

# Comments

## A PORT IN THE STORM?: THE PROBLEMATIC AND SHALLOW SAFE HARBOR FOR ELECTRONIC DISCOVERY

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| INTRODUCTION.....  | 259 |
| I. THE HISTORY AND POLICY BEHIND OUR CURRENT SYSTEM OF LIBERAL, YET LIMITED DISCOVERY..... | 262 |
| II. COURTS' POWER TO LEVEL SANCTIONS FOR DISCOVERY VIOLATIONS.....                         | 265 |
| A. <i>Legal Authority for Sanctions</i> .....  | 266 |
| B. <i>Analysis of a Motion for Sanctions Due to Spoliation</i> .....                       | 268 |
| III. ELECTRONIC DISCOVERY IS DIFFERENT THAN TRADITIONAL PAPER-BASED DISCOVERY.....         | 275 |
| IV. THE PROPOSED RULE CHANGE.....  | 281 |
| A. <i>Problems with Proposed Changes to Rule 37(f)</i> .....                               | 283 |
| B. <i>A Partial Proposed Solution</i> .....  | 290 |
| CONCLUSION.....  | 292 |

### INTRODUCTION

As the use of computers and the Internet has expanded, more and more company information is stored in an electronic format.<sup>1</sup> The original architects of the Federal Rules of Civil Procedure (hereinafter the “Civil Rules”) did not craft discovery rules with a view to this vast category of discoverable information.<sup>2</sup> Eventually the rules seemed inadequate enough in light of the expanded use of electronic discovery to rouse some groups into calling for far-reaching changes. The federal civil rulemaking body took notice

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<sup>1</sup> See, e.g., Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 589–90 (2001).

<sup>2</sup> *Id.* at 564.

and began drafting new rules, which they eventually published for public commentary.<sup>3</sup> The final proposal, however, curtails courts' ability to level sanctions on litigants for abusing the discovery process and hindering parties' rights and obligations.<sup>4</sup> One of the most controversial<sup>5</sup> proposed rule changes creates a "safe harbor" within Federal Rule of Civil Procedure 37(f) to shield parties against sanctions for inadvertently destroying discoverable information while operating an electronic information system in good faith.<sup>6</sup> That proposal is problematic in light of both the legal environment in which electronic discovery has evolved and the policy behind discovery sanctions.

Discovery in the federal courts has grown over the last century from a system that allowed litigants to conceal facts prior to trial to one that requires parties to retain and disclose vast amounts of information.<sup>7</sup> The driving theory behind this progression is to facilitate a broad search for facts, the names of witnesses, or any other information that may aid a party in preparing for or arguing its case.<sup>8</sup> Parties can easily delve into the lives or operations of an opposing party; the potential admissibility of requested information does not determine the validity of a request for fear that such a standard could curtail the utility of discovery altogether.<sup>9</sup> This system has warts, however, as parties frequently demand overbroad disclosures or destroy invaluable information required by the opposing party's case. To remedy the first problem, the Civil Rules include a rule limiting discovery requests and introduced a method of balancing the burden of producing information with the benefit thereof.<sup>10</sup> For the second problem, the Civil Rules grant courts the authority to impose sanctions on parties who tamper with or destroy evidence.<sup>11</sup>

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<sup>3</sup> See *infra* Part IV.

<sup>4</sup> COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE app. at 32–35 (revised Aug. 3, 2004) [hereinafter PROPOSED RULES I].

<sup>5</sup> See COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 200, 207, 250–55, 306–09 (Feb. 11, 2005) [hereinafter "2/11/05 PUBLIC HEARING"], available at <http://www.uscourts.gov/rules/e-discovery/CVHearingFeb2005.pdf>.

<sup>6</sup> SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, Rules App. at C-86 (Sept. 2005) [hereinafter PROPOSED RULES II].

<sup>7</sup> See *infra* Part I.

<sup>8</sup> See FED. R. CIV. P. 26 advisory committee's note to 1946 amendment. For example, interrogatories, depositions and requests to admit provide the same liberal access to information that may or may not be admissible at trial.

<sup>9</sup> *Id.*

<sup>10</sup> FED. R. CIV. P. 26(b)(2).

<sup>11</sup> FED. R. CIV. P. 37.

Electronic documents, broadly defined as virtually anything stored on a computer,<sup>12</sup> are the “corporate equivalent of DNA evidence,” which a party can hide or destroy only with great difficulty.<sup>13</sup> Litigants have a legal obligation to preserve documents relating to current or impending litigation.<sup>14</sup> While burdensome, parties need not retain every scrap of paper or email, as courts consider such an expansive rule overbroad and inefficient,<sup>15</sup> as well as potentially fatal to business functions.<sup>16</sup> Large companies, however, have grown increasingly uneasy with the legal standards governing electronic document retention obligations in light of the ever-expanding volume of electronic information and penalties imposed by some courts.<sup>17</sup> These apprehensive companies and their counsel have demanded that the discovery rules evolve further to accommodate this new realm of discoverable information.

Recently, the Committee answered their requests with proposed Rule 37(f).<sup>18</sup> The upshot of the proposal is that companies can avoid sanctions for destroying discoverable, relevant information so long as they operate

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<sup>12</sup> THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, SK071 ALI-ABA 363, 373 (ALI 2004) [hereinafter SEDONA PRINCIPLES]. The *Sedona Principles* were crafted by a group of practitioners, judges, academics and information-technology consultants who frequently encounter electronic discovery in their practice or research. *Id.* at 367. The definition of a discoverable “electronic document” is somewhat unsettled despite the *Sedona Principles*’ discussion. The absence of a definition in the Civil Rules, *see* FED. R. CIV. P. 34(a), has caused some confusion for courts. In general, courts have broadly interpreted the definition of “document” in the context of electronic discovery. *See, e.g.*, *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382 (7th Cir. 1993) (holding that an assortment of deleted computer records are discoverable and imposing sanctions for discovery misconduct); *Mosaid Techs., Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004) (holding that a document request for typed matter, data compilations, correspondence and interoffice communications called for the production of defendant’s emails); *Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000) (holding that computer “records, including records that have been ‘deleted,’ are documents discoverable under Fed. R. Civ. P. 34” and can expose the party who deleted said records to sanctions). For a survey of the issues courts face when defining what constitutes an “electronic document,” *see* generally Shannon M. Curreri, *Defining “Document” in the Digital Landscape of Electronic Discovery*, 38 LOY. L.A. L. REV. 1541 (2005).

<sup>13</sup> Nicholas Varchaver, *The Perils of E-mail*, FORTUNE, Feb. 17, 2003, at 96, 96. Indeed, “email has been called a ‘truth serum,’ access to which could expose all manner of wrong-doing.” Berkman Ctr. for Internet & Soc’y at Harvard Law Sch., *The Federal Rules of Civil Procedure: Impact of Digital Discovery*, [http://cyber.law.harvard.edu/digitaldiscovery/digdisc\\_library\\_4.html](http://cyber.law.harvard.edu/digitaldiscovery/digdisc_library_4.html) (last visited Sept. 16, 2006) [hereinafter *Impact of Digital Discovery*].

<sup>14</sup> *See* FED. R. CIV. P. 26.

<sup>15</sup> *See, e.g.*, *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 email . . . is not justified.”); 7 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 37.120 (3d ed. 1999) (“A party is not obligated to retain every document or tangible item that is in its possession, or subject to its control, after a complaint has been filed.”).

<sup>16</sup> *See Concord*, 1997 WL 33352759, at \*4.

<sup>17</sup> *See, e.g.*, *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, No. CA-3-5045 AI, 2005 WL 674885, at \*10–13 (Fla. Cir. Ct. Mar. 23, 2005).

<sup>18</sup> PROPOSED RULES II, *supra* note 6, at Rules App. C-86.

their electronic information storage systems “in good faith.”<sup>19</sup> This proposal, however, has its own warts. For one, empirical data fails to support claims that the current rules will result in a pestilence of dire discovery sanctions that cripple corporate America. Second, Rule 37(f) ignores one fundamental policy behind discovery sanctions: compensation for damage to the non-spoiling party’s case. Lastly, the proposal does not protect parties against sanctions from the Court’s inherent authority or from sanctions for spoliation that occurs prior to commencement of an action.<sup>20</sup> This Comment argues that, due to those flaws, the Committee must reconsider Rule 37(f) and should reformulate it along lines that parallel the existing common law doctrine. Furthermore, the Committee must resist the temptation to impose knee-jerk rules without ample evidence of a problem or a clear solution. Rather, the Committee should look before it leaps: use the federal courts as laboratories to weigh various approaches, gather information, and allow the common law doctrine to find a potential solution.

This Comment proceeds in six parts. Part I discusses the history of pre-trial discovery and the Civil Rules. Next, Part II outlines the spoliation doctrine used by courts to enforce the Civil Rules and the effect the Rule 37 Safe Harbor will inevitably have on future disputes. Part III examines the problems presented by electronic discovery under the current discovery rules. Part IV discusses the proposed rule changes in detail, and Part IV.A analyzes the ways in which the proposed Safe Harbor in Rule 37(f) is flawed. Finally, Part IV.B outlines an alternative to proposed Rule 37(f) that addresses some of the flaws in Rule 37(f) as currently drafted, and argues that the Committee should wait before promulgating any new rules until the electronic discovery picture is clearer.

## I. THE HISTORY AND POLICY BEHIND OUR CURRENT SYSTEM OF LIBERAL, YET LIMITED DISCOVERY

Judges, commentators and practitioners tend to agree that challenges presented by electronic discovery are inherently different from those presented by other types of discovery.<sup>21</sup> The question remains, however: Does electronic discovery require specialized rules and sanctuaries because of these differences? One can only evaluate the necessity and potential flaws

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<sup>19</sup> *Id.*

<sup>20</sup> *See infra* Part IV.

<sup>21</sup> *See generally* Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422, 427–28 (S.D.N.Y. 2004); Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212, 216–20 (S.D.N.Y. 2003); SEDONA PRINCIPLES, *supra* note 12; Ronald J. Hedges, *A View From the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 127 (2005); Henry S. Noyes, *Is E-Discovery So Different that It Requires New Discovery Rules? An Analysis of Proposed Amendments to the Federal Rules of Civil Procedure*, 71 TENN. L. REV. 585 (2004); Redish, *supra* note 1, at 589–92 (noting that electronic discovery is unique in its volume, difficulty of retrieval, and translation). The sources of authority listed above disagree, however, as to the appropriate response to these challenges.

or benefits of the Rule 37 Safe Harbor for electronic discovery in light of the history and competing policies behind the Civil Rules. This part discusses the relevant history behind the Civil Rules.

As society changes, so does the nature of dispute resolution and, in time, our methods of handling these disputes.<sup>22</sup> Over the past century, the American legal system has witnessed three progressive developments that have brought us to a legal and technological crossroads with respect to discovery: first, the inception of the Civil Rules in 1938; second, the drastic increase in documents open to discovery due to technological advancements such as the photocopier and electronic documents; and third, a retrenchment from the most liberal discovery practices in light of the massive discovery burdens litigants can impose on one another.<sup>23</sup>

The inception of the Civil Rules in 1938 marked a “revolution[ary]” change in dispute-resolution policy.<sup>24</sup> Prior to 1938, discovery before trial was extremely limited, if available at all, in both the United States and England.<sup>25</sup> As a result, a party entered trial knowing almost nothing about the strength of its own claim, much less the validity of an opposing party’s case

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<sup>22</sup> See Redish, *supra* note 1, at 568 n.20 (discussing the “litigation matrix”: “the synthesis of the fundamental social, moral, political, and economic values society seeks to foster in shaping its civil litigation process”). Professor Redish argues that:

[t]o fully comprehend why the quantitative and qualitative differences between electronic and traditional discovery justify distinctive treatment in the courts, then, one needs to add another level of analysis, one grounded in the deep normative structure of procedure. By adding this missing link, one is able to understand why these differences call for distinctive treatment, because by exploring modern procedure’s deep normative structure, one can best understand how the added burdens associated with electronic discovery threaten the procedural system’s underlying social, political, and economic goals.

*Id.* at 593.

