WHY RULE 37(e) DOES NOT CREATE A NEW SAFE HARBOR FOR ELECTRONIC EVIDENCE SPOLIATION

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I. INTRODUCTION

Rule 37(e)[1] of the Federal Rules of Civil Procedure received much attention in the lead-up to its promulgation in December 2006 because it appeared to create a safe harbor from spoliation sanctions ordinarily available under Rule 37's other provisions[2] for parties that inadvertently lose electronic evidence.[3] Proponents of the new rule applauded the relief it would deliver to litigants who operate sophisticated electronic information systems in good faith but are held accountable when those systems' routine data-deletion functions cause the loss of information that may be relevant to litigation.[4] The rule's opponents criticized it for giving a free pass to parties who lose information to the detriment of their opponents, which in turn may have the residual effect of creating an incentive for litigants to shorten the retention period for data destined to be deleted. Both the proponents and the opponents of Rule 37(e) have it wrong.

Rule 37(e) will not, in most cases, offer any protection that the federal rules did not already provide. And in those few cases where

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[1] FED. R. CIV. P. 37(e) was originally promulgated as Rule 37(f). This change in designation came as a result of a 2007 amendment to Rule 37, and was "intended to be stylistic only." *Id.* Therefore, references to Rule 37(f) in the sources cited herein should generally be read as references to the current Rule 37(e), unless otherwise indicated.

[2] Rule 37 authorizes courts to issue sanctions for discovery abuses. *See* FED. R. CIV. P. 37.

[3] *See, e.g.*, Helen Bergman Moure, *EDD Showcase: Rules and Procedures: Extreme Makeover*, L. TECH. NEWS, Aug. 2005, at 38 (Bergman refers to the new rule as a "safe harbor").

[4] 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_eDiscWories.pdf.

37(e) will deliver a novel safe harbor, it will be the result of a jurisdictional idiosyncrasy rather than the rule drafters' policy. Two factors combine to reach this result. First, the circumstances under which Rule 37(e) applies are narrow. The rule requires litigants to satisfy a three-element foundation, but it also includes an exception that can override that foundation. Second, Rule 37, as it existed prior to the addition of subsection (e), already included various requirements that, when taken in the aggregate, function similarly to the safe harbor that the provision purports to create.

Nevertheless, Rule 37(e) is not entirely irrelevant. It organizes the pre-existing exceptions in one rule and thus provides guidance to litigants and judges on how to deal with electronic information loss.[5] Further, although the rule itself does not add much to the procedural law of sanctions, the fact that some litigants may believe that it does could result in the untoward reactions that the opponents of the rule feared. For example, companies may still elect "to purge information . . . on an accelerated basis . . . to avoid keeping what could hurt them in litigation."[6]

Part II of this Comment introduces a framework for applying Rule 37(e), thereby exposing the narrow applicability of the rule. Each element is interpreted using a combination of committee notes, materials used during the rule-making process, and analogies from cases that have encountered similar elements. Part III focuses on the different ways Rule 37 can be used to sanction information loss and how each method creates its own safe harbor, thus obviating the need for Rule 37(e). This Part also includes a brief analysis of other sources of law for sanctioning spoliators and their lawyers. Although Rule 37(e) only concerns sanctions that are based in Rule 37, this analysis is useful because it emphasizes the law's reluctance, under alternative sources of authority, to sanction parties that lose information under the circumstances described in Rule 37(e).

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[5] *See* Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006: Sanctions*, 116 YALE L.J. POCKET PART 167 (2006), http://thepocketpart.org/2006/12/5/rosenthal.html.

[6] *Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Before the Civil Rules Advisory Comm.*, 9 (2005), http://www.uscourts.gov/rules/e-discovery/0112frcp.pdf. (statement of Hon. Lee H. Rosenthal, Chairperson). For a summary of Judge Rosenthal's public comments on the proposed Civil Rule Amendments submitted to the Committee, see Summary of Testimony and Comments on E-discovery Amendments, http://www.uscourts.gov/rules/e-discovery/SummaryE-DiscoveryComments.pdf (last visited May 15, 2008).

II. THE NARROW APPLICATION OF RULE 37(e)

The Advisory Committee on Civil Rules ("Advisory Committee") first became aware of problems with computer-based discovery in 1996.[7] At that time, the Advisory Committee recognized that electronically stored information raised "different issues from conventional discovery of paper records."[8] One such issue is quantity: large organizations' computer networks have storage capacities measured in tetrabytes, one of which is equivalent to 500 million typewritten pages.[9] A second issue is that computer information is dynamic, meaning that it can change without specific direction or knowledge.[10] For example, "turning a computer on or off can change the information it stores."[11] A third difference is that electronically stored information "may be incomprehensible when separated from the system that created it."[12] As a result of these differences, the Advisory Committee chose to amend Rule 37.

"Rule 37[e] responds to a distinctive and necessary feature of computer systems—the recycling, overwriting, and alteration of electronically stored information that attends normal use."[13] Since "computer systems lose, alter, or destroy information as part of routine operations," a party could be exposed to sanctions under Rule 37 more readily than they would with paper documents.[14] Further, not only can these computer systems be difficult to interrupt, but it is questionable whether, in the interest of expediency, it is desirable to interrupt them; the result would be an accumulation of what could be "duplicative and irrelevant data that must be reviewed."[15]

After deliberating on these issues, which included a public comment period and a number of hearings, the Advisory Committee settled on the following language for the new rule:

> (e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically

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[7] COMM. ON RULES OF PRACTICE & PROC., EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE 3 (Sept. 2005), http://www.uscourts.gov/rules/supct1105/Excerpt_STReport_CV.pdf.

[8] *Id.* at 4.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] COMM. ON RULES OF PRACTICE & PROC., *supra* note 7, at 13.

[14] *See id.*

[15] *Id.*

> stored information lost as a result of the routine, good-faith operation of an electronic information system.[16]

The following three step foundation for gaining the rule's protection, and an exception, are imbedded in the rule:

> *Step 1*: The loss of information must have been due to the operation of an Electronic Information System (EIS).
> *Step 2*: The EIS must have been operating routinely at the time the information was lost.
> *Step 3*: The litigant responsible for the lost information must have been operating the EIS in good faith at the time of the loss.
> *Exception*: Notwithstanding the litigant's ability to satisfy the rule's foundation, under exceptional circumstances the litigant may still be sanctioned.

A. Step 1: What Is an "Electronic Information System"?

The Judicial Conference Committee on Rules of Practice and Procedure ("Judicial Committee") included the following examples of what it considers to be an EIS:

> [P]rograms that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been "deleted"; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period. Similarly, many database programs automatically create, discard, or update information without specific direction from, or awareness of, users.[17]

The Judicial Committee indicated that the common denominator among these systems is that their automatic features are essential to their operation; suspending or interrupting them would be either prohibitively expensive or burdensome.[18] This characteristic makes these systems fundamentally different from a hard-copy document retention system, which could ostensibly operate without interrupting an ongoing business.[19]

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[16] FED. R. CIV. P. 37(e).

[17] SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE & PROC. 168 (Sept. 2005), http://www.uscourts.gov/rules/Reports/ ST09-2005.pdf#page=168 [hereinafter SUMMARY REPORT].

[18] *Id.*

[19] *Id.*

> The Judicial Committee provided the following example:
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> A data producer can warehouse large volumes of papers without affecting ongoing activities and can maintain and manage hard-copy records separately from the creation of products or services. By contrast, electronic information is usually part of the data producer's activities, whether it be the manufacture of products or the provision of services.[20]

One example of the type of EIS to which this new rule would apply is a dynamic database. These are databases that are constantly updated by individuals, groups of people, or automatic processes:[21]

> For example, data feeds from point-of-sale terminals and sales-staff reports constantly update and change a company's sales database with new information. Most enterprises could not even contemplate preserving the vast quantity of data that would be required to determine the exact state of a dynamic database at any moment, days, months, or years earlier.[22]

The court in *Bob Barker Co. v. Ferguson Safety Products, Inc.*[23] addressed dynamic databases in the context of the propriety of a document request for the production of a database and recognized the infeasibility of preserving a database which is a "dynamic collection of data that changes over time."[24] The court was careful to note, however, that documents once part of a software database that may exist at the time of the discovery request would be discoverable.[25]

More mundane electronic information systems also possess dynamic data characteristics. For example, files created in a computer's word processing program automatically record and update information about that file as it is being accessed and updated.[26] More generally, such metadata, or "data about data," includes "contextual, processing, and use information needed to identify and certify the

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[20] *Id.*

[21] *See* Thomas W. Burt & Gregory S. McCurdy, *E-Discovery of Dynamic Data and Real-Time Communications: New Technology, Practical Facts, and Familiar Legal Principles*, 115 YALE L.J. POCKET PART 166, 169 (2006), http://www.thepocketpart.org/2006/08/burt_and_mccurdy.html.

[22] *Id.*

[23] No. C 04 04813 JW, 2006 WL 648674 (N.D. Cal. Mar. 9, 2006).

[24] *Id.* at *4.

