TECH. 14, 19 (2006); *see also* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("It goes without saying that a party can only be sanctioned for destroying evidence if it had a duty to preserve it.").

20. *See* Nelson & Rosenberg, *supra* note 19, at 15.

21. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

22. *Id.*

23. *Id.*

24. The concept of the "duty to preserve" is founded on the idea that parties to litigation are required to preserve documents or other materials that may be requested as potential evidence during the discovery process. *See, e.g.*, Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994); Green Leaf Nursery v. E.I. DuPont De Nemours & Co., 341 F.3d 1292, 1308 (11th Cir. 2003). This duty is long standing, widely recognized, and established in federal law. *See* Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001); Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991).

foreseeable.[25] It is this context, where litigation has commenced, or can be expected to commence, that gives rise to the duty to preserve.[26]

When a complaint has been filed, the duty to preserve is unquestionably imposed on parties.[27] The filing of the complaint provides the parties with express notice that documents that are relevant to that litigation must be preserved, simply by virtue of the fact that litigation has commenced.[28] Once pleadings are filed, it is presumed that because parties have been given notice of the issues to be litigated, it is within reason that the parties are, or ought to be, aware of what information and what sorts of documents may be categorized as relevant at later stages of the litigation, and most notably, during discovery.[29]

Beyond the obvious situation where a party is put on notice to preserve potential evidence by the initiation of litigation through the filing of a complaint, it is well established that "[t]he duty to preserve evidence is triggered when an organization reasonably anticipates litigation."[30] Courts have held that reasonable anticipation of litigation is based on the occurrence of "significant signs of imminent litigation prior to the filing of a complaint" and have only imposed a duty to preserve evidence on a party "when the signs are clear."[31] This duty is assessed by the relevance of potential evidence in light of the foreseeability of potential litigation, from the perspective of a reasonable person.[32]

To date, courts have not agreed on a bright line rule for when these "significant signs," which trigger the duty to preserve, exist.[33] However, some commonly recognized signs of imminent litigation are communication with adverse parties and/or their counsel prior to the commencement of litigation,[34] the existence of litigation between other,

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25. *Goodyear Tire & Rubber Co*., 167 F.3d at 779 (defining spoliation as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence *in pending or reasonably foreseeable litigation*" (emphasis added)).

26. *See* Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998).

27. *See, e.g.*, Computer Assoc. Int'l, Inc. v. Am. Fundware, Inc., 133 F.R.D. 166, 168-70 (D. Colo. 1990) (sanctioning a default judgment issued against a party that knowingly destroyed evidence after a litigation between the parties had commenced).

28. FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court.").

29. *See* Maria Perez Crist, *Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information*, 58 S.C. L. REV. 7, 18 (2006).

30. *E.g.*, China Ocean Shipping Co. v. Simone Metals, Inc., No. 97 C 2694, 1999 U.S. Dist. LEXIS 16264, at *12 (N.D. Ill. Sept. 30, 1999) ("The duty to preserve evidence includes any relevant evidence over which the non-preserving entity had control and reasonably knew or could reasonably foresee was material to a potential legal action.").

31. Crist, *supra* note 29, at 18.

32. Boyd v. Travelers Ins. Co., 652 N.E.2d 267, 271 (Ill. 1995).

33. Crist, *supra* note 29, at 18 ("Courts are not in agreement as to when a party should be charged with sufficient notice of a claim to trigger the preservation obligation.").

34. *See* Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1446 (C.D. Cal.

non-related parties based on the same subject matter as contained in the destroyed documents,[35] an investigation into a party's actions,[36] and the filing of a complaint by an adverse party with a government agency.[37]

Thus, the duty to preserve is an affirmative duty imposed on parties to refrain from destroying documents, tapes, and the like where it is reasonably foreseeable that they may be requested in discovery.[38] It is the breach of this duty to preserve potentially material information that invokes application of the spoliation doctrine based on the actions of the party that destroyed these kinds of documents and allows courts to impose sanctions for the violation of the duty.[39]

C. Sanctions for Spoliation

The consequences of a party's violation of its duty to preserve may be far-reaching. At its most basic level, spoliation by a party has a negative impact not only on a particular litigation, but on the justice system as a whole.[40] Spoliation strikes at the heart of the most fundamental assumptions that underlie the American justice system, as it "undermines the efficacy of the adversarial system" because it "prevents a party from adequately proving or defending a claim at trial."[41]

In order to combat and deter spoliation, courts have the discretion to impose sanctions against parties that destroy potentially relevant documents.[42] These sanctions are to be imposed in light of three underlying purposes: deterrence from engaging in spoliation,

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1984) (stating that a notice of the duty to preserve was triggered by pre-litigation communications between counsel for the parties).

35. United States *ex rel.* Koch v. Koch Indus., 197 F.R.D. 463, 482 (N.D. Okla. 1998) (noting that a party that destroyed documents had a duty to preserve documents and tapes based on prior litigation between other parties on the same subject matter as was contained in the destroyed documents).

36. E*TRADE Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582, 589 (D. Minn. 2005) (noting that the duty to preserve potentially relevant documents arose when party received notice that a potentially fraudulent loan scheme was being investigated by a bankruptcy court).

37. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (holding that the duty to preserve potentially relevant documents was triggered when an employee filed an employment discrimination charge with the EEOC).

38. *See* FED. R. CIV. P. 26(b)(1) (defining the scope of pre-trial discovery requests as "any matter relevant to the subject matter involved in the action" so long as it appears to be "reasonably calculated to lead to the discovery of admissible evidence"). Thus, documents that are destroyed fit within this standard, and may lead to the imposition of sanctions for spoliation.

39. *See* Computer Assoc. Int'l, Inc. v. Am. Fundware, Inc., 133 F.R.D. 166, 168 (D. Colo. 1990).

40. *See* Crist, *supra* note 29, at 43 ("The American justice system is premised on the fair adjudication of disputes through both sides obtaining and presenting the relevant evidence.").

41. Killelea, *supra* note 10, at 1046.

42. *See* E*TRADE Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582, 586 (D. Minn. 2005).

punishment for a wrongful act, and remediation.[43] Each of these purposes attempts to cure the prejudice that resulted to the injured party as a consequence of the spoliation by its adversary.[44]

Sanctions for spoliation, and the circumstances under which they are imposed, vary across jurisdictions.[45] However, after establishing that the duty to preserve has been breached, courts traditionally make the determination as to whether sanctions are warranted based on the three-part test set forth in *Schmid v. Milwaukee Electric Tool Corp.*[46] In *Schmid*, the Third Circuit held that sanctions should be imposed based on "the degree of fault of the party who altered or destroyed the evidence; . . . the degree of prejudice suffered by the opposing party; and . . . whether there is a lesser sanction that will avoid substantial unfairness to the opposing party."[47] Additionally, in particularly serious situations, courts also consider whether the sanctions are likely to deter future parties from similar conduct.[48]

Once a court determines that some sort of sanction is warranted for a party's destruction of documents,[49] that court has "broad authority" to impose a sanction which sufficiently implements the established underpinnings of the spoliation doctrine.[50] Courts are afforded this broad authority in order to enable them to "level[] the evidentiary playing field and . . . sanction[] the improper conduct."[51] It has been held that sanctions ought to be imposed so that the underlying purposes of the spoliation doctrine are served, while at the same time, crafting the least drastic sanction available.[52] The imposition of sanctions is reviewed by higher courts for abuse of discretion, and absent such abuse, sanctions will be upheld.[53]

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43. *See* West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

44. Patton v. Newmar Corp., 538 N.W.2d 116, 119 (Minn. 1995).

45. Killelea, *supra* note 10, at 1046.

46. 13 F.3d 76, 79 (3d Cir. 1994).

47. *Id.*; *see also* Crist, *supra* note 29, at 44 ("To determine whether sanctions are warranted, federal courts generally follow the three part test outlined in *Schmid v. Milwaukee Electric Tool Corp*. . . . .").

48. *Schmid*, 13 F.3d at 79; Crist, *supra* note 29, at 44.

49. *See* Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 748 (8th Cir. 2003) (noting that a finding that a sanction is warranted for destruction of documents is contingent upon a finding of prejudice to the opposite party).

50. Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) ("[A] district court has broad discretion in choosing an appropriate sanction for spoliation . . . ."); *see also* FED. R. CIV. P. 37(b)(2) (authorizing court imposed sanctions for violations of discovery orders).

51. Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995).

52. *See* Hartford Ins. Co. v. Am. Automatic Sprinkler Sys., Inc., 201 F.3d 538, 543-44 (4th Cir. 2000).