For example, the drafters of the Constitution added the jury trial requirement after experiencing unfair treatment at the hands of English authorities prior the American Revolutionary War. *E.g.*, *Stockbridge v. Mixer*, 215 Mass. 415 (1913). In the modern context:

[t]here seems to be little doubt that we are increasingly making greater and greater demands on the courts to resolve disputes that used to be handled by other institutions of society. Much as the police have been looked to “solve” racial, school and neighborly disputes, so, too, the courts have been expected to fill the void created by the decline of church and family. Not only has there been a waning of traditional dispute resolution mechanisms, but with the complexity of modern society, many new potential sources of controversy have emerged as a result of the immense growth of government at all levels, and the rising expectations that have been created.

Frank E.A. Sander, *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 114 (Apr. 7–9, 1976).

<sup>23</sup> Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 *FORDHAM L. REV.* 1, 2–6 (2004).

<sup>24</sup> Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 *B.C. L. REV.* 691, 734 (1998). Common law principles controlled the rules of discovery before state laws and the Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2003), made discovery procedure statutory. Because the United States adopted English Common Law after declaring independence, United States discovery practice and policy started in England. Subrin, *supra*, at 694–95.

<sup>25</sup> Subrin, *supra* note 24, at 695.

or evidence.<sup>26</sup> Many attorneys strongly opposed any attempt to liberalize discovery that might promote the decried “fishing expedition”—opening the floodgates to frivolous claims and avoidable expense and delay.<sup>27</sup> The benefits of liberalized discovery, however, proved overwhelming. For example, one commentator has argued that “[i]t is probable that no procedural process offers greater opportunities for increasing the efficiency of the administration of justice than that of discovery before trial.”<sup>28</sup> Modern practitioners take many of the benefits of pretrial discovery for granted: Much of the delay in the preparation of a case, most of the lost effort in the course of trial, and a large part of the uncertainty of the outcome result from the want of information on the part of litigants and their counsel as to the real nature of the respective claims and the facts upon which they rest. False and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary states of litigation followed by surprise and confusion at trial.

Though litigants have achieved many of the goals that prompted the liberalization of discovery, the Civil Rules have undergone several changes.<sup>29</sup> Within the first decade after the Civil Rules became law, the Advisory Committee proposed, and the Supreme Court adopted, a number of amendments that helped finalize the discovery revolution.<sup>30</sup> Most significantly, the new rules placed all discovery mechanisms under the same “scope of discovery” as defined by the then-amended Rule 26.<sup>31</sup> The Advisory Committee counseled: “[T]he purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.”<sup>32</sup> The rule change further stated that inquiries into the potential admissibility of requested information should not determine the validity of a request because “such a standard unnecessarily curtails the utility of discovery practice.”<sup>33</sup> The rules

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<sup>26</sup> See GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* 17–18 (1932) [hereinafter *DISCOVERY BEFORE TRIAL*].

<sup>27</sup> *Id.* Ragland’s book details the potential benefits and some of the threats of pre-trial discovery, *id.*, and is largely credited as one of the earliest comprehensive works supporting liberal pre-trial discovery. See generally Charles E. Clark, Book Review, 42 *YALE L.J.* 988 (1933) (reviewing *Discovery Before Trial* shortly after its publication).

<sup>28</sup> Edson R. Sunderland, *Foreword* to *DISCOVERY BEFORE TRIAL*, *supra* note 26, at iii.

<sup>29</sup> See, e.g., Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 *TUL. J. INT’L & COMP. L.* 153, 158–64 (1999). Some aspects of discovery are drastically new and different, such as video depositions; not only do the policy justifications for those changes remain virtually unchanged, but the Civil Rules easily adapted to those information media. *FED. R. CIV. P.* 30. Electronic discovery, on the other hand, presents fundamental challenges completely unanticipated by the current Civil Rules. See Marcus, *supra* note 23, at 7–8.

<sup>30</sup> Subrin, *supra* note 24, at 736.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

deem some requests beyond the scope of discovery, however, if they could not possibly bear any direct or circumstantial evidence.<sup>34</sup>

After amendments in 1946, discovery became increasingly liberal until the Civil Rules “reached their zenith of aggressiveness in 1970,” and complaints of “overdiscovery” became louder and more widespread.<sup>35</sup> In response, changes in 1980, 1983, 1991, 1993, and 2000 aimed to contain or curtail abusive discovery.<sup>36</sup> These changes introduced limits on the number of interrogatories and the length of depositions,<sup>37</sup> and adopted the concept of “proportionality.”<sup>38</sup> Proportionality analysis requires a court to weigh the benefits of a discovery request versus the costs of producing the requested documents or data. This balancing test imposed new limits on the amount of permissible discovery under Rule 26(b)(2).<sup>39</sup>

Thus, the most recent changes marked the beginning of a new era of limited, yet still liberal, discovery that has set the stage for the current debate over electronic information. These two competing policies, one favoring liberal discovery and the other concerned with preventing disproportionate burdens on litigants, lie at the heart of the proposed rule changes for electronic discovery.<sup>40</sup>

## II. COURTS’ POWER TO LEVEL SANCTIONS FOR DISCOVERY VIOLATIONS

Since the inception of the Civil Rules in 1938, courts have punished parties whose actions threaten the liberal discovery policy and the fairness

<sup>34</sup> *Id.* Of course, attorney work product and attorney-client privilege enjoy protections.

<sup>35</sup> Marcus, *supra* note 23, at 4–5. This complaint is one central to the argument in favor of the proposed Safe Harbor for electronic discovery. *See infra* Part IV.

<sup>36</sup> Marcus, *supra* note 23, at 5–6. For an interesting perspective on how frequently the discovery rules changed relative to other rules of procedure, consider the rules governing class actions, which were changed in 1966 and remained unchanged until 2003. *Id.*; *see also* FED. R. CIV. P. 23(c), (e), (g), (h), advisory committee’s notes to 2003 amendment.

<sup>37</sup> *See* FED. R. CIV. P. 30(a)(2)(A) & (d)(2); *see also* FED. R. CIV. P. 33(a) & advisory committee’s notes to 1993 amendment.

<sup>38</sup> *See, e.g.,* *Zubulake v. UBS Warburg LLC (Zubulake III)*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 167–68 (S.D.N.Y. 2004) (citing *Zubulake*).

<sup>39</sup> The rule provides that:

[t]he frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2).

<sup>40</sup> *See* Marcus, *supra* note 23, at 6.

of judicial proceedings.<sup>41</sup> To protect the discovery process from abuse, courts may sanction parties that fail to meet their discovery obligations when that failure prevents opposing parties from arguing their cases with the benefits of complete factual records.<sup>42</sup> This part discusses the legal authority courts can use when imposing discovery sanctions, the legal standards and policy underlying this doctrine, the types of sanctions available to courts, and the role prejudice plays in compensating the non-spoiling party.

### A. *Legal Authority for Sanctions*

In practice, courts rely on two sources of authority when imposing sanctions for discovery violations.<sup>43</sup> First, a court can level sanctions against a party failing to preserve discoverable information it knew or reasonably should have known was potentially relevant to the dispute pursuant to Rule 37.<sup>44</sup> Alternatively, a court can rely on its inherent authority when discovery violations threaten the orderly administration of justice or the dignity of the court.<sup>45</sup> Regardless of which source the court relies on, the nature of the court's authority is essentially the same.<sup>46</sup>

Under Rule 37(b)(2), a court may impose sanctions when a party fails to obey an order entered under Rule 26(f).<sup>47</sup> That provision limits the court's power to sanction for failure to preserve relevant documents when a party violates a specific preservation order or discovery ruling. Courts, however, have interpreted what constitutes a discovery "order" broadly as a result of their reliance on the Advisory Committee's assessment note that Rule 37 sanctions can stem from "any order 'to provide or permit discov-

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<sup>41</sup> See, e.g., *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212–13 (1958); *Zubulake IV*, 220 F.R.D. at 222 (S.D.N.Y. 2003). Discovery sanctions stemming from abusing discovery answers fall outside the scope of this comment.

<sup>42</sup> See, e.g., *Societe Internationale*, 357 U.S. at 212–13; *Hickman v. Taylor*, 329 U.S. 495, 500–01 (1947).

<sup>43</sup> See generally *Chambers v. NASCO*, 501 U.S. 32 (1991) (discussing a district court's authority to impose sanctions under either its inherent authority or under the Civil Rules).

<sup>44</sup> See FED. R. CIV. P. 37(b).

<sup>45</sup> See, e.g., *Chambers*, 501 U.S. at 50–51; *Barnhill v. United States*, 11 F.3d 1360, 1368 n.8 (7th Cir. 1993).

<sup>46</sup> See *Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998); *Danis v. USN Commc'ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at \*30 (N.D. Ill. Oct. 23, 2000) (quoting *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 18 (D.D.C. 1999)). The analytical difference between a court's decision to impose sanctions under its inherent authority or under the Civil Rules, if any, may be that a court cannot sanction a party for pre-litigation spoliation under the Civil Rules. See *infra* Part IV.A.3 and accompanying text.

<sup>47</sup> Rule 37(b) states that at a pre-discovery conference, parties must confer and address any discovery issues, including "any orders that should be entered by the court," to ensure that parties meet their duty to preserve relevant documents. FED. R. CIV. P. 37(b).

ery.”<sup>48</sup> In addition, the courts have broadly construed what constitutes an “order” for purposes of Rule 37; in perhaps the most liberal interpretation, a judge held that an instruction to provide opposing counsel “with complete discovery” constituted a court order pursuant to Rule 37(b)(2).<sup>49</sup> Therefore, failure to abide by a non-specific directive requiring complete discovery can serve as an adequate basis for discovery sanctions.<sup>50</sup>

Second, a court’s inherent authority provides the powers to protect “the due and orderly administration of justice and [to] maintain[] the authority and dignity of the court.”<sup>51</sup> The power vested in courts under their inherent authority includes the ability to sanction a party for spoliation of evidence.<sup>52</sup> For example in *Dillon v. Nissan Motor Co.*, the court reasoned that sanctions may be imposed against a party who is on notice that certain documents are relevant, regardless of an explicit discovery order.<sup>53</sup> This description of a court’s inherent authority parallels the ways in which courts have broadly interpreted the term “discovery order” when analyzing a motion for sanctions under Rule 37(b).<sup>54</sup>

Thus, courts can impose sanctions for failure to preserve or produce discoverable information under either their inherent authority or under Rule 37.<sup>55</sup> The dual source of this power, as discussed later in this Comment, opens a loophole in the protection promised by the proposed Safe Harbor.<sup>56</sup>

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<sup>48</sup> See FED. R. CIV. P. 37, advisory committee note to 1970 amendment; see also *Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756 n.7 (7th Cir. 1994) (discussing courts’ broad interpretation of what constitutes an “order”).

<sup>49</sup> *Props. Int’l, Ltd. v. Turner*, 706 F.2d 308, 310 (11th Cir. 1983) (imposing sanctions for failing to preserve relevant evidence). In *Metropolitan Life Insurance Co. v. Cammon*, No. 88-C5549, 1989 WL 153558, at \*4 (N.D. Ill. Nov. 7, 1989), the court imposed punitive sanctions for failure to provide requested documents by the deadline. The court reasoned that it had

issued an order at the September 22, 1989 status hearing that directed defendant Cammon to produce all outstanding discovery by October 6, 1989. This order is unambiguous as the only outstanding discovery brought to the court’s attention was Metropolitan’s request for production of documents. Furthermore, the court set a specific date by which defendant was to comply.

*Id.*

<sup>50</sup> See *Turner*, 706 F.2d at 310.

<sup>51</sup> *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (citing *Cooke v. United States*, 267 U.S. 517, 539 (1925)); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (stating that a court’s inherent powers are not governed by a rule or encoded in statute, but are inherently vested in our courts to expeditiously adjudicate disputes).

<sup>52</sup> See, e.g., *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263, 267 (8th Cir. 1993).

<sup>53</sup> *Id.*

<sup>54</sup> See *infra* note 76 and accompanying text.

<sup>55</sup> See generally *Chambers*, 501 U.S. 32 (discussing courts’ authority to impose sanctions for spoliation of evidence).

<sup>56</sup> See *infra* Part IV.A.3.