[25] *Id.*

[26] Microsoft, WD97: How to Minimize Metadata in Microsoft Word Documents, http://support.microsoft.com/kb/223790 (last visited May 15, 2008).

scope, authenticity, and integrity of active or archival electronic information or records."[27]

B. Step 2: What Is "Routine"?

The Judicial Committee indicated that the "'routine operation of an [EIS]'" refers to the "ways in which such systems are generally designed, programmed, and implemented *to meet the party's technical and business needs*."[28] Further, the Judicial Committee indicated that "[s]uch features are essential to the operation of electronic information systems."[29] This choice of language indicates that the Judicial Committee believes that a system's "routine" operation is more than just an operation which is periodic or habitual, but rather one that has a purpose linked to the party's particular "technical and business needs."[30] In essence, a determination of whether a system is "routine" should focus on how the system was operated generally, without regard to the particular facts surrounding the lost information in question.

Document retention policies—companies' stated policies regarding how long they retain data[31]—are precursors to electronic information systems. When determining whether documents were properly destroyed pursuant to a firm's document retention policy, courts have discussed the policy's "reasonableness."[32] In *Stevenson v. Union Pacific Railroad Co.*,[33] the court evaluated the reasonableness of the defendant's document retention policy.[34] That case was brought by a motorist and the estate of his deceased wife after a train operated by the defendant collided with the motorist's car, injuring the motorist and killing his wife.[35] The plaintiffs moved for sanctions against the railroad company for destroying discoverable dispatch tapes between the train crew and the dispatcher that would have

[27] THE SEDONA CONF., THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES AND COMMENTARY FOR MANAGING INFORMATION AND RECORDS IN THE ELECTRONIC AGE 80 (Charles R. Ragan et al. eds., 2005).

[28] SUMMARY REPORT, *supra* note 17, at 172 (emphasis added).

[29] *Id.*

[30] *Id.*

[31] *See* LEXISNEXIS, WHITE PAPER, ELEMENTS OF A GOOD DOCUMENT RETENTION POLICY 2 (2007), http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_WP_ElementsOfAGoodDocRetentionPolicy.pdf.

[32] Stevenson v. Union Pac. R.R. Co., 204 F.R.D. 425, 428 (E.D. Ark. 2001), *rev'd on other grounds*, 354 F.3d 739 (8th Cir. 2004).

[33] *Id.*

[34] *Id.* at 430.

[35] *See* Stevenson v. Union Pac. R.R. Co., 110 F. Supp. 2d 1086, 1087 (E.D. Ark. 2000).

probably led to other discoverable evidence.[36] The defendant's director of dispatching practices and quality assurance testified that "the purpose of taping conversations between crew members and dispatchers is to monitor the job performance of dispatchers and to resolve any question about movement authority that might arise."[37] The defendant's policy required retaining tapes for ninety days before destroying them, sixty days longer than the Federal Railroad Administration's reported national average.[38] Given the defendant's business purpose for retaining the tapes, the court held that the document retention policy was not unreasonable.[39]

Courts will project the analysis they use to evaluate a *reasonable* document retention policy onto a *routine* EIS, particularly because an EIS will often be a component of a company's document retention policy, if not the policy itself.[40] Consequently, when an EIS is scrutinized for "routineness" within the meaning of the rule, a party who cannot provide a business reason for how it chooses to operate its EIS—as the defendant did in *Stevenson* with regard to its document retention policy—will not gain the benefit of the rule.[41] To be sure, the law does not require companies to save "every single scrap of paper in [their] business[es],"[42] and recognizes that "keep[ing] certain information from getting into the hands of others . . . [is] common in business."[43] However, parties that program their EIS to eliminate data on an accelerated basis solely for the purpose of avoiding discovery during litigation would violate their common law duty to preserve documents that may be subject to litigation.[44]

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[36] *Stevenson*, 204 F.R.D. at 430.

[37] *Id.*

[38] *Id.*

[39] *Id.* The court did note, however, that the reasonableness of a document retention policy does not relieve a defendant of the burden to preserve documents that the defendant knows, or should know, will become material at some point in the future. *Id.*

[40] *See* Paul French, *Electronic Document Retention Policies (and Why Your Clients Need Them)*, L. PRAC. TODAY (2004), http://www.abanet.org/lpm/lpt/articles/ftr01045.html.

[41] *See Stevenson*, 204 F.R.D. at 430.

[42] Wiginton v. Ellis, No. 02 C 6832, 2003 WL 22439865, at *4 (N.D. Ill. Oct. 27, 2003). See infra Part III.B.1.c.ii for a more detailed discussion of what a party's obligation to preserve entails.

[43] Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005).

[44] For a complete discussion of parties' common law and other obligations to preserve information, see infra Part III.B.1.c.ii.

C. Step 3: When Is a Party Operating in "Good Faith"?

The "good faith" requirement of Rule 37(e) refers to how a party operated its EIS with regard to the specific information that had been lost.[45] When Rule 37(e) was originally published for public comment in 2004, it adopted a negligence test rather than the current "good faith" standard.[46] In addition to the "negligence" version of the rule, an alternate "intentional or reckless" version was also proposed and was published as a footnote to the "negligence" version.[47] The Judicial Committee noted in its comments to the final version of the rule that the negligence standard offered "no meaningful protection, but rather protected against conduct unlikely to be sanctioned in the first place."[48] However, the "intentional or reckless" version of the rule was considered too restrictive among those who contributed opinions during the public comment phase. The commentators urged that this version of the rule would essentially insulate conduct that should be subject to sanctions.[49] The Judicial Committee noted that the final "good faith" version is an intermedi-

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[45] SUMMARY REPORT, *supra* note 17, at 169.

[46] COMM. ON RULES OF PRACTICE & PROC., REPORT ON THE CIVIL RULES ADVISORY COMMITTEE (2004), http://www.uscourts.gov/rules/comment2005/CVAug04.pdf. Rule 37(e), as proposed for public comment, stated:

> Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions
>
> (f) Electronically Stored Information. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:
>
> > (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and
> >
> > (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

Id.

[47] *Id.* The "intentional or reckless" version of the Rule reads:

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

Id.

[48] SUMMARY REPORT, *supra* note 17, at 169.

[49] *Id.*

ate culpability standard.[50] The explicit rejection of a "negligence" standard in favor of a subjective standard implies that a party who loses information negligently may benefit from the safe harbor, so long as the party acted in good faith.

Whereas the "routine" element of the rule focuses solely on the structure of the EIS, the "good faith" element is based on what the parties did once their obligations to preserve evidence were triggered. The committee notes on the rule emphasized the various ways in which a preservation obligation may arise, including obligations based in common law,[51] statutes and regulations, agreements between the parties, and court orders.[52] The committee notes go on to state that "[t]he 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 by allowing that operation to continue in order to destroy specific stored information that it is required to preserve."[53]

Broccoli v. Echostar Communications Corp.[54] illustrates the type of conduct that would not be protected by Rule 37(e). In that case, a motion for sanctions was brought against defendant employer Echostar Communications Corporation ("Echostar") for destroying e-mails that would have been relevant to the Title VII sexual harassment and retaliation claims brought against Echostar by the plaintiff.[55] Echostar's e-mail retention policy consisted of automatically transferring all of an employee's sent e-mails after seven days to a "deleted items" folder, which in turn was purged fourteen days later.[56] Once purged, these e-mails were irretrievable.[57] The court opined that this e-mail system, though "extraordinary" and "risky," could have an arguably defensible business justification.[58] However, since Echostar was on notice of potential litigation, it had an obligation to interfere with the automatic destruction of e-mails.[59] The court stated: "Echostar clearly acted in bad faith in its failure to suspend its e-mail and data destruction policy or preserve essential personnel

[50] *Id.* at 169–70.
[51] *See infra* Part III.B.1.c.ii.1.
[52] SUMMARY REPORT, *supra* note 17, at 169.
[53] *Id.*
[54] 229 F.R.D. 506 (D. Md. 2005).
[55] *Id.* at 509.
[56] *Id.* at 510.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 510–13.

documents in order to fulfill its duty to preserve the relevant documentation for purposes of potential litigation."[60]

D. The Exception: What Constitutes an "Exceptional Circumstance"?

Rule 37(e) will not apply if exceptional circumstances warrant the imposition of sanctions.[61] This exception allows the party seeking sanctions to override the safe harbor if it can establish that the circumstances under which the information was lost necessitate sanctions, even though the party responsible for the loss has satisfied the three elements of Rule 37(e). The Judicial Committee does not outline the scope of an "exceptional circumstance" except to state that it is one in which "a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information."[62]

Courts applying "exceptional" or "extraordinary" circumstance provisions in other contexts have ordinarily examined circumstantial evidence, such as patterns of behavior or badges of untruthfulness. For example, in *Campbell v. Spectrum Automation Co.*,[63] the U.S. Court of Appeals for the Sixth Circuit affirmed a lower court's decision that—even though a party's conduct did not amount to bad faith or an intent to defraud—the party's general dishonesty amounted to an "exceptional" circumstance such that sanctions were appropriate.[64] In *Advantacare Health Partners, LP v. Access IV*,[65] the court opined that "extraordinary circumstances" exist "where there is a pattern of disregard for [c]ourt orders and deceptive litigation tactics that threaten

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[60] *Broccoli*, 229 F.R.D. at 512.

[61] FED. R. CIV. P. 37(e).

[62] SUMMARY REPORT, *supra* note 17, at 173.

[63] 601 F.2d 246 (6th Cir. 1979).

[64] *Id.* at 251–52.