53. Dillon v. Nissan Motor Co., 986 F.2d 263, 267 (8th Cir. 1993).

While a wide range of sanctions may be—and have—been imposed by the courts, "[t]he most frequent sanctions for the destruction of evidence include fines and adverse inference jury instructions."[54] Other common sanctions include dismissal of a claim, issue preclusion, or summary judgment for the party prejudiced by the destruction of evidence.[55] While a court is not necessarily required to impose the "least onerous" sanction available, the sanction that a court chooses to impose must be the most appropriate under the circumstances of the particular case[56] and must be necessary in order to redress abuse to the judicial system caused by the destruction of documents by a party.[57]

D. Crafting Sanctions for Spoliation of Evidence

Trial courts have broad discretion in the imposition of sanctions for spoliation of evidence, and must craft those sanctions in an effort to redress abuses to the justice system by the party that caused the documents to be destroyed.[58]

As a general rule, the sanctions imposed on a party that destroys potentially relevant documents are based on a variety of factors,[59] and depend largely on the degree of prejudice resulting to the opposing party as a consequence of the destroying party's conduct.[60] When imposing a sanction on a party responsible for the destruction of potentially relevant documents, courts seek to fulfill the purposes of sanctions,[61] while at the same time, selecting the least onerous sanction, balanced against the "willfulness of the destructive act and the prejudice suffered by the victim."[62]

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54. Crist, *supra* note 29, at 43 (footnote omitted); *see also* Killelea, *supra* note 10, at 1056. When an adverse inference instruction is imposed as a sanction against a party, the court "instructs the jury to presume that destroyed evidence, if produced, would have been adverse to the party that destroyed it." *Id.*

55. Killelea, *supra* note 10, at 1052; *see also* FED. R. CIV. P. 37(b)(2) (listing sanctions available for the court to impose in the event of a violation of a discovery order).

56. Keefer v. Provident Life & Accident Ins. Co., 238 F.3d 937, 941 (8th Cir. 2000).

57. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 44-45 (1991) (noting that the power of the courts to impose sanctions is limited to that necessary to redress conduct "which abuses the judicial process").

58. *See supra* text accompanying notes 42-55.

59. *See* Killelea, *supra* note 10, at 1055 (noting that courts typically attempt to balance a number of factors in determining appropriate sanctions).

60. *See* Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 748 (8th Cir. 2004) (stating that the imposition of sanctions against a party for destroying documents is only merited when the other party is able to demonstrate that they have suffered prejudice as a result of the destruction of evidentiary materials).

61. Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995).

62. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 3.16 (Supp. 2005).

In crafting sanctions for spoliation, there is significant attention paid to the prejudicial effect of the destructive act on the innocent party.[63] When a court makes the determination as to which sanction to impose on a spoliating party, it must keep in mind that, absent a sanction, "a spoliating party would obtain an unfair advantage and un-level playing field when prosecuting or defending its case."[64] Thus, in crafting sanctions, the desired result of the court should be to place the prejudiced party back in the position it would have been, absent the spoliation.[65]

Sanctions for spoliation are not dependent on a particular state of mind at the time of the act that destroyed the documents.[66] That is, the application of sanctions does not require a finding of bad faith on the part of the party responsible for destroying the documents at issue in a particular case.[67] Instead, it is the relationship between the degree of prejudice suffered by the innocent party and the mindset of the responsible party when engaging in the destructive acts that is controlling in the imposition of spoliation sanctions on a party.[68] These countervailing factors are balanced in order to determine an appropriate sanction in particular circumstances.[69]

The rationale for this methodology is based on the theory that if a party is willing to take the risk of getting caught and sanctioned by the court for destroying relevant documents or other materials, the inference may be drawn that these destroyed documents are likely to harm that

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63. Daniel Renwick Hodgman, Comment, *A Port in the Storm?: The Problematic and Shallow Safe Harbor for Electronic Discovery*, 101 NW. U. L. REV. 259, 273 (2007) ("[E]videntiary sanctions are predominantly compensatory, allowing courts to 'level the playing field' when one party destroys evidence that circumstances suggest would aid the non-spoliating party's case.").

64. *Id.* at 272; *see also* Trigon Ins. Co. v. United States, 204 F.R.D. 277, 284, 291 (E.D. Va. 2001) (finding that the U.S. government's failure to preserve certain documents relating to communication between experts and consultants materially prejudiced the plaintiff's ability to cross-examine witnesses).

65. *Trigon Ins. Co.*, 204 F.R.D. at 287.

66. *See* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 113 (2d Cir. 2002) ("[D]iscovery sanctions . . . may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence."); *see also* Hodgman, *supra* note 63, at 273 ("[C]ourts generally grant evidentiary sanctions regardless of the spoliating party's state of mind; the evidence can be missing due to negligent, intentional or reckless conduct.").

67. Although a finding of bad faith on the part of the destructing party is not necessary, "it is definitely the primary factor to consider in weighing the appropriateness of the instruction." Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, 1997 U.S. Dist. LEXIS 24068, at *22 (E.D. Ark. Aug. 29, 1997).

68. *See* Killelea, *supra* note 10, at 1058 ("[A]s the culpability of the spoliating party decreases (from intent to innocence), so too does the appeal of the punitive and deterrent purpose underlying the [sanction].").

69. *Trigon Ins. Co*., 204 F.R.D. at 286, 288.

party's case.[70] The balancing of culpability against resultant prejudice in relation to application of sanctions is especially important in the context of the adverse inference instruction sanction,[71] which is considered to be the most common sanction for spoliation.[72] Generally, this particular sanction will only be imposed on a party as a consequence of a bad faith, intentional act.[73] An adverse inference instruction permits the court to allow the jury to make the inference that the destructive action was undertaken in order to suppress the truth or purposely keep damaging evidence out of the hands of an opposing party.[74]

For example, in *Wiginton v. Ellis*,[75] an adverse inference instruction was imposed against a party based on the trial court's determination that the party acted in bad faith in its destruction of relevant documents.[76] The trial court determined that

> the facts surrounding the destruction of the documents are evidence that [the party] knew that it had a duty to preserve relevant documents. Its failure to change its normal document retention policy, knowing that relevant documents would be destroyed if it did not act to preserve these documents, is evidence of bad faith.[77]

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70. *See* Charles R. Nesson, *Incentives to Spoilate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 795-96 (1991) ("The risk of being caught suppressing evidence clearly depends on the particular type of evidence and the particular circumstances of the case."); *see also Trigon Ins. Co.*, 204 F.R.D. at 284 (quoting Anderson v. Nat'l R.R. Passenger Corp., 866 F. Supp. 937, 945 (E.D. Va. 1994)).

71. When an adverse inference instruction is given by a judge to the jury, the jury is permitted, although not required, to assume that the destroyed evidence would have been unfavorable to the destructing party's case. *E.g.*, Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998); *see also* Crist, *supra* note 29, at 47 ("In determining whether the [adverse] inference [instruction] should be awarded, a key consideration is the level of culpability of the party responsible for the destruction.").

72. *See supra* text accompanying note 54.

73. Courts should look to the facts surrounding the destruction of documents to determine if they support an inference of bad faith. S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R. Co., 695 F.2d 253, 258-59 (7th Cir. 1982). "Bad faith" destruction of documents means that documents were destroyed "for the purpose of hiding adverse information." Mathis v. John Morden Buick, Inc., 136 F.3d 1153, 1155 (7th Cir. 1998). Additionally, a determination that a party acted in bad faith depends, in large part, on a breach of the duty to preserve relevant information. *See id.*

74. *See, e.g.*, Lewy v. Remington Arms Co., 836 F.2d 1104, 1111-12 (8th Cir. 1988) (stating the general proposition that an adverse inference instruction is appropriate where evidence was destructed intentionally, indicating fraud or a desire to hide the truth); Gumbs v. Int'l Harvester, Inc., 718 F.2d 88, 96 (3d Cir. 1983) (the context in which to apply an adverse instruction inference arises only where the destruction of evidence was intentional and motivated by some sort of fraudulent intent, and the sanction ought not apply in a context absent some such intent).

75. No. 02 C 6832, 2003 U.S. Dist. LEXIS 19128 (N.D. Ill. Oct. 27, 2003).

76. *Id.* at *21-23.

77. *Id.* at *23-24.

Thus, it is clear that in imposing sanctions against a party for spoliation, the court focuses on placing the prejudiced party back in the evidentiary position it would have been in, but for the opposing party's actions.[78] However, at the same time, sanctions must be imposed in such a way to serve the "evidentiary, prophylactic, punitive, and remedial rationales" underlying spoliation sanctions.[79]

III. FROM CUTTING EDGE TO COMMONPLACE: THE RISE IN THE PREVALENCE OF ELECTRONICALLY STORED INFORMATION AND ELECTRONIC DISCOVERY

A. From Paper into Thin Air: The Prominent Use of Electronic Information Systems

The changes that technology has brought to society, especially in the last half of the twentieth century, cannot be understated. While this certainly has resulted in numerous benefits to society and increased efficiency in many areas, many perplexing issues have arisen, especially those surrounding e-discovery.[80] The use of electronic information systems has created issues in discovery regarding the deletion of documents stored in such systems, as well as issues surrounding the questions raised by the information contained in metadata.[81]

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78. Skeete v. McKinsey & Co., No. 91 Civ. 8093, 1993 U.S. Dist. LEXIS 9099, at *15 (S.D.N.Y. July 7, 1993) (recognizing that a sanction should serve the function of restoration of the prejudiced party to the position it would have been in had the spoliation not occurred).

79. Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998).

80. *See, e.g.*, Robert D. Brownstone, *Preserve or Perish; Destroy or Drown—eDiscovery Morphs Into Electronic Information Management*, 8 N.C. J.L. & TECH. 1, 3 (2006) ("[O]ver the past few years, some unique electronic information issues—such as preservation obligations and cost-shifting—have increasingly crept into civil litigation.").

81. *See id.* at 2; *see also* THE SEDONA CONFERENCE WORKING GROUP ON ELEC. DOCUMENT RETENTION & PROD. (WG1), THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 4 (2d ed. 2007), *available at* http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf [hereinafter SEDONA PRINCIPLES]. Metadata is defined as:

> Data typically stored electronically that describes characteristics of ESI, found in different places in different forms. Can be supplied by applications, users or the file system. Metadata can describe how, when and by whom ESI was collected, created, accessed, modified and how it is formatted. Can be altered intentionally or inadvertently. Certain metadata can be extracted when native files are processed for litigation. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Metadata is generally not reproduced in full form when a document is printed to paper or electronic image.

THE SEDONA CONFERENCE WORKING GROUP ON ELEC. DOCUMENT RETENTION & PROD. (WG1) RFP+ GROUP, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION

In recent years, the amount of electronically stored information ("ESI") has vastly surpassed the amount of information stored as tangible paper documents. While estimates of an exact figure vary, with regard to corporate entities, generally, ninety-three percent of information is generated in electronic form.[82]

Consequently, ESI makes up a great deal of the information stored as potentially relevant evidence in litigation.[83] Its increasingly significant role in discovery has made ESI the subject of many discovery disputes relating to the discovery process.[84] The combination of the enormous amount of ESI and today's "litigious culture," which "creates the likelihood that many corporate activities will eventually be the subject of litigation,"[85] creates a great deal of confusion in discovery. Perhaps what is most perplexing and difficult to reconcile in terms of ESI is the fact that the capabilities of metadata result in a situation in which files that are "deleted" from a computer are not actually destroyed, but in fact, remain stored within an electronic information system.[86]

This, in turn, leads to an interesting dilemma for the courts. Because of the metadata capabilities of ESI, information that is believed to have been destroyed remains tucked away, hidden on a hard drive in an electronic storage system, and thus actually remains available.[87] However, when a party fails to produce electronic documents that it has

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MANAGEMENT 33 (2d ed. 2007), *available at* http://www.thesedonaconference.org/content/miscFiles/TSCGlossary_12_07.pdf.

82. Kenneth J. Withers, National Workshop for United States Magistrate Judges: Electronic Discovery (June 12, 2002), *available at* http://www/kenwithers.com/articles/minneapolis/index.html; *see also* SEDONA PRINCIPLES, *supra* note 81, at 2 (stating that there is "substantially more electronically stored information than paper documents, and electronically stored information is created and replicated at much greater rates than paper documents").

83. It should be noted, as a threshold matter, that ESI is discoverable under the Federal Rules of Civil Procedure, and the same rules that apply to paper documents apply to ESI. FED. R. CIV. P. 34(a)(1)(A) (stating that electronically stored information is subject to discovery). *E.g.*, Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652 (D. Minn. 2002) (stating that Rule 34 applies to electronic data); Simon Prop. Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 640 (S.D. Ind. 2000) (stating that computer records, including those that are "deleted," are discoverable under Rule 34).

84. Nelson & Rosenberg, *supra* note 19, at 17 ("[M]any corporations are faced with the Hobson's choice of either preserving vast quantities of electronic data without any indication that the data will ever be relevant to litigation or deleting such data while running the risk of potential spoliation sanctions.").

85. *Id.*

86. Andrew Moerke Mason, Note, *Throwing Out the (Electronic) Trash: True Deletion Would Soothe E-Discovery Woes*, 7 MINN. J. L. SCI. & TECH. 777, 779 (2006).

87. *See id.*; Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 214 (S.D.N.Y. 2003) ("Finding a suitable sanction for the destruction of evidence in civil cases has never been easy. Electronic evidence only complicates matters. As documents are increasingly maintained electronically, it has become easier to delete or tamper with evidence (both intentionally and inadvertently) and more difficult for litigants to craft policies that ensure all relevant documents are preserved.").

a duty to preserve, courts are faced with the challenge of attempting to "strike a balance between the general duty to preserve discovery and the impracticality of preserving" various types of electronic data.[88]

B. Striking a Balance, or Striking Out?: Document Retention Policies and the Scope of the Duty to Preserve

The scope of the duty to preserve relevant documents as potential evidence in litigation takes an interesting twist in light of e-discovery.[89] Substantial challenges have arisen based on the relationship between the sheer volume of electronic information system storage capabilities,[90] corporate document retention policies,[91] and the duty to preserve relevant evidence when litigation is imminent.[92] Consequently, "[c]ourts have found it increasingly difficult to reconcile the unique nuances of electronic discovery with the existing federal rules."[93]

Thus, trial courts are left with the novel and complicated task of determining how to apply the duty to preserve evidence in light of these circumstances brought on by technology.[94] As an additional difficulty, courts must often make this decision without a concrete understanding of electronic information storage.[95]

Contemporary plaintiffs are often aware of the massive information storage abilities of an electronic information storage system, as well as the capabilities of these systems to retrieve "deleted" data.[96] As a result, their adversaries are often burdened with onerous discovery requests.[97]

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88. Nelson & Rosenberg, *supra* note 19, at 20.

89. *See supra* Part II.B; *see also* Nelson & Rosenberg, *supra* note 19, at 25.

90. *See* SEDONA PRINCIPLES, *supra* note 81, at 2-5 (stating that actions to duplicate or back up a file (in essence, forwarding an e-mail, moving a word processing file) only take seconds and create enormous amounts of duplicative, yet still discoverable, information that can result in unmanageable discovery costs and increased chances for spoliation claims).

91. *See* Nelson & Rosenberg, *supra* note 19, at 16.

92. *Id.* at 17.

93. Rena Durrant, Note, *Spoliation of Discoverable Electronic Evidence*, 38 LOY. L.A. L. REV. 1803, 1806 (2005).

94. Hodgman, *supra* note 63, at 275 ("Modern electronic discovery is fundamentally different in many respects from more traditional, paper-based discovery. Electronic discovery confounds the traditional frameworks established by both the Civil Rules and discovery sanctions.").

95. Crist, *supra* note 29, at 23 (explaining the lack of familiarity among courts and litigants of the creation, modification, and storage of electronic data, and its consequences on the duty to preserve and the discovery process as a whole).

96. Deleted data generally remains on a computer hard drive until the space is actually overwritten, thus rendering it still potentially discoverable. Brian Organ, *Discoverability of Electronic Evidence*, 2005 SYRACUSE SCI. & TECH. L. REP. 5, 8.

97. Sasha K. Danna, Note, *The Impact of Electronic Discovery on Privilege and the Applicability of the Electronic Communications Privacy Act*, 38 LOY. L.A. L. REV. 1683, 1688-89 (2005) (explaining how "discovery requests seeking electronic data are more likely to be unduly

The requests, although falling within the bounds set by the FRCP,[98] are burdensome because of the exceedingly high costs that may result from compliance with the discovery request, as well as the difficulty in achieving the restoration of "deleted" documents.[99]

In response to the potential for burdensome document requests, many corporations adopt document retention policies whereby "[e]lectronic data is routinely deleted from a business' 'active' computer system."[100] Herein, however, creates the problem faced by courts, as these automated deletion features gave rise to spoliation claims in instances where some of the information encompassed in an automatic purging of documents was "relevant," and thus within the duty to preserve potential evidence in the face of litigation.[101] The courts, then, must attempt to strike a balance between the need to sanction parties for spoliation of evidence, while at the same time, keeping in mind that, "[i]n a world where the very act of deletion is integral to normal operations, it is unfair to treat the inadvertent or negligent loss of [ESI] as indicative of intent to destroy evidence and to thereby infer spoliation."[102]

Prior to the 2007 amendments to the FRCP, the application of the duty to preserve by courts in e-discovery conflicts was unclear and varied across the courts.[103] Consequently, it became increasingly

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burdensome than those seeking paper documents").

98. FED. R. CIV. P. 26(b)(1) (noting the scope of discovery extends to all documents that are "reasonably calculated to lead to the discovery of admissible evidence" at trial); FED. R. CIV. P. 34(a)(1)(A) (stating electronically stored information is discoverable).