*B. Analysis of a Motion for Sanctions Due to Spoliation*

The substantive doctrine for sanctions to prevent spoliation of evidence adheres to a core framework<sup>57</sup> illustrated by a recent series of opinions decided in the Second Circuit by District Judge Scheindlin.<sup>58</sup> According to those decisions, a successful motion for sanctions meets four criteria. First, the allegedly spoliating party must have a duty to preserve documents that may be relevant at trial. Second, the spoliating party must have breached its duty to preserve. Third, the spoliating party must have evinced a level of culpability for breaching the duty to preserve that is sufficient to justify the imposition of severe sanctions. And fourth, the non-spoliating party must have suffered prejudice and deserve some form of compensatory sanction as a result of the missing evidence.<sup>59</sup>

*I. A Party's Duty to Preserve.*—The first prong of a court's analysis of a motion for sanctions due to spoliation is an inquiry into whether a party from whom discovery is sought had notice of the relevance of that information. If a party had such notice, then it had an affirmative duty to preserve that evidence.<sup>60</sup> Three forms of notice will trigger a party's duty to preserve relevant information: receipt of a complaint or answer, a discovery request, or reasonable anticipation of future litigation.<sup>61</sup> I address each in turn.

The duty to preserve can arise during the course of litigation in two ways. First, *Webb v. Government for the District of Columbia, Department*

<sup>57</sup> See, e.g., *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 216–22 (S.D.N.Y. 2003); *Danis v. USN Commc'ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at \*30–35 (N.D. Ill. Oct. 23, 2000).

<sup>58</sup> *Zubulake v. UBS Warburg LLC*, 382 F. Supp. 2d 536 (S.D.N.Y. 2005); *Zubulake v. UBS Warburg LLC*, 231 F.R.D. 159 (S.D.N.Y. 2005); *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Zubulake IV*, 220 F.R.D. 212; *Zubulake v. UBS Warburg LLC (Zubulake III)*, 217 F.R.D. 309 (S.D.N.Y. 2003).

<sup>59</sup> See *Zubulake IV*, 220 F.R.D. at 220–22. Though the court only lists three formal elements in its analysis, the fourth element is necessary by implication. The Court denied the adverse inference instruction, holding that “although UBS had a duty to preserve all of the backup tapes at issue, and destroyed them with the requisite culpability, *Zubulake* cannot demonstrate that the lost evidence would have supported her claims.” *Id.* at 222. In other words, though the three elements listed by the court were satisfied, the destruction of evidence did not have a prejudicial effect—making a sanction inapposite.

<sup>60</sup> See, e.g., *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72–73 (S.D.N.Y. 1991). The duty to preserve is not absolute; practitioners and courts generally acknowledge that parties inadvertently destroy or delete some relevant information. See 2/11/05 PUBLIC HEARING, *supra* note 5, at 147–48, 290. At that hearing, Jonathan Redgrave argued to the Advisory Committee that if he were to

serve discovery requests on anyone sitting at this table . . . you'll fail if I set you to a standard of absolute perfection to preserve the things in your BlackBerrys, your cell phones, your PDAs, your home TiVo, whatever it is. It's just the way in which the world is today with respect to technology.

*Id.* at 147–48.

<sup>61</sup> See *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 749–50 (8th Cir. 2004) (regarding notice from a discovery request); *Zubulake IV*, 220 F.R.D. at 216–20 (regarding notice from anticipated litigation); *Webb v. Gov't for the District of Columbia, Dep't of Corrections*, 175 F.R.D. 128 (D.D.C. 1997), *rev'd on other grounds*, 146 F.3d 964, 978 (D.C. Cir. 1998) (regarding notice from a complaint).

of *Corrections*<sup>62</sup> serves as an example of circumstances where a party gained notice by receiving a complaint. In that case, the court imposed sanctions when the defendant Department of Corrections wrongfully destroyed certain types of relevant information.<sup>63</sup> According to the court, the defendant should have surmised that information on specific positions named in the plaintiff's amended complaint were "encompassed in plaintiff's litigation," and therefore relevant and discoverable.<sup>64</sup> And second, a party can gain notice of the relevance of certain information from a document request.<sup>65</sup> This method of gaining notice is the most straightforward because document requests are made in writing between the parties and contain more-specific requests for documents that do not require a party to infer what may or may not be relevant from a complaint.<sup>66</sup> The duty to preserve that arises in the course of litigation has a profound effect on how companies plan for electronic discovery, because seldom do litigants (or their counsel) want to have any uncertainty regarding what they have asked the opposing party to preserve in the current discovery climate.

Perhaps most dauntingly for counsel in the business of defending large corporations, a party can gain notice of documents' relevance before a complaint is even filed.<sup>67</sup> Thus, the duty to preserve potentially discoverable material evidence extends "not only during litigation but also . . . to that period before litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."<sup>68</sup> For example, in *Kronisch v. United States*, a defendant claimed to have destroyed certain documents to preserve confidentiality, prevent misunderstanding of incomplete documents that had been partially destroyed, and prevent document overflow. The court interpreted the fear of misunderstanding as a fear of litiga-

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<sup>62</sup> 175 F.R.D. at 133.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 144; *see also* *Skeete v. McKinsey & Co.*, No. 91 Civ. 8093, 1993 WL 256659, at \*4 (S.D.N.Y. Jul. 7, 1993). In *Skeete*, the court held that, despite lack of specificity in a document request, defendant *Skeete* had notice that certain tape recordings were relevant because "the complaint in the instant case, by itself, would alert a reasonable plaintiff as to the potential relevance of these tape recordings in the litigation." *Id.*

<sup>65</sup> *See, e.g., Stevenson*, 354 F.3d at 749–50 (stating that defendant railroad had notice stemming from a document request); *Stallworth v. E-Z Serve Convenience Stores*, 199 F.R.D. 366, 368 (M.D. Ala. 2001) (stating same); *White v. Office of the Pub. Defender for the State of Md.*, 170 F.R.D. 138, 151 (D. Md. 1997) (stating same).

<sup>66</sup> *See, e.g., Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991); *Cohn v. Taco Bell Corp.*, No. 92 C-5852, 1995 WL 519968, at \*5 (N.D. Ill. Aug. 30, 1995).

<sup>67</sup> *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

<sup>68</sup> *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001); *see also Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. 149, 153 (D. Mass. 1997). For a guide regarding the best process for requesting and ensuring that an opposing party preserves electronic evidence, *see* Lisa M. Arent et al., *EDiscovery: Preserving, Requesting & Producing Electronic Information*, 19 SANTA CLARA COMPUTER & HIGH TECH L.J. 131, 138 (2002).

tion,<sup>69</sup> holding that the defendant had notice of the relevance of the documents and, therefore, a duty to preserve them.<sup>70</sup> While this case serves as merely one example, other courts recognize that the obligation to preserve potentially discoverable material can arise prior to the actual onset of litigation.<sup>71</sup>

2. *Scope of Duty and Breach.*—The second prong of an analysis for sanctions requires a court to determine the scope of the spoliating party's duty and whether it breached that duty. According to Rule 26(b)(1), a party may obtain discovery regarding any matter relevant to the claim or defense of any party.<sup>72</sup> Implicit in that rule is a party's obligation to preserve both electronic and paper-based information.<sup>73</sup> This obligation is a broad one; a party must preserve "any relevant evidence over which the nonpreserving entity had control and reasonably knew or could reasonably foresee was material to a potential legal action."<sup>74</sup>

For large corporations that generate large volumes of electronic documents, preserving any document that may be relevant to litigation would impose a crippling obligation because it is impossible to store electronic documents forever due to exploding volume, limited storage space, and technological innovation.<sup>75</sup> As a result, corporations can discharge their duty to preserve and still recycle corporate records by (1) creating a comprehensive document retention policy to ensure that discoverable and potentially relevant documents are preserved and (2) disseminating that policy to

<sup>69</sup> *Kronisch*, 150 F.3d at 127.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*; see also *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *Zubulake IV*, 220 F.R.D. at 218; *Turner*, 142 F.R.D. at 73; *Danis v. USN Commc'ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at \*32–33 (N.D. Ill. Oct. 23, 2000); *Cohn*, 1995 WL 519968 at \*5; *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551 & n.14 (D. Minn. 1989). Additionally, some courts have suggested that their authority to sanction parties for spoliating evidence prior to the initiation of litigation stems solely from their inherent authority. *Capellupo*, 126 F.R.D. at 551; see also *EEOC v. Jacksonville Shipyards, Inc.*, 690 F. Supp. 995, 997–98 (M.D. Fla. 1988). In *E\*Trade Securities LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 587–88 (D. Minn. 2005), for example, the court imposed sanctions for pre-litigation discovery misconduct under its inherent authority and because Nomura had, in the words of the plaintiff, "converted the litigation process into a sport of dirty tricks and obfuscation" by destroying evidence prior to trial and conducting insufficient searches for documents subject to discovery requests. *Id.* at 587. In *E\*Trade*, the court explicitly imposed sanctions for conduct outside of that which is sanctionable under the Civil Rules, based on its inherent authority to manage its docket and control its own judicial proceedings. *Id.* at 586.

<sup>72</sup> FED. R. CIV. P. 26(b)(1).

<sup>73</sup> See, e.g., *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, No. CA-3-5045 AI, 2005 WL 674885, at \*10–13 (Fla. Cir. Ct. Mar. 23, 2005).

<sup>74</sup> *China Ocean Shipping (Group) Co. v. Simone Metals, Inc.*, No. 97 C-2694, 1999 WL 966443, at \*3 (N.D. Ill. Sept. 30, 1999).

<sup>75</sup> See *infra* Part III (discussing volume of electronic documents, methods of storing them, and how technological change renders some storage media obsolete).

its employees.<sup>76</sup> These large companies frequently store electronic documents in databases on so-called back-up tapes that automatically save information and erase it after a certain period of time.<sup>77</sup> When confronted with this type of system, the *Zubulake* court provided some guidance on the scope of a company's duty to preserve by stating that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold,'" to ensure that relevant information is preserved.<sup>78</sup> Backup tapes probably fall under the litigation hold if they are accessible, not obsolete due to technological advances, and currently used to retrieve information.<sup>79</sup> Furthermore, "[i]f a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of 'key players' . . . should be preserved if the information contained on those tapes is not [easily accessible or] otherwise available."<sup>80</sup> The final Rule attempts to address this kind of situation by defining the scope of the duty to preserve electronic documents when a company both follows its standard document recycling policy and imposes a "litigation hold" on the destruction of potentially discoverable information.<sup>81</sup>

3. *Sanctions and Policy.*—The third step of a sanctions analysis affords the court broad discretion in choosing an appropriate sanction for spoliating evidence.<sup>82</sup> Punishing parties for discovery misconduct through

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<sup>76</sup> See *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 615 (D.N.J. 1997). The *Prudential* Court held that "it was incumbent on senior management to advise its employees of the pending . . . litigation," as well as to "provide them with a copy of the Court's [preservation] Order, and to acquaint its employees with the potential sanctions" if the company violated that order. *Id.* The court also held that in the event that "senior management fails to establish and distribute a comprehensive document retention policy, it cannot shield itself from responsibility because of [employees'] . . . actions. The obligation to preserve documents that are potentially discoverable materials is an affirmative one that rests squarely on the shoulders of senior corporate officers." *Id.* Interestingly enough, in a recent *Zubulake* decision, the court moved some of that burden onto the shoulders of outside counsel. To make certain that all potentially relevant electronic information is preserved, outside "counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture." *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004). Outside counsel's duty, then, requires speaking with the client's information technology staff as well as the "key players" involved in the dispute. *Id.*

<sup>77</sup> See Cristine S. Martins & Sophia J. Martins, *Records and Information Management Programs Have Become Vital for Law Firms and Clients*, N.Y. STATE B.J., Oct. 2001, at 21, 21.

<sup>78</sup> *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 217–18 (S.D.N.Y. 2003).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See PROPOSED RULES I, *supra* note 4, at app. 52–53; see also PROPOSED RULES II, *supra* note 6, at 34.

