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Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Rule 37(e)

To the Committee on Rules of Practice and Procedure:

I respectfully submit this comment on the proposed amendment to Federal Rules of Civil Procedure 37(e). I testified at the Committee's January 9 hearing in Phoenix, Arizona.

Summary. I join many others in commending the Committee for working to reform the procedural rules in the area of preservation. There is an urgent need for rule-based preservation reform (*see* Point I, *infra*) because the current law poses many problems for clients, practitioners, and courts (Point II). I argue for adoption of a clear, tightly written, national rule on preservation (Point III) that will decisively displace the negligence culpability standard of *Residential Funding* because the explosive growth and dispersion of data has rendered negligence an unfair measure of culpability (Point III(C)). Rule 37(e) should unambiguously predicate the issuance of a sanctions order on a showing of intentional, bad faith destruction of discoverable material, and I join many others in arguing that "willful" is a dangerously unclear term, that the (B)(ii) exception should apply only to tangible things, and that the (e)(2) list of factors should be omitted from the rule. (Point IV) Finally, I respond to points raised by critics of the proposed rule (Point V).

I. There Is an Urgent Need for Rule-Based Preservation Reform.

Since the adoption of the Federal Rules of Civil Procedure in 1938, the biggest changes in American civil litigation have flowed from the digital revolution. When the Federal Rules were adopted and for decades thereafter, full pretrial disclosure imposed a relatively modest burden in most cases, even for larger litigants in larger cases. However, the explosion of electronic data volumes and sources in the last 20 years has transformed pretrial disclosure into a complex, expensive, and risky exercise for large organizations and, increasingly, for individual litigants and smaller entities as well.

The exponential expansion of electronic data volumes and sources is old news. But what is now routinely overlooked is how radically the evolving federal common law of preservation altered the American litigation landscape. I refer, of course, to the pre-commencement duty to preserve. Using the ancient prohibition against *destroying* obviously important tangible evidence[1] as a *stare decisis* justification for their decisions, courts facing egregious conduct imposed a very different duty on all litigants -- a new *affirmative* duty to preserve *all* discoverable material, including nontangible information in whatever form, as soon as they "reasonably anticipate" bringing or defending an action. "Don't destroy or lose a central piece of evidence" over time became "You must preserve everything discoverable."

This new burden is significant, the scope of discovery under Rule 26(b)(1) being as broad as it is,[2] and the burden is growing as ESI volumes, sources, and complexities multiply. In the course of my 40-year litigation career in New York City, electronic discovery has become the biggest driver of litigation cost and risk.

II. The Current Preservation Law Has Many Problems.

My letter to the Committee dated October 24, 2011 amplified my remarks at the September 9, 2011 Dallas mini-conference on preservation and sanctions and listed the problems inherent in the federal common law preservation requirement.[3] To recap what I said there, the current requirement is:

A. Inconsistent. The current judge-made regimen produces different outcomes in different jurisdictions, leading to confusion and unfairness. Companies operating nationally must adhere to the requirements of the most extreme cases.

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[1] Most sources credit a 1722 King's Bench decision as being the first to award an adverse inference because of the loss of evidence (two jewels) central to the matter. *Armory v. Delamirie*, 1 Strange 505, 93 Eng. Rep. 664 (K.B. 1722) ("unless the defendant did produce the jewel, and shew [sic, show] it not to be of the finest water [sic, the highest quality], [the jury] should presume the strongest case against him, and make the value of the best jewels the measure of their damages").

[2] *Narrowing the Scope of Discoverability.* I enthusiastically support the proposed amendment to Rule 26(b)(1), which would narrow and place proportionality limits on the scope of discoverable information. It is simply no longer feasible or fair to require litigants to locate and produce information and things, at no cost to the requester, in accordance with the current 26(b)(1) scope. Beyond the proposed narrowing of the scope of discovery, I would also support cost-shifting when the requester seeks more than a reasonably sufficient quantity of materials related to the claims and defenses in the action.

[3] Letter of Robert D. Owen to Hon. David G. Campbell, dated Oct. 24, 2011 ("R. Owen Oct. 24, 2011 Letter"), available at http://1.usa.gov/Kwvcvs. I argued at the mini-conference and in my letter that the trigger for preservation should be actual notice of the commencement of an action or proceeding, coupled with a permanent prohibition against intentional destruction of material (i) still within its retention period and (ii) done "with the intention of making it unavailable to an adversary in litigation, whether specific litigation is reasonably foreseeable or not." I also suggested that Rule 27 be amended to allow pre-filing applications for preservation orders in exceptional cases. I still believe this proposal deserves consideration. Several other comments filed to date endorse a commencement-as-trigger rule.

B. **Imprecise.** The law on preservation affords scant *definitive* guidance to potential litigants regarding (a) trigger, (b) scope, (c) manner of preservation, or (d) duration. Companies seeking in good faith to avoid the shame, cost, and prejudice of a spoliation charge inevitably over-preserve. Individual litigants are also increasingly subjected to litigation risk by the lack of clear guidance.

C. **Unjustified.** The current system of affirmative preservation was created without empirical evidence of need, and what evidence exists suggests that spoliation, whether intentional or inadvertent, is not a rampant problem.