99. *See, e.g.*, Lisa M. Arent et al., *Discovery Preserving, Requesting & Producing Electronic Information*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 131, 148 (2002) (stating that the cost of reviewing backup tapes for responsive information can run up to tens of thousands of dollars).

100. Nelson & Rosenberg, *supra* note 19, at 16.

101. *See* Marilee S. Chan, Note, *Paper Piles to Computer Files: A Federal Approach to Electronic Records Retention and Management*, 44 SANTA CLARA L. REV. 805, 809 (2004) (citing J. Edwin Dietel, *Corporate Compliance Series: Designing an Effective Records Retention Compliance Program*, CORPC-RECR § 1:26 (2003)).

102. Thomas Y. Allman, *Inadvertant Spoliation of ESI After the 2006 Amendments: The Impact of Rule 37(e)*, 3 FED. CTS. L. REV. 25, 28 (2009).

103. *Compare* Wiginton v. Ellis, No. 02 C 6832, 2003 U.S. Dist. LEXIS 19128, at *12-18 (N.D. Ill. Oct. 27, 2003) (highlighting a stringent interpretation of a party's duty to preserve relevant evidence, where the court held that the defendant had breached its duty to preserve when it did not act to prevent the automated destruction of e-mail messages and did not perform a search of electronic data for relevant material before deleting when this evidence was "reasonably likely" to be requested in discovery, even before the order was received by the party), *with* Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, 1997 U.S. Dist. LEXIS 24068, at *15-17 (E.D. Ark. Aug. 29, 1997) (exemplifying a less stringent, technology friendly interpretation of the duty to preserve). In *Concord Boat Corp.*, the court held that while a duty to preserve all relevant e-mail unquestionably exists subsequent to the initiation of a lawsuit, the corporate defendant was under no such duty to preserve all relevant e-mail messages prior to the initiation of the suit. 1997 U.S. Dist. LEXIS 24068, at *15-17. To find as much would impose an onerous burden and "be tantamount to

difficult for parties to predict at what point the duty to preserve was triggered and the circumstances under which compliance with a corporate document retention policy may give rise to a claim for spoliation.[104]

C. *Light at the End of the Tunnel?:* Zubulake*'s Attempt at Clarity for the Federal Courts*

A 2003 case out of the Southern District of New York, *Zubulake v. UBS Warburg*,[105] has been recognized as being particularly helpful in providing guidance "as to the extent of a corporate defendant's electronic discovery preservation obligations."[106] In *Zubulake*, the court held that it would be unreasonable to require a party to preserve "every shred of paper, every e-mail or electronic document, and every backup tape," as this would "cripple" the business practices of corporate defendants.[107]

Rather, the *Zubulake* court emphasized that the duty to preserve turns on the combination of a party's anticipation of litigation and the protection of its adversary from destruction of "unique, relevant evidence that might be useful," as determined based on a reasonable calculation of the relevance of documents in a pending action.[108]

The *Zubulake* decision also offered guidance as to the specific kinds of documents that must be retained once the duty to preserve is triggered.[109] According to the court, in addition to documents encompassed under FRCP 34(a),[110] "[t]he duty also includes documents prepared *for* those individuals [involved in the litigation], to the extent those documents can be readily identified (*e.g.*, from the 'to' field in e-mails)."[111] In addition, the *Zubulake* court held that "information that is relevant to the claims or defenses of *any* party, or which is 'relevant to

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holding that [a] corporation must preserve all e-mail." *Id.*

104. Nelson & Rosenberg, *supra* note 19, at 25 (noting that the imposition of spoliation sanctions is "fact-specific," and that few courts had "attempted to promulgate broadly applicable standards to guide corporations regarding the specific nature of their responsibilities to preserve [ESI], due to the impracticalities of preserving all electronic data with even a slim possibility of relevance").

105. 220 F.R.D. 212, 215 (S.D.N.Y. 2003) (discussing an employment discrimination dispute in which several employees deleted e-mail messages despite instructions to keep them, and corporate counsel failed to take steps to preserve the tapes until they were expressly requested in one of plaintiff's discovery requests).

106. Nelson & Rosenberg, *supra* note 19, at 25.

107. 220 F.R.D. at 217.

108. *Id.*

109. *Id.* at 218.

110. *Id.*

111. *Id.*

the subject matter involved in the action,'" falls within the ambit of the duty to preserve.[112] *Zubulake* held that the duty to preserve "extends to those employees likely to have relevant information—the 'key players' in the case."[113]

Once the duty to preserve attaches, *Zubulake* requires that "[a] party . . . must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter," and, as a general rule, the preservation obligation does not apply to inaccessible backup tapes, except in cases where "a company can identify where particular employee documents are stored on backup tapes."[114] Then, the tapes storing the documents of the "key players" to the existing litigation should be preserved if the information is not otherwise available.[115] Despite the recognition of *Zubulake*'s importance to e-discovery, in actuality, the decision does little in the way of offering bright-line standards, or even significant guidance, on the duty to preserve.[116]

*D. Something to be Desired: E-Discovery in the Post-*Zubulake *Era*

Following the *Zubulake* decision, there was hope throughout the federal court system that parties and judges alike would have a clearer understanding of their responsibilities relating to document preservation in relation to ESI.[117] After *Zubulake*, courts began to recognize and impose a heightened duty on parties to preserve electronic evidence.[118] Under this duty, once a dispute reaches the point where litigation is reasonably anticipated, a party must put in place a "litigation hold"[119] and suspend any routine document purging system to ensure document preservation.[120]

Despite the attempt by the *Zubulake* court to clarify a party's duty to preserve, inconsistent decisions in its wake dashed the hope for

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112. *Id.* (quoting FED. R. CIV. P. 26(b)(1)).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Cf.* Crist, *supra* note 29, at 18 (noting that there was disagreement among courts as to when the duty to preserve attaches in the wake of *Zubulake*).

117. *See* Sharon D. Nelson & John W. Simek, *Spoliation of Electronic Evidence: This Way Be Dragons*, 68 TEX. B.J. 478, 478 (2005).

118. *Id.* at 479.

119. A "litigation hold" is a duty placed upon organizations to suspend any document deletion polices in order to preserve potentially relevant evidence. *Zubulake*, 220 F.R.D. at 218.

120. Rambus, Inc. v. Infineon Techs. AG, 222 F.R.D. 280, 295, 298 (E.D. Va. 2004) (holding that a litigation hold should have been in place before the commencement of litigation because the litigation was reasonably anticipated).

uniformity in the federal courts.[121] What proved most problematic in the post-*Zubulake* era was the rule that an obligation to preserve is triggered at the moment when a party begins to "consider the possibility of litigation," which imposes too onerous a burden on corporate defendants in light of the "constant threat of litigation facing corporate America."[122]

Thus, while the *Zubulake* decision seems to alleviate e-discovery problems, the realities of electronic information storage, coupled with a nearly perpetual threat of litigation faced by corporate defendants, make its application infeasible in practice.[123] Strict application of the *Zubulake* principles would require that nearly every shred of electronic data be saved, as corporate defendants face the reality that potential plaintiffs' attorneys are on a seemingly constant mission to litigate.[124] Viewed through the lens of *Zubulake*, this essentially requires that potential defendants place a perpetual litigation hold on document production and retention.[125] Although a litigation hold appears reasonable in the abstract, or when considered on a case-by-case basis, such a preservation obligation is overly burdensome in practice.[126]

In its wake, the standard set by *Zubulake* has resulted in a heavily plaintiff-friendly approach to document retention, especially considering that corporate defendants have a "seemingly limitless obligation" to retain documents when there is even the slightest possibility of litigation in the future.[127] *Zubulake*, then, rather than providing the clarity and uniformity that many had initially hoped it would,[128] largely seemed to result in a "'litigation hold' for some corporate defendants in perpetuity."[129]

Consequently, courts in the wake of *Zubulake* did not apply the duty to preserve and implement litigation holds in a uniform manner. In

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121. *Compare* E*TRADE Sec. LLC v. Deutsche Bank AG, 230 F.R.D. 582, 588 (D. Minn. 2005) (holding that the duty to preserve attached prior to the commencement of litigation because of the evidence's relevance to the subject matter of the future litigation), *with* Treppel v. Biovail Corp., 233 F.R.D. 363, 371 (S.D.N.Y. 2006) (holding that a party's preservation obligations attached when the party became aware of the *filing of the complaint*, because the mere existence of dispute between the parties was not sufficient to impose reasonable anticipation of litigation on the parties).

122. Nelson & Rosenberg, *supra* note 19, at 29.

123. *Id.* at 28.

124. *Id.* at 31.

125. *Id.*

126. *See, e.g.*, Andrew Hebl, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. ILL. U. L. REV. 79, 92 (2008) ("[P]arties cannot be expected to preserve every relevant electronic document after a preservation obligation arises. Because of the nature of electronically stored information, [it] . . . places too great a burden on the parties.").