> The district court suggested that the conduct of Campbell may not have amounted to bad faith or intent to defraud the Patent Office. However, the district court's findings that Campbell was not the inventor, that his testimony was unbelievable, and that he was aware of the facts surrounding the invention because of his relationship with Zimmerman were more than ample to support a determination of bad faith on the part of Campbell for his inexplicable failure to respond truthfully to the request for admission, which had the effect of prolonging the litigation in this suit. We agree with the district court that such conduct was sufficient to justify classifying the case as "exceptional" and awarding attorneys' fees to Spectrum. We find no abuse of discretion or misapplication of the law.

Id.

[65] No. C 03-04496 JF, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004).

to interfere with the rightful decision of a case."[66] Both the *Advantacare* court and the *Campbell* court recognized that even when it appears that a party was justified in doing a particular act, facts generally related to the party's conduct—such as patterns of behavior or badges of dishonesty—may evince an exceptional circumstance. Thus, in the context of Rule 37(e), if courts choose to apply the "exceptional circumstances" provision in the same way that the courts in *Advantacare* and *Campbell* did, then they withhold the benefit of the rule from parties which are found to repeatedly lose information, without the appearance of bad faith, or from parties that have a history of dishonesty.

* * *

Rule 37(e)'s three-step foundation, and its embedded exception, create a high hurdle for parties that wish to gain its protection. If we were to visualize the prototypical candidate for Rule 37(e)'s application—a relatively sophisticated corporate litigant that has been operating a sizeable EIS with a legitimate business purpose for some time, which finds itself embroiled in litigation, and in an effort to comply with a discovery request, inadvertently destroys a document—it is difficult to imagine why a court might find the corporate litigant's good faith conduct worthy of punishment. To borrow from the criminal law, the corporate litigant lacked the requisite mens rea to deserve punishment. However, if under an exceptional circumstance it can be proven that the document was lost to the detriment of the corporate litigant's adversary, then it would not be surprising if a court took action to remedy the evidentiary imbalance the loss created. In sum, not only does Rule 37(e) appear to merely reflect our preexisting notions regarding sanctions, it distills the law regarding spoliation sanctions, rather than adding to it.

III. SAFE HARBORS FOR SPOLIATION SANCTIONS: RULE 37(e) BY ANY OTHER NAME

An examination of prior case law reveals that many courts would not have sanctioned parties for their good faith destruction of evidence, reasoning that a party should not be punished for destroying evidence it did not intend to destroy.[67] Further, those courts that

[66] *Id.* at *5.

[67] *See, e.g.*, Shepherd v. Am. Broad. Co., 62 F.3d 1469, 1478 (D.C. Cir. 1995) (holding that an order to pay an adversary's attorneys' fees is "fundamentally penal" thus requiring evidence of misconduct); Procter & Gamble Co. v. Haugen, 179 F.R.D. 622, 631 (D. Utah 1998) (holding that bad faith destruction of evidence is predicate to an adverse instruction). See infra Part III.B.2 for a discussion about

have chosen to sanction parties for destroying evidence, even if destroyed in good faith, did so not for punitive purposes, but rather equitable ones, with the intent to level the evidentiary playing field.[68] Hence, courts will continue this practice with regard to electronic information, basing their authority to do so on the "exceptional circumstances" provision of Rule 37(e).

The law regarding spoliation of evidence is well developed. "Spoliation" has been defined 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."[69] The law's reaction to the destruction of evidence has two purposes. One is to punish the improper conduct and the other is remedial, functioning to level the evidentiary playing field or "place the risk of an erroneous judgment on the party who wrongfully created the risk."[70] Similar to a judge's consideration of a criminal's mens rea when issuing a punishment, in spoliation cases the court matches a party's state of mind at the time the party destroyed the evidence with an appropriate sanction.[71] Sanctions against spoliators include dismissal of a suit for egregious destruction of evidence[72] and orders to pay the opposing party's costs and fees for less flagrant intentional conduct.[73]

When the court is interested in leveling the evidentiary playing field, punishing the spoliator plays less of a role in determining which sanction to issue. In those instances, the court is more concerned with the prejudice that was caused to the non-destroying party by the

sanctions courts impose on parties that lose evidence and the requisite states of mind associated with each sanction.

[68] *See, e.g.*, Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (holding that an adverse inference instruction is an "appropriate mechanism for restoring the evidentiary balance" caused by the loss of evidence—even without a finding of "moral culpability") (quoting Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991)).

[69] West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (citing BLACK'S LAW DICTIONARY 1401 (6th ed. 1990)).

[70] *Id.*; *see also Turner*, 142 F.R.D. at 74 ("The concept of an adverse inference as a sanction for spoliation is based on two rationales. The first is remedial . . . [and] [t]he second is punitive."). The sanctioning of improper conduct for punitive purposes performs a dual role in that it might serve as a deterrent for future improper conduct. *See West*, 167 F.3d at 779.

[71] *See* DaimlerChrysler Motors v. Bill Davis Racing, Inc., No. Civ.A. 03-72265, 2005 WL 3502172, at *2 (E.D. Mich. Dec. 22, 2005).

[72] Krumwiede v. Brighton Assocs., No. 05 C 3003, 2006 WL 1308629, at *11 (N.D. Ill. May 8, 2006).

[73] Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 512 (D. Md. 2005).

loss of the evidence.[74] A common evidentiary sanction is the adverse inference instruction,[75] which is sometimes called a "spoliation instruction."[76] An adverse inference instruction is an instruction to the jury that it may presume that the evidence that was destroyed would have been unfavorable to the party that destroyed it.[77] The adverse inference instruction is a classic sanction employed against the spoliation of evidence "as illustrated by that favorite maxim of law, *omnia presumuntur contra spoliaterum*"[78]—all is presumed against the spoliator.

Under federal law, courts derive their power to sanction a party from two sources of authority.[79] First, all courts are vested with an inherent "power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."[80] This power is not governed by statute, but rather is necessarily implied from the nature of the institution.[81] Consequently, these powers "cannot be dispensed with in a [c]ourt, because they are necessary to the exercise of all others."[82] In fact, the Supreme Court of the United States has held that the federal rules "are not substitutes for the inherent power[s]."[83] The significance of this characteristic of the court's inherent power is that Rule 37(e) does not disturb this authority.

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[74] *See DaimlerChrysler*, 2005 WL 3502172, at *1 ("A sanction may be appropriate 'regardless of whether the evidence is lost as the result of a deliberate act or simple negligence, [as] the other party is unfairly rejudiced . . . .'" (quoting Brenner v. Colk, 573 N.W.2 65, 70 (Mich Ct. App. 1997))).

[75] *See Turner*, 142 F.R.D. at 77.

> In order to remedy the evidentiary imbalance created by the destruction of evidence, an adverse inference may be appropriate even in the absence of a showing that the spoliator acted in bad faith. However, where the destruction was negligent rather than willful, special caution must be exercised to ensure that the inference is commensurate with information that was reasonably likely to have been contained in the destroyed evidence.

Id.

[76] Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, 1997 WL 33352759, at *5–6 (E.D. Ark. Aug. 29, 1997).

[77] *See Turner*, 142 F.R.D. at 74.

[78] Pastorello v. City of New York, No. 95 Civ. 470 (CSH), 2003 WL 1740606, at *7 (S.D.N.Y. Apr. 1, 2003) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (internal quotations and citations omitted)).

[79] Under state law, parties can be held criminally liable and liable in tort for destruction of evidence. Lawyers may also be held liable for destruction of evidence under ethics rules.

[80] Chambers v. NASCO, Inc, 501 U.S. 32, 43 (1991) (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821)).

[81] *Id.*

[82] *Id.*

[83] *Id.* at 46.

Rule 37(e) does apply, however, to the court's alternate source of authority to sanction spoliators: Rule 37.[84] Rule 37 outlines both the procedures and the remedies for dealing with parties that do not cooperate in discovery. Although nowhere in the rule is there any reference to loss or destruction of evidence, the rule is commonly used to impose sanctions for spoliation.[85]

There are four methods to obtain sanctions under Rule 37 for the loss of information.[86] One method is through a combination of subsection (a) and (b)(2) of Rule 37: the non-violating party must move for an order to compel under 37(a) and then the court must rule that the order was violated under Rule 37(b)(2).[87] The second method requires the court to rule that a previously standing court order was violated pursuant to Rule 37(b)(2).[88] The third method, pursuant to Rule 37(c), requires a failure to comply with mandatory disclosures under Rule 26(a) and (e)(1).[89] The final method requires a failure of a party to serve a response to a request made under Rule 34.[90]

A. Rule 37(a): Motions to Compel and Sanctions

Rule 37(a) allows parties to file a motion with the court seeking an order compelling an opposing party to produce documents.[91] Parties would typically employ this rule when they have sought discovery pursuant to Rule 34,[92] but their adversary has refused to comply. Therefore, if a party suspects that an opposing party has destroyed or otherwise lost information, the party may first move for an order to

[84] FED. R. CIV. P. 37.

[85] *See, e.g.*, Wiginton v. Ellis, No. 02 C 6832, 2003 WL 22439865, at *3 n.5 (N.D. Ill. Oct. 27, 2003).

[86] FED. R. CIV. P. 37.

[87] FED. R. CIV. P. 37(a)–(b).

[88] FED. R. CIV. P. 37(b). The analysis under the second method will be co-extensive with the first method, since the "order" requirement under this method can, but need not, originate from a motion to compel discovery under Rule 37(a).

[89] FED. R. CIV. P. 37(c).

