# Public Comment to the Civil Rules Advisory Committee Concerning **Proposed Rule 37(e)(2013)**

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## Introduction

The E-Discovery Panel of the 2010 Duke Litigation Conference, on which the Author served, argued for a rule relating to spoliation which would authorize "sanctions for noncompliance resulting in prejudice"[2] and "[c]onference participants asked for a rule establishing uniform standards of culpability of different sanctions."[3]

After three years of diligent efforts by the Rules Committee, the result is the current Proposal to replace current Rule 37(e) with a new rule ("Proposed Rule 37(e)"), applicable to all forms of discoverable information. It is intended to reduce the practice of "defensive preservation" by entities and the unfair involvement of individual litigants in costly "spoliation/sanctions battles that they simply do not have the economic resources to fight."[4]

This memorandum discusses the impact of the Proposed Rule on the (1) duty to preserve and (2) the elements required for the imposition of spoliation sanctions as well as (3) the selection of sanctions versus "curative" measures. Generally speaking, the Proposed Rule should help promote a uniform approach and foreclose the current practice of using inherent sanctioning power as an end-around existing Rule 37(e).[5] However, as noted below, a number of aspects of the proposal raise concerns that need to be addressed, for which suggestions are made.

## The Duty to Preserve

The duty to preserve in anticipation of reasonably foreseeable litigation - a duty owed to the court, not to an individual party - is currently governed by case law incidental to the

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[2] Elements of A Preservation Rule ("The E-Discovery Panel . . . holds the consensus view that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure").

[3] Memo to Chief Justice, Sept, 10, 2010, p. 8.

[4] Bozic v. City of Washington, 912 F. Supp.2d 257, at n. 2 (W.D. Pa. Dec. 5, 2012)("[n]either state of affairs is a good one").

[5] United State v. Aleo, 681 F.3d 290, 310 (6th Cir. May 15, 2012)("a judge may not use inherent power to end-run a cabined power")(Sutton, J., concurring in result).

spoliation doctrine.[6] At the time of the 2006 Amendments, the Rules Committee refused to even consider whether incorporation of the preservation duty into the Federal Rules "would be an authorized or wise exercise of Enabling Act authority."[7]

Proposed Rule 37(e)(2013)(*see* Appendix for full text) avoids delineating the elements of the duty to preserve by deferring to the common law to determine when a party has "failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation."[8] Rule 37(e)(2) provides a list of factors[9] said to contain "many" of the considerations to be used in determining when a duty to preserve arose and what information should have been preserved.[10]

The Committee rejected the inclusion of a detailed Rule 26.1 which would have articulated the trigger and scope of the duty and conditioned relief from sanctions on compliance with the Rule. Accordingly, a movant will be required to apply existing common law standards to determine if a duty to preserve was triggered and whether a failure to act, within the scope of the duty, caused the loss of relevant and discoverable evidence.

One can expect that the *Zubulake* exhortation of prompt attention, with use of litigation holds,[11] will be cited by many courts, tempered, however, by the endorsement in Proposed Rule 37(e)(2) of the need to consider, *inter alia*, "the reasonableness of the party's efforts to preserve the information" and the "proportionality" of such efforts to the "anticipated or ongoing litigation." This "layering" of reasonability and proportionality on top of the *Zubulake* definition echoes the *Rimkus* decision[12] and is clearly intended to reject the *per se* approach to preservation standards articulated in *Pension Committee*.[13]

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[6] Surowiec v. Capital Title, 790 F. Supp.2d 997, 1006 (D. Ariz. May 4, 2011)("[o]nce a party knows that litigation is reasonably anticipated, the party owes a duty to the judicial system to ensure preservation of relevant evidence").

[7] MINUTES, 39; copy at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0405.pdf.

[8] Rule 37(e)(1). The proposed Committee Note states that the preservation obligation "[is] not created by Rule 37(e), but has been recognized by many court decisions."

[9] The non-exclusive factors listed in Proposed Rule 37(e)(2) are:

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

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

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of reservation;

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

(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

[10] Committee Note, 39. *See also* Committee Note, Subdivision (e)(2), 45 ("the court's focus should be on the reasonableness of the parties' conduct").

[11] Zubulake v. UBS Warburg ("Zubulake IV"), 220 F.R.D. 212, 218 (S.D. N.Y. Oct. 22, 2003)("[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents").