<sup>82</sup> See *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642–43 (1976); *Barnhill v. United States*, 11 F.3d 1360, 1371 (7th Cir. 1993). Though it leads to similar results, the Ninth Circuit employs a somewhat different policy analysis that gives additional clarity to some of these considerations. According to the Ninth Circuit, a court must consider five factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to

sanctions serves three policy considerations that implicate varying levels of culpability<sup>83</sup>: to compensate the non-spoiling party for any prejudice its claim or defense has suffered, to punish the spoiling party, and to deter future misconduct of the same kind.<sup>84</sup> The Fourth Circuit recently provided additional guidance on the policy considerations behind sanctions by stating that an adequate sanction will “burden the guilty party with the risk of an incorrect determination,” and also “attempt to place the prejudiced party in the evidentiary position it would have been in but for the spoliation.”<sup>85</sup>

Moreover, prejudice to the non-offending party’s claim or defense plays an important role for courts selecting an appropriate sanction.<sup>86</sup> Indeed, prejudice and the availability of other, lesser sanctions help courts determine whether to impose discovery sanctions at all.<sup>87</sup> Courts clearly do not ignore prejudice to the non-spoiling party’s claim caused by spoliation of electronic or other discoverable evidence. In an empirical study by District Judge Scheindlin of cases involving discovery sanctions, courts referred to prejudice (or lack thereof) to one party’s claim in a majority of decisions when granting or denying a motion for sanctions.<sup>88</sup> Thus, prejudice is an important factor under the current spoliation doctrine.

Absent compensatory sanctions for spoliation, a spoiling party would obtain an unfair advantage and un-level playing field when prosecuting or defending its case in the absence of a default judgment. For example, in *Trigon Insurance Co. v. United States*, the court held that the U.S. government’s failure to preserve communications between experts and consultants, materially prejudiced plaintiff Trigon’s ability to cross-examine the defendant’s expert witnesses.<sup>89</sup> That court stated that an appropriate sanction would deter, punish and “place the prejudiced party in the evidentiary posi-

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[the party seeking sanctions]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.” *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1022 (9th Cir. 2002) (upholding district court’s imposition of default judgment as sanction against defendant Rio International for failure to comply with discovery orders). This analysis essentially borrows the public interest in expedited resolution of litigation from the courts’ inherent authority powers, demonstrating a further link between sanctions under either source of authority. *See supra* note 51 and accompanying text.

<sup>83</sup> *Nat’l Hockey League*, 427 U.S. at 642–43.

<sup>84</sup> *Id.*

<sup>85</sup> *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 287 (E.D. Va. 2001) (citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)).

<sup>86</sup> *See, e.g., In re Heritage Bond Litig.*, 223 F.R.D. 527, 530 (C.D. Cal. 2004) (discussing court’s ability to impose strictly punitive sanctions).

<sup>87</sup> *Id.*

<sup>88</sup> Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. & TECH. L. REV. 71, 77–80 (2004).

<sup>89</sup> *Trigon*, 204 F.R.D. at 296. In *Trigon*, plaintiff, in a corporate taxpayer action, sought a refund. The court required that the government produce communications between the government’s testifying experts and its non-testifying litigation consultant who assisted experts in preparing for the case. *Id.* at 282. The court-ordered production included drafts of experts’ reports that were exchanged between experts and the consultant. *Id.*

tion it would have been in but for the spoliation.”<sup>90</sup> Additionally, in *In re Old Banc One Shareholders Securities Litigation*, the court prevented defendant Bank One from cross-examining the plaintiffs’ expert to “remedy prejudice to plaintiffs and allow the case to be decided on the merits.”<sup>91</sup>

In sum, when a court selects an appropriate sanction for discovery misconduct, it must consider whether the sanction needs to punish, deter, and compensate.<sup>92</sup> While not a mandatory element of a spoliation claim, compensatory sanctions (in the form of an evidentiary jury instruction or adverse inference instruction) serve two important purposes: (1) enforcing the policy that parties should be able to obtain full discovery of all issues relevant to their case so long as they do not place an undue burden on the opposing party; and (2) allowing cases to be heard on their merits despite negligent, though prejudicial, spoliation.<sup>93</sup>

4. *Choice of Sanctions.*—Courts can thus impose two distinct forms of sanctions based on the nature of the violation: evidentiary and punitive. First, evidentiary sanctions are predominantly compensatory, allowing courts to “level the playing field” when one party destroys evidence that circumstances suggest would aid the non-spoliating party’s case. These sanctions take the form of a jury instruction or adverse inference that allows the jury to draw the same conclusions it would have if the spoliating party had preserved and produced the pertinent evidence.<sup>94</sup> Though compensatory, evidentiary sanctions can have severe consequences; the most expensive example of this type of sanction may cost Morgan Stanley over \$1.5 billion.<sup>95</sup> This type of sanction allows cases to be tried on their merits rather than adjudicated on a procedural rule. Moreover, courts generally grant evidentiary sanctions regardless of the spoliating party’s state of mind; the evidence can be missing due to negligent, intentional or reckless conduct.<sup>96</sup>

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<sup>90</sup> *Id.* at 287 (citing *West*, 167 F.3d at 779).

<sup>91</sup> No. 00 C-2100, 2005 WL 3372783, at \*5 (N.D. Ill. Dec. 8, 2005).

<sup>92</sup> FED. R. CIV. P. 26; *see also* *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642–43 (1976).

<sup>93</sup> *Nat’l Hockey League*, 427 U.S. at 642–43.

<sup>94</sup> *See, e.g.*, *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 216, 222 (S.D.N.Y. 2004).

<sup>95</sup> *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, No. CA 03-5045 AI, 2005 WL 674885, at \*1 (Fla. Cir. Ct. Mar. 23, 2005). In *Coleman*, the judge chose to reverse the burden of proof and place it on Morgan Stanley (which had the effect of a default judgment) to disprove the plaintiff’s case, after the judge found that Morgan Stanley had acted in bad faith in refusing to admit to having, or produce, relevant emails. *Id.* at \*9–10. Ironically, that case served as a wake-up call to the financial services and other industries that they can no longer ignore their duty to preserve and produce electronic information. Susanne Craig, *Perelman Beats Morgan Stanley*, WALL ST. J., May, 17, 2005, at C1. Thus, while the sanction itself was compensatory, its repercussions had the effect of a punitive sanction. *Id.*

<sup>96</sup> *Compare* *Marrocco v. General Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992) *with* *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 748 (8th Cir. 2003).

Second, punitive sanctions—normally in the form of a default judgment, dismissal with prejudice, or monetary sanction—primarily serve to punish or deter future misconduct of a similar nature.<sup>97</sup> While courts have broad discretion to choose an appropriately harsh sanction, there are limits. Specifically, due process serves to limit the sanctions available to courts by imposing two requirements. In the first place, the conduct must be so egregious that it effectively precludes a hearing on the merits. In addition, if the party could not in good faith have complied with the requested discovery, then the harshest sanctions are not warranted.<sup>98</sup> In more recent decisions, courts have distilled the due process limits into one test of proportionality: “[a]n award of sanctions must be proportionate to the circumstances surrounding the failure to comply with discovery.”<sup>99</sup> Despite the limits on courts’ power to impose punitive sanctions, courts continue to impose these sanctions frequently.<sup>100</sup>

In order to comply with those limits on punitive sanctions, courts require a finding of bad faith, willfulness,<sup>101</sup> or fault rising to “gross negligence” or “extraordinarily poor judgment.”<sup>102</sup> For example, in *Wm. T. Thompson Co. v. General Nutrition Corp.*,<sup>103</sup> the court granted default judgment to plaintiff Wm. T. Thompson when the defendant destroyed business records relevant to the plaintiff’s antitrust action either in bad faith or with gross negligence.<sup>104</sup> In another example, a magistrate judge recommended default judgment against defendant PricewaterhouseCoopers for modifying electronic documents in bad faith after the onset of litigation, not producing relevant emails, and losing other electronic documents that went “missing.”<sup>105</sup> Thus, courts will grant punitive sanctions against a party that

<sup>97</sup> See *Nat’l Hockey League*, 427 U.S. at 642–43.

<sup>98</sup> *Hovey v. Eliot*, 167 U.S. 409, 423–24 (1897); see also *SEC v. Seaboard Corp.*, 666 F.2d 414, 416–17 (9th Cir. 1982) (applying same analysis).

<sup>99</sup> *Langley v. Union Elec. Co.*, 107 F.3d 510, 515 (7th Cir. 1997) (quoting *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382 (7th Cir. 1993)); see also *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395 (1st Cir. 1990) (stating that judges should “take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms”); *Advantacare Health Partners, LP v. Access IV*, No. C 03-04496 JF, 2004 WL 1837997 (N.D. Cal. Aug. 17, 2004) (vacating default judgment after holding that the district court’s sanction was disproportionate to the misconduct the court aimed to punish).

<sup>100</sup> Scheindlin and Wangkeo, *supra* note 88, at 77 (stating that an empirical study revealed that 60% of sanctions imposed involved monetary punitive sanctions, and 23% of sanctions involved a dismissal with prejudice or default judgment).

<sup>101</sup> See, e.g., *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958); *Long v. Steepro*, 213 F.3d 983, 985 (7th Cir. 2000).

<sup>102</sup> *Marrocco v. General Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992).

<sup>103</sup> 593 F. Supp. 1443, 1446 (C.D. Cal. 1984).

<sup>104</sup> *Id.* Furthermore, the court found that the defendant willfully continued to spoliage after specific discovery requests and production orders. *Id.*

<sup>105</sup> *In re Telxon Corp. Sec. Litig.*, Nos. 5:98CV2876, 1:01CV1078, 2004 WL 3192729, at \*23 (N.D. Ohio Jul. 16, 2004). The Telxon court inferred that defendant PricewaterhouseCoopers had destroyed the missing documents in bad faith. *Id.* at \*35.

acts willfully, in bad faith, or with gross negligence when failing to preserve and produce discoverable information.

### III. ELECTRONIC DISCOVERY IS DIFFERENT THAN TRADITIONAL PAPER-BASED DISCOVERY

Modern electronic discovery is fundamentally different in many respects from more traditional, paper-based discovery. Electronic discovery confounds the traditional frameworks established by both the Civil Rules and discovery sanctions. Although academics, judges, and attorneys all agree electronic discovery provides for more complete and liberal access to information, it also presents some unique challenges that concern the Judicial Conference, practitioners, and large corporations such as Morgan Stanley. That concern has resulted in a proposed set of rules for electronic discovery that facilitates full discovery and yet ensures that parties are not strapped with an undue burden.<sup>106</sup> This part discusses the arguments made by commentators and practitioners that electronic discovery is, in fact, fundamentally different than any type of traditional, paper-based discovery with which courts, practitioners and their clients have previously dealt.<sup>107</sup>

The *Sedona Principles*, created by a group of “lawyers, consultants, academics and jurists” who confront the problems of electronic discovery frequently, provide some guidance in this area while calling for new rules to avoid over-burdening parties with sanction liability.<sup>108</sup> These *Sedona Principles* list the following reasons why electronic discovery “is qualitatively and quantitatively different from producing paper documents” so as to necessitate a specialized discovery framework distinct from paper-based discovery: (1) the volume and ease of duplicability of electronic documents; (2) the difficulty in deleting or persistence of electronic information; (3) databases that exist in dynamic and constantly changeable formats easily altered by unknowing or otherwise-innocent acts; (4) the problem presented by obsolete “legacy” data; and (5) the problems of dispersion and searchability of electronic databases.<sup>109</sup> As discussed below, many of these differ-

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<sup>106</sup> See, e.g., *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 360526 (N.D. Ill. June 15, 1995) (stating that a party called to produce electronic evidence must receive the same protection against an undue discovery burden as a party producing paper documents); *S. Diagnostic Assocs. v. Bencosme*, 833 So. 2d 801 (Fla. Dist. Ct. App. 2002). Indeed, Texas Rule of Civil Procedure 196.4 treats state actions involving electronic discovery different than paper-based discovery. TEX. R. CIV. P. 196.4 (listing discovery procedures and sanctions for discovery of “Electronic or Magnetic Data”).

<sup>107</sup> See generally Marcus, *supra* note 29 (discussing problems presented by electronic discovery).

<sup>108</sup> SEDONA PRINCIPLES, *supra* note 12, at 368; see also Redish, *supra* note 1, at 589–92 (discussing the quantitative and qualitative differences between paper-based and electronic discovery).