D. **Radical.** The current preservation regimen has silently reversed the long-prevailing presumption that persons in possession of evidentiary material would not destroy it. Despite the absence of empirical justification, our federal courts have reversed this presumption, and now require affirmative oversight and policing by lawyers and judges *in all cases*.

E. **Unbalanced.** A putative plaintiff can impose a "reasonable anticipation of litigation" on a defendant by simply sending a preservation demand letter, but Rule 11(b)'s certification requirements – that he has a good faith basis for his allegations – do not apply to him until that day, if ever, that he files a formal complaint.

F. **Expensive.** The hypothetical benefits of the current preservation regimen do not justify the very real costs and burdens.

G. **Spurs Ancillary Litigation.** The new preservation regimen has spawned an area of dispute entirely ancillary to the merits.

I respectfully submit this is a pretty robust list of problems for something created entirely by decisions in "bad-facts" cases, with no legislative hearings or other input. The proposed Rule 37(e) – if edited to close some already apparent loopholes – will address the first problem of inconsistency and perhaps to a small extent the issue of expense. I applaud the Committee's work in this difficult area, but the other problems listed above will continue to vex entities and individuals attempting in good faith to meet their preservation obligation.

III. Only a Clear, Tightly Written, National Rule Can Restore Uniformity and Fairness.

The Committee has noted that a split in the Circuits exists on the most central issue presented by the current regimen, the so-called culpability factor. Given the impossibility of achieving preservation perfection, most Circuits recognize that mere negligence or gross negligence in preservation is an insufficient basis for an adverse inference order. Most require some further showing of bad faith.

A. One Circuit Skews Preservation Practices Everywhere. *The outlier negligence culpability standard must be unambiguously supplanted by rule, because it forces parties who face litigation nationally to adopt wasteful, overbroad preservation practices.*

Contrary to the majority rule, in the states comprising the Second Circuit (New York, Connecticut and Vermont), it has long been accepted that a party can be exposed to sanctions by virtue of having made a mistake when deciding when and what to preserve among the many data sources litigants must manage.

Residential Funding. The seminal Second Circuit case is, of course, *Residential Funding Corp. v. DeGeorge Financial Capital Corp.*[4] Ironically, given the breadth of its subsequent impact on spoliation law in that Circuit, *Residential Funding* was not a spoliation case at all, and negligent loss of data was not before the Court. Its statement that negligence suffices in spoliation cases[5] is pure dictum.[6] But lower courts in the Circuit have employed it to expand the costs and risks of preservation common law. In *Chin v. Port Authority*,[7] a Second Circuit panel that included the author of *Residential Funding* (Cabranes, C.J.) dialed back one such case's holding[8], but it is beyond cavil that the central holding of *Residential Funding* remains the law in my Circuit.

Obviously entities that operate nationally and those that are subject to suit in the Second Circuit must design their preservation practices accordingly. It makes no difference to them that the majority of circuits require a showing of bad faith before sanctions will issue. This situation will not change without a tightly worded rule, or legislation. Proposed Rule 37(e) is not worded tightly enough, as I discuss below, but it is a very good step in the right direction.

B. Negligence in Preservation Does Not Justify Adverse *Evidentiary* Inferences. *If a party did not intentionally destroy evidentiary material, an adverse inference is inappropriate.*

If the alleged spoliating party did not intend to lose or destroy evidence *in order to keep it out of the hands of a litigation opponent*, it is simply unfair to presume that the evidence was unfavorable to its case. As Ken Withers recently observed, "The state of mind of the party

[4] 306 F.3d 99 (2d Cir. 2002).

[5] "[D]iscovery sanctions, including an adverse inference instruction, may be imposed where a party has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence." *Id.*

[6] "[T]his is not a typical spoliation case. It does not appear that RFC *destroyed* the e-mails on the back-up tapes." *Id.*

[7] 685 F.3d 135 (2012).

[8] The Court in *Chin* stated clearly, "We reject the notion that a failure to issue a 'litigation hold' constitutes gross negligence *per se*," thereby rejecting that portion of Judge Scheindlin's opinion in *Pension Committee* that had held to the contrary.

accused of spoliation must rise to the level to support a reasonable inference that the destruction was at least motivated by a fear of discovery."[9]

Without a state of mind suggesting fear of discovery, it is unfair *as an evidentiary matter* to allow or instruct the jury to find or assume the lost material was even relevant, let alone unfavorable. The jury's job is to find the facts, not be an instrument of the court's disciplinary power. Withers again:

> [I]nferences to be drawn from circumstantial evidence must have some rational basis. And by divorcing the inference from a rational basis, the jury is drafted into service to impose what should be a court sanction under the guise of evidential presumptions and findings.

Only when there is a rational basis for an evidentiary instruction should one be given. And only when there is evidence of bad faith loss of relevant evidence should it be presumed that the lost evidence was adverse to the interests of the producing party.