[90] FED. R. CIV. P. 37(d).

[91] FED. R. CIV. P. 37(a) ("On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery.").

[92] FED. R. CIV. P. 34. This rule allows parties to request documents, things, and entry upon land for inspection. *Id.* The rule does not require the intervention of the court for a request to be made. *Id.* If the party served with the document request objects to the request or any part thereof, then the requesting party may move for an order to compel disclosure under Rule 37(a). *Id.*

compel pursuant to Rule 37(a).[93] Although this subsection of the rule does not afford sanctions for the failure to produce the documents in question, it does allow the successful movant to seek sanctions in the form of payment for "reasonable expenses incurred in making the motion, including attorney's fees."[94]

Rule 37(e) could theoretically shield litigants from paying the costs and fees associated with a Rule 37(a) motion. For example, suppose Party X moves to compel Party Y to produce a document, and the court, accepting the motion, orders Party Y to comply. In attempting to comply, however, Party Y loses the information he was ordered to produce as a result of a good faith operation of a routine EIS. Under Rule 37(e), Party Y will probably not have to pay the costs and fees associated with Party X's motion to compel.

However, Rule 37(a) already has a safe harbor provision of its own that shields Party Y just as effectively as, if not more than, Rule 37(e)'s protections.[95] Under Rule 37(a)(5)(A)(ii), parties may escape sanctions if they can prove that their nondisclosure was "substantially justified."[96] The Supreme Court has held that the standard for determining whether resistance to a motion to compel is "substantially justified" is rather low, requiring merely that there be a "genuine dispute" or that "reasonable people could differ as to [the appropriateness of the contested action]," as opposed to requiring a "high degree" of justification.[97]

Consequently, the protections provided by Rule 37(e) as to sanctions under 37(a) are redundant. A party seeking the protection of Rule 37(e) from Rule 37(a) sanctions would have to satisfy the rigid framework imposed by Rule 37(e). By contrast, a party seeking protection using the "substantially justified" provision of Rule 37(a) would merely have to demonstrate that "reasonable people could differ" as to the propriety of the act which led to information being

[93] *See In re* Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 90 F.R.D. 613, 620–21 (N.D. Ill. 1981). Plaintiff sought an order to compel pursuant to Rule 37(a) after suspecting that relevant documents had been destroyed. *Id.*

[94] FED. R. CIV. P. 37(a)(5).

[95] *See id.* 37(a)(5)(A).

[96] *Id.* ("If the motion [to compel] is granted . . . the court must . . . require the party . . . whose conduct necessitated the motion . . . to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees . . . [unless] the opposing party's nondisclosure, response, or objection was substantially justified . . . .").

[97] Pierce v. Underwood, 487 U.S. 552, 565 (1988) (internal quotations and citations omitted).

lost[98]—arguably, a lower threshold than Rule 37(e)'s "good faith" requirement.

B. Rule 37(b)(2): Sanctions for Failing to Comply with an Order

Rule 37(b)(2) has two parts.[99] The first part, the "violation stage," outlines the circumstances under which this rule is applicable. Essentially, the only element which exists at the violation stage is the violation of a court order. Although at first blush this element appears unambiguous, a large body of case law interpreting this element has developed since the promulgation of the rule, including a number of circuit splits. Therefore, to fully understand how Rule 37(e) will interact with Rule 37(b)(2), Part III.B.1, below, consists of a thorough delineation of how courts have interpreted the rule and what consequences these interpretations will have on how Rule 37(e) will be applied in those jurisdictions.

The second part of Rule 37(b)(2), the "sanction stage," lists the different types of sanctions that a court may choose to employ against a party that has been found to be in violation of a discovery order in the violation stage. Courts have diverged on how to apply these sanctions, therefore in Part III.B.2 these differences will be discussed and the consequences they will have on Rule 37(e)'s application will be explained.

1. "The Violation Stage": The Order Requirement

Once an order to compel discovery is issued, whether it be a result of a motion made under Rule 37(a) or sua sponte, the failure to comply with that order can give rise to sanctions under Rule 37(b)(2).[100] This rule is used to sanction destruction of evidence when the loss results in a party's inability to comply with a court order.[101] To be sure, under this rule the court is sanctioning the party for violating a court order and not specifically for destroying evidence.

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[98] *Id.*

[99] *See* FED. R. CIV. P. 37(b)(2).

[100] *Id.* ("If a party . . . fails to obey an order to provide . . . discovery, including an order under . . . 37(a), the court . . . may issue further just orders.").

[101] Note that Rule 37(a) provides the means for a party to make a motion for an order to compel an opponent to produce documents. Besides ordering the nonproducing party to pay for the costs and fees associated with that motion, Rule 37(a) is not a source of authority for the court to sanction the underlying behavior which led the moving party to file the motion in the first place. Rule 37(b), on the other hand, does address the underlying behavior because it authorizes the court to sanction a party for failing to comply with a court order.

The order requirement renders this rule a clumsy instrument to employ sanctions for spoliation. Some courts hesitate to issue sanctions for spoliation pursuant to the rule, noting that Rule 37(b)(2) does not specifically address evidence destruction, and prefer to employ their inherent powers.[102] As noted above, the destruction of evidence is a classic annoyance of the courts[103] and has been frequently sanctioned pursuant to the courts' inherent authority since long before the federal rules were promulgated.[104]

Since Rule 37(b)(2) is not tailor-made for addressing evidence spoliation, different jurisdictions justify their course of action based on their interpretation of Rule 37(b)(2). For example, courts differ in their understanding of what constitutes a "court order."[105] Courts also differ over whether a party must demonstrate a particular state of mind or culpability level before they will be held liable for sanctions under the rule.[106] Finally, courts differ over whether an order can be violated before the order is even issued.[107] Since Rule 37(e), by definition, only applies to sanctions "under these rules,"[108] how a court chooses to interpret Rule 37(b)(2) will have an effect on whether Rule 37(e) will be applicable.

a. What Constitutes a "Court Order"?

A typical scenario in which 37(b)(2) is used to sanction spoliation involves a party's destruction of evidence that was the subject of a preservation order or an order to produce discovery. However, some courts are more willing than others to find the existence of an "order" that was violated, which facilitates using 37(b)(2) for sanctioning evidence destruction. For example, the U.S. Court of Appeals for the Seventh Circuit takes a generous position, acknowledging that a party could be found to be in violation of an order if they fail to produce documents by the date on which they promised to deliver them.[109] In

[102] Pastorello v. City of New York, No. 95 Civ. 470 (CSH), 2003 WL 1740606, at *7 (S.D.N.Y. 2003).

[103] *See supra* note 78 and accompanying text.

[104] *See* West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d. Cir. 1999) ("It has long been the rule that spoliators should not benefit from their wrongdoing . . . .").

[105] *See infra* note 112 and accompanying text.

[106] *See infra* notes 113–14 and accompanying text.

[107] *See infra* notes 115–47 and accompanying text.

[108] FED. R. CIV. P. 37(e).

[109] Brandt v. Vulcan, Inc., 30 F.3d 752, 756 n.7 (7th Cir. 1994) (citing Metro. Life Ins. Co. v. Cammon, No. 88 C 5549, 1989 WL 153558, at *4 (N.D. Ill. Nov. 7, 1989)).

Brandt v. Vulcan,[110] the court stated in dicta that it might consider an "agreement among the parties" as constituting an order.[111] Therefore, courts that are more likely to find that an order was violated are also more likely to use Rule 37(b)(2) to sanction that violation, and consequently, Rule 37(e) will play a larger role in those jurisdictions.[112] Stated differently, courts in jurisdictions that choose to apply a broad definition of "order" are more likely to find individual instances of information loss that are sanctionable under Rule 37(b)(2).

b. Which State of Mind Is Required?

Courts also differ on the state of mind required when a party violates the order. Some courts require that the party display "willfulness, bad faith, or fault."[113] This approach, however, appears to be the minority since the Supreme Court, in a landmark decision, held that neither willfulness nor good faith should be considered when a party violates a production order; willfulness and good faith are only considered when determining the appropriate sanction.[114] Neverthe-

[110] *Id.*

[111] *Id.* at 756.

[112] Recall that according to the plain language of Rule 37(e) the Rule applies only to sanctions imposed under "these rules"—referring to the federal rules. Therefore, in jurisdictions that are less likely to find that an order was violated and consequently will not apply Rule 37(b)(2), the court might seek alternate avenues for sanctioning the party—in which case Rule 37(e) will have no application.

[113] Philips Med. Sys. Int'l v. Bruetman, 982 F.2d 211, 214 (7th Cir. 1992). The holding in *Philips Medical Systems* may be a result of sloppy research: to support the court's proposition that an order be violated with "willfulness, bad faith, or fault," the court cites to *Roland v. Salem Contract Carriers, Inc.*, 811 F.2d 1175 (7th Cir. 1987), which holds that the sanction of dismissal can only be employed when there is evidence of willfulness, bad faith, or fault. *Id.* at 1179. These cases are distinguishable because the *Philips Medical Systems* court considers state of mind when determining the *propriety* of sanctions, while the *Roland* court considers state of mind when determining the *type* of sanction to impose, presupposing that sanctions are appropriate.