[12] Rimkus Consulting Group v. Cammarata, 688 F. Supp.2d 598, 613 (S.D. Tex. Feb. 18, 2010)("[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established applicable standards")(emphasis in original).

[13] *See* Pension Comm. v. Banc of America, 685 F. Supp. 2d 456, 471 (S.D. N.Y. May 28, 2010))("the failure to adhere to contemporary standards can be considered gross negligence"), *abrogated in part* by Chin v. Port

## Comment

The Proposed Rule acknowledges that a common law duty to preserve may arise in the pre-litigation context and treats the duty as an abstract obligation to be guided by the "factors" listed in Rule 37(e)(2).

However, there is a dark side to the choice to merely hint at what the Committee might see as desirable by listing idiosyncratic "factors." The factors listed – as evolved from an original eight suggested in the draft presented to the Subcommittee in April, 2011[14] - identify only selected aspects of the mix of issues involved and do not provide the type of practice commentaries issued by more nimble entities such as the Sedona Conference®.[15]

Two examples of the possible mischief from this approach of quasi-rulemaking by Committee Note follow:

First, the Committee asserts that the Rule 37(e)(2) factors will guarantee that if potential parties make reasonable preservation planning decisions they will avoid being branded as a "spoiliator."[16] This, in turn, will reduce costly over-preservation. However, the Rule does not allow a party to safely rely upon its *ex ante* assessment of proportionality in designing the scope of an initial preservation effort, even in the absence of access to opposing parties or to a court. The Committee deleted without explanation a reference to the role of proportionality in "calibrating a reasonable preservation regime,"[17] and the Committee Note now merely advises parties who demand preservation to keep proportionality concerns "in mind."[18]

Second, there is a serious risk that courts will unfairly or inadvertently turn the encouragement of reasonable conduct in the Committee Note to Rule 37(e)(2) on its head by determining that the protection from sanctions under Rule 37(e)(1)(B)(i) will be forfeited in the absence of following the advice of the Committee Note. For example, the proposed Note unequivocally advocates the interruption of routine operations ("[a]s under the current rule")[19] and touts the use of litigation holds,[20] implicitly endorsing their use regardless of the circumstances.

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Authority, 685 F. 3d 135, 162 (July 10, 2012)("we reject the notion that a failure to institute a 'litigation hold' constitutes gross negligence *per se*").

[14] *See* Proposed Rule 37(g), Appendix, Minutes of Subcomm. Mtg, April 2011 Agenda Book, Rules Comm. Mtg., at 229, copy available at http://www.uscourts.gov.

[15] Sedona is now, for example, working on what will be its third iteration of a Commentary on the use of Legal Holds, which is by far the most accessed resource on the topic and is constantly updated to reflect emerging best practices.

[16] Committee Note, 38 ("[t]he amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts").

[17] Rules Comm. Report to Stdg. Comm., May 8, 2013, 59.

[18] Committee Note, 47 ("[p]rospective litigants who call for preservation efforts by others" should "keep these proportionality principles in mind").

[19] Committee Note, 39 ("As under the current rule, the prospect of litigation may call for altering that routine operation").

[20] Committee Note, 45.

We have been down that cul-de-sac already. In *Arista Records v. Usenet.com*, for example, a court interpreted a similar articulation in the 2006 Committee Note as indicative of "what steps parties should take" and made it clear that successful intervention in the operation of an information system was "required"[21] and would be sanctioned if not undertaken. Courts adopting that *per se* logic assume that "[o]nce the duty to preserve attaches, any destruction of documents is, at a minimum, negligent."[22]

### Suggested Action

The Committee should acknowledge the implications of its decision not to articulate the elements of the duty to preserve in the Rule. The factors listed in Rule 37(e)(2) do not belong in the Civil Rules and, at most, should only be described in the Committee Notes as a checklist of possible issues to consider. The Comments in the Committee Note cannot (and candidly, should not be expected to) substitute for the preservation rulemaking anticipated at Duke on the topic.

If the current approach is retained, however, the Committee Note should, as a minimum, make it clear that in retroactively assessing the reasonableness of a preservation effort, it is not appropriate for the Court to lose sight of the fact that sanctions - as opposed to curative measures - requires both heightened culpability and substantial prejudice. A failure to adopt the guidance in the Committee Note does *not* mean that a party forfeits the protections of (B)(i).