C. Negligence Is Increasingly an Unfair Measure of Culpability. *Data volumes, sources, and complexity have exploded far beyond 2002 levels, when* Residential Funding *was decided.*

When *Residential Funding* was decided in 2002, negligence in preservation was far less excusable. Relevant evidence was typically found in a single email server, in a few network shares, and occasionally in databases. It was far easier in most cases for parties to marshal a reasonably complete set of discoverable material.

There is no need to belabor the point that data sources are now more numerous, complex, dispersed, and difficult to preserve.[10] After 2002, the three basic sources of ESI listed above were joined by instant messaging, text messaging, social media, web pages, blogs, Instagram, interactive public-facing portals – just to name a few. Hardware sources of ESI expanded from relatively simple server-based networks and standalone desktops to include laptops, tablets, smartphones, thumbdrives, external hard drives, remote storage, and cloud storage – just to name a few.

Some say that large data-producing entities should manage their information better and if they don't, too bad. But that overlooks the complexity of data today. What's more, unforgiving, draconian responses to simple human error have never found a comfortable home in our due

[9] Ken Withers, "Withers on the Problem With 'Willful,'" BNA Digital Discovery and E-Evidence, Aug. 18, 2013.

[10] The Committee said as much in its transmittal memo: "The amount and variety of digital information has expanded enormously in the last decade . . . ." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, at 271 (2013) [hereinafter *Preliminary Draft of Proposed Amendments*] available at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx.

process-based system. Our jails are not filled with people who merely made mistakes. Our rules and our cases alike should take into account the increasing complexity of the environment in which discoverable data may be located. It is grossly unfair today to assume that a negligent failure to preserve without more means the lost evidence was prejudicial to the party who lost it or even relevant to the parties' claims and defenses.

The increasing complexity of data has another preservation consequence. My clients' line employees don't need extensive training to know when they are destroying something in bad faith. They come "pre-wired," if you will, to know the difference between good faith and bad faith. But training them to avoid mere mistakes in preservation is a different matter. In this area, it is an impossible task, to be honest.

Finally, technology is not the answer, as some have argued. There is no product at present that can marshal responsive ESI from across the many platforms where it resides. And in any event, if there were it would surely be unjust to require smaller companies and individuals to acquire it and manage it successfully as a precondition to litigate in the federal courts.

The solution to the problems presented by this situation is, at a minimum, to render negligence an insufficient basis for sanctions, as the proposed rule would do.

D. This Is a Complex and Controversial Area; the Rule Must Be Tightly and Clearly Written. *Lawyers and judges outside "the Sedona bubble" need a clearly written rule, and judges disinclined to change their views do too.*

I join many others in commending the Committee for taking on what all recognize to be a daunting task – reforming the current preservation regime in a rule. (Over 300 American companies have jointly filed a comment letter endorsing proposed Rule 37(e), albeit with some changes, and affirming that the current preservation law leads inevitably to wasteful over-preservation.) But as hard as the task is already, I urge the Committee to do a little more work, and report out a more tightly written rule that gives clear guidance and allows no wiggle room. I say this for three reasons.

First, the Federal Rules of Civil Procedure are intended to provide clean, definitive answers to procedural questions. *How many days do I have to serve an answer to the complaint? How many depositions can I take without leave of court? In what form must I produce ESI requested by opposing counsel?* The typical practitioner finds the rulebook, looks up the answer, and acts or rules accordingly. That's what litigants expect from the Federal Rules of Civil Procedure. Rule 37(e) should conform to that expectation, especially because the vast majority of practitioners who don't inhabit the "Sedona Bubble" (or who aren't otherwise experts in the law of e-discovery) have to make preservation decisions pre-commencement, when there is no complaint to define scope, no adversary to negotiate with, and no judge to resort to. The preservation rule should be clear and unambiguous, so those lawyers know what their and their clients' preservation duties are and have a fair shot at making the right preservation decisions.

Second, it is not only practitioners who need clear guidance; most judges do, too. While there are over 670 district judges and over 500 magistrate judges, only a few dozen of those at most regularly attend and speak at conferences organized by Sedona, Georgetown, and EDI. The rest of the bench needs clear guidance on this tricky – and consequential – topic. The rule should be rewritten to provide it.

Third, there are also judges whose personal views are out-of-step with the Committee and for whom tightly worded guidance is essential. For example, a judge in my district for whom I have both affection and deep respect issued an opinion recently that construed "willful" to mean merely intentional conduct.[11] If applied to the new rule 37(e), that construction of "willful" would enable *Residential Funding* to survive.

So to ensure a consistent, fair application around the country, revised Rule 37(e) should be carefully, clearly, and restrictively written.

Judges understandably resist incursions on their discretion. I would too. But I believe the decisions of a few judges in a handful of courts in a few bad-facts cases have distorted our system, skewed the balance of fairness between parties, and drawn far too many cases away from a focus on the merits. Their decisions are rarely reviewed on appeal, and thus remain good – or at least unreviewed – law and loom large in the national e-discovery psyche.