<sup>109</sup> SEDONA PRINCIPLES, *supra* note 12, at 375. The *Sedona Principles* also listed the problem of encrypted metadata that is not generally accessible by the computer user as one of its areas of concern. That kind of information, while also a problem, presents the same general problems as other types of electronic information and thus does not merit a detailed discussion.

ences implicitly suggest that certain types of electronic discovery place an undue burden on a party to preserve, locate, and produce relevant information.

Modern businesses and individuals create and duplicate electronic documents at a much more rapid pace than paper documents. Email is one prime example of a new class of discoverable information; businesses in North America exchange over 2.5 trillion emails every year,<sup>110</sup> and an average 10-person company will send about 2 million emails in a given year.<sup>111</sup> Additionally, at least 99% of documents created today are first generated in an electronic format,<sup>112</sup> 70% of corporate records are stored in electronic format,<sup>113</sup> and at least 30% of electronically created documents are never printed out in paper format.<sup>114</sup> A digital forensics consultant who works with corporations and lawyers navigating electronic discovery said:

[I]n 1956, IBM came out with their computer. If you take \$100 in 1956 and spent \$100 from 1956 . . . through 2003 . . . and bought storage space, took that space, printed it to paper—because that's what we all know and can appreciate, piles of paper—laid those end to end. In 1956, if you got off the train at Penn Station in New York, you'd get to the ticket counter.

In 1980, if you bought the same \$100 of storage space, printed it to paper, laid it end to end, left the train, you'd get to the post office across the street. In 1990, you'd get to the Hudson River on the East Side. In 2000, you'd get to Detroit. You could lay that paper end to end to Detroit. And in 2003, you'd get it to New Delhi, India.<sup>115</sup>

Thus, the sheer volume of potentially discoverable information is growing rapidly. Large corporations encounter this problem more directly than an individual or small business, since a single corporation can send and receive thousands, if not millions, of emails a day.<sup>116</sup> In order to maintain an adequate record for business purposes or disaster recovery, corporations nearly always accumulate vast amounts of electronic data.<sup>117</sup> Compounding this

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<sup>110</sup> David Narkiewicz, *Electronic Discovery and Evidence*, PA. LAW, Nov.–Dec. 2003, at 57. In an interesting comparison, Americans sent an estimated 182.5 million emails in 1998, a figure that is 90 times larger than the number of written messages the United States Postal Service processed in that year. SEDONA PRINCIPLES, *supra* note 12, at 375.

<sup>111</sup> David K. Isom, *Electronic Discovery: New Power, New Risks*, UTAH B.J., Nov. 2003, at 8, 11–12.

<sup>112</sup> Kenneth J. Winters, *The Real Cost of Virtual Discovery*, 7 FED. DISCOVERY NEWS 3 (2001).

<sup>113</sup> Lori Enos, *Digital Data Changing Legal Landscape*, E-COMMERCE TIMES, May 16, 2000, <http://www.ecommercetimes.com/story/3339.html>.

<sup>114</sup> Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS. 253, 280–81 (2001).

<sup>115</sup> 2/11/05 PUBLIC HEARING, *supra* note 5, at 28–29.

<sup>116</sup> For example, State Farm Insurance Co. sends and receives over 5 million emails a day. *Id.* at 221.

<sup>117</sup> SEDONA PRINCIPLES, *supra* note 12, at 375.

problem is the ease with which one can duplicate an electronic document: simply forward an email, copy and paste a note, or backup a file.<sup>118</sup> These actions take only seconds and can create enormous amounts of duplicative, yet still potentially discoverable, information that can result in unmanageable discovery costs and increased chances for spoliation claims.<sup>119</sup>

In addition to the volume, the difficulty involved in completely disposing of an electronic file is a second problem presented by electronic discovery. On its face, this is not a problem for a litigant worried solely about defending against spoliation claims, but it actually results in over-retention of old and obsolete information.<sup>120</sup> While it may be easy to intentionally or even inadvertently “delete” an email or other electronic document, the total destruction of every electronic copy of that information is much more difficult than with a paper-based document.<sup>121</sup> Most “deleted” documents can be restored using forensic recovery unless the electronic storage device has been physically destroyed.<sup>122</sup> One court summarized this problem:

“Deleting” a file does not actually erase the data from the computer’s storage devices. Rather, it simply finds the data’s entry in the disk directory and changes it to a ‘not used’ status—thus permitting the computer to write over the deleted data. Until the computer writes over the ‘deleted’ data, however, it may be recovered by searching the disk itself. . . . Accordingly, many files are recoverable long after they have been deleted—even if neither the computer user nor the computer itself is aware of their existence.<sup>123</sup>

Because of the difficulty in erasing electronic files, some companies have developed and sold software that will completely eliminate all records of files that a given user wants to delete.<sup>124</sup> This aspect of electronic discovery

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<sup>118</sup> *Id.*

<sup>119</sup> See Conference on Electronic Discovery, *Panel Four: Rule 37 and/or a New Rule 34.1: Safe Harbors for E-Document Preservation and Sanctions*, 73 *FORDHAM L. REV.* 71, 77 (2004) [hereinafter *Panel Four*].

<sup>120</sup> See *Zubulake v. UBS Warburg LLC (Zubulake III)*, 217 F.R.D. 309, 313 (S.D.N.Y. 2003).

<sup>121</sup> David K. Isom, *Electronic Discovery Primer for Judges*, 2005 *FED. CTS. L. REV.* 1, at pt. II.K.5.

<sup>122</sup> See, e.g., *U.S. v. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 46 n.8 (D. Conn. 2002). That decision contains a detailed, if somewhat technical, discussion of how electronic storage works and why that procedure causes problems when attempting to dispose of electronic information: “‘Deleted files’ are part of the free [storage space on an electronic storage medium]. When a user deletes a file, the data in the file is not erased, but remains intact in the [area] where it was stored until the operating system places other data over it.” *Id.*

<sup>123</sup> *Zubulake III*, 217 F.R.D. at 313 n. 19.

<sup>124</sup> See, e.g., *Kucala Enters., Ltd. v. Auto Wax Co.*, No. 02 C 1403, 2003 WL 21230605, at \*1–3 (N.D. Ill. May 27, 2003). In *Kucala*, the software program claimed to defeat certain forensic electronic searching programs and clean a given electronic storage device of “deadly . . . unwanted data hidden in hard drives.” *Id.* at \*2. The user of the so-called “Evidence Eliminator” software, however, could not avoid the severe sanction of dismissal for his discovery misconduct. *Id.* at \*8.

differs from traditional, paper-based discovery because it is nearly impossible to re-create a set of documents that one party has shredded or burned.<sup>125</sup>

Another unique aspect of electronic discovery relates to electronic databases or documents designed to change, update, or recycle information as time goes by without human intervention.<sup>126</sup> In fact, many electronic documents never exist in a fixed form and can fundamentally change simply by accessing them.<sup>127</sup> For example, merely booting up a computer or moving a word processing file to a new location can significantly alter data.<sup>128</sup> This electronic information raises spoliation concerns because a court order to preserve this data could force a company to completely halt many routine operations, thus “crippl[ing] large corporations.”<sup>129</sup>

Additionally, some electronically stored information may be completely incomprehensible when separated from the technology and expertise required to store it.<sup>130</sup> The rapid pace of technological change forces corporations to migrate to a new electronic storage format every few years, thus making all the backup tapes from the legacy system quickly “out-of-date.”<sup>131</sup> Large corporations have faced massive financial burdens when

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<sup>125</sup> *But see* Douglas Heingartner, *Back Together Again*, N.Y. TIMES, July 17, 2003, at G1. That article discusses new technologies that can reconstruct both conventionally shredded and cross-shredded documents with 50–90% accuracy. *Id.* According to Heingartner, courts have treated these reconstructed documents

in much the way that fingerprint or handwriting evidence is. An expert may not be able to vouch for the accuracy of the information on a given page, said [a] former F.B.I. investigator, but he can testify that a reconstructed document “was at one time one piece of paper that was cut into little pieces of paper, and now it’s back into one piece of paper.”

*Id.*

<sup>126</sup> SEDONA PRINCIPLES, *supra* note 12, at 376; *see also* Marcus, *supra* note 23, at 13.

<sup>127</sup> SEDONA PRINCIPLES, *supra* note 12, at 376.

<sup>128</sup> *Id.*

<sup>129</sup> *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003); *see also* *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 33352759, at \*4 (E.D. Ark. Aug. 29, 1997). In *Concord*, the court examined one party’s argument relating to routinely deleted emails by stating that

to 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. This would be especially burdensome where the e-mail system apparently was used primarily for routine communication rather than to convey material significant to antitrust violations. Any corporation the size of Defendant (or even much smaller) is going to be frequently involved in numerous types of litigation. Whether it be patent, trademark, labor or antitrust suits, the threat of litigation is ever present for large, successful corporations. Arguably, most e-mails, excluding purely personal communications, could fall under the umbrella of “relevant to potential future litigation.” For example, the e-mail could contain “stray remarks” which would have a bearing on some legal issue. Thus, it would be necessary for a corporation to basically maintain all of its e-mail. Such a proposition is not justified.

*Id.*

<sup>130</sup> *See* *Zubulake v. UBS Warburg LLC (Zubulake II)*, 216 F.R.D. 280, 290 n. 79 (S.D.N.Y. 2003); *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 425 (S.D.N.Y. 2002) (discussing the problems of restoring back-up storage tapes); *see also* Redish, *supra* note 1, at 591–92.

<sup>131</sup> SEDONA PRINCIPLES, *supra* note 12, at 377. The *Sedona Principles* also state that “[i]n a perfect world, electronic records that have continuing value for business purposes or litigation are converted for

courts have ordered them to produce these older “legacy” storage systems.<sup>132</sup> In one recent case, for example, the cost of restoring seventy-two backup tapes containing legacy data was \$165,954.67.<sup>133</sup> This is obviously a new problem for litigants—while parties may have had to translate paper documents written in a different language, old paper never made translation prohibitively expensive.<sup>134</sup>

Last, the authors of the *Sedona Principles* argue that paper-based documents relevant to a given dispute are relatively consolidated when compared to electronic records, which may “reside in numerous locations,” including “desktop hard drives, laptop computers, network servers, floppy disks, and backup tapes.”<sup>135</sup> The dispersion of electronic documents makes determining the authorship and provenance of electronic documents complicated, especially in light of programs that allow multiple users to modify the same document saved on a single drive while other hard drives and backup tapes may contain duplicative copies of the same document.<sup>136</sup> For example, if one party requested all documents authored by a single employee in a one-hundred-person company, hundreds if not thousands of electronic copies of that person’s documents would have percolated throughout the company’s electronic information system and emails, as well as into those of third parties. Furthermore, while the ubiquity of photocopiers has made dispersion of paper documents more of a problem beginning in the 1960s, even today’s high-speed copiers cannot disperse documents at the rate with which electronic documents can travel between offices, states, and continents.<sup>137</sup> Thus, this problem is also unique to electronic discovery.

In light of electronic discovery’s challenges, those in favor of the proposed discovery rules argue that the scope of the duty to preserve is over-

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use in successor systems, and all other data is discarded. In reality, however, such migrations are rarely flawless.” *Id.*

<sup>132</sup> See *Zubulake II*, 216 F.R.D. at 285–90.

<sup>133</sup> *Id.* at 289. However, that figure did not include the cost that would be incurred to review and produce the documents. *Id.* Courts have not turned a blind eye to these costs, however, and have allowed for cost-shifting to the party requesting discovery in the event the legacy data failed the proportionality requirement of Rule 26. *Id.* at 290–93; see also *Rowe*, 205 F.R.D. 421 (establishing an eight-factor analysis for courts considering cost-shifting); *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, No. Civ. 99-3564, 2002 WL 246439 (E.D. La. Feb. 19, 2002) (following same analysis).

<sup>134</sup> Translation of documents in a foreign language is perhaps the closest analogy one can draw from paper-based discovery relative to the production of legacy data off obsolete storage media, and courts have consistently held that forcing the producing party to bear the cost of translating documents is unduly burdensome. See, e.g., *In re Fialuridine Prods. Liab. Litig.*, 163 F.R.D. 386, 387–89 (D.D.C. 1995).