In addition, the Committee Note should clarify that the diminished scope of discovery under Proposed Amended Rule 26(b)(1) due to proportionality concerns is equally applicable to the scope of preservation under Proposed Rule 37(e). A party making a good faith effort to apply proportionality to its preservation efforts should be presumptively entitled to protection from being found to have failed to preserve, especially in the pre-litigation context involving primary conduct.

## Culpability and Prejudice

The entitlement to spoliation sanctions is currently governed by varying common law Circuit standards based on application of inherent sanctioning authority. While current Rule 37(b) can, in some instances, apply if prior preservation orders are violated, the Committee has eschewed granting general sanctioning authority for preservation failures.

A major objective of the Proposed Rule is to impose a uniform national standard in Rule 37 for the key elements required to impose spoliation sanctions. Allegations of culpable spoliation are currently being resolved differently depending solely on the Circuits in which the

[21] 608 F. Supp. 2d 409 (S.D. N.Y. Jan. 26, 2009); *see also* Doe v. Norwalk Community College, 248 F.R.D. 372, 378 (D.Conn. July 16, 2007)(finding implication of a duty to act affirmatively to prevent automatic overwriting in Committee Note).

[22] Zubulake v. UBS Warburg ("Zubulake IV"), 220 F.R.D. 212, 220 & n. 46 (S.D. N.Y. Oct. 22, 2003).

case is brought. Moreover, the split in authority is often "compounded by confusing semantics and the shading of precedents."[23]

To create the desired uniformity, Proposed Rule 37(e) "rejects"[24] the holding in *Residential Funding*[25] under which mere negligence is sufficient to support spoliation sanctions on the theory that innocent parties should not suffer the consequences of failures to preserve. That approach has been utilized in the Fourth,[26] Sixth,[27] Ninth[28] and District of Columbia[29] Circuits, although some of those Circuits temper that "looser standard" by requiring that dismissals or defaults meet a higher culpability standard.[30]

Instead, the Proposed Rule echoes holdings requiring heightened culpability and material prejudice.[31] Thus, Proposed Rule 37(e)(1)(B)(i) will authorize sanctions for preservation failures *only* if a party's actions "caused substantial prejudice in the litigation and were willful or in bad faith," subject to an exception in (B)(ii) discussed below. The list of sanctions is "borrowed" from Rule 37(b)(2) and a reference to an "adverse inference jury instruction" has been added as an equivalent sanction.

However, a no-fault exception in Subsection (B)(ii), inspired by the *Silvestri* decision,[32] would permits sanctions to be imposed without a showing of *any* culpability – even if the party acted in good faith – if the failure to preserve "irreparably deprived a party of any meaningful opportunity to present or defend against claims in the litigation."

## Comment

Under (B)(i), a potential producing party will be immune from sanctions even if discoverable information is lost through negligent or grossly negligent conduct (assuming that such conduct is not deemed "willful") or, even if it were to be, if there has been no "substantial"

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[23] United Medical Supply, 77 Fed. Cl. 257, 266-267 (2007)(collecting and summarizing cases).

[24] REPORT, May 8, 2013, as supplemented June 2013,[unnumbered page] 272 of 354, copy at http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf. The unnumbered portion of the May 8, 2013 Report of the Committee, as revised)(" REPORT"), begins at page 259 and the numbered portion begins at 281. The text of Rule 37(e) begins at 34 of the latter, and references to the Rule and the Committee Notes utilize that form of pagination in this Memorandum.

[25] Residential Funding Corp v. DeGeorge, 306 F.3d 99, 108 (2nd Cir. Sept. 26, 2002)(a culpable state of mind is satisfied by a showing that evidence was destroyed "knowingly, even if without intent to [breach a duty to preserve it] or *negligently*")(emphasis added by court ).

[26] Buckley v. Mukasey, 538 F.3d 306, 323 ((4th Cir. Aug. 20, 2008)(permitting sanctions for "intentional," "willful," or "deliberate" conduct).

[27] Beaven v. USDOJ, 622 F.3d 540, 554 (6th Cir. Sept. 27, 2010).

[28] Glover v. BIC, 6 F.3d 1318, 1329 (9th Cir. Sept. 29, 1993)('bad faith' is not a prerequisite").

[29] Grosdidier v. Broadcasting Board, 709 F.3d 19, 27 (D.D.C. March 8, 2013).