[114] Societé Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 208 (1958). The pre-1970 version of Rule 37(b) contained language which indicated that sanctions were appropriate only if a party *refused* to disclose evidence, rather than *failed* to do so. Consequently, some courts interpreted this choice of language as indicating that for a party to refuse to obey a discovery order required a degree of willfulness, while a failure to obey, *see, e.g.*, FED. R. CIV. P. 41(b), did not. *See* Roth v. Paramount Pictures Distrib. Corp., 8 F.R.D. 31, 32 (D.C. Pa. 1948) (refusing to impose sanctions pursuant to Rule 37(b)(2) because the party did not willfully violate a court order). However, in 1958 the Supreme Court clarified this ambiguity by declaring that "a party 'refuses to obey' simply by failing to comply with an order." *Societé Internationale*, 357 U.S. at 208. Congress adopted Justice Harlan's decision in *Societé Internationale* in its 1970 amendment to the Federal Rules of Civil Procedure, excising "refusal" and replacing it with "failure."

less, in those jurisdictions that do require willfulness, bad faith, or fault, Rule 37(e) will be inapplicable since it protects only parties that lose information in good faith. Thus, litigants charged with spoliation would not be liable in these jurisdictions anyway. For jurisdictions that do not consider scienter at the violation stage of Rule 37(b)(2), violations committed in good faith may be subject to sanctions, in which case 37(e) might have some applicability at the sanctions stage of Rule 37(b)(2).

c. Does the Rule Encompass Pre-Order Violations?

Courts are divided on the issue of whether to find that a party has violated an order if the information is lost *prior to the issuance of the order*. The District of New Jersey has held that when documents are destroyed prior to an order to produce, no violation occurs because the party was unable to comply.[115] Other jurisdictions summarily refuse to use Rule 37(b)(2), a discovery rule, to sanction pre-litigation conduct and choose to employ their inherent powers to sanction the conduct instead.[116]

Some jurisdictions put a more lenient judicial gloss on the rule and indicate that a party which destroys information before a discovery order is issued *can* in fact be subject to sanctions for violating that order.[117] Although at first blush this interpretation of the rule appears counter-intuitive, if not metaphysical, the basis for its rationale is plausible.[118] Courts that accept this approach to the rule, including

[115] Struthers Patent Corp. v. Nestle Co., 558 F. Supp. 747, 765 (D.N.J. 1981).

[116] *See e.g.*, Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994) ("The court simply recognizes that Rule 37 is a procedural rule, and like all procedural rules, it governs conduct during the pendency of a lawsuit."); Capellupo v. FMC Corp., 126 F.R.D. 545, 551 n.14 (D. Minn. 1989) ("Rule 37 does not, by its terms, address sanctions for destruction of evidence prior to the initiation of a lawsuit or discovery requests.").

[117] *See, e.g.*, Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (holding that sanctions are appropriate for pre-order destruction of evidence).

[118] The approach is arguably supported by the Supreme Court in *Societé Internationale*, 357 U.S. at 207–08, in which the Court stated:

> Indeed subsection (b) [of Rule 37] . . . is itself entitled 'Failure to Comply With Order.' For purposes of subdivision (b)(2) of Rule 37, we think that a party 'refuses to obey' simply by failing to comply with an order. So construed the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.

Id.

the U.S. District Courts for the Southern District of New York and the Northern District of Illinois, indicate that if a party's inability to comply with a discovery order is self-inflicted, then that party should not elude sanctions for failing to obey the discovery order simply because they were unable to comply.[119] The keystone to sanctions for pre-order destruction under 37(b)(2) is the prerequisite that the violator had some prior duty to preserve besides the order itself.[120] Notice of a pending litigation triggers that duty to preserve.[121] Therefore, in the few jurisdictions that expand the reach of Rule 37(b)(2) sanctions to pre-order, and sometimes pre-litigation, destruction of evidence, the courts limit the expansion by also requiring that the party have a pre-existing duty to preserve that evidence.[122]

The implication of courts that employ the doctrine of pre-order spoliation of evidence is substantial and mirrors the effect caused by a broader interpretation of "court order."[123] In these jurisdictions, an act of spoliation is more likely to be sanctionable under Rule 37. In turn, this broad application of Rule 37(b)(2) translates into greater numbers of spoliators that can avail themselves of Rule 37(e)'s safe harbor.[124]

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[119] *Id.*; *see also In re* Air Crash Disaster Near Chicago, Ill. on May, 25 1979, 90 F.R.D. 613, 621 (N.D. Ill. 1981) (holding as inadequate a "self-serving" defense to the destruction of evidence which stated that documents were destroyed prior to the issuance of a preservation order and therefore were not subject to the order).

[120] *See* Alliance to End Repression v. Rochford, 75 F.R.D. 438, 440 (N.D. Ill. 1976) (ordering sanctions against defendant for defendant's failure to properly respond to interrogatories because relevant documents had been destroyed; the court held that even though documents were destroyed by defendants before the complaint was filed, the defendant was aware of the pendency of the suit, and therefore had a duty to preserve that evidence); Stubli v. Big D Int'l Trucks, Inc., 810 P.2d 785, 787–88 (Nev. 1991) (applying a rule practically identical to Rule 37(b)(2), held that plaintiffs' pre-trial destruction of evidence warranted sanctions pursuant to the rule because plaintiffs knew the evidence would be relevant to a potential litigation).

[121] Broccoli v. Echostar Commc'ns, 229 F.R.D. 506, 510 (D. Md. 2005).

[122] *See, e.g.*, *Alliance to End Repression*, 75 F.R.D. at 440 (holding that sanctions for destruction of evidence that occurred before suit was filed were appropriate because at the time of the destruction the spoliators had knowledge, obtained from paid informants, that they would be sued).

[123] *See supra* note 112 and accompanying text.

[124] This broad interpretation of how Rule 37(e) should be applied mirrors the broad interpretation some courts have of what constitutes an order. *See supra* Part III.B.1.a. In both situations, the effect of the court's interpretation is to broaden the scope of acts that can be sanctioned using Rule 37(b)(2).

i. Pre-order 37(b)(2) Application and the Court's Inherent Powers

When courts allow Rule 37(b)(2) to reach back in time to pre-order acts, they in effect try to reconcile their Rule 37(b)(2) analysis with an inherent powers analysis.[125] Under the inherent powers approach, parties charged with notice of litigation have a duty to preserve all information that may be relevant to that litigation.[126] Similarly, under the pre-order approach to Rule 37(b)(2), courts will find a violation of an order resulting from a party's pre-order loss of information only where that party had notice that what it lost would be relevant to litigation in the future.[127] Recall that on its face, Rule 37(b)(2) applies in narrow circumstances where a court order is violated. These courts, however, create a back door to the rule through which they can use the broad reach of the inherent powers analysis while simultaneously flying the flag of Rule 37(b)(2). Thus, it behooves litigants in jurisdictions that apply Rule 37(b)(2) to pre-order violations to understand their duty to preserve.

ii. The Duty to Preserve: Triggering the Duty and the Scope of Preservation

Two questions arise when courts analyze what evidence a party must preserve: (1) when does the duty to preserve arise, and (2) what should be the scope of the preservation?[128] The duty to preserve arises "when the party is placed on notice that the evidence is relevant to litigation or when the party should have known that the evidence may be relevant to future litigation."[129] Certainly, a party is placed on notice of its duty to preserve information when the court explicitly orders that party to preserve a document or produce it to the adversary.[130] However, as mentioned above, duties to preserve are

[125] As a general matter, using principles of a court's inherent power to sanction spoliation under the federal rules is not revolutionary; courts have indicated that the analysis under the two doctrines is similar. Wiginton v. Ellis, No. 02 C 6832, 2003 WL 22439865, at *3 n.5 (N.D. Ill. Oct. 27, 2003). Sometimes courts base their authority to sanction concurrently on both their inherent powers and Rule 37. *See* Smith v. City of New York, 388 F. Supp. 2d 179, 188–89 (S.D.N.Y. 2005).

[126] Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (quoting Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F.Supp. 1443, 1455 (C.D. Cal. 1984)).

[127] *See supra* note 120 and accompanying text.

[128] *Id.*

[129] Broccoli v. Echostar Commc'ns, 229 F.R.D. 506, 510 (D. Md. 2005) (citing Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001)).

[130] *Turner*, 142 F.R.D. at 73.

sometimes triggered without formal discovery requests.[131] For example, the filing of a complaint would inform the party of its duty.[132]

When a party has, or should have, reason to believe that he will be subject to litigation which may arise in the future, the duty to preserve may be triggered before a complaint is filed.[133] In some cases, the moment this pre-litigation duty is triggered is clear. For example, if a party has actual knowledge that another party is poised to file a suit, the duty is triggered.[134] Further, if a party intends to file suit, naturally it would be charged with notice of its own action and its duty to preserve would be triggered.[135]

In other instances, whether a pre-litigation duty to preserve has been triggered is more nebulous. For example, a party that is responsible for the injury of another party may reasonably anticipate that it will be sued, in which case the duty to preserve will arise at the time of injury.[136] Facts which are not directly related to an injury may refine a party's notice of litigation that may arise in relation to that injury. For example, if a party has been sued before on the basis of a similar injury in the past, then once that injury occurs again, the party should reasonably anticipate that it will be sued.[137]

Once the duty is triggered, the party charged with the duty must institute a litigation hold.[138] A litigation hold covers those documents

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[131] Krumwiede v. Brighton Assocs., No. 05 C 3003, 2006 WL 1308629, at *8 (N.D. Ill. May 8, 2006).