Why Do We Need a Rule at All? I was asked at the end of a "debate" at Georgetown's conference last November why I didn't trust the judges to decide these matters without the tight guidance of a revised rule. The best answer (which in the moment I didn't give) is this:

Our current preservation regimen drives an enormous amount of cost and risk in American litigation and yet a single decision by a single district judge, rendered without warning and without an opportunity for *amici* to weigh in, can radically change preservation behavior nationally. Numerous corporate commentators have affirmed that this is so. Having a single judge's decision on e-discovery affect the behavior of innumerable non-parties across the country is out of sync with our traditions – particularly when such decisions are only rarely appealed and thus often become the final word.

By contrast, our federal judicial system doesn't entrust the final word on appeals – which of course have broad national impact – to a single judge. It provides for a court comprising nine individuals. Just as we want the collective judgment of nine people to determine significant matters taken to our court of last resort, so should we want highly consequential policy decisions concerning preservation and sanctions to be determined, not by a single judge, but by a rule that reflects the collective judgment after notice and hearing of the Judicial Conference, the Supreme Court, and the Congress. That's why I think we need a carefully drafted rule.

[11] *Sekisui America Corp. v. Hart*, 945 F. Supp.2d 494 (2013) ("In the context of an adverse inference analysis, there is no analytical distinction between destroying evidence in bad faith, *i.e.*, with a malevolent purpose, and destroying it willfully."

IV. Proposed Rule 37(e) Should Unambiguously Require a Showing of Intentional, Bad Faith Destruction of Discoverable Material.

The proposed Rule 37(e) reflects a welcome recognition by the Rules Committee that our current preservation regimen needs rules-based reform that both (i) supplants inherent power in that area and (ii) overrules the *Residential Funding* line of cases. It is a strong step in the right direction, but it can and should be improved before final adoption.

A. "Willful" Is Too Ambiguous.

*The current draft rule 37(e) would forbid sanctions where a party's actions were not "willful **or** in bad faith" but "willful" is an imprecise term that can encompass deliberate but entirely innocent actions.*

The Committee's fifth question posed to the public concerned the meaning of "willful" and "bad faith": "Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)? If so, what should be included in that definition?" Because the term "willful" is ambiguous and the current proposed draft would allow simple willfulness standing alone to satisfy the culpability requirement ("willful *or* in bad faith), my answer to the first part of Question 5 is most definitely "yes."

The Supreme Court has stated several times that "willful" is "a word of many meanings." *Spies v. U.S.* 317 U.S. 492 (1943). *See also McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (the term "has not by any means been given a perfectly consistent interpretation"). Some cases read bad faith into "willful": *see, e.g., One 1941 Buick Sedan v. U.S.*, 158 F.2d 445 (10th Cir. 1946) ("To constitute a violation an act must be 'wilful' in the sense of a bad purpose, and more is required than mere doing of an act proscribed by the statute." But some cases don't: *see, e.g., Coosemans Specialties v. Dep't of Agric.*, 482 F.3d 560 (D.C. Cir. 2007) ("An action is 'willful' . . . if a prohibited act is done intentionally, irrespective of evil intent . . . .").[12]

So "willful," standing alone, will not achieve the Committee's goal of overruling *Residential Funding*, nor it ensure national uniformity. There are three possible solutions:

First, omit the term "willful" altogether, and focus on the requirement to show "bad faith," or

Second, amend the proposed rule's language to require that the movant show the loss was "willful **and** in bad faith," or

[12] Ken Withers agrees that use of the word "willful" is troublesome:

> That's why the word "willful" is such a problem: the word is commonly understood to implicate some degree of bad faith (it is often used in conjunction with that phrase in court opinions) but is defined in this [*Sekisui*] *Opinion* and elsewhere as merely intentional conduct in the broadest sense.

Ken Withers, "Withers on the Problem With 'Willful,'" BNA Digital Discovery and E-Evidence, Aug. 18, 2013.

> *Third*, define "willful" as proposed by The Sedona Conference®: We encourage the Committee to clarify that the standard adopted, "willful", "bad faith", or "willful and bad faith," require a finding by the court that the alleged spoliating party *acted with "specific intent" to deprive the opposing party of material evidence relevant to the claims and/or defenses* to the matter prior to the imposition of sanctions and/or any curative measure that would be tantamount to a sanction.[13]

Because I believe this rule must be tightly and clearly written, I favor the third alternative of requiring an express finding of fact as suggested by The Sedona Conference®.

B. The "Irreparably Deprived" Exception Will Render the Rule Ineffective. *Companies and others fear that the* Silvestri *exception to the requirement of bad faith and substantial prejudice will allow out-of-step judges to undermine the Committee's intent to overrule* Residential Funding*, displace inherent power, and achieve national uniformity.*

The Committee correctly perceived after the Duke Conference in May 2010 and the Dallas mini-hearing in September 2011 that the current law on preservation confronts American companies and other parties with a profound lack of predictability. The "reasonable anticipation of litigation" trigger requires them to make preservation decisions in many cases without a scope-defining complaint, without an adversary with whom to dialogue and negotiate, and without a court to which they can resort if negotiations fail. Layered on top of that challenge is (i) the national incoherence of the culpability standard and (ii) the possibility that a court might exercise its inherent power to order sanctions. Faced with the chance that a merely negligent preservation mistake could bring a sanctions order, and not knowing under what circumstances a court might invoke its inherent power, companies (and others) over-preserve.