[30] *See, e.g.*, Stocker v. United States, 705 F.3d 225, 236 (6th Cir. Jan. 17, 2013)(the "more severe sanctions [should be] reserved for the knowing or intentional destruction of material evidence").

[31] *See, e.g.*, Batson v. Neal Spelce Associates, 765 F.2d 511, 514 (5th Cir. July 18, 1985)(sanctions authorized only when the failure [in that case, a failure to comply with a discovery order] "results from willfulness or bad faith" and the trial preparation of the other party is "substantially prejudiced").

[32] Silvestri v. General Motors, 271 F.3d 683, 593 (4th Cir. Nov. 14, 2001)(dismissing plaintiff's action since the "effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim").

prejudice. A safe harbor of that nature is essential to create predictability, especially for potential producing parties implementing preservation obligations prior to institution of litigation.

Judge Shira Scheindlin has recently written that "imposing sanctions only where evidence is destroyed willfully or in bad faith creates perverse incentives and encourages sloppy behavior."[33] However, that argument rests on the assumption that potential producing parties will intentionally violate their responsibilities and will be aided and abetted by counsel unresponsive to their ethical obligations. Our judicial system rests on an entirely different set of assumptions – and there is no anecdotal or other evidence that a slip in standards of conduct has resulted from adoption of Rule 37(e), as was predicted when the 2006 Amendments were considered.

A major threat to the efficacy of (B)(i), however, comes from the ambiguity in the case law over the meaning of "willful" conduct. If, as Judge Scheindlin recently held, merely intentional conduct suffices to demonstrate willfulness, then the Rule could lose its intended impact.[34] A showing of willful conduct was, however, widely understood by the Committee to be more demanding than "negligence, even gross negligence."[35]

Similarly, the requirement that the party seeking sanctions under (B)(i) must show that it has been substantially prejudiced[36] could be compromised by the *Residential Funding* premise that gross negligence justifies presumptions (or inferences) of prejudice - without the need to prove it.[37]

Finally, (B)(i) risks being undermined by the exception in Subsection (1)(B)(ii) which makes sanctions generally available outside the tangible property realm in the absence of culpability so long as the resulting prejudice is deemed "irreparable." The Committee Note distinguishes the "substantial" prejudice required in (B)(i) from the "irreparable" prejudice in (B)(ii) by describing the latter as "more demanding" than the former.[38]

This option will be tempting to courts interested in finding "a safety value" for the "general directive" in (B)(i).[39]

## Suggested Action

It would be advisable to drop the (B)(ii) exception in favor of other viable options, notably the introduction of the primary rule by the phrase "absent exceptional circumstances."[40]

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[33] Sekisui American Corporation v. Hart, 2013 WL 4116322, n. 51 (S.D. N.Y. Aug. 15, 2013)(Scheindlin, J).
[34] *Id*., at *5 (intentional destruction of relevant information after a duty to preserve has attached is "willful").
[35] Subcommittee Notes, August 7, 2012, 6 (any definition is more likely to cause trouble than to solve it).
[36] Committee Note, 42.
[37] Residential Funding , *supra*, 306 F.3d 99, 110 ("intentional or grossly negligent acts that hinder discovery support such an inference"). District Judge Scheindlin also noted in Sekisui that she does "not agree" with the Proposed rule that the burden "to prove prejudice from missing evidence" should fall on the "innocent party.
[38] Committee Note, 43-44 (an "alleged injury-causing instrumentality" such an automobile or "evidence of a critically important event").
[39] Rules Comm. Report to Stdg. Comm., Dec. 5, 2012, 11.

This would not "overrule the *Silvestri* line of cases"[41] but would simply extend the role the clause currently plays in existing Rule 37(e) without controversy.[42]

The Committee Note could explain the rare nature of the exception so as to help avoid its inappropriate use to impose liability without fault outside the typical *Silvestri* context, where it is used to shield a party from having to defend products cases when it would be unfair to proceed.[43] Authorizing sanctions for conduct lacking culpability comes very close to invoking a *per se* approach inconsistent with the rejection of *Residential Funding.*

If the Committee is not prepared to modify the exception, it should give consideration to confining the Proposed Rule to "documents and ESI," a distinction already embodied in Rule 34.[44]

It also seems clear that "willful" conduct would benefit from clarification. The Rule could specify the necessity of showing that the conduct was undertaken for the purpose of hiding adverse information[45] or a similar formulation showing purposeful conduct.[46] Connecticut has already done so.[47] Two other viable options are to (1) delete the "willfulness" category entirely or (2) insert "and" for "or" and require that both elements ("willful" and "bad faith") be proven.