[132] *Id.*

[133] *See Broccoli*, 229 F.R.D. at 510.

[134] *See supra* note 121 and accompanying text.

[135] *See* Struthers Patent Corp. v. Nestle Co., 558 F. Supp. 747, 765–66 (D.N.J. 1981).

[136] Stevenson v. Union Pac. R.R. Co., 204 F.R.D. 425, 430 (E.D. Ark. 2001) (noting that "[w]hen there is a death or serious injury in a collision, the Defendant *knows* within reason that a personal injury or death claim may be made").

[137] *See* Capellupo v. FMC Corp., 126 F.R.D. 545, 547 (D. Minn. 1989). *But see* Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, 1997 WL 33352759, at *4 (E.D. Ark. Aug. 29, 1997).

> [T]o hold that a corporation is under a duty to preserve all e-mail potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all e-mail. . . . Any corporation the size of Defendant (or even much smaller) is going to be frequently involved in numerous types of litigation. . . . Arguably, most e-mails, excluding purely personal communications, could fall under the umbrella of 'relevant to potential future litigation.' . . . [I]t would be necessary for a corporation to basically maintain all of its e-mail. Such a proposition is not justified.

Id.

[138] Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) ("Once a party reasonably anticipates litigation, it must suspend its routine document reten-

which "are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence."[139] This is an objective standard because it is based on what information a litigant reasonably calculates will lead to discovery, as opposed to what the litigant believes is relevant.[140]

The obligation to enact a litigation hold can appear to impose a Herculean task on parties anticipating, or embroiled in, litigation. A party may face the difficult choice between interrupting the routine operation of its business and potentially exposing itself to sanctions in the future.[141] Recognizing the predicament, some courts have provided some breathing room. For instance, the U.S. District Court for the Northern District of Illinois has instructed that a party "does not have to preserve every single scrap of paper in its business."[142] The court also stated that "[a] party does not have to go to 'extraordinary measures'" to preserve all potential evidence.[143] Judge Scheindlin of the Southern District of New York indicated in *Zubulake v. UBS Warburg LLC*[144] that a party does not need to preserve all its backup tapes, which are generally used for disaster recovery.[145] In fact, the Supreme Court has held that document retention policies "which are created in part to keep certain information from getting into the hands of others . . . are common in business" and that "[i]t is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."[146]

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tion/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."). A "litigation hold," also known as a "legal hold," is "a communication issued as a result of current or anticipated litigation, audit, government investigation or other such matter that suspends the normal disposition or processing of records." THE SEDONA CONF., *supra* note 27, at 94.

[139] Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984).

[140] Wiginton v. Ellis, No. 02 C 6832, 2003 WL 22439865, at *5 (N.D. Ill. Oct. 27, 2003) ("A party cannot destroy documents based solely on its own version of the proper scope of the complaint." (quoting Diersen v. Walker, No. 00 C 2437, 2003 WL 21317276, at *5 (N.D. Ill. June 6, 2003))).

[141] *See* THE SEDONA CONF., *supra* note 27, at 45 ("[i]n particular circumstances, implementing a legal hold may also require a change to the organization's backup procedures for business continuation or disaster recovery").

[142] *Wiginton*, 2003 WL 22439865, at *4 (citing Danis v. USN Commc'ns, Inc., No. 98 C 7482, 2000 WL 1694325, at *32 (N.D. Ill. Oct. 20, 2000)).

[143] *Id.* (citing China Ocean Shipping (Group) Co. v. Simone Metals Inc., No. 97 C 2694, 1999 WL 966443, at *3 (N.D. Ill. Sept. 30, 1999)).

[144] 220 F.R.D. 212 (S.D.N.Y. 2003).

[145] *Id.* at 217.

[146] Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005).

However, that policy must be suspended when a litigation hold is put in place.[147]

The intricacies and vagaries of the duty to preserve discussed above, such as when the duty arises and what the duty encompasses, provide a fertile landscape for litigation. Although strictly limiting Rule 37(b)(2) to post-order destruction of evidence may shorten the court's reach to what otherwise may be sanctionable behavior, the limitation leads to less litigation when strictly enforced and fewer instances in which Rule 37(e) will be available for parties that have lost information in good faith. Conversely, in the jurisdictions in which courts have expanded Rule 37(b)(2) to pre-order destruction of evidence, more parties will be able to make use of Rule 37(e).

2. "Sanctions Stage"

Once a court has ruled that sanctions are warranted, it must determine which sanctions are appropriate. Rule 37(b)(2) sets forth nine types of sanctions available for courts to levy against parties that violate discovery orders,[148] eight of which may be imposed on parties in the context of lost information.[149] The sanctions range in severity from paying the opposing party's expenses to a dismissal or default judgment.[150] As mentioned above, in issuing sanctions, the courts' objectives are both punitive and remedial.[151] District courts have "broad discretion in fashioning an appropriate sanction" in cases involving the non-production of evidence, and their decision can be overturned on appeal only if the reviewing court finds the lower court abused its discretion.[152]

The factors that some courts consider when determining which sanctions are appropriate include the spoliator's degree of fault, the opposing party's degree of prejudice, and the effectiveness of the sanction in deterring similar future conduct and in remedying the substantial unfairness caused to the opposing party.[153] Some courts tend to focus more or less on a single factor. For example, in the Fifth Circuit, courts focus on the intentional conduct of the spolia-

[147] Broccoli v. Echostar Commc'ns, 229 F.R.D. 506, 510 (D. Md. 2005).

[148] FED. R. CIV. P. 37(b)(2)(A)–(C).

[149] *Id.* Rule 37(b)(2)(B) relates to a party's failure to produce another for examination under Rule 35(a).

[150] *Id.*

[151] *See supra* note 70 and accompanying text.

[152] Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002).

[153] *See, e.g.*, Getty Props. Corp. v. Raceway Petroleum, Inc., No. Civ.A.99-CV-4395DMC, 2005 WL 1412134, at *2 (D.N.J. June 14, 2005).

tor.[154] In the Sixth Circuit, courts look to state law when determining whether certain sanctions are proper.[155] The Supreme Court has ruled, however, that the most severe sanction under Rule 37(b)(2), dismissal or default judgment, should never be imposed on a party when its noncompliance was due to "inability, and not to willfulness, bad faith, or any fault of petitioner."[156]

As for the less severe sanctions, jurisdictions are divided over how and when they should be applied. For example, an adverse inference instruction requires intentional destruction in some jurisdictions while not in others.[157] In the District of Utah, a court has held that an adverse inference instruction, a sanction available under Rule 37(b)(2)(A), "must be predicated on the bad faith of the party destroying the records."[158] Some would argue that by definition, an adverse inference can be imposed only against parties that destroy evidence intentionally. The rationale supporting that argument is that when a party intentionally destroys a document, it does so because the document would have been harmful to its case.[159] Therefore, it follows logically that if a party destroys evidence negligently or in good faith, then there is no reason to believe that the destroyed evidence would have been harmful to that party. Consequently, in jurisdictions that follow the intent-based approach, parties that lose information in good faith will not be sanctioned with an adverse inference instruction. In turn, Rule 37(e), which only protects good faith loss, would offer a safe harbor to parties that do not need it.

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[154] MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 271 (2d. ed. 2005).

[155] *Id.* at 274.

[156] Societé Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212 (1958).

[157] *Compare* Procter & Gamble Co. v. Haugen, 179 F.R.D. 622, 631 (D. Utah 1998) (holding that bad faith destruction of evidence is predicate to an adverse inference instruction), *with* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (holding that an adverse inference instruction may be based on a showing of negligence rather than bad faith or gross negligence).

[158] *Procter & Gamble Co.*, 179 F.R.D. at 631 (quoting Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997)) (internal quotations omitted); *see also* Mathis v. John Morden Buick, Inc. 136 F.3d 1153, 1155 (7th Cir. 1998) (holding that a showing of bad faith was necessary before an adverse inference instruction would be issued).

[159] *Procter & Gamble Co.*, 179 F.R.D. at 631 (noting "mere negligence in losing or destroying a document does not support an inference that the party was conscious of a weakness in its case, the 'adverse inference must be predicated on bad faith of the party destroying the records.'" (quoting *Aramburu*, 112 F.3d at 1407)).

In other jurisdictions—instead of using an intent-based rationale for imposing an adverse inference instruction—courts focus more on the damage done to the party that did not destroy the documents. For example, in *Residential Funding Corp. v. DeGeorge Financial Corp.*,[160] the court explained:

> [The] sanction [of an adverse inference] should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference. It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance. The inference is adverse to the 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 the loss.[161]

In jurisdictions that follow the evidentiary-based approach, therefore, courts are more willing, under certain circumstances, to impose adverse inference instructions against parties that destroy evidence negligently.[162] In fact, in *Societé Internationale* the Supreme Court stated in dicta that a party which fails to comply with an order "due to inability, and not to willfulness, bad faith, or any fault of [its own] . . . will [not] profit through its inability to tender the records called for."[163] The Court went on to say that "[i]t may be that in the absence of complete disclosure by petitioner, [a court] would be justified in drawing inferences unfavorable to petitioner as to particular events."[164]

When intentional destruction is lacking, courts typically require the party seeking the adverse inference to establish, using "extrinsic evidence of content," that the lost information was prejudicial to the spoliator.[165] Proving that destroyed evidence was prejudicial to the party that destroyed it can be difficult since, of course, the party with the burden of proof might not know exactly what was destroyed. Therefore, the U.S. District Court for the Southern District of New

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[160] 306 F.3d 99 (2d Cir. 2002).