127. *See* Nelson & Rosenberg, *supra* note 19, at 32.

128. *See* Nelson & Simek, *supra* note 117, at 479 ("Will *Zubulake*'s clear reasoning and explicit standards be heeded? Commentators . . . believe it will.").

129. Nelson & Rosenberg, *supra* note 19, at 31.

some instances, courts followed the standard set by *Zubulake*.[130] One such example is *Broccoli v. Echostar Communications Corp.*,[131] where the court held that the defendant's duty to preserve was triggered when the plaintiff employee first began to complain about sexual harassment by his supervisor, which was eleven months before the plaintiff was fired and fourteen months before a complaint was filed.[132]

Other courts, such as the court in *Treppel v. Biovail Corp.*,[133] recognized the severity of the *Zubulake* standard on corporate defendants and were unwilling to impose quite as heavy a burden.[134] These courts took a more narrow approach to the application of the duty to preserve, and the court in *Treppel* held that a mere dispute between the parties was insufficient to trigger the duty to preserve, as it did not create grounds for the reasonable anticipation of litigation.[135] Instead, the court held that the duty to preserve did not attach until the defendant became aware of the filing of a formal complaint.[136]

When attempting to impose sanctions for the seemingly inadvertent destruction of potential evidence resulting from adherence to corporate document retention policies, it is necessary for courts to strike a balance between the policies behind the *Zubulake* standard, favoring the wide availability of potential evidence, with the realities of the burdens that such a standard imposes on defendants, especially in the corporate context.[137] In *E*TRADE Securities LLC v. Deutsche Bank AG*,[138] the United States District Court for the District of Minnesota held that sanctions may be imposed for the destruction of potential evidence that occurred before litigation commenced when that destruction is the result of bad faith.[139] However, the court noted that, absent the destruction of relevant paper documents by a corporate defendant, mere failure to institute a "litigation hold" in and of itself does not suffice to constitute

130. *See, e.g.*, Danis v. USN Commc'ns, Inc., 53 Fed. R. Serv. 3d (West) 828, 834-35 (N.D. Ill. 2000) (imposing sanctions for spoliation on a party for failure to implement a suitable document preservation program; even though the party took affirmative steps to preserve relevant evidence, those steps were inadequate, thus warranting sanctions and serving as a strict application of the duty to preserve relevant evidence).

131. 229 F.R.D. 506 (D. Md. 2005).

132. *Id.* at 511.

133. 233 F.R.D. 363 (S.D.N.Y. 2006).

134. *See id*. at 371.

135. *Id.*

136. *Id.*

137. *See* Crist, *supra* note 29, at 35-36; Nelson & Rosenberg, *supra* note 19, at 31.

138. 230 F.R.D. 582 (D. Minn. 2005).

139. *Id.* at 588.

bad faith.[140] This decision is an example of a court attempting to strike a balance between *Zubulake*'s countervailing policies.[141]

In *E*TRADE Securities*, the court held that sanctions for spoliation are appropriate when a party acted in bad faith, a finding of which can be based on a party's behavior with regard to its corporate document retention policy.[142] To determine bad faith, the court considered the reasonableness of that policy "considering the facts and circumstances surrounding those documents, . . . whether lawsuits or complaints have been filed frequently concerning the type of records at issue, and . . . whether the document retention policy was instituted in bad faith."[143]

Because no easily applicable standards were promulgated in the federal court system, parties remained uncertain as to precisely when the duty to preserve potential evidence arises.[144] In *United States v. Arthur Andersen, LLP*,[145] these problems were brought to light.[146] In this infamous case,[147] employees of the accounting firm Arthur Andersen were advised to shred documents on the eve of the SEC's investigation of the firm's client, Enron.[148] The destruction, despite the pending investigation of Enron, was conducted based on the corporate document retention policy in place at the firm.[149] The conflict between corporate document retention policies and the duty to preserve potential evidence in a foreseeable litigation is the source of the greatest confusion in terms of the application of spoliation sanctions.[150]

The necessity of corporate document destruction policies is widely recognized.[151] In *Arthur Andersen*, the Supreme Court noted that when

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140. *See id.* at 591.

141. *Id.* (citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)).

142. *Id.* at 588.

143. *Id.* at 588-89 (quoting Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 747-48 (8th Cir. 2004)).

144. Crist, *supra* note 29, at 18.

145. 374 F.3d 281 (5th Cir. 2004), *rev'd on other grounds*, 544 U.S. 696 (2005).

146. *See* Jeffrey S. Kinsler, *Arthur Andersen and the Temple of Doom*, 37 SW. U. L. REV. 97, 107-11 (2008).

147. *Id.* at 97.

148. *Arthur Andersen, LLP*, 374 F.3d at 285-86.

149. Arthur Andersen in-house counsel Michael Odom sent an e-mail message, based on outside counsel Nancy Temple's advice, on October 10, 2001 that "urged Andersen personnel to comply with the document retention policy," and noted that if a potentially relevant document was "'destroyed in the course of normal policy and litigation is filed the next day, that's great . . . we've followed our own policy and whatever there was that might have been of interest to somebody is gone and irretrievable.'" *Id.* at 285-86 (omission in original).

150. *See* Kinsler, *supra* note 146, at 112-15 (discussing case law with varied applications of the duty to preserve and imposition of sanctions).

151. *Id.* at 111 ("Storage of documents and other records is expensive and burdensome. Thus, a company ordinarily may destroy documents pursuant to a document retention policy that is

such a policy is reasonable and evenly applied, it is "not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."[152] However, when litigation becomes foreseeable, it becomes necessary to reconcile compliance with company policy with the duty to preserve potential evidence, and courts will impose sanctions for parties that fail to do so.[153]

Despite this recognition, different standards continued to be applied across the federal court system, and uniformity had yet to be achieved.[154] Courts across the country recognized that when a party knew or should have known that documents might become material to litigation at some point in the future, and nonetheless destroys them, that party "cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy."[155] It was against this background, in an attempt to clarify the duty to preserve, that Rule 37(e) was adopted into the FRCP.[156]

IV. RULE 37(e): A FEDERAL ATTEMPT AT A SOLUTION TO THE E-DISCOVERY PROBLEM

A. Aiming for Clarity: The Backdrop of Rule 37(e), the "Safe Harbor" Provision

Rule 37(e) was proposed by the Federal Rules Advisory Committee as an addition to the FRCP as part of the 2007 e-discovery amendments.[157] It was added specifically to deal with the nuanced problems brought about by e-discovery and the preservation obligation in litigation.[158] It was also intended to rectify the lack of clarity as to the

reasonable and evenly applied.").

152. 544 U.S. 696, 704 (2005).

153. Courts have held that parties may be sanctioned for failure to preserve potential evidence as a consequence of compliance with document retention policies based on failure to provide notification to relevant personnel when litigation becomes foreseeable, failure to suspend the destruction plan when litigation becomes foreseeable, and inconsistent application of said document policy and a lack of bad faith, shown by unusual or sporadic destruction of documents associated with a particular foreseeable litigation. *See* Kinsler, *supra* note 146, at 112-15.

154. *See supra* notes 117-43 and accompanying text.

155. Lewy v. Remington Arms Co., 836 F.2d 1104, 1112 (8th Cir. 1988) (citing Gumbs v. Int'l Harvester, Inc., 718 F.2d 88, 96 (3d Cir. 1983)).

156. *See infra* Part IV.A.

157. Lloyd S. van Oostenrijk, Comment, *Paper or Plastic?: Electronic Discovery and Spoliation in the Digital Age*, 42 HOUS. L. REV. 1163, 1168-69 (2005).

158. *See* Memorandum from Honorable Lee H. Rosenthal, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 55 (May 17, 2004), *available at* http://www.uscourts.gov/rules/Reports/CV5-2004.pdf.

circumstances under which it is appropriate for a court to impose sanctions for the spoliation of potential evidence.[159]

Rule 37(e) was proposed in order to achieve "the needed balance between information preservation and continuation of business operations."[160] In addition, Rule 37(e) attempted to address the prevalent problems associated with the massive amounts of data that corporate defendants were theoretically required to store in the interest of potential future litigation.[161]

Prior to its implementation into the FRCP, there was a general feeling of skepticism towards Rule 37(e).[162] While it was clear that courts had not reached a consensus as to when spoliation sanctions were appropriate, critics did not believe that Rule 37(e) offered much in the way of providing a stricter or more easily applicable set of guidelines for courts to follow.[163] Rather, many believed that the proposed Rule would have an insignificant impact on e-discovery.[164]

At the time of its drafting, Rule 37(e) appeared to be a well-intentioned, yet premature, attempt at a solution to e-discovery problems.[165] While it was not debated that ESI continued to have an increasingly prominent role in discovery, this role varied from case to case, largely as a consequence of the relatively new nature of e-discovery.[166] Consequently, rather than the adoption of a federal rule to govern this aspect of e-discovery, it was thought that a "wait and see" approach ought to be taken until ESI had a more clear-cut role in

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159. Chan, *supra* note 101, at 820 ("[N]o federal law solely addresses the management of electronic records retention and destruction. Companies are accountable for their own policies, yet are still responsible for incorporating a myriad of inconsistent state and federal laws.").