<sup>135</sup> SEDONA PRINCIPLES, *supra* note 12, at 377.

<sup>136</sup> *Id.*

<sup>137</sup> See *Marcus*, *supra* note 23, at 15; see also *Redish*, *supra* note 1, at 589–90.

broad and exposes them to unjust sanctions.<sup>138</sup> For example, a court may force a party to produce “voice mail, e-mail, deleted e-mail, data files, program files, back-up files, archival tapes, temporary files, system history files, web site information in textual, graphical or audio format, web site files, cache files, ‘cookies’ and other electronically stored information.”<sup>139</sup> Under the current rule framework, if a corporation fails to retain all relevant and potentially discoverable electronic information pursuant to the Civil Rules, it also runs the risk of court-imposed sanctions.<sup>140</sup> These potential liabilities have forced corporations to alter their document retention policies, designed specifically for their unique business needs, to retain electronic information for their litigation needs as well.<sup>141</sup>

In conclusion, electronic discovery is inherently different from paper-based discovery and presents an entirely new array of issues for courts when considering whether certain types of discovery overburden litigants.<sup>142</sup>

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<sup>138</sup> See 2/11/05 PUBLIC HEARING, *supra* note 5, at 52 (“It seems like every month there is a big sanctions case with a big company or a big law firm. It’s not because they’re bad people. It’s because it’s incredibly difficult to implement a litigation hold over electronic information perfectly, and that’s why we believe that the safe harbor makes sense.”).

<sup>139</sup> *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 96 (D. Md. 2003) (citing *Kleiner v. Burns*, No. 00-2160-JWL, 2000 WL 1909470 (D. Kan. Dec. 15, 2000)). See also *SEDONA PRINCIPLES*, *supra* note 12, at 373.

<sup>140</sup> See FED. R. CIV. P. 26(b)(1); FED. R. CIV. P. 37(b). Certain statutory or regulatory provisions, however, require heightened retention of both electronic and paper-based information. See, e.g., 15 U.S.C. § 78u-4(b)(3)(C) (2000). That provision states:

- (i) In general; During the pendency of any stay of discovery pursuant to this paragraph, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

- (ii) Sanction for willful violation; A party aggrieved by the willful failure of an opposing party to comply with clause (i) may apply to the court for an order awarding appropriate sanctions.

*Id.*; see also 17 C.F.R. § 240.17a-4(f)(2) (2006).

<sup>141</sup> *Martins & Martins*, *supra* note 77, at 21–22, 24 (2001); see also *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 617 (D.N.J. 1997). In *Prudential*, the court required defendant Prudential not only to pay a \$1 million sanction absent evidence of willful destruction of documents, but also required the company to create a written document-retention policy for the court’s review within 30 days after issuing its opinion. 169 F.R.D. at 617. Corporations, moreover, face exposure to criminal charges for obstruction of justice stemming from their document retention responsibilities, such as Arthur Andersen’s criminal prosecution for shredding documents relating to the Enron collapse when its corporate decision-makers knew that the Justice Department was contemplating a criminal investigation against Enron. *United States v. Arthur Andersen LLP*, 374 F.3d 281 (5th Cir. 2004), *overruled by Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). Though the criminal conviction against Arthur Andersen was eventually overruled, the firm still expended vast amounts of resources fighting its conviction in lower courts. *Id.* Arthur Andersen will probably serve as the basis for future criminal suits against companies who destroy electronic records.

<sup>142</sup> See *Marcus*, *supra* note 23, at 5–8; see also *Noyes*, *supra* note 21, at 654–55.

However, as this Comment discusses below, proposed Rule 37(f) will address these issues at best awkwardly and at worst inadequately.<sup>143</sup>

#### IV. THE PROPOSED RULE CHANGE

The Advisory Committee<sup>144</sup> (hereinafter “Committee”) has proposed amendments to Rules 16, 26, 33, 34, 37 and 45 with the explicit goal of “ensur[ing] that the rules provide effective support and guidance for managing discovery practice as it changes with technology.”<sup>145</sup> The text of the proposed amendment to Rule 37 reads as follows:

(f) **Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.<sup>146</sup>

The Committee intends proposed Rule 37(f) to apply to circumstances when the routine operation of the party’s electronic information system allows information to disappear without a conscious human direction to destroy that specific information.<sup>147</sup> This provision gives organizations that use large volumes of electronic documents some guidance on how they must operate electronic information retention policies to meet both their business needs and their duty to preserve under the Civil Rules.<sup>148</sup> However, the Safe Harbor would not apply if a court found that a company designed an electronic information storage system to deliberately destroy litigation-related material, thus violating the good-faith requirement.<sup>149</sup>

The Rule is limited, however; it applies only to sanctions under the Civil Rules.<sup>150</sup> As a result, the Rule says nothing about sanctions imposed under the Court’s inherent authority from the Safe Harbor, an area of concern for those who support the Safe Harbor.<sup>151</sup> The Committee goes so far as to say that “[t]he protection provided by Rule 37(f) applies only to sanctions ‘under these rules.’ It does not affect other sources of authority to impose sanctions or rules of professional responsibility.”<sup>152</sup> Furthermore, the rule does not define the scope of the duty to preserve or what standards govern the loss of information before an action is commenced.<sup>153</sup> Addition-

<sup>143</sup> See *infra* Part IV.

<sup>144</sup> The Advisory Committee has the authority to monitor the Civil Rules and propose amendments to them pursuant to 28 U.S.C. § 2073 (2003).

<sup>145</sup> PROPOSED RULES I, *supra* note 4, at app. 51.

<sup>146</sup> PROPOSED RULES II, *supra* note 6, at Rules App. C-86.

<sup>147</sup> *Id.* at C-82.

<sup>148</sup> *Id.* at C-82 to -84.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at C-86.

<sup>151</sup> See *infra* Part III.

<sup>152</sup> PROPOSED RULES II, *supra* note 6, at Rules App. C-87.

<sup>153</sup> *Id.* at C-85 to -86.

ally, the Advisory Committee's majority proposal does not require a court to inquire into the culpability of a spoliating party's conduct.

Legal scholars and practitioners have differing opinions on the proposed amendments, especially the proposed Safe Harbor provision.<sup>154</sup> Some attorneys fear the Safe Harbor will merely exacerbate the problems frequently faced when litigating against large corporate defendants who can afford both a more extensive legal team and the additional costs for dilatory tactics and stonewalling.<sup>155</sup> It remains possible, however, that the proposed Safe Harbor will allow strategic document retention policies to destroy potentially harmful documents and shield companies from sanctions under circumstances where the current rules would impose sanctions.<sup>156</sup>

On the other hand, the Safe Harbor has its supporters. Another group, led by large corporations such as Microsoft and Intel, as well as industry attorneys who focus their practice on defending large corporations, argue in favor of the Safe Harbor for two main reasons.<sup>157</sup> First, it will aid attorneys in giving their clients better guidance for constructing an appropriate document retention policy. Second, it will allow attorneys and their clients to more accurately evaluate whether a case is worth litigating or whether an out-of-court settlement presents the most economical option when considering the cost of electronic discovery. If a larger corporation chooses to forego settlement, it exposes itself to the threat of the cost of electronic discovery and the potential for dire sanctions if its electronic records are not complete as of the moment it had notice of the documents' relevance.<sup>158</sup>

Interestingly enough, the threat of sanctions and the potentially suffocating cost of searching and producing the information contained in large electronic databases rarely arises between two large corporate parties.<sup>159</sup> Rather, that threat occurs much more readily when an individual plaintiff and a corporation have a dispute; an individual plaintiff, utterly lacking a

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<sup>154</sup> See *Panel Four*, *supra* note 119, at 77. See also PROPOSED RULES I, *supra* note 4, at app. 31–35; PROPOSED RULES II, *supra* note 6, at Rules App. C-84.

<sup>155</sup> See PROPOSED RULES I, *supra* note 4, at app. 31–32.

<sup>156</sup> Essentially, a party that customarily encounters certain types of litigation—say, a large employer familiar with defending itself against employment discrimination claims—could structure a document retention policy so that valuable personnel files to plaintiffs' claims are automatically erased before future disputes can trigger the duty to preserve. See, e.g., *Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739, 749–51 (8th Cir. 2004). In *Stevenson*, the court imposed a sanction on defendant Union Pacific after track maintenance records, which would have been discoverable and potentially relevant to either party's case, had been destroyed pursuant to its standard document retention policy. *Id.*

<sup>157</sup> See COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FED. RULES OF CIVIL PROCEDURE 2, 4, 14 (January 12, 2005), available at <http://www.uscourts.gov/rules/e-discovery/0112frcp.pdf>.

<sup>158</sup> See *id.* at 4, 14.

<sup>159</sup> See *Panel Four*, *supra* note 119, at 77. When two corporations have a dispute, both are familiar with the hazards involved with electronic discovery and the costs associated with it. Thus, the situation becomes something of a standoff, with neither party wanting to threaten to open the Pandora's box of electronic discovery without a good reason to do so. *Id.*

vast quantity of discoverable electronic information, could wield the threat of electronic discovery without exposing itself to the same prohibitive costs.<sup>160</sup> Currently, larger corporations and their attorneys argue that the cost of electronic discovery coupled with the imminent threat of defending a spoliation claim do not outweigh the cost of settling the dispute for a much smaller sum at the outset of discovery.<sup>161</sup>

Thus, the Advisory Committee intends Rule 37(f) to be a narrow safe harbor for the routine operation and maintenance of an electronic information system in good faith.<sup>162</sup> However, as discussed in the next part of this Comment, the proposed rule does not provide much, if any, of the protections sought by large corporations. At the same time, the Rule ignores important policy considerations behind discovery sanctions that will injure a party's ability to argue its case when an opposing party negligently destroys vital evidence.<sup>163</sup>

#### *A. Problems with Proposed Changes to Rule 37(f)*

While the unique aspects of electronic discovery demonstrate the need for equally unique rules regarding sanctions, the Advisory Committee's proposed Rule 37(f) does not solve the problems plaguing electronic discovery.<sup>164</sup> For one, empirical studies of spoliation jurisprudence have not uncovered a single case where the Safe Harbor would have protected a spoliating party.<sup>165</sup> Additionally, the proposed amendments to Rule 37 fail to incorporate an important piece of the common law spoliation doctrine into the Civil Rules, providing little if any additional protection to a corporate party facing electronic discovery and failing to solve the problems be-moaned by the corporate defense bar.<sup>166</sup> Furthermore, the new Rule 37(f) ignores policy concerns aimed at compensating non-spoliating parties for prejudice to their cases caused by spoliation.<sup>167</sup> Thus, while the proposed changes to Rule 37 have not completed the rulemaking process, they are far from perfect and should be remedied in one of two ways. First, the Advi-

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<sup>160</sup> An individual plaintiff probably has very few electronic documents in comparison to a large corporation, which suggests that a plaintiff with a weak case could threaten an electronic "fishing expedition" to drive settlement negotiations when a successful electronic discovery request will result in thousands (if not millions) of dollars in litigation costs. *See id.*

<sup>161</sup> *See* 2/11/05 PUBLIC HEARING, *supra* note 5, at 302 (commentator stating: "[y]ou sometimes enter into the economic decision that this case, it's not an \$80 million case. It's \$1 million case. I'm going to settle it, even though I don't want to, because it's going to cost me a million dollars to restore, review, do the privilege review, get a human being who understands what we're turning over.>").

<sup>162</sup> *See* PROPOSED RULES II, *supra* note 6, at Rules App. C-83.

<sup>163</sup> *See infra* Part IV.A.3.

<sup>164</sup> *See generally* Scheindlin & Wangkeo, *supra* note 100, at 94–95 (criticizing the proposed rules at an early stage in their development).

<sup>165</sup> *Id.*

<sup>166</sup> 2/11/05 PUBLIC HEARING, *supra* note 5, at 166–68.