[161] *Id.* at 108 (quoting Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991)).

[162] *See* Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 219 (1st Cir. 1982) (holding that an adverse inference was an appropriate sanction against a party that had not destroyed evidence in bad faith and considered, among other factors, the issue of fairness to the opposing party).

[163] Societé Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212 (1958).

[164] *Id.* at 213.

[165] *Turner*, 142 F.R.D. at 77.

York has opined that parties burdened with establishing prejudice should not be held to "'too strict a standard of proof regarding the likely contents of the destroyed evidence.'"[166] In *New York National Organization for Women v. Cuomo*,[167] however, the Southern District of New York recognized that too lax a standard of proof would be problematic as well because spoliators are not supposed to be punished merely for depriving their adversary of "a pond in which they would like to have gone on a fishing expedition."[168]

In the jurisdictions that regard the adverse inference instruction as a measure to remedy the evidentiary imbalance caused by the loss of information, and therefore are not as concerned that the party committed the act in bad faith, it would appear that Rule 37(e) could play a meaningful role in protecting parties that have lost information in good faith. However, application of the Rule 37(e) safe harbor in these instances may pose a dilemma for these courts. They will be confronted with a situation in which evidence has been lost in good faith, but the opposing party has succeeded to some extent in demonstrating that the lost evidence was prejudicial to the spoliator's case, thus tipping the evidentiary scales in the spoliator's favor.[169] It is plausible that under these circumstances, a judge that follows this rationale toward spoliation sanctions will find that "exceptional circumstances" exist such that a jury should be instructed on the adverse inference despite the spoliator's satisfaction of the elements of Rule 37(e). This application of the "exceptional circumstances" doctrine is consistent with past applications of the doctrine, where courts have held that exceptional circumstances may lead a court to take a course different from what is expected of it because the totality of the circumstances demand the court to do so.[170]

Besides dismissal or default judgment and adverse inference instructions, Rule 37(b)(2) authorizes a court to order the offending party to pay any of its adversary's costs and fees that were caused by

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[166] Pastorello v. City of New York, No. 95 Civ. 470 (CSH), 2003 WL 1740606, at *12 (S.D.N.Y. Apr. 1, 2003) (quoting Kronisch v. United States, 150 F.3d 112, 128 (2d Cir. 1998)).

[167] No. 93 Civ. 7146 (RLC) JCF, 1998 WL 395320 (S.D.N.Y. July 14, 1998).

[168] *Id.* at *3.

[169] Note also, however, that if the opposing party fails to establish that the lost information would have been prejudicial to the party that lost it, then the court will not be convinced that the evidentiary balance has been disturbed and will thus refrain from instructing the jury on an adverse inference. Therefore, Rule 37(e) would be unnecessary in that case as well.

[170] *See supra* notes 63–66 and accompanying text.

the failure to comply.[171] However, just as in Rule 37(a), the costs and fees provision of Rule 37(b)(2) disallows the award if the violating party can establish that its failure was substantially justified.[172] Therefore, as with Rule 37(a), the "substantially justified" provision functions as a "safe harbor" for parties whose failure to comply is in good faith. Clearly, then, Rule 37(e) would not be of any use to parties that wish to avoid paying costs and fees because the rule already contains an instrument to protect such parties. Further, some courts have held that, as a general rule, ordering a party to pay its adversary's attorneys' fees is a "fundamentally penal" sanction such that there must be "clear and convincing evidence of the predicate misconduct."[173] In those courts, since good faith destruction would not be penalized, Rule 37(e) would have no function.

C. Rule 37(c): Sanctions for Failing to Disclose

Rule 37(c)(1) gives courts the authority to sanction parties that fail to make disclosures which are required by Rule 26(a) or 26(e)(1).[174] Rule 26(a) outlines three instances when parties to a litigation must provide certain disclosures to all the other parties.[175] These instances include initial disclosures, disclosures of expert testimony, and pretrial disclosures.[176] The disclosures are mandatory,

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[171] FED. R. CIV. P. 37(b)(2)(C).

> Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Id.

[172] *Id.*

[173] Shepherd v. Am. Broad. Co., 62 F.3d 1469, 1478 (D.C. Cir. 1995).

[174] FED. R. CIV. P. 37(c)(1).

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure; (B) may inform the jury of the party's failure; and (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Id.

[175] FED. R. CIV. P. 26(a)(1)–(3).

[176] *Id.*

meaning that they must be provided even without having been requested.[177]

If a party fails to make a mandatory disclosure pursuant to Rule 26(a) or 26(e)(1), then Rule 37(c)(1) imposes an automatic preclusion sanction.[178] This means that a party that fails to disclose information is automatically forbidden from using that information at a trial, hearing, or motion.[179] Since it may be to the responding party's benefit to withhold the information, when a party's failure to disclose is due to the loss of information, the preclusion sanction is ineffective. In those cases, the rule provides for alternate sanctions, such as paying attorneys' fees or issuing an adverse inference instruction.[180] The Advisory Committee Notes to this rule specifically state that when a failure to disclose results from spoliation of evidence, the alternate sanctions should be used.[181]

The alternate sanctions under Rule 37(c)(1) are not self-executing, but rather are imposed after the party seeking the sanction files a motion and the party against whom sanctions are sought is given an opportunity to be heard on the issue.[182] The alternate sanctions are the same as the ones listed in Rule 37(b)(2), which include adverse inference instructions and payment of costs and fees.[183]

A unique feature of Rule 37(c)(1) that distinguishes it from Rule 37(b)(2) is that parties will only be found in violation if they do not have a "substantial justification" for their failure.[184] Recall that under Rule 37(b)(2), a party that violates a court order is considered to have failed to comply with the order, "whatever its reasons" are for not complying, and that "willfulness[,] or good faith . . . can hardly affect the fact of noncompliance and are relevant only to the path

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[177] *Id.*

[178] FED. R. CIV. P. 37(c)(1).

[179] *Id.*

[180] *See supra* note 174 and accompanying text.

[181] FED. R. CIV. P. 37 advisory committee's notes, 1993 amends., subdivision (c).

> Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions— . . . like [in the case of] spoliation of evidence, allowing the jury to be informed of the fact of nondisclosure—that, though not self-executing, can be imposed when found to be warranted after a hearing.

Id.

[182] FED. R. CIV. P. 37(c)(1).

[183] *Id. See supra* Part III.B.2.

[184] FED. R. CIV. P. 37(c)(1).

which the District Court might follow in dealing with petitioner's failure to comply."[185] In contrast, Rule 37(c)(1) directs a court to consider at the outset any justifications a violating party might have for failing to disclose.[186]

"[W]hether a party's failure to disclose was substantially justified is a fact question to be decided on the totality of the circumstances. In making this determination, the court considers all relevant factors, including:" (1) good faith, (2) willfulness or negligence, (3) control, and (4) surprise.[187] Therefore, the "substantial justification" provision functions as a "safe harbor" for parties that have failed to make a disclosure despite attempting to comply with the rule.[188] The Advisory Committee Notes to the rule indicate that this provision is included in the rule "to avoid unduly harsh penalties" which may be associated with the mandatory nature of disclosures under Rule 26(a).[189] Just as in Rule 37(a) and the costs and fees provision to Rule 37(b)(2), the existence of a "substantially justified" provision obliterates the use of Rule 37(e). Any conduct that would be protected under Rule 37(e) would also have been protected by the "substantially justified" provision of Rule 37(c).

D. Rule 37(d): Sanctions for Failing to Respond

Rule 37(d) is the final vehicle under Rule 37 that a party could use to seek sanctions against an adversary for failing to provide lost information. The rule provides, in relevant part, for sanctions against parties that fail to answer or object to interrogatories submitted by a party and parties that fail to serve written responses to requests for inspection.[190] If a party's loss of information renders it unable to an-

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[185] Societé Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 208 (1958).

[186] FED. R. CIV. P. 37(c)(1).

[187] GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 595–96 (3d ed. 2000).

[188] *See* Hinton v. Patnaude, 162 F.R.D. 435, 439 (N.D.N.Y. 1995) (holding that plaintiff did not violate the Rule despite untimely disclosure because plaintiff's conduct exhibited no "bad faith" or "callous disregard" and plaintiff "made efforts to conform with the Rules").

[189] FED. R. CIV. P. 37 advisory committee's notes, 1993 amends., subdivision (c); *Hinton*, 162 F.R.D. at 439 ("[The substantial justification provision] was meant to soften the impact with respect to initial disclosures required by Rule 26(a)(1) . . . .").

[190] FED. R. CIV. P. 37(d).