160. Mason, *supra* note 86, at 786.

161. Nelson & Rosenberg, *supra* note 19, at 36 ("The . . . amendments represent a wide-ranging effort to conform the Federal Rules of Civil Procedure to the digital age."); Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 17 (2004) (acknowledging that "[e]-discovery is new, and the breadth of use of computers is also relatively new, . . . [clients and lawyers] await the decision of a judge in the future, and the judge will be acting in an area with few landmarks").

162. Anita Ramasastry, *The Proposed Federal E-Discovery Rules: While Trying to Add Clarity, the Rules Still Leave Uncertainty*, FINDLAW, Sept. 15, 2004, http://articles.technology.findlaw.com/2004/Sep/15/10103.html ("[T]he rules' proposals as to when sanctions can be imposed for deletion of electronic information . . . leave something to be desired.").

163. *See, e.g.*, *id.*

164. *See, e.g.*, Nelson & Rosenberg, *supra* note 19, at 38 ("While seemingly an important step in the ongoing effort to reflect the impact of electronic discovery upon a litigant's preservation obligations, [the proposed rule] will have little, if any, practical impact upon these obligations.").

165. *See* Ramasastry, *supra* note 162.

166. *See, e.g.*, Hester v. Bayer Corp., 206 F.R.D. 683, 685-86 (M.D. Ala. 2001) (stating that preservation orders and duties to preserve are unique to each case because "like snowflakes, no two litigations are alike"); *see also* Hodgman, *supra* note 63, at 286.

discovery.[167] However, despite its critics, Rule 37(e) was included as part of the 2007 e-discovery amendments to the FRCP.[168]

B. Putting Policy into Practice: Understanding Rule 37(e)

At its adoption, the legal world looked to Rule 37(e) to provide some much needed relief to e-discovery problems.[169] Much of this relief was expected to come from the "safe harbor" provision in the Rule.[170] This provision precludes a party that destroyed data as a consequence of the routine operation of an electronic information system, rather than as a result of culpable, bad-faith conduct, from being sanctioned under Rule 37(b)(2) for failure to produce the documents relevant to its adversary's request.[171]

Much to the chagrin of its proponents, the most glaring problem with Rule 37(e), since it has been adopted, is that it has not led to any much needed clarity as had been its purpose.[172] One explanation for this ineffectiveness lies within the language of the Rule.[173] The Advisory Committee notes to Rule 37(e) attempt to define the type of lost information protected by the Rule's safe harbor provision; it explicitly states that Rule 37(e) is applicable if and only if the operation of the information system was both routine and in good faith.[174]

This explanation, however, has essentially proved to be circular. 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

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167. Hodgman, *supra* note 63, at 286.

168. Davidovitch, *supra* note 3, at 1131.

169. *See* David Wilner, *e-Discovery Worries?: Proposed Federal Rules on Electronic Discovery May Have a Broad Impact*, CORP. COUNSELOR, Nov. 2004, *available at* https://www.lexisnexis.com/applieddiscovery/NewsEvents/PDFs/200411_CorpCounselor_eDiscWorries.pdf (stating that Rule 37(e) will deliver relief to litigants who operate sophisticated electronic information systems in good faith, but are nonetheless held accountable if those information systems' routine deletion functions cause the loss of information that may be relevant to litigation).

170. FED. R. CIV. P. 37(e) ("[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.").

171. FED. R. CIV. P. 37(e) advisory committee's note ("Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(e), absent *exceptional circumstances*, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system."(emphasis added)).

172. *See supra* Part III.D.

173. *See* Ramasastry, *supra* note 162.

174. FED. R. CIV. P. 37(e) & advisory committee's note.

routine operation to prevent the loss" of potentially relevant documentation when litigation is reasonably foreseeable.[175] Additionally, the Advisory Committee notes state that a court should consider a variety of factors in determining whether the destruction of documents was in good faith.[176] This includes "the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information."[177]

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.[178] 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 or destroy evidence of any sort . . . to hide behind the shield of good faith and undue burden to protect themselves from sanctions."[179]

Rather than giving rise to disputes over concrete issues relating to the actual documents in question, the wording of Rule 37(e) has led to discovery disputes over what constitutes "'routine, good-faith operation'" in terms of properly adhering to the duty to preserve.[180] As a result, courts must spend a great deal of time making "decisions as to what is reasonable and what is done in good faith," which "undermine[s] the consistency and predictability that discovery rules generally seek to create."[181] In this way, Rule 37(e) runs counter to the purposes of the FRCP.[182]

A great deal of this difficulty stems from the fact that the FRCP do not apply directly to pre-litigation conduct.[183] This creates complications

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175. *Id.*; *see also* Hebl, *supra* note 126, at 101 ("If . . . a party takes affirmative, though inadequate, steps to preserve relevant data, that party should have the protection of the safe harbor, since taking those affirmative steps is evidence that the party did not spoliate evidence . . . in bad faith.").

176. *See* FED. R. CIV. P. 37(e) advisory committee's note.

177. *Id.*

178. *See* Rachel Hytken, Comment, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 898 (2008).

179. Ryan J. Reaves, *The Dangers of E-Discovery and the New Federal Rules of Civil Procedure*, 3 OKLA. J.L. & TECH. 32, 38-39 (2007).

180. *Id.* at 37.

181. *Id.*

182. *See* FED. R. CIV. P. 1 (stating the FRCP "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").

183. *See* ABC Home Health Servs., Inc. v. Int'l Bus. Machs. Corp., 158 F.R.D. 180, 182 (S.D. Ga. 1994) ("Rule 37 of the Federal Rules of Civil Procedure authorizes a court to impose sanctions for discovery abuses. . . . In this case, Rule 37 does not directly apply because the alleged destruction of documents took place before the action was filed and before discovery began.").

because the duty to preserve may arise before litigation commences.[184] In contrast, when the duty to preserve is breached after litigation has commenced, the FRCP undoubtedly provide the authority for the court to impose sanctions.[185] However, when a violation of the duty occurs before litigation commences, it is less clear as to whether or not Rule 37(e) may be invoked.[186] 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."[187] This, then, requires that a party predict what will be discoverable before becoming involved in a lawsuit or receiving a discovery request, rather than being provided with guidance from the text of the FRCP.[188]

Despite the hopes of the Advisory Committee, Rule 37(e) has not offered the clear guidance that it was initially proposed to provide.[189] The application of Rule 37(e) has resulted in confusion over its meaning, rather than focusing on concrete disputes relating to the actual documents in question and the imposition of spoliation sanctions.[190] Consequently, the question must arise as to whether or not parties are any better off since the inception of Rule 37(e) than they were prior to it. The 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.[191]

An unquestionable shortcoming of Rule 37(e) is the limited scope of protection that it provides to parties.[192] Based on the text of Rule 37(e), in order for a party's actions to fall under the umbrella of protection provided by the safe harbor provision,

> a party to litigation must (1) have a routine operating protocol for the storage and destruction of its electronically stored information, (2) not delete files potentially responsive to litigation in any manner

184. *See, e.g.*, Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F.Supp. 1443, 1446 (C.D. Cal. 1984) (stating that the parties were on notice of the litigation because of pre-litigation correspondence between the parties, and thus the duty to preserve was triggered).

185. FED. R. CIV. P. 37(b)(2) (listing possible sanctions for failure to comply with a discovery order).

186. *See* FED. R. CIV. P. 3 (stating that an action is commenced by the filing of a complaint).

187. Allman, *supra* note 1, at 15.

188. *See id.* at 15-16.

189. Nelson & Rosenberg, *supra* note 19, at 40 (noting that the e-discovery amendments "fail to provide litigants with the necessary guidance concerning the precise extent of electronic discovery preservation obligations").

190. *See* Davidovitch, *supra* note 3, at 1133-41 (discussing the intricate analysis which is required in order to determine whether Rule 37(e) is applicable in a particular case).

191. *See supra* text accompanying notes 172-87.

192. *See* Davidovitch, *supra* note 3, at 1141.