<sup>167</sup> *Cf. In re Heritage Bond Litig.*, 223 F.R.D. 527, 530 (C.D. Cal. 2004).

sory Committee could alter the proposed changes to address the above concerns. Second, the Advisory Committee could abandon the changes altogether. The current legal framework functions adequately to protect parties against discovery misconduct, and additional guidance to large corporations on proper document retention policies and discovery practice could obviate many of the problems identified with electronic discovery.<sup>168</sup>

1. *No Empirical Evidence of a Sanction Problem Exists, Despite the Challenges Presented by Electronic Discovery.*—The first problem with the proposed change to Rule 37 is that it may address a merely theoretical problem that does not exist in practice. In other words, while large corporations and their in-house and outside counsel may fear sanctions for the routine operation of their electronic information storage systems, courts have applied the substantive spoliation doctrine cautiously enough in the face of awkward discovery rules to have prevented those fears from ever materializing.<sup>169</sup> This conclusion is supported both by empirical information,<sup>170</sup> as well as by the subjective opinions of practitioners who have commented on the proposed change to Rule 37.<sup>171</sup>

The proposition that district courts and magistrate judges have wantonly imposed grave sanctions on corporations draws no support from empirical studies. First, in Judge Scheindlin's empirical analysis of all cases imposing discovery sanctions, she argued that "the sky has not fallen in the absence of a safe harbor provision," because that study did not uncover a single case "where a court sanctioned a party solely for following its document retention and recycling policy" in good faith.<sup>172</sup>

Additionally, from a more anecdotal point of view, one commentator told the Advisory Committee that a survey revealed that 90% of people ei-

<sup>168</sup> See Scheindlin & Wangkeo, *supra* note 88, at 94–95.

<sup>169</sup> See, e.g., COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FED. RULES OF CIVIL PROCEDURE 106 (Feb. 12, 2005) [hereinafter 2/12/05 PUBLIC HEARING]. At the 2/12/05 *Public Hearing*, one commentator asked, "where are the parade of horrors? . . . No one has cited me to the case where we tripped over it, it was purely innocent, and you've sanctioned us \$2.75 million and stopped 15 of our experts from testifying. That case hasn't come down the pike that I know about." *Id.*

<sup>170</sup> See 2/11/05 PUBLIC HEARING, *supra* note 5, at 213; Scheindlin & Wangkeo, *supra* note 88, at 75–80.

<sup>171</sup> See *supra* notes 155–61 and accompanying text.

<sup>172</sup> Scheindlin & Wangkeo, *supra* note 88, at 94; see also *MasterCard Int'l, Inc. v. Moulton*, No. 03 Civ. 3613VMMHD, 2004 WL 1393992 (S.D.N.Y. June 22, 2004) (refusing to impose an evidentiary or punitive sanction against defendant credit card issuer when it destroyed relevant emails in good faith and under its normal document retention policy after the onset of litigation). *But see* *Applied Telematics, Inc. v. Sprint Commc'ns Co., L.P.*, No. Civ. 94-4603, 1996 WL 33405972, at \*4–5 (E.D. Pa. Sept. 17, 1996). In *Applied Telematics*, the court found that defendant Sprint had deleted relevant backup files automatically as part of its normal document-retention procedures, but still imposed the monetary sanction of the plaintiff's costs for filing its motion for sanctions due to spoliation. *Id.* The sanction imposed, however, is quite mild and does not disrupt the premise that courts do not generally impose sanctions for this kind of spoliation.

ther defending or prosecuting a case had never dealt with the issue of discovery sanctions and that less than 1% had actually received a sanction.<sup>173</sup> Furthermore, that study also revealed some flaws in the argument that the threat of electronic discovery and subsequent sanctions compelled some corporate clients to settle cases against their better judgment; only 30.3% of respondents agreed that the issue of electronic discovery, as opposed to regular discovery, played a factor when considering settlement.<sup>174</sup>

Cases like *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*<sup>175</sup> and *United States v. Phillip Morris USA, Inc.*<sup>176</sup> have justifiably scared corporate clients and their counsel into implementing better electronic document preservation policies. These cases, however, represent extreme examples and do not involve the routine operation of either company's electronic information system. Rather, both sanctions resulted from the given company's culpable conduct or state of mind when they destroyed discoverable electronic records.

Furthermore, even if one concedes the existence of the "electronic discovery problem," the proposed Safe Harbor in Rule 37(f) provides little, if any, protection outside of the common law spoliation doctrine. Because no court has ever sanctioned a party for the routine operation of its electronic information system, litigants gain no protection under the "shallow" Safe Harbor the Committee has created.

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<sup>173</sup> 2/11/05 PUBLIC HEARING, *supra* note 5, at 213. That commentator stated:

Now one of our most interesting findings was about sanctions, because we're talking about spoliation sanctions so much. We found that spoliation sanctions just aren't coming up that much, at least as reported by these respondents. Very, very few said that they had had it requested against them. Very few had requested against others, and over 90 percent of the people just said it had never come up in their case. We only had one—well, less than 1 percent of the people had actually been sanctioned.

*Id.*

<sup>174</sup> *Id.* at 214–15. *But see id.* at 302 (commentator stating: "You sometimes enter into the economic decision that this case, it's not an \$80 million case. It's \$1 million case. I'm going to settle it, even though I don't want to, because it's going to cost me a million dollars to restore, review, do the privilege review, get a human being who understands what we're turning over."); *id.* at 305 (stating "[a]nd again, large corporations, yes, we have plenty of money. But hundreds and hundreds and hundreds of lawsuits come in, and you end up settling cases that really shouldn't be settled and for increasingly large amounts. It used to be what a nuisance value was 20,000. Now a nuisance value might be 500,000 because of electronic discovery.").

<sup>175</sup> No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005) (granting plaintiff's motion for an adverse inference jury instruction for discovery misconduct surrounding emails that could establish whether the company misled and defrauded its client); *see also* Verdict Form, *Coleman*, No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. May 16, 2005) (finding defendants guilty of fraud and awarding \$600 million in damages for the plaintiff) (on file with author); Verdict Form, *Coleman*, No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. May 18, 2005) (providing for an additional \$800 million in punitive damages against the defendant) (on file with author).

<sup>176</sup> 327 F. Supp. 2d 21, 26 (D.D.C. 2004). In *Philip Morris*, the court held that defendant corporation's noncompliance with a court-imposed order that resulted in loss of relevant emails two years after the court issued its discovery order warranted a sanction of nearly \$3 million. *Id.* at 23, 26.

Thus, the fears about electronic discovery sanctions appear at best premature and at worst unfounded. As argued above, electronic discovery presents some unique challenges, but those challenges have not yet caused a catastrophic rain of draconian sanctions against sophisticated corporate clients.<sup>177</sup> While the Advisory Committee should be wary of the new problems litigants experience in modern electronic discovery, the best solution could be a “wait-and-see” approach, rather than a hasty one. The prospect of maintaining complete electronic records without deleting anything, while not overburdening a corporation, is conceivable based on the pace at which technology advances. Finally, because of the “newness”<sup>178</sup> of modern electronic discovery and the idiosyncratic role of electronic information in each case,<sup>179</sup> leaving these decisions to the malleable common law process of solving problems in their own context, as this Comment argues for below, provides a better solution than drafting a rule in an abstract environment without benefit of sufficient experience under the existing set of rules.<sup>180</sup>

2. *Rule 37(f) Fails to Adhere to the Common Law Doctrine for Sanctions by Ignoring the Importance of Compensatory Sanctions for Prejudice Suffered from Negligent Spoliation of Evidence and Culpability.*—Rule 37(f) is flawed because it omits two important aspects of the flexible common law spoliation doctrine. Specifically, the proposed rule omits the fundamental common law guarantee of compensatory sanctions for prejudicial spoliation and culpability.<sup>181</sup> That oversight could both erode courts’ ability to ensure substantial justice for non-spoliating parties and fail to provide meaningful protection to organizations concerned about electronic discovery’s burdens.

First, new Rule 37(f) would essentially prevent courts from alleviating prejudice to a non-spoliating party arising from the negligent spoliation of

<sup>177</sup> See Scheindlin & Wangkeo, *supra* note 88, at 94–95.

<sup>178</sup> Marcus, *supra* note 23, at 17. Prof. Marcus acknowledges that

[e]-discovery is new, and the breadth of use of computers is also relatively new. The expressions of concern about uncertainty that abound with regard to e-discovery are partly due to its newness. . . . [Clients and lawyers] await the decision of a judge in the future, and the judge will be acting in an area with few landmarks.

*Id.*

<sup>179</sup> See, e.g., *Hester v. Bayer Corp.*, 206 F.R.D. 683, 685–86 (M.D. Ala. 2001). In *Hester*, the court stated that preservation orders and duties are unique to each case because “like snowflakes, no two litigations are alike.” *Id.*

<sup>180</sup> Marcus, *supra* note 23, at 16–17. Speakers at the 2/12/05 *Public Hearing* also expressed concern about “locking in” the new rule because it specifies a certain technology that will probably become obsolete in the future due to the difficulty in searching certain electronic information storage systems. 2/12/05 PUBLIC HEARING, *supra* note 169, at 187, 241.

<sup>181</sup> See, e.g., *Danis v. USN Commc’ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at \*33–34 (N.D. Ill. Oct. 20, 2000) (discussing the importance of a culpability inquiry before imposing sanctions); see also *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706–07 (2005). In *Arthur Andersen*, the Supreme Court dealt with a spoliation issue as it related to a criminal action for obstruction of justice; however, it made clear that a jury instruction removing notions of culpability was improper. *Id.*

electronic information. Evidentiary sanctions, preclusion of evidence or testimony, or adverse inference sanctions would be unavailable. In other words, under the current spoliation doctrine, when a corporation imposes a litigation hold in good faith but nevertheless fails to preserve some electronic evidence that in turn prejudices the opposing party's case, a court can alleviate that prejudice by issuing a compensatory sanction and still allow the case to be heard on the merits. Under proposed Rule 37, however, the fact that the effort was made in good faith would preclude the court from levying a compensatory sanction against the corporation, leaving the opposing party with no remedy.

For example, in *Larson v. Bank One Corp.*,<sup>182</sup> defendant Bank One implemented a litigation hold in good faith upon receiving the plaintiffs' complaint.<sup>183</sup> However, regardless of Bank One's best efforts, certain electronic and paper-based documents disappeared and could not be found.<sup>184</sup> After the plaintiff made a showing that the missing documents prejudiced their ability to show that Bank One's merger-proxy statement contained materially misleading information, the magistrate judge imposed a compensatory sanction preventing Bank One from cross-examining plaintiffs' financial expert regarding his analysis of Bank One's financial records.<sup>185</sup> This sanction served to compensate the plaintiffs for Bank One's negligent spoliation while also allowing the case to be heard on its merits.<sup>186</sup> Under proposed Rule 37(f), if Bank One deleted any electronic information in *Larson* as part of its routine recycling of the information, the court could not have imposed its necessary, and compensatory, sanction to ameliorate the prejudice to the plaintiffs' claim.<sup>187</sup>

Thus, the proposed Safe Harbor would prevent courts from allowing cases involving negligent spoliation of electronic evidence to be heard on the merits without either (1) the benefit of a complete factual record or (2) a compensatory sanction in the event a complete factual record is prejudicially tainted by spoliation.<sup>188</sup> Furthermore, as corporations use more complex and opaque information systems, the likelihood of negligent spoliation

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<sup>182</sup> Case No. 00 C 2100, 2005 WL 4652509 (N.D. Ill. Aug. 18, 2005); see also *In re Old Banc One S'holders Sec. Litig.*, No. 00 C 2100, 2005 WL 3372783 (N.D. Ill. Dec. 8, 2005) (affirming *Larson*).

<sup>183</sup> *Larson*, 2005 WL 4652509 at \*4-5.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at \*15.

<sup>186</sup> *Id.* at \*4-5.

<sup>187</sup> See PROPOSED RULES II, *supra* note 6, at Rules App. C-83 to -86; see also *Applied Telematics, Inc. v. Sprint Commc'ns Co., L.P.*, No. Civ. A. 94-4603, 1996 WL 33405972, at \*4-5 (E.D. Pa. Sept. 17, 1996). In *Applied Telematics*, defendant Sprint negligently destroyed some backup data for which it had notice of relevance, according to its normal document retention policy. *Id.* The court, finding that the destroyed information did not prejudice the plaintiff's case, imposed the mild sanction of plaintiff's cost for the motion for sanctions against Sprint. *Id.* Proposed Rule 37(f) would preclude that kind of thorough analysis that ensures cases are heard on the merits and on a level evidentiary playing field.