Finally, it would be useful to emphasize that the rejection of *Residential Funding*[48] extends to the argument that a finding of "gross negligence" excuses a party from having to prove that there actually was a loss of relevant evidence which inflicted prejudice.[49] That *per se* approach is inconsistent with the intended effect of the Proposed Rule.

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[40] Until November, 2012, the draft rule was introduced by the phrase "absent extraordinary circumstance" or "absent exceptional circumstances." At the November Rules Meeting, that language was dropped for the current standalone exception in (B)(ii) dealing "irreparable prejudice."

[41] Subcommittee Notes, Feb. 18, 2013, [unnumbered page] 2, April 2013 Agenda Book, at 206.

[42] Rules Committee Report, Transmittal of Amendments to Congress, 234 F.R.D. 219, 372 (2006). As explained in the "Changes Made after Publication and Comment" section, "[t]his provision recognizes that in some circumstances a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information."

[43] A default judgment entitling a party to damages as a sanction for "irreparable" prejudice without requiring culpability comes close to creating a spoliation tort in derogation of 28 U.S.C. § 2072 (b). *Cf* Gutman v. Klein, 515 Fed. Appx. 8, 2013 WL 1136587 (2nd Cir. March 20, 2013)(rejecting argument that default judgment created a windfall for plaintiff where defending party spoliated laptop).

[44] The term "discoverable information" is apparently used in the Proposed Rule to include *both* the contents of documents and ESI as well as the discernible knowledge which may be gleaned from "tangible property." *But see* Rule 34(a)(1)(distinguishing between discovery of documents and ESI as sources of "information" (in (A)) and discovery of "tangible things" (in (B)).

[45] Bracey v. Grondin, 712 F.3d 1012, 1019 (7th Cir. March 15, 2013).

[46] Adeptech Systems v. Fed. Home Loan Mortgate, 502 Fed. Appx. 295, 2012 WL 6720927 (4th Cir. Dec. 28, 2012)("purposefully destroyed relevant email evidence in anticipation of litigation" [citing McCormick, Evidence § 273]).

[47] CONNECTICUT PRACTICE BOOK, CT. R. SUPER CT CIV, § 13-14 (2012)(barring sanctions information lost due to good-faith operation of a process unless movant shows "intentional actions designed to avoid known preservation obligations").

[48] Residential Funding , *supra*, 306 F.3d 99, 110 ("intentional or grossly negligent acts that hinder discovery support such an inference").

[49] Sekisui American v. Hart, *supra,* 2013 WL 4116322, at *7 ("the destruction [of email] was willful" and "prejudice is therefore presumed" citing Residential Funding).

## Sanction Selection

Many Circuits distinguish between entitlement to sanctions and the choice of a specific sanction in a particular case. In the selection process, the degree of culpability and prejudice is often important.[50]

Subsection (e)(1) of the Proposed Rule reflects this distinction by requiring heightened culpability and prejudice only for "sanctions" while under Subsection (e)(1)(A), "curative" measures are available without showing either because, according to the Committee Note, they "are not sanctions." [51] The Subsection identifies payment of reasonable expenses, including attorney's fees, as measures that may be ordered without proof of culpability or prejudice. Moreover, the Committee Note authorizes a form of adverse inference instructions and the allowance of argument about missing evidence as curative measures.[52]

### Comment

The distinction suggested in Subsection (1) between "sanctions" and "curative measures" is quite murky and will allow a District Court to avoid the ban in Subsection (1)(B))(i) on all but the harshest of sanctions by simply invoking Subsection (1)(A).[53] This suggests that curative measures – focusing on leveling the playing field and not punitive actions - will become a primary remedy, as opposed to "sanctions," with adverse inferences slipping into the former, rather than the latter.