> inconsistent with its protocol, and (3) suspend the destruction protocol with respect to any backup tapes or other storage devices that contain files its knows may be relevant to a dispute likely to result in a litigation.[193]

Thus, Rule 37(e), while it may appear on its surface to provide broad protection to parties who inadvertently destroy ESI, in reality, the class of those that are protected is far more restricted.[194] Instead, it applies only to those who comply with the standards set in the text of the Rule.[195]

V. WHERE TO GO FROM HERE?: THE FUTURE OF RULE 37(e)

A. Taking out the Garbage: The Need for a New Rule 37(e) and an Emphasis on the Duty to Preserve

It is clear that Rule 37(e) has not proved to offer any novel and significant protections to parties in the digital era.[196] Because parties are not given bright-line parameters, or even significant guidance as to when the duty to preserve is triggered, Rule 37(e) has not functioned in a way that coincides with the FRCP goal of "just, speedy, and inexpensive" determination of litigations.[197] The combination of this uncertain scope of preservation obligations and the risk of sanctions if information is not preserved oftentimes results in an over-broad pre-litigation preservation effort, which is extremely costly and time consuming for corporate defendants.[198] In order for Rule 37(e) to function in a way consistent with the purpose of the FRCP, courts must reevaluate the Rule.

Rule 37(e) states that its protection is applied "*absent* exceptional circumstances."[199] In terms of defining what constitutes "exceptional circumstances," the Judicial Conference Committee on Rules of Practice and Procedure notes only that such an exceptional circumstance could "permit[s] sanctions . . . even when information is lost because of a

193. Daniel R. Murray et al., *Discovery in a Digital Age: Electronically Stored Information and the New Amendments to the Federal Rules of Civil Procedure*, 39 U.C.C. L.J. 509, 525-26 (2007).

194. *Id.* at 526.

195. *Id.* at 525-26.

196. *See supra* notes 178-95 and accompanying text.

197. FED. R. CIV. P. 1.

198. Hebl, *supra* note 126, at 92.

199. FED. R. CIV. P. 37(e) (emphasis added).

party's good-faith routine operation of a computer system."[200] Thus, a party loses the protection of Rule 37(e) if "exceptional circumstances" warrant the imposition of sanctions despite satisfaction of requirements under Rule 37(e).[201]

This creates a hurdle for parties that seek the protection of Rule 37(e), as it is unclear what constitutes "exceptional circumstances."[202] Due to the absence of guidelines for applying Rule 37(e), courts are left with "tremendous discretion" in determining proper application of the Rule.[203] As presently interpreted, the "exceptional circumstances" clause results in a bias towards parties requesting documents because of the emphasis on the provision of remedies for innocent parties, and thus the application of Rule 37(e) "distills" the law regarding spoliation sanctions.[204]

Traditionally, spoliation sanctions have been imposed in order to serve prophylactic, punitive, and remedial functions.[205] However, the phrase "exceptional circumstances" allows courts to essentially discount the mental state of the party that destroyed relevant documents.[206] By giving courts the authority to find "exceptional circumstances," Rule 37(e) may allow courts to place undue emphasis on remedying the evidentiary playing field for the party requesting the destroyed documents.[207]

Rule 37(e) leaves unaddressed an especially vexing problem for the courts: the destruction of documents not in bad faith, but as Rule 37(e) states, as a consequence of the "good faith" operation of an electronic information system.[208] The inadvertent destruction of evidence, despite the lack of bad faith, may nevertheless leave the requesting party at a disadvantage.[209]

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200. SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE & PROC. 83 (2005), *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=168.

201. *See id.*

202. Hytken, *supra* note 178, at 895 ("[A] judge, upon a finding of 'extraordinary circumstances,' can sanction a party that meets the general requirements of Rule 37. Neither the Committee nor the courts have attempted to define this term; there is no sense of when, if, or how this term will take on meaning.").

203. *Id.* at 899.

204. Davidovitch, *supra* note 3, at 1141.

205. *See supra* text accompanying notes 42-45.

206. Davidovitch, *supra* note 3, at 1141.

207. *See id.* at 1141-42.

208. *See* FED. R. CIV. P. 37(e).

209. *See, e.g.*, Pandora Jewelry, LLC v. Chamilia, LLC, No. CCB-06-3041, 2008 U.S. Dist. LEXIS 79232, at *27-29 (D. Md. Sept. 30, 2008) (noting that despite a party's duty to preserve, and gross negligence, the failure to preserve evidence did not rise to the level of bad faith conduct).

It is important to keep in mind what constitutes good faith; as a general principle, it is commonly understood to be the absence of bad faith.[210] In the context of spoliation, bad faith may be discerned from the direct destruction of documents by a party in order to hide information adverse to its case.[211] Bad faith in this context may also be characterized by "'willful blindness,'" whereby a party is aware of discoverable evidence, but "nonetheless allows for its destruction."[212]

It is long established that courts have wide discretion in the imposition of sanctions for spoliation.[213] In using this discretion, courts take into account both the intent and state of mind of the party that fails to produce evidence when determining whether or not sanctions are appropriate.[214] Under Rule 37(e), then, "courts will likely assess the intent of a producing party . . . as well as the prejudice to the requesting party resulting from the inability to obtain such data."[215] This is not a novel creation of Rule 37(e).[216] Rather, this is a reiteration of the commonly accepted method for imposing spoliation sanctions.[217]

B. Shifting the Focus to a New Solution to E-Discovery Problems

In *United Medical Supply Co. v. United States*,[218] the court asserted that "spoliation sanctions spring from two main sources of authority":[219] first, the "inherent power [of the court] to control the judicial process and litigation, a power that is necessary to redress conduct 'which abuses the judicial process'"; and second, the authority given under Rule 37(b)(2) to impose sanctions in appropriate circumstances.[220] Using these powers, the court must craft sanctions that are "just and proportionate in light of the circumstances underlying the failure to

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210. Gerseta Corp. v. Wessex-Campbell Silk Co., 3 F.2d 236, 238 (2d Cir. 1924) ("Good faith is fidelity and honesty, and bad faith is the opposite; and the definition of one defines its antonym by the addition of a negative.").

211. Durrant, *supra* note 93, at 1819; *see also* Pennar Software Corp. v. Fortune 500 Sys., Ltd., 51 Fed. R. Serv. 3d (West) 279, 286 (N.D. Cal. 2001) (finding that a party acted in bad faith by deleting relevant webpages from a webserver and altering the server's log files).

212. *Id.* at 1819 (citing Danis v. USN Commc'ns, Inc., 53 Fed. R. Serv. 3d (West) 828, 878 (N.D. Ill. 2000)).

213. *See supra* Part II.D.

214. *See supra* Part II.D.

215. Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 368 (2008).

216. *See supra* Part II.D.

217. *See supra* Part II.D.

218. 77 Fed. Cl. 257 (2007).

219. *Id.* at 263.

220. *Id.* at 263-64 (citing Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991)).

preserve relevant evidence, as well as the punitive, prophylactic, remedial and institutional purposes to be served by such sanctions."[221]

In light of the multitude of factors to be taken into account, Rule 37(e) is ineffective.[222] 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.[223] Therefore, Rule 37(e) should be removed from the FRCP.

The language of Rule 37(e) has been interpreted to require a showing of intentional or reckless conduct in order for a court to impose spoliation sanctions.[224] This ensures that a party that engaged in egregious conduct cannot invoke the protection of Rule 37(e)'s safe harbor.[225] For example, in *Arista Records LLC v. Usenet.com, Inc.*,[226] the defendant party was unable to claim the protection of Rule 37(e) because the court found that it had intentionally deleted documents from that company's webpage that were requested in a discovery order.[227] Despite that the party was technically following its corporate document retention policy, that party was not afforded the protection of Rule 37(e) because of its willful disregard of the duty to preserve these potentially relevant documents.[228]

The "good faith" requirement in Rule 37(e) prevents precisely this type of conduct, and, in doing so, prevents parties from using the safe harbor as a shield for outright failure to institute a litigation hold when the duty of preservation has attached.[229] This protection is consistent with the spoliation doctrine as it stood prior to e-discovery, because through the Rule, courts are able to impose sanctions that are consistent with the purposes that underlie the doctrine.[230]

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221. *Id.* at 270; *see also supra* text accompanying notes 42-44.

222. *See* Davidovitch, *supra* note 3, at 1141-42.

223. *See id.* at 1165.

224. *See* FED R. CIV. P. 37 advisory committee's note ("The good faith requirement of Rule 37[(e)] means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations . . . ."); *see also* Hebl, *supra* note 126, at 98 (stating that case law and committee notes "are entirely consistent with the idea that good faith requires some sort of reckless or intentional conduct for the protection of the safe harbor to be withdrawn").

225. *See, e.g.*, *In re* Krause, 367 B.R. 740, 768-69 (Bankr. D. Kan. 2007) (finding that defendant was not entitled to safe harbor protection because he did not act in good faith when he failed to disable the running of a file-wiping feature and then re-installed a data-erasing program after the preservation duty had attached).

226. 608 F. Supp. 2d 409 (S.D.N.Y. 2009).

227. *Id.* at 438-39.

228. *See id.*

229. *In re* NTL, Inc. Sec. Litig., 244 F.R.D. 179, 198-99 (S.D.N.Y. 2007) (finding that a party's "utter failure to preserve documents" after receiving plaintiff's complaint warrants spoliation sanctions because the duty to preserve had clearly attached).