<sup>188</sup> See *Larson*, 2005 WL 4652509, at \*15.

occurring increases as the likelihood decreases of finding the “smoking gun” email or memo the opposing party needs to make their case. This reality essentially opens up the “negligent spoliation” defense to all large corporations absent the elusive smoking gun.

On the flipside, however, by eschewing a more nuanced culpability provision in Rule 37(f), the Advisory Committee has failed to provide some much-needed guidance to businesses with complex information systems and their attorneys. At the February 2005 Public Hearing on the proposed changes to the Civil Rules, practitioners who defend corporate clients repeatedly broached this concern.<sup>189</sup> Essentially, this group fears that without a higher threshold of culpability for imposing sanctions, the Safe Harbor offers little protection above the current spoliation doctrine.<sup>190</sup> As discussed above, under the common law doctrine, a court must make a finding of bad faith, intent, or recklessness before imposing the harsher variety of sanctions (such as default judgment or monetary sanctions).<sup>191</sup> This group is concerned that the proposed amendments would remove that threshold inquiry and replace it with the “good faith” inquiry, a test fraught with uncertainty and vulnerable to creative lawyering in front of a fact finder.<sup>192</sup> Thus, by replacing the “good faith” inquiry with a “culpability” inquiry similar to the current one, the proposed rule could lay to rest the concerns of many larger corporations and their lawyers.<sup>193</sup>

3. *Proposed Rule 37(f) Does Not Protect Parties Against Sanctions from the Court’s Inherent Authority or from Sanctions from Spoliation that Occurs Prior to Commencement of an Action.*—

Another problem with the proposed amendment to Rule 37 involves two potential loopholes that would allow courts to circumvent the electronic discovery Safe Harbor’s protection. The first involves courts’ inherent authority to impose sanctions for discovery misconduct.<sup>194</sup> The second stems from the Advisory Committee Note that the Safe Harbor applies only to discovery duties after commencement of the action.<sup>195</sup> Both of these loop-

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<sup>189</sup> See 2/11/05 PUBLIC HEARING, *supra* note 5, at 45–46, 146–47, 206, 307; 2/12/05 PUBLIC HEARING, *supra* note 169, at 100, 237, 243.

<sup>190</sup> 2/11/05 PUBLIC HEARING, *supra* note 5, at 306–07. One commentator stated:

I think a safe harbor is necessary, but I’m concerned that the safe harbor as written is less of a safe harbor than perhaps already exists today. You talked earlier about spoliation law, and there is always a degree of culpability considered when you get to spoliation. But I’m not sure that there’s any—the way this is worded, that there is any showing of culpability required here.

*Id.*

<sup>191</sup> See *supra* Part II.B.3–4 (discussing types of sanctions a court may impose).

<sup>192</sup> Marcus, *supra* note 23, at 17 (discussing how certain standards allow for more leeway and creative lawyering than others).

<sup>193</sup> 2/11/05 PUBLIC HEARING, *supra* note 5, at 45, 253, 417–18.

<sup>194</sup> See *supra* Part II.A (discussing courts’ power to impose sanctions under their inherent authority).

<sup>195</sup> See PROPOSED RULES I, *supra* note 4, at app. 3.

holes violate Congressionally-authorized policies for changing the Civil Rules, suggesting that the Safe Harbor falls outside the authority granted to the Judicial Conference by Congress.<sup>196</sup>

First, as stated above, the analyses for imposing sanctions under current Rule 37 and under a court's inherent authority are essentially the same.<sup>197</sup> Thus, a party operating its electronic information storage system in a way that falls under the protection of Rule 37(f) could still be sanctioned under a court's inherent authority if that operation threatens "the due and orderly administration of justice and in maintaining the authority and dignity of the court."<sup>198</sup> Though this loophole may not occur frequently, it could result in unjust administration of procedural law and determination of litigation if a court decides to circumvent one basis of authority for another in order to punish or deny sanctions to a given party.

Second, Rule 37(f) explicitly prevents sanctions against the loss of electronic information "after commencement of the action in which discovery is sought."<sup>199</sup> Thus, a party who has notice and may have to defend itself against future litigation prior to the filing of a complaint would be unprotected by Rule 37(f) until the plaintiff "commenced" the action.<sup>200</sup> This could create an incentive for plaintiffs to delay filing a claim so as to cause businesses relying on an electronic information management system to fall prey to exactly the kind of sanctions the Safe Harbor aims to prevent.<sup>201</sup>

Thus, two unintended loopholes created by Rule 37(f)—one under courts' inherent authority and the other due to Rule 37(f)'s provision limiting its application to conduct after the commencement of an action—may create dissonant results and unfair administration of justice in direct conflict with statutory authority for amending the Civil Rules.

In conclusion, Rule 37(f) has several flaws, some more easily addressed than others. The next section of this Comment presents an improved new rule that avoids some of the problems of the current proposal and explores the option of giving the courts time to struggle with electronic discovery before passing any rule at all.

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<sup>196</sup> 28 U.S.C. § 331 (2000). Congress listed the following as statutory reasons for amending the rules: (1) fairness in administration and (2) just determination of litigation. *Id.*

<sup>197</sup> See *supra* Part II.A (discussing analysis under inherent authority or under Federal Rules of Civil Procedure).

<sup>198</sup> *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (quoting *Cooke v. United States*, 267 U.S. 517, 539 (1925)). See also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (stating that a court's inherent powers are not governed by a rule or encoded in statute, but instead lie vested in our courts to expeditiously adjudicate disputes).

<sup>199</sup> PROPOSED RULES II, *supra* note 6, at Rules App. C-83 to -86.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

*B. A Partial Proposed Solution*

While proposed Rule 37(f) is flawed, the Advisory Committee could address some of the problems by (1) significantly redrafting the rule or (2) waiting for lower courts to deal with a practical, rather than a theoretical, problem before adopting a new rule. Either option presents a better solution than the current rule because both redrafting the rule and allowing lower courts to create their own solutions to electronic discovery can avoid the problems mentioned in the previous section.

As for a redrafted rule, this Comment proposes the following rule as the foundation of an improved Safe Harbor for electronic discovery sanctions under Rule 37:

**(f) Electronic Discovery.**

- (1) A court may not impose sanctions under these rules on the party for failing to provide such information if:
  - (A) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action;
  - (B) the failure resulted from loss of the information because of the routine operation of the party's electronic information system; and
  - (C) the party requesting the lost electronic information cannot demonstrate that its case was materially prejudiced as a result of the lost information. In the event that the requesting party can make this showing, a court may only impose sanctions that compensate the requesting party for the loss of that information.
- (2) The following sanctions are available to courts based on the corresponding finding of fault:
  - (A) If the court finds a party acted willfully, recklessly, or in bad faith in failing to preserve electronic information, the court may impose a sanction it deems necessary to provide just and fair compensation to the party seeking discovery, punish the offending party, and deter future similar misconduct.
  - (B) If the court finds the non-preserving party acted negligently in failing to preserve electronic information, the court may only impose sanctions that compensate the requesting party for the loss of that information if the party requesting the lost electronic information can demon-

strate that its case was materially prejudiced as a result of the lost information.<sup>202</sup>

This proposed rule addresses some, but not all of the concerns identified in Part V of this comment. First and foremost, subdivision (C) of 37(f)(1) alleviates any concern that a non-spoiling party's case will be materially prejudiced and that the party will have no recourse at a trial on the merits by conduct that falls under the Safe Harbor. Thus, Subdivision (C) allows the Safe Harbor to comply with the two policies the Advisory Committee's Rule 37(f) ignores: that parties obtain the fullest possible discovery on their case while not placing an undue burden on the producing party; and that, to the extent possible, cases are to be heard on the merits even in the face of prejudicial spoliation.<sup>203</sup>

Rule 37(f)(2), on the other hand, is directed at all kinds of electronic discovery. Essentially, the goal behind Rule 37(f)(2) is to provide a rigid guide to courts on the types of sanctions they may impose while also providing some comfort to companies relying on electronic information systems to manage their business records.<sup>204</sup> The Advisory Committee heard arguments for this type of provision at its public hearings.<sup>205</sup>

The proposal above, and perhaps any rule passed at this time, will ultimately need to address several of the challenges facing electronic discovery and provide more guidance to litigants confronting electronic discovery issues. Neither proposal above addresses: (1) whether the problem exists at all,<sup>206</sup> and (2) the problem of sanctions under courts' inherent authority both before, and after the onset of, litigation.<sup>207</sup> The Advisory Committee probably cannot solve these problems with a sanctions-related rule.

Perhaps only the malleability of the common law and time can resolve all the problems presented by electronic discovery.<sup>208</sup> Because empirical data suggests that the electronic discovery calamity exists only in theory,<sup>209</sup> the Advisory Committee should exercise patience before passing the current

<sup>202</sup> This proposal is built off an earlier rule on which the Advisory Committee sought public comment. PROPOSED RULES I, *supra* note 4, at app. 31–32. In that proposal, the Advisory Committee ostensibly attempted to emulate the common law doctrine, but failed to include the prejudice inquiry. *Id.*

<sup>203</sup> *Barnhill v. United States*, 11 F.3d 1360, 1367 (7th Cir. 1993); *see also supra* note 37 and accompanying text.

<sup>204</sup> In-house and outside counsel for large corporations expressed this concern many times at public hearings. *See, e.g.*, 2/11/05 PUBLIC HEARING, *supra* note 5, at 40–41, 43, 126, 204–06, 251; 2/12/05 PUBLIC HEARING, *supra* note 169, at 52–53.

<sup>205</sup> *See* 2/11/05 PUBLIC HEARING, *supra* note 5, at 206 (stating that “my compromise on that would be to list the level of sanctions that are available and specify the level of culpability required for each one”). Furthermore, proposed Rule 37(f)(2) grafts a much more complete and appropriate portion of the spoliation doctrine into the Civil Rules.

<sup>206</sup> *See supra* Part IV.A.1.

<sup>207</sup> *See supra* Part IV.A.3.

<sup>208</sup> *See* Marcus, *supra* note 23.

<sup>209</sup> *See* Scheindlin & Wangkeo, *supra* note 88, at 94–95.

proposal.<sup>210</sup> Waiting allows the Advisory Committee to use the lower courts as laboratories to develop a better strategy than the one it has proposed above. In the alternative, waiting would allow the Advisory Committee to determine that the current system is not broken despite electronic discovery's challenges. Though this strategy may not satisfy the corporate-defense bar's demand for guidance in the short term, it could provide a more satisfying approach in the long run.

#### CONCLUSION

This Comment provides a theoretical and historical background of the Civil Rules and critiques the proposed amendment that aims to create a Safe Harbor from sanctions under Rule 37. Electronic discovery presents new and exciting possibilities for businesses, yet proves problematic for courts, litigants and rule makers under the current discovery framework. Proposed Rule 37(f) does not address enough of those challenges and may create more problems than it solves. The rulemaking body must reconsider its proposed amendment to Rule 37 and take into account the problems listed above. More to the point, the Advisory Committee must either redraft the rule to account for problems or wait while lower courts function as laboratories aiming to construct a new and better framework that solves electronic discovery's problems.

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<sup>210</sup> Indeed, recent decisions suggest that lower federal courts are coping with and adapting to electronic discovery in a fashion outside of the corporate defense bar's complaints. See *Turner v. Resort Condo. Int'l, LLC*, No. 1:03-cv-2025-DFH-WTL, 2006 WL 1990379, at \*8 (S.D. Ind. July 13, 2006) (denying motion for sanctions when defendant produced "much of [the electronic information] plaintiff sought" in discovery, though not everything); *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05 Civ. 4837(HB), 2006 WL 1409413, at \*7-9 (S.D.N.Y. May 23, 2006) (imposing small monetary sanction for grossly negligent destruction of computers containing discoverable information); *Holt v. Nw. Mut. Life Ins. Co.*, No.1:04-CV-280, 2005 WL 3262420, at \*4-5 (W.D. Mich. Nov. 30, 2005) (imposing small monetary sanction for single negligent email deletion).