> The court where the action is pending may, on motion, order sanctions if: (i) a party . . . fails, after being served with proper notice, to appear for that person's deposition; or (ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response. . . .

swer an interrogatory or respond to a request, then that failure could lead to sanctions.[191] As a threshold matter, a litigant must learn what constitutes a failure to respond in the jurisdiction in which that party seeks to apply Rule 37(d). Generally, partial answers are not sanctionable because parties may move to compel additional answers under Rule 37(a).[192] However, courts have held that "a response that in substance disclaims responsiveness is sanctionable."[193]

Rule 37(d) is similar to Rule 37(b)(2) in that a prima facie showing of a failure to respond is all that is necessary before a court begins to consider which sanction is appropriate.[194] The Advisory Committee Notes to the 1970 Amendment to the Federal Rules of Civil Procedure state that willfulness and other factors play a role in Rule 37(d), but only in the choice of sanctions.[195] The notes go on to state:

> [I]n view of the possibility of light sanctions, even a negligent failure should come within Rule 37(d). If default is caused by counsel's ignorance of Federal practice, or by his preoccupation with another aspect of the case, dismissal of the action and default judgment are not justified, but the imposition of expenses and fees may well be.[196]

It is plausible that Rule 37(e) will provide some protection to parties that have exposed themselves to sanctions for failing to respond to a document request because they have lost information that would have enabled them to respond. However, as mentioned above, in most jurisdictions a party can avoid being sanctioned for failing to respond by simply giving a partial answer. The requesting party can then seek an order to compel under Rule 37(a), which returns us to the analysis of Rules 37(a) and 37(b)(2), above. In jurisdictions in

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> Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(iv). Instead or in addition to these sanctions, the court must require the party failing to act, the attorney advising the party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award unjust.

Id.

[191] *See* Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 17 (D. Neb. 1985) (where plaintiffs filed a motion pursuant to Rule 37(d) seeking sanctions for defendant's failure to respond to document requests submitted under Rule 34 as a result of their destruction of certain documents).

[192] JOSEPH, *supra* note 187, at 591.

[193] *Id.*

[194] FED. R. CIV. P. 37 advisory committee's notes, 1970 amends., subdivision (d).

[195] *See supra* note 118 and accompanying text.

[196] FED. R. CIV. P. 37 advisory committee's notes, 1970 amends., subdivision (d).

which a court will not accept a partial answer and will go forward with sanctions, the types of sanctions that Rule 37(d) proposes are the same as those in Rule 37(b)(2). As discussed above, rarely are any significant sanctions imposed on parties that have failed to comply with their discovery obligations in good faith.

E. Sources of Authority to Sanction Other than Rule 37

Other areas of the law also demonstrate the justice system's reluctance to reprimand a party that has lost evidence in good faith. In jurisdictions that recognize the tort of spoliation, only a small fraction acknowledge liability when evidence is lost negligently, and in those cases there must be a further showing that the party prosecuting the tort claim was impaired in its ability to prove its case in a prior suit.[197] Further, much of the criminal law with respect to the destruction of evidence requires that the evidence be destroyed intentionally. Finally, ethics rules appear to hold a lawyer accountable for the loss of evidence only when his or her involvement in the loss amounted to bad faith conduct.

1. Tort Liability

Some state courts recognize an independent cause of action against a party that has destroyed evidence.[198] However, "only a minority of state high courts have recognized [the] independent tort claim."[199] States that have recognized the claim are further divided between those that recognize claims for intentional spoliation and those that also recognize claims for negligent spoliation.[200] There is general agreement that the elements of intentional spoliation consist of: "(1) pending or probable litigation involving the plaintiff; (2) knowledge on the part of defendant that litigation exists or is probable; (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case; (4) disruption of the plaintiff's case; and (5) damages proximately caused by the defendant's acts."[201] Since intentional spoliation requires intent on behalf of the spoliator to disrupt

[197] This is similar to jurisdictions that issue an adverse inference instruction as a sanction for good faith loss of information, but only when there can be an independent showing that the lost evidence would have been harmful to the party that lost it. *See supra* note 161 and accompanying text. As had been postulated above, such a scenario would elicit the "exceptional circumstances" provision of Rule 37(e)'s safe harbor. *See supra* notes 169–70 and accompanying text.

[198] *See* KOESEL & TURNBULL, *supra* note 154, at 81.

[199] *Id.*

[200] *Id.* at 82.

[201] *Id.* at 88.

the plaintiff's case, it can be inferred that in these jurisdictions, if evidence is lost in good faith—for example, without intent to disrupt the opponent's case—the court would not find the spoliator tortiously liable for the destruction. This approach to tortious liability mirrors the approach taken by courts which emphasize the punitive purposes of sanctions for spoliation of evidence because in both cases the court is focused on the intent of the destroying party to destroy the evidence. If evidence is lost in good faith, neither liability nor sanctions are imposed.

As for the jurisdictions that recognize liability for negligent destruction of evidence, which consist of only four states and the District of Columbia,[202] the tort requires:

> (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages.[203]

In these jurisdictions, although a party may be held liable for negligently destroying evidence, even if it was acting in good faith, the opponent must still establish that the destruction of the evidence actually occurred. This approach mirrors the approach taken by courts that focus on the evidentiary imbalance that is created when evidence is lost, even when lost in good faith. Here, as in the sanction context, besides a finding that the evidence was actually lost, the court also requires the additional element that the lost evidence caused the opponent an inability to prove their case. As postulated in Part II.D., courts applying Rule 37(e) in jurisdictions such as those focusing on the evidentiary imbalance caused by spoliation will likely find that evidence which tends to prove that the lost information impaired an opponent's case is an "exceptional circumstance" that requires a sanction and militates against employing the safe-harbor protections of Rule 37(e).

2. Criminal Liability

There are many sources of criminal liability for destruction of evidence at the federal level.[204] Generally, these statutes require that

[202] *Id.* at 89 ("Only Alabama, Montana, Indiana, some Pennsylvania courts and the District of Columbia presently recognize this tort.").

[203] *Id.* at 89.

[204] *See, e.g.*, 18 U.S.C. § 1503 (2000) (prohibiting obstruction of justice); § 1505 (Supp. V 2005) (governing obstruction of agency and congressional proceedings); §

the evidence be destroyed with intent. For example, § 802 of the Sarbanes-Oxley Act of 2002, promulgated in the aftermath of the Enron and Worldcom scandals, attributes criminal liability to anyone that knowingly destroys documents "with the intent to impede . . . the investigation . . . within the jurisdiction of any department or agency of the United States" and provides that violators "shall be fined . . . [or] imprisoned . . . or both."[205]

Further, Sarbanes-Oxley requires accountants to "retain corporate 'audit or review work papers for a period of 5 years'" and makes it a crime to "knowingly and willfully violate" that requirement.[206] Some argue that "it seems unlikely that prosecutors will use such resources to pursue 'negligent or sloppy recordkeeping' absent other criminal conduct."[207]

3. Model Rules of Professional Conduct

Lawyers' ethical duties forbid them from destroying documents.[208] The ABA Model Rules of Professional Conduct indicate that a lawyer "shall not . . . unlawfully . . . destroy . . . a document or other material having potential evidentiary value."[209] Although the rule itself does not propound a culpability level, the comments to the rule state that the "[a]pplicable law in many jurisdictions makes it an offense to destroy material for purpose[s] of impairing its availability in a pending proceeding or one whose commencement can be foreseen."[210] It can be inferred that since the destruction has to be for the purpose of impairing its availability, then a lawyer's loss of information in good faith probably does not rise to the level of culpability required for a lawyer to be in violation of this rule. Further, when a lawyer has an obligation pursuant to a tribunal to preserve or otherwise produce evidence, the rule explicitly requires that a lawyer disobey that obligation "knowingly" before she may be held accountable for the loss, thus exposing herself to disciplinary action.[211]

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1512 (Supp. V 2005) (governing witness tampering); *and* § 2071 (2000) (criminalizing willful destruction of records filed or deposited with federal courts or public offices, or by one having custody of such records).

[205] Sarbanes-Oxley Act of 2002 § 802(a), 18 U.S.C. § 1519 (Supp. V 2005).

[206] KOESEL & TURNBULL, *supra* note 154, at 111.

[207] *Id.* at 112.

[208] *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(a); RESTATEMENT OF THE LAW GOVERNING LAWYERS § 118.

[209] MODEL RULES OF PROF'L CONDUCT R. 3.4(a).

[210] MODEL RULES OF PROF'L CONDUCT R. 3.4(a) cmt. 2.

[211] MODEL RULES OF PROF'L CONDUCT R. 3.4(c).

Regardless of how a court chooses to address spoliation, sanctions are rarely imposed on parties that lose evidence in good faith—precisely the only parties that can benefit from Rule 37(e)'s safe harbor. In those few instances where courts do decide to issue sanctions when evidence is lost in good faith, they do so after a minimum showing is made that the lost evidence would be beneficial to the non-spoliating party. It may be difficult for that party to meet such a burden, since it can be impossible to know the content of the document which is now lost. Rule 37(e)'s safe harbor may be of use in those cases, but if the non-spoliating party succeeds in proving that the evidence was prejudicial, the court may consider the "exceptional circumstances" exception satisfied. In light of the "safe harbors" that pre-date Rule 37(e), and which are still in force, it is doubtful that Rule 37(e) will have much of an impact on how courts issue sanctions in the context of inadvertent electronic spoliation.

IV. CONCLUSION

Although electronic information is inherently different from non-electronic sources of evidence, this difference does not disturb the principles on which the law of sanctions for evidence spoliation is based—punishing bad faith conduct and remedying evidentiary imbalances. These principles are the ultimate arbiters of whether a party's conduct requires the court to intervene, and the Judicial Committee acknowledged them as such by including Rule 37(e)'s "good faith" requirement and its "exceptional circumstances" provision. In the final analysis, Rule 37(e) will be most effectively used as a quick-reference for how courts have always treated the types of evidence loss covered by Rule 37(e).