230. *See supra* Part II.D.

Since its adoption, Rule 37(e) has left parties in no better a position than they were prior to the Rule's enactment.[231] The combination of both the inherent power of the court and that of Rule 37(b)(2) provide sufficient authority for courts to sanction parties for spoliation, even in light of the problems created by ESI.[232] Under Rule 37(e), parties have not received any protection that they would not have had absent the Rule.[233] The safe harbor provision erects a bar against parties who engage in purposeful, bad-faith conduct and then look to use Rule 37(e) as a shield for its bad acts; these parties, however, are already precluded from this protection by the language of the Rule.[234]

In the end, the result is no different than imposition of spoliation sanctions prior to the implementation Rule 37(e).[235] Through application of the traditional spoliation doctrine, courts should take a willful mindset into account, balance it against the resultant prejudice to the opposing party, and craft a sanction based on these considerations, as is the case in the invocation of sanctions under the traditional spoliation doctrine.[236]

Therefore, common law development of the spoliation doctrine gives courts ample ability to impose spoliation sanctions in the pre-litigation context, and Rule 37(b)(2) remains sufficient to sanction parties that violate specific discovery orders. This being the case, Rule 37(e) should be removed from the FRCP. The wide discretion already afforded to trial courts in crafting sanctions will allow for the necessary case-by-case consideration of discovery disputes, and appellate level

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231. *See* Davidovitch, *supra* note 3, at 1165.

232. *See id.*

233. *See, e.g.*, *Arista Records LLC*, 608 F. Supp. 2d at 439. The defendant in *Arista Records* blatantly disregarded a discovery order by willingly allowing documents that had been requested to be deleted. *Id.* at 416-17. Even though this was in accordance with "company policy," the party was not given the protection of Rule 37(e) because of the bad faith nature of the conduct. *Id.* at 439. However, absent Rule 37(e), it is likely that the outcome would have been the same based on the court's analysis of the party's conduct, coupled with the remedial function served by sanctions. *See id.* at 429-30.

234. *See supra* text accompanying notes 224-27.

235. *Compare In re* Krause, 367 B.R. 740, 766-69 (Bankr. D. Kan. 2007) (holding that defendant was not entitled to the protection of Rule 37(e) because he installed software specifically designed to delete information from his electronic storage system after he was on notice of pending litigation), *with* Kucala Enters., Ltd. v. Auto Wax Co., 56 Fed. R. Serv. 3d (West) 487, 496-97 (N.D. Ill. 2003) (sanctioning defendant for spoliation when he purchased and utilized a software program called "Evidence Eliminator" after he received a letter from the plaintiff regarding pending litigation). Just as the willful, bad faith conduct in *Kucala* was sanctioned, so too was the analogous conduct in *Krause*, despite the fact that Rule 37(e) was in place at the time *Krause* was decided. This is because the bad faith nature of a party's actions precludes that party from receiving the protection of the safe harbor.

236. *See supra* Part II.D.

review for abuse of this discretion will ensure protection against abuses of the power to sanction.[237]

Even after the implementation of Rule 37(e), courts continue to use common law as their main source of guidance in terms of how to best determine whether or not the duty to preserve relevant or potentially relevant information has attached in a particular case.[238] In *Goodman v. Praxair Services, Inc.*,[239] the court discusses the attachment of the duty to preserve solely in terms of case law, without specific mention of Rule 37(e), despite the fact that the discovery dispute centers around the deletion of back-up tapes that were requested during discovery.[240]

Instead of the current Rule 37(e), the problems brought about by ESI will be most effectively resolved by creating standards for when the duty to preserve attaches to parties in the time period before a complaint is filed. A clearer understanding of when this duty attaches is essential for parties involved in e-discovery.[241] This clarification is necessary so that parties will be able to predict, with a degree of certainty, when they must put litigation holds in place and modify their corporate document retention policy procedures.[242] Recent case law suggests that such a clarification has yet to come to light, and parties are essentially left in the dark as to when the duty to preserve attaches.[243]

In order to best achieve this clarification, the courts must focus on the principles set forth in *Zubulake*.[244] While the standard created in *Zubulake* creates too onerous a burden on parties, the rationale behind the decision provides an appropriate framework within which clearer guidelines for the duty to preserve may be established, and courts should use this framework to create these guidelines. In *Zubulake*, the court noted that "almost everyone associated with [the plaintiff] recognized

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237. *See* Hytken, *supra* note 178, at 900 (noting the benefits and risks of the wide discretion afforded to judges in crafting sanctions due to the potential unfamiliarity of judges with the subject matter).

238. *See* Davidovitch, *supra* note 3, at 1165.

239. 632 F. Supp. 2d 494 (D. Md. 2009).

240. *Id*. at 511-16.

241. *See* Hebl, *supra* note 126, at 104 ("Several cases have turned almost exclusively on whether the obligation to preserve had arisen, and thereby have continued to apply an essentially pre-Rule 37(e) analysis, since often, no consideration of state of mind even takes place.").

242. *See id.* at 104-06 (discussing case law with varied outcomes and applications of Rule 37(e) in terms of when the duty to preserve is triggered).

243. *Compare* Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 621 (D. Colo. 2007) (stating that the duty to preserve "should require more than a mere possibility of litigation"), *with Goodman*, 632 F. Supp. 2d at 509 & n.7 (stating that the duty to preserve attaches when litigation is reasonably anticipated). These cases exemplify the notion that, while courts *state* when the duty to preserve relevant documents attaches, there is little predictability as to what this means in terms of application from case to case.

244. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

the possibility that she might sue."[245] The recognition by those involved in the eventual litigation was the determinative factor as to when the court stated that the duty to preserve relevant evidence had been triggered.[246]

Courts must focus on this prong of analysis in the future. A focus on the individuals involved in the dispute will make understanding of the duty to preserve more manageable for parties. The duty to preserve must be centered around the individuals that are involved in a particular dispute, and the determination as to when the duty attaches must be centered on when these individuals know, or reasonably should know, that litigation is forthcoming.

An ability to predict will allow for e-discovery to comport with the goals of the FRCP, because it will reduce the time courts must spend making inquiries into when the duty to preserve attaches. Additionally, with this understanding, corporate parties will be better able to engage in more efficient self-modification of document retention policies in a conscious effort to reduce the possibilities of invocations of spoliation sanctions. This in turn will better serve the goals of the judicial system as a whole, as it will promote the wide availability of evidence.[247]

VI. CONCLUSION

The exponential increase in the use of technology in these modern times has certainly left discovery wrought with confusion. Courts have been, and remain to be, perplexed as to how to reconcile the massive data storage capabilities of contemporary electronic information systems both with the traditional spoliation doctrine and within the parameters of FRCP.[248] The task of imposing sanctions in order to protect the integrity of the American legal system, while simultaneously taking into consideration the onerous burden that a duty to preserve potentially relevant evidence in litigation may impose on a party is no doubt an exceedingly difficult one, especially in light of the changes that technology has bestowed on discovery.

Rule 37(e) was adopted into the FRCP as an attempted solution to this quandary.[249] However, the Rule, as evidenced in its interpretation and application, does no more than reiterate the policies behind the

245. *Id.* at 217.

246. *Id.* (noting that the preservation obligation attached because the "relevant people" were aware of the possibility of litigation).

247. *See* Crist, *supra* note 29, at 43 (stating that the American justice system is based on the idea that both sides have the ability of "obtaining and presenting relevant evidence").

248. *See* van Oostenrijk, *supra* note 157, at 1170-71.

249. *Id.* at 1168.

traditional spoliation doctrine.[250] That being the case, Rule 37(e) should be removed from the FRCP, and the traditional spoliation doctrine should instead govern the imposition of these sanctions. In its place, a reconfigured analysis of the aforementioned e-discovery problems must take place. The focus must shift to effectuating a more standardized statement of the point at which the duty of a party to preserve potentially relevant evidence to litigation attaches. Once this is done, the problems created when documents are inadvertently destroyed through the use of electronic information systems will be lessened, and courts will be able to take control of discovery, despite the enormous impact brought on by technology.

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250. *See* text accompanying notes 213-17.

* J.D., 2010. I would like to thank the members of the Hofstra Law Review, especially Sean Doherty, Lisa Fortin, Michael de Matos, Alison Sablick, Danielle Nunziato, David Bamdad, Brenda Guiliano, and Rachael Ringer, for your support, assistance, and most importantly, friendship throughout the editorial process. A special thank you also to Justin Levy for your impeccable attention to detail, uncanny ability to notice italicized punctuation marks, and consistent humor during the Note-writing process. Additionally, thank you to Professor Frank Gulino for your ever-careful editorial eye, and for your consistent guidance throughout my tenure at Hofstra University School of Law. Finally, I would like to dedicate this Note to my two brothers and especially to my parents, for your unconditional love and support in all that I do.