The Committee, to its great credit, has taken note and has taken action. "A central objective of the proposed new Rule 37(e)" is to adopt a single standard for culpability. Another objective is to "remove any occasion to rely on inherent power" in the treatment of incidents of unpreserved material.[14] While achieving these objectives will not address all the problems with the current preservation regime, *see supra* at Section II ("Problems With the Current Preservation Law"), doing so would mark real progress. But even that progress is threatened by the inclusion of the (B)(ii) exception. "Irreparable deprivation" is as subject to diverse and inconsistent application in practice as is "culpability." The introduction of the *Silvestri* wild card into the rule – and having it apply to ESI and documents as well as tangible things – would put at risk all the gains so laboriously won since 2010.

[13] Comment submitted by The Sedona Conference® to the Rules Committee dated November 26, 2013, at p.13 (emphasis added).

[14] *Preliminary Draft of Proposed Amendments* at p. 272.

What Does Silvestri *Stand For?* The *Silvestri* case[15] arose out of a one-car accident. The plaintiff, Silvestri, was drunk, speeding, and driving recklessly. The accident was clearly 100% his fault. His case against General Motors rested on his allegation that his car's airbag did not function as designed to prevent or lessen the injuries he suffered. The central piece of evidence was obviously the car and its airbag component. He, or at least his lawyer, had been expressly advised by their experts to notify General Motors and preserve the car for its inspection, but Silvestri never did either and GM wasn't notified of the claim until three years later, when the action was filed. The district court dismissed his case as a sanction for spoliating the only piece of evidence, and the Fourth Circuit affirmed, relying on two New York spoliation cases that also involved the loss of tangible, obviously central pieces of evidence (a street sweeper and a stove). The appellate court held it was within the district court's discretion to invoke its inherent power to order the dismissal.

So, in *Silvestri* (i) the car was obviously the central piece of evidence on which the whole case turned, and (ii) the plaintiff knew or should have known that GM would need access to the car to have a fair chance to present a defense. I believe, therefore, that the (B)(ii) "irreparable deprivation" exception to showing bad faith and substantial prejudice is broader than it needs to be to take account of *Silvestri.* As phrased, (B)(ii) doesn't require that the lost evidence be the central piece of evidence in the case and doesn't require a showing of recklessness on the part of the alleged spoliator. In striving to account for *Silvestri*, I respectfully submit that the proposed (B)(ii) clause goes too far and threatens to swallow the rest of the rule.

I see two ways to take account of *Silvestri*. *First*, provide that the (B)(ii) exception applies only to "tangible things" and not to "documents or electronically stored information." Rule 34(a)(1) already draws a distinction between those two categories of evidence. Carrying it forward into proposed Rule 37(e) would maintain that distinction, and avoid overruling *Silvestri*.

Second, the Committee could define "bad faith" to include "reckless actions that are the equivalent of bad faith because a party (i) failed to preserve an obviously crucial piece of evidence and (ii) knew or should have known that the loss would render any trial fundamentally unfair." This articulation would be more consistent with *Silvestri* than the proposed (B)(ii) clause.

Of the two alternative approaches, I favor the first. It is more elegant and consistent with the current structure of Rule 34, it is consistent with the facts of *Silvestri* and its antecedent cases, and it is less likely to produce collateral damage by unintentionally expanding the ambit of "bad faith." Therefore, as other commentators have suggested, I would simply limit the applicability of (B)(ii) to the loss of "tangible things."[16]

[15] *Silvestri v. General Motors*, 271 F.3d 583 (4th Cir. 2001).

[16] Thus, my answer to Question No. 3 in the Invitation for Public Comment ("Should Rule 37(b)(1)(B)(ii) be retained in the rule?") is that it should be retained, provided it is limited to the loss of tangible things.

What about a loss of ESI that without anyone's fault may "catastrophically deprive the other side of any meaningful opportunity to litigate"?[17] In most if not all cases involving lost ESI, there exist duplicate copies of the lost ESI or other material from which the contents of the lost ESI can reasonably be inferred. (In *Sekisui*, for example, the party responsible for deleting the defendant's email account was able to recover 36,000 of the lost emails by resort to other sources.[18]) I don't believe the rule should be contorted or its gains put at risk by trying to craft the perfect rule that takes account of all possibilities. As I have said elsewhere,

> It bears recalling that the standard of proof in most civil cases is the preponderance of evidence, i.e., 51-49%. As I mentioned at the mini-conference, this reflects our society's acceptance of "rough justice," loosely speaking, in most civil cases. Our system's settled acceptance of this standard is sharply at odds with the implicit striving for perfection that permeates the preservation decisions.[19]

There will certainly be isolated cases where the loss without fault of some ESI will damage a party to civil litigation. Procedural rules can on rare occasions have the effect of unfairly denying some persons the opportunity to litigate their cases, but the overall good achieved by having such a rule should not be put at risk by trying to write a rule that takes account of every contingency, but in the end creates ambiguity and uncertainty, or adds confusing complexity.