Judge Schaffer has presciently written in support of the Proposed Rule that it has the "salutary effect of re-focusing attention on the 'remedial' aspects of a spoliation motion."[54]

In contrast, the Sedona Conference® proposal of October 2012,[55] defined the full spectrum of "sanctions" without differentiation,[56] but separately acknowledged the role of case management and remedial orders as necessary to "effectuate discovery or trial preparation."[57] It separately provided guidelines on sanction selection, including that they be proportional to the degree of prejudice inflicted and the failure to preserve.[58]

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[50] Committee Note, 42 (there is an "expectation" under (B)(i) that the court "will employ the least severe sanction needed to repair the prejudice" from the loss of information).
[51] Committee Note, 40 (a court "may adopt a variety of measures that are not sanctions).
[52] Committee Note, 41 ("[a]dditional curative measures might include permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information").
[53] *Compare* Mali v. Fed. Insur. Co.720 F.3d 387, 393(2nd Cir. June 13, 2013)("it is not the sort of punitive adverse inference instruction that we discussed in Residential Funding") *with* Arch Insurance v. Broan-Nutone, 2012 WL 6634323, at *5 (6th Cir. Dec. 21, 2012)(the instruction "came dressed in the authority of the court").
[54] Craig R. Shaffer and Ryan T. Shaffer, Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure, Vol 7, Issue 1 (2013), The Federal Courts Law Review, at 207.
[55] Letter from Sedona Conference® (WG 1) to Hon. D. G. Campbell, October 3, 2012, at 1 (hereinafter "SEDONA PROPOSALS").
[56] *Id*., Rule 37(e)(4)("Types of Sanctions").
[57] *Id.*, Rule 37(e)(6)("Remedial Orders").
[58] *Id*., Rule 37(e)(5)("Selection of Sanction").

## Conclusion

The Committee has asked for Public Comment on whether "the current Rule 37(e) should be retained?"[59] The current rule provides that a party acting in "good faith" in the operation of its information systems – *i.e*, without a showing of "bad faith" intent to withhold evidence – cannot be the recipient of rule-based sanctions for losses from routine operations.

While the author had earlier suggested methods of revitalizing and enlarging the coverage of the Rule because case law had "all but read [the] safe harbor [of Rule 37(e)] out of the rules,"[60] that would appear unnecessary now. The form of the Proposed Rule is superior in several ways. For example, it authorizes sanctions based on heightened culpability[61] and covers any form of discoverable information (not just ESI). Moreover, it extends the cabining of authorized sanctions and curative measures to all types of failures (not just losses from routine operations).

Thus, it is reasonable to assume that the Proposed Rule will displace and foreclose the use of inherent sanctioning power[62] as an end-around the Proposed Rule.[63] As the Supreme Court noted in *Chambers v. NASCO*,[64] only if the Rules are not "up to the task" may a court rely on its inherent power.[65]

In addition, the Committee has expressly affirmed an intent that "any loss of data that would be insulated against sanctions under the current rule would also be protected under the amended rule,"[66] thus preserving an important body of case law on the topic. Thus, there is no need to retain the existing Rule 37(e) if the appropriate changes suggested in this Memorandum are made.

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[59] REPORT, *supra*, at [unnumbered] 275 ("(3) Should the provisions of current Rule 37(e) be retained in the rule?").
[60] Thomas Y. Allman, Adapting Rule 37(e): The Decisive Issue, March 16, 2012, 1 (Paper submitted to Rules Committee prior to March, 2012 Meeting); copy at March 2012 Agenda Book, Addendum at 11.
[61] Except for the circumstances covered in Subsection (1)(B)(ii), and subject to the caveats expressed earlier about "willful' conduct.
[62] Rules Comm. Report to Stdg. Comm., Dec, 5, 2012, 10 - 11(foreclosing the temptation for courts to rely upon "looser notions of inherent power" to circumvent the protections established by Rule 37(e)).
[63] United State v. Aleo, 681 F.3d 290, 310 (6th Cir. May 15, 2012)("a judge may not use inherent power to end-run a cabined power")(Sutton, J., concurring in result).
[64] 501 U.S. 32 (1991).
[65] *Id*., 50.
[66] Committee Note, 39.

# Appendix: Proposed Rule 37(e) (2013)

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

…

**(e) Failure to Preserve Discoverable Information.**

**(1)** ***Curative measures; sanctions*****.** If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may:

**(A)** permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

**(B)** impose any sanction listed in Rule 37(b)(2)(A) or give an adverse inference jury instruction, but only if the court finds that the party's actions:

**(i)** caused substantial prejudice in the litigation and were willful or in bad faith; or

**(ii)** irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

**(2)** ***Factors to be considered in assessing a party's conduct*****.** The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:

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

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

**(C)** whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;

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

**(E)** whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.