C. The Non-Exclusive List of Factors Contained in Proposed Rule 37(e)(2) Should Be Omitted. *The factors dilute the rule's intended focus on a requirement of bad faith, do not provide definitive answers, and omit – and thereby undervalue – equally significant considerations.*

The determination whether a party has "failed to preserve discoverable information that should have been preserved"[20] is entrusted to the sound discretion of the district court. To provide guidance to courts, the Committee has proposed to include a list of factors in Rule 37(e)(2). Although they are well intentioned and the proposed Committee Note that accompanies them is well written, I believe the factors should be dropped from the rule, for several reasons.

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[17] The quoted language is taken from the text of Question No. 3, appearing at page 275 of the *Preliminary Draft of Proposed Amendments*.

[18] *Sekisui*, *supra* note 11 ("Sekisui searched several alternative sources and eventually produced about 36,000 emails to and from Hart.") The proposed Committee Note acknowledges that "[b]ecause digital data often duplicate other data, substitute evidence is often available." *Preliminary Draft of Proposed Amendments* at p. 322. *See also id.* at p. 323 ("Particularly with electronically stored information, alternative sources may often exist.")

[19] R. Owen Oct. 24, 2011 Letter, *supra*, note 3.

[20] Proposed Rule 37(e)(1).

First, including the factors runs the risk of diverting the attention of some courts and practitioners away from the rule's central requirement of bad faith. The proposed Committee Note states that "it must be established that the party that failed to preserve did so willfully or in bad faith" and adds that "[t]his determination should be made with reference to the factors identified in rule 37(e)(2)."[21] But many of the factors have nothing to do with the bad faith of the alleged spoliating party.

For example, the second factor – "the reasonableness of the party's efforts to preserve information" – risks substituting a determination of reasonableness for a determination of bad faith. If a court can make a hindsight determination regarding the reasonableness of preservation efforts and conclude that unreasonable preservation efforts suggest bad faith on the part of the preserving party, how would this rule reassure preserving parties that reasonable preservation efforts will suffice to avoid sanctions? Why would they not continue to over-preserve?

A far better approach, I submit, would be to define bad faith precisely as proposed by The Sedona Conference®[22] and omit the factors, or at least make them applicable only to the determination of what reasonably should have been preserved (for purposes of considering curative measures) and expressly inapplicable to the determination of culpability.

Second, the factors are not tightly written and may lead to confusion and inconsistency among district courts (because such decisions are rarely appealed the inconsistencies will not likely be reconciled by higher courts). For example, the fourth factor suggests that a court consider "the proportionality of the preservation efforts" to the litigation. But what does this mean? Nowhere in the rule or in any proposed Committee Note is there a flat statement that preservation efforts can be limited so as to be proportional to the anticipated or actual action. Some courts may construe the factor as signaling that preservation can be so limited, while others may hold otherwise, concluding that the factor is non-exclusive, non-binding and only advisory. If the Committee intends the former, it should say so expressly.

Third, courts may give the listed factors undue weight and undervalue equally important considerations that are not listed. Individual litigants who are inexperienced in litigation will certainly want to argue that their mistakes in making preservation decisions should be excused, but they would find no support anywhere in 37(e)(2).

Whether or not the factors are included in a final rule, it is important that the Committee Note include a clear statement that a failure to preserve – or to meet any contemporary preservation standards such as those identified by *Pension Committee* – does not, in and of itself, justify sanctions without a separate showing of culpability and substantial resulting prejudice.

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[21] *Preliminary Draft of Proposed Amendments* at p. 322.

[22] A finding of bad faith would require a determination that "the alleged spoliating party acted with 'specific intent' to deprive the opposing party of material evidence relevant to the claims and/or defenses to the matter." Comment submitted by The Sedona Conference® to the Rules Committee dated November 26, 2013, at p.13.

V. Criticisms of the Proposed Rule Have No Merit.

Some critics of proposed rule 37(e) seek to derail the entire four-year effort that has brought us to this point. I offer my responses to some of the more frequently heard criticisms.

A. "*Over-preservation is not a real issue.*"
"*These proposals are a solution to a problem that doesn't exist.*"

To credit this contention the Committee would have to disbelieve the testimony and submission of every corporate representative, practitioner, and other witness that has said to the contrary. It is intuitively false and the evidence before the Committee has shown it to be false. Serious people cannot honestly contend otherwise.

B. "*Working with opposing counsel can resolve many of the issues.*"

Perhaps this tautology is true once a preserving party knows with whom to "work," but in many cases that is unknowable prior to the receipt of a signed complaint. As the Committee surely recalls, two-thirds of Microsoft's litigation holds pertain to unfiled matters, so who is it, exactly, that Microsoft is supposed to "work with"? Furthermore, even if a preserving party does reach some agreement with a plaintiff who has come forward and who has acted professionally, how can it be sure that other adverse parties won't also file similar claims and disavow it?

C. "*There is no need to limit judicial authority.*"

To be blunt, that depends on which judge one draws. Some judges know the area cold and have attitudes consistent with the Committee's, but many do not. Also, and perhaps even more significantly, it is helpful to parties attempting to resolve these issues without court intervention to know where the boundaries are, i.e., "what guidance can we glean from the rules?" Having a starting place for negotiation – as opposed to believing that the judge has maximum latitude to freelance a decision and being sure that one's charm during oral argument will carry the day – is a strong positive.

D. "*The proposed rule will not create uniformity.*"

It will in the federal courts, and many state courts will follow the federal lead. As for the other state courts, cases like *Residential Funding* in state courts are rare if they exist at all. In any event, adopting proposed Rule 37(e) at the federal level will be a strong signal nationally that the tide is turning. The fact that some states might not immediately follow suit is no reason not to go forward with the proposed rule.

One proponent of this proposition also notes in his comment that the meaning of the word "willful" varies according to its context. I agree, as noted above, and have suggested three solutions. If any one of them is adopted, that objection drops away.

E. *"The proposed rule will not alleviate over-preservation."*

Adopting proposed Rule 37(e) is not a complete solution to overpreservation as I have noted, *supra*, but the Committee has heard testimony that the rule will permit conscientious companies to preserve less.

Such evidence also appears elsewhere in the public record. I moderated a panel discussion at EDI's Leadership Summit last October on proposed Rule 37(e), and I asked the panelists – in-house counsel from Microsoft, ExxonMobil and GlaxoSmithKline – whether adoption of the rule would change their behavior. The response from Jon Palmer of Microsoft was typical, and belies this objection to the rule:

> Jon Palmer: A uniform standard that requires some level of culpability before death penalty sanctions can be issued would at least change my behavior. I would no longer put entire organizations under a hold when I know that there are three or four key players within the organization that are going to have all of the relevant material.[23]

F. *"Imposing sanctions only where evidence is destroyed willfully or in bad faith creates perverse incentives and encourages sloppy behavior."*[24]

This suggestion – that the rule will lead to sloppy preservation conduct – presumes that the only thing preventing businesses from being careless in the management of their own business information is the federal judiciary. The statement displays little awareness of the very real incentives that operate on American business with no help from the courts:

> *Business Reasons.* Businesses design their data systems so their employees can work efficiently and profitably. This is the most compelling reason for having good records management, and it exists irrespective of the law on preservation.
>
> *To Defend Claims*. Businesses are motivated to have the information they need in order to *disprove* plaintiffs' claims. This rule won't change their practices.
>
> *Trust*. What is the basis for assuming that sloppy preservation conduct will promptly ensue on December 1, 2015? The American litigation system is built on trust. For example, we trust that lawyers will cause their clients to produce unfavorable material without appointing overseers to audit the client's every decision. Why do some feel that trust is inappropriate when it comes to preservation practices? In 40 years of working inside the attorney-client privilege with American corporations large and small, I have

[23] The entire transcript of the panel discussion, which was entitled "At the Crossroads of Bad Faith & Negligence: How *Sekisui* Shows We Need New Rule 37(e)," was annexed to the comment filed by Patrick Oot, the co-founder of the Electronic Discovery Institute (of which I am privileged to be President). Mr. Palmer's remarks appear at p. 13.

[24] This argument is taken verbatim from footnote 51 to *Sekisui*.

never seen the destruction or withholding of evidence, never suspected it, and never thought that one of my cases was decided on an unfair record.[25]

G. *"Innocents should not be required to prove bad faith in order to repair the damage done by the loss of evidence."*

The proponents of this argument ask, "Why should a party who has negligently lost discoverable material not face an adverse inference instruction?" Their position echoes the Second Circuit's opinion in *Residential Funding* which said, to paraphrase, the inference should be adverse to the negligent destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.[26]

Here's the short answer. Without a finding of intentional destruction, the evidentiary inference that the material would have been negative is unsupported. Our juries are charged with sorting out opposing factual contentions and making determinations, and their factual findings have huge consequences for the parties to the dispute. To inject an adverse factual inference into a lawsuit because a party was merely negligent in its preservation practices risks making reaching the right factual result secondary and risks distorting the case result all out of proportion because of a simple, unintentional failure to preserve.

We live in a time when no one contends that 100% of all discoverable material must be preserved, collected, and produced. Computer assisted review (a/k/a technology assisted review or predictive coding) is deemed excellent if it produces 80% recall, meaning the technology has retrieved 80% of the relevant documents from the data set. But that means we have become comfortable leaving 20% behind. In this context, then, does it really make sense to punish parties who have negligently lost some discoverable material as if they had deliberately destroyed it?

Another formulation of this same point comes from Ken Withers' column published three days after *Sekisui* was decided:

> But the adverse inference jury instruction is inappropriate as a sanctioning tool in cases of negligence, or even gross negligence, because it implicates the Federal Rules of Evidence. The introduction of inferences drawn from presumptions that have no rational basis in circumstantial evidence unsettles me, even in the service of a just cause. . . .
>
> But in some cases the nature of the missing evidence cannot be established except with circumstantial evidence, and the accused spoliator's state of mind

[25] For this reason and others, as I have stated elsewhere, I think the whole system of affirmative preservation of every bit of discoverable material is a solution in search of a problem.

[26] Adapted from *Residential Funding*, 306 F.3d at 108.

> may be key. Mere negligence, or even gross negligence, in the destruction of discoverable evidence – standing alone – does not support the inference that the evidence was even relevant, let alone that its loss prejudiced the moving party.
>
> The state of mind of the party accused of spoliation must rise to the level to support a reasonable inference that the destruction was at least motivated by fear of discovery.[27]

Finally, as the late Judge Mark Kravitz put it at the March 2013 meeting of the Committee, "Sanctions – as compared to remedial or curative measures – should be available only for bad behavior."[28]

H. *"Innocents should not be required to prove substantial prejudice; it should be presumed if there is bad faith."*

Critics ask, "Why should the non-spoliating party bear the burden of proving substantial prejudice? How can it do that if the material is lost and its contents unknowable? In cases of bad faith destruction, why shouldn't prejudice be presumed, subject to the possibility of rebuttal?"

First of all, there is no requirement in the proposed rule or elsewhere that the innocent party prove the *precise contents* of the missing material. Numerous decisions have held that the innocent party need make only a minimal showing of relevance and prejudice. Absolving the innocent party of *any* burden to show relevance and prejudice goes too far. Otherwise the fact-finding mission of the jury might be infected unfairly in the other direction. What if the deliberately destroyed material was not in fact relevant to any claim or defense in the case? Injecting its destruction into the trial would distort the result.

Second, Ken Withers has stated, "In many cases that is not an issue, because there is ample evidence from other sources 'such that a reasonable trier of fact' could find that the evidence was relevant and its loss prejudicial to the moving party."[29] The interwoven connectedness of ESI will often allow the innocent party to make the minimal showing.

Third, if the innocent party fails to make the required showing to justify a sanction order, nothing in the proposed rule prevents the court from ordering curative measures as appropriate.

Finally, and of most importance, *the non-innocent party can never know the extent of prejudice to the innocent party's case.* During the discovery stage of the case, when each side is still discovering the other's proof, the totality of the adversary's case is opaque. What if the

[27] Withers, *supra*, note 9.

[28] Minutes, Civil Rules Advisory Committee, March 22-23, 2012, at p. 21.

[29] Withers, *supra*, note 9.

innocent party has other ways to prove the same fact, but has not disclosed them? What if the innocent party knows for a fact that the loss of the missing evidence is *not* prejudicial to its case? In the construction of the rule proposed by the critics to whom I respond here, the innocent party could remain silent and experience an undeserved windfall. Putting the burden on the innocent party to show, minimally, how the missing evidence prejudices its case is sensible and fair.

VI. Responses to the Committee's Five Questions

1. Should the rule be limited to sanctions for loss of electronically stored information? Current Rule 37(e) is so limited, and much commentary focuses on the preservation problems resulting from the proliferation of such information. But the dividing line between "electronically stored information" and other discoverable matter may be uncertain, and may become more uncertain in the future, and loss of tangible things or documents important in litigation is a recurrent concern in litigation today.

Response: No, the rule should apply to all types of material, except the (B)(ii) exception, which should apply to tangible evidence only.

2. Should Rule 37(b)(1)(B)(ii) be retained in the rule? This provision is focused on the possibility that one side's failure to preserve evidence may catastrophically deprive the other side of any meaningful opportunity to litigate, and permits imposition of sanctions even absent a finding of willfulness or bad faith. It has been suggested that limiting the rule to loss of electronically stored information would make (B)(ii) unnecessary. Does this provision add important flexibility to the rule?

Response: Yes, provided its application is limited to tangible evidence only.

3. Should the provisions of current Rule 37(e) be retained in the rule? As stated in the Committee Note, the amended rule appears to provide protection in any situation in which current Rule 37(e) would apply.

Response: There is no need to retain the current rule, particularly in light of the express reference to its provisions in the proposed Committee Note.

4. Should there be an additional definition of "substantial prejudice" under Rule 37(e)(1)(B)(i)? One possibility is that the rule could be augmented by directing that the court should consider all factors, including the availability of reliable alternative sources of the lost or destroyed information, and the importance of the lost information to the claims or defenses in the case.

Response: Yes, to achieve the goal of a tightly written rule giving maximum guidance to lawyers and judges alike. Certainly to achieve the Committee's goal, "substantial prejudice" must be defined to be something more than the mere loss of evidence relevant to a claim or defense.

5. Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)? If so, what should be included in that definition?

Response: Yes, to achieve the goal of a tightly written rule. As described above, I support the definition proposed by The Sedona Conference®: A finding of bad faith would require a determination that the alleged spoliating party acted with "specific intent" to deprive the opposing party of material evidence relevant to the claims and/or defenses to the matter.

VII. Conclusion

The continuing collision of the Depression-era full pretrial disclosure approach and mammoth case data sets has created an unbalanced and unfair situation that is fraught with risk for large entities and which distorts civil litigation results. The changes to the Federal Rules of Civil Procedure proposed by the Committee will not entirely rebalance the system, but they are a strong step in the right direction.

I thank the Committee for the remarkable work it has done, for the opportunity to submit this comment, and for its consideration of my remarks.

Respectfully yours,

Robert D